Submission to the

SENATE COMMUNITY AFFAIRS COMMITTEE'S

Inquiry into Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009 and two related Bills

from

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SUMMARY

The three Bills under consideration should not be passed by the Senate because:

1. The introduction of the Bills into Parliament is premature, being only three of a four-part package. This means the full implications to the community cannot yet be known.
   (See Part A of this submission on page 4)

2. The effect of the bills would most likely be unconstitutional. The restrictive nature of the measures on the established interstate trade of midwives contravenes constitutional trade and commerce freedoms among the States. There is also an acquisition of property (being midwives' goodwill in business) in the effective redirection of homebirth custom and trade to federally registered midwives, which hasn't been done on just terms. Aspects of civil conscription are also evident in the operation of the proposed indemnity insurance scheme as it relates to other proposed legislation, beyond the Commonwealth's power.
   (See Part B of this submission on page 7)

3. In light of its intended use, the discriminatory nature of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009* contravenes Article 9 of the International Covenant on Economic, Social and Cultural Rights. Australia ratified this treaty without reservation in 1975. Article 9 concerns the right of everyone to equal access to social insurance which the proposed Bill expressly fails to ensure. In a similar way the associated *Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009* also provides scope for regulations to violate this United Nations' treaty. *(See Part C on page 10)*

4. The Commonwealth should also provide funding to help midwives meet its (mostly unnecessary) premises requirements as part of its national infrastructure programs. This may counter the uncertainty the Bills will create through delegated legislation over the practice of independent midwives, and defray high regulatory compliance costs. *(See Part D, page 12)*

5. If the Bills are not amended, parents will be denied both Medicare assistance and midwifery services merely for exercising our freedom of choice and human rights guaranteed by State Acts of Parliament and 700 years of common law. If the new legislation passes, women who have done nothing more than live too far away from hospital, or choose a gentler approach in normal pregnancy, will face financial disadvantage and be forced to give birth unassisted.
   (See Part E of this submission on page 13)

6. The question of whether or not midwives should be allowed to offer competitive primary care in maternity services, including homebirth, was settled in Victorian law 94 years ago. The World Health Organisation reports of Government funded homebirths in the Netherlands: *"There was no evidence that this system of care for pregnant women can be improved by increasing medicalization of birth"*. Therefore, we believe the *Health Insurance Act 1973* cannot be excused from the rigours of review under the *National Competition Policy Agreement* between the Commonwealth and Victoria. But the deal appears to be, that the Minister gets the AMA's blessing if independent midwives become bound to high-overhead clinics. Prediction: Unless the Bills are amended, within seven years of the legislation's passing, all the new midwife clinics will be run by medical practitioners.
   (See Part F of this submission on page 15)

The Minister has shown courage in the face of fierce opposition. However the Bills must allow for the independence of midwives to practice as they have according to law since before Federation.

BACKGROUND

1. Eric and Tracey Wilson of Taylors Lakes Victoria object to the legislation because we have a very conservative view of pregnancy and birth which would be compromised. This is because the legislation effectively conscripts all mothers into a system which does not reflect our conservative values.

2. Eric literally inherited his conservatism from his mother, who when he was young told him the story of what happened to babies born a few years before him: With a herd-mentality the medical profession injected pregnant women with a drug called Thalidomide, leading to deformities and other serious birth defects. Eric's mother consequently resisted every jab she was offered while pregnant, and Eric is thankful for that. Tracey likewise has a conservative view, believing medical intervention in normal birth should be avoided unless it's really needed, since normal childbirth is a natural process not a sickness.

3. Here's an example of what we mean by the lack of conservatism in the medical profession today: There's no long term research showing that ultrasounds on the unborn are safe. Are we slightly damaging the genes we pass on to future generations? The medical profession, which has always been attracted to new gizmos, has rushed headlong into this unproven technology, and the pressure is on if you resist. “What if there's a problem inside?” they say. But Eric's mother was a radiologist, who told him about how X-rays were first used with abandon. The jury is still out on ultrasounds, and in this case, the 'jury' is quite literally 'the whole country' in future generations. But for all we know, ultrasounds may actually improve chromosomes. The point is we don't know. No one does. Yet herd-mentality sometimes rules the medical profession in the guise of public health. This is the case with midwives under the proposed legislation.

4. Doctors are not trained for normal birth as midwives are, yet Doctors' views have shaped this legislation. For as we shall see, the unusual quietness of the AMA is a sure give-away a deal has been done. For this legislation offers us no guarantees of choice at all, contrary to how it has been sold. It merely provides a framework for centralized midwife control, against every principle of free enterprise. In effect, in addition to being qualified and duly registered, Midwives will now need Federal Government *permission* to operate independently. Going by the proposed red tape, most of todays independent midwives won't get the permission or be able to keep it. Therefore we say these bills constitute a civil wrong.

5. Unlike the submissions you are likely to receive from the medical profession and midwives, Tracey and I have no pecuniary interest. We have no axe to grind except for the unsuitability of what is proposed; in the State of Victoria, the conduct of independent midwives has been successfully regulated under State statute for over 90 years, and was practiced under common law in colonial times before that. Nothing done to federalize the health system should prevent midwives from continuing unmolested. As Australians we rejoice in being young and free and rely on the States' House to guard this precious heritage.

PART A

NON-DISCLOSURE: A FOUR-BILL PACKAGE

1. From the outset it is clear the introduction of the three bills into Parliament is premature. This is because the bills are only three of a four-part package, meaning the full implications to the community cannot yet be known. Here's how we see the complete system, which has only been partially presented to Parliament, is proposed to work:

2. The missing bill is presently known as *Health Practitioner National Law*, which is a national scheme of health professional registration that includes midwives. It only exists today as an exposure draft[1]. The amendments to the Health Insurance Act 1973, as proposed in the present *Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009*, intends reliance on this unfinished registration scheme.

3. We say this because page one of the explanatory note states that the Health Legislation Amendment Bill supports the Council of Australian Governments (COAG) Health Workforce Reform Agenda, whose working party appears to be the authors of the *Health Practitioner National Law* exposure draft. This work comes under *The Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions*, signed by the Commonwealth and all mainland State and Territorial governments in March 2008. Clause 5.1 of that Agreement includes midwifery under the new national registration scheme, while clause 6.1 states:

   > *"6.1 For the purpose of ensuring a national registration and accreditation scheme, the States and Territories undertake to use their best endeavours to submit to their respective Parliaments whatever Bill or Bills that have the effect of achieving a national scheme from 1 July 2010."*

4. Thus the *Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009*, coming into force on 1 November 2010, is predicated on the national registration of midwives under the missing *Health Practitioner National Law*; For page two of the explanatory note of the reliant Health Legislation Amendment Bill states:

   > "To meet the core requirement of being an "eligible midwife, the Bill requires registration as a midwife..."

5. While page 9 of the explanatory notes imply State-based qualifications will be insufficient:

   > "it will not be sufficient to be a midwife to satisfy the definition of ***eligible midwife***." [emphasis original]

6. Thus it is fair to say the as yet undisclosed regulations allowed for under the Health Legislation Amendment Bill will prescribe registration under the "*Health Practitioner National Law*" rather than any State-based registration.

7. To be registered under the proposed "*Health Practitioner National Law*", a midwife will need indemnity insurance, as disclosed in section 69(1)(d) of the exposure draft. This has not been available since 2001, so professional registration mandates participation in the scheme proposed by the present *Midwife Professional Indemnity (Commonwealth*

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1 The exposure draft was released by the Australian Health Workforce Ministerial Council for public consultation on 12 June 2009.

Contribution) Scheme Bill 2009. This fact is recognised on page one of that Bill's explanatory notes:

> "Professional indemnity insurance is currently not available for private midwife practitioners in Australia... The Commonwealth intends to contract with an insurer (through a national tender process) to provide this type of insurance at an affordable price to certain midwives."

8. Thus the four pieces of legislation are designed to work together, with the "*Health Practitioner National Law*" being the missing link between the bills presently before Parliament. **In other words, a midwife will need to be registered under the *Health Practitioner National Law* to practice, and would need to qualify for Commonwealth indemnity to be so registered under that law, and would also need to be registered to participate in Medicare.**

9. On its face there is nothing wrong with all this, except as the above quote from the explanatory note admits, *the indemnity scheme only applies to "certain midwives"*, while all independent midwives will need the indemnity scheme to continue their registration. The discriminatory nature of the Indemnity Bill is immediately obvious in view of clause 11(3)(b), which only allows claims relating to "eligible midwives", combined with the definition of "eligible midwife" in clause 5. The definition makes no bones as to the discriminatory nature of the law, since carrying on a lawful practice is simply not enough to qualify. Certain classes of people are to be expressly excluded, as part (c) of the definition states. Part (b) on the other hand, allows for untold terms and conditions to be imposed on independent midwives through as yet to be revealed delegated legislation.

10. This clearly discriminatory arrangement would directly contravene Australia's "social insurance" treaty obligations as shall be discussed in Part C of this submission. We also say that in operation, the strings attached to the indemnity insurance will impose conditions on midwives' practice which are either irrelevant or disproportionate to the actual risks involved. This is discussed in Part F of this submission. However for now it is sufficient to say the proposed compulsion in the missing Bill for midwives to obtain the otherwise unavailable insurance, makes the indemnity Bill presently before Parliament a defacto policy instrument which effectively restricts a midwife's trade. Thus the nature and character of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009* is more than it purports to be. In operation, it is a law regulating trade and commerce, not just insurance. This means the whole package of legislation most likely would attract the neglected Constitutional considerations discussed in Part B of this submission.

11. Although the objects of the four-part legislative package are commendable, its implementation has potentially draconian consequences. For example, one effect of the missing linking health professional registration legislation, could be to impose $30,000 fines on each parent ($60,000 per family) who "incite" a midwife to help them homebirth. This can be found buried in the combined operations of the definition of "unprofessional conduct (b)(i)" in clause 6 of the *Health Practitioner National Law* exposure draft when combined with clauses 69(1)(d) and 148(1)(a), in the light of clauses 11(3)(b) and the definition of "eligible midwife" in section 5 of the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill, as described above. **The women hardest hit by this would be those who live too far from hospitals**, prompting alarm at the Country Women's Association[2]. Although otherwise supportive, the Australian College of Midwives has

2 "Mothers and babies at risk: Access to qualified midwives for homebirth under threat" - CWA Vic Web 'notice board' site post

condemned this aspect of the four-part legislative package[3].

12. However, there remains also a big potential health issue for city women who would normally *choose* to birth in a hospital. In the event of insufficient hospital beds during a sudden epidemic, or a pandemic where hospitals might became dangerous for pregnant women, birthing mothers could find themselves without a choice but to birth at home, alone. For this reason also, we say the bills are ill-conceived in their present form. <u>While the federal Department of Health and Aging has indicated its draconian $60,000 fining of parents will be revised, the measure clearly demonstrates why Parliament aught to be shown the whole package first, to know which parts might best be amended.</u> For this reason, consideration the three Bills presently before Parliament should be put on hold, at least until the fourth Bill is introduced. Only then can the impact on the community of the entire system be properly evaluated.

3 In a media release dated June 2009, the Australian College of Midwives branded this as a “dangerous move”. In a further release the very softly-spoken body characterized it as a “dark cloud”.

PART B.

THREE CONSTITUTIONAL ISSUES

1. The effect of the bills (even though only three have been introduced – see Part A) would most likely be unconstitutional. The indemnity legislation has the effect of acquiring the goodwill of independent midwives through class exclusions and redirecting it to federally registered midwives. However the restrictive nature of the measures impacts on the established trade of midwives more generally. This would in effect contravene other parts of the Constitution, such as the ban on civil conscription and the guarantee of free enterprise among the States.

2. *Acquisition of property otherwise than on just terms?*
   Clause 5 of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009* reads in part:

   > ***eligible midwife*** *means a person who:*
   > *(a) is licensed, registered or authorised to practice midwifery by or under a law of the Commonwealth, a State or a Territory; and*
   > *(b) meets such other requirements (if any) as are specified in the Rules for the purposes of this paragraph; and*
   > *(c) is not included in a class of persons specified in the Rules for 9 the purposes of this paragraph.*

3. It is clear the intent of the bill is to exclude certain midwives from insurance and as a consequence, deny their registration (see Part A of this submission) and therefore the goodwill of their businesses. This can be seen in part (c) of the above quote, which provides for the creation of excluded classes of people. As parts (a) and (b) indicate, these excluded people may be otherwise legally entitled to continue their practice and also meet all the "other requirements" of safe and medically collaborative conduct. But that doesn't matter, because they already have been excluded. End of business.

4. The first excluded group to have their property (business goodwill) confiscated and redirected to federally registered midwives instead, will likely be independent midwives who offer homebirth services. While ignoring their safe and positive contribution to overseas health systems (See Part F of this submission) the Minister's press release announced the introduction of the three Bills in these terms:

   > *"Medicare benefits and PBS prescribing will not be approved for deliveries outside clinical settings, and the Commonwealth-supported professional indemnity cover will not respond to claims relating to homebirths."*[4]

5. The four Bills by means of allowing such discriminatory insurance provisions, contemplate abolishing the homebirth aspect of the businesses of independent midwives. This in effect redirects their livelihoods (customers and income) to Federal Government-approved hospitals or clinics instead, without offering any compensation for the loss. Nor does it compensate for the arbitrary derogation of an independent midwife's qualifications.

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4 Media release from the Hon Nichola Roxon MP, Minister for Health and Aging, dated 24 June 2009

6. Although we are only lay-people, all this seems to be contrary to section 51(xxxi) of the Constitution, which only allows the Commonwealth to acquire such goodwill or professional capacity “on just terms”; for “taking the title of midwife” has been part of the general law since colonial times. **To be constitutional, there needs to be a proper compensation scheme put in place, which includes the cost of relocation of midwives where there is no approved premises to practice nearby.**

7. Parliament should resist the temptation to quickly amend the legislation with a quick “constitutional safety net” clause. In our view, simply referring midwives to the Federal Court in a “take a number and sue us” policy would be an unjust procedure. This is because midwives will have been stripped of their income and therefore their capacity to mount a lawsuit against the Commonwealth to obtain just terms.

8. We also regard a woman's right to give birth where she pleases with the assistance of a willing midwife, as her personal property of choice; and that a woman has constitutional standing as a person in her own right as a subject of the Queen.

9. <u>*Civil conscription of maternity services?*</u>
   Even if the three bills were somehow amended to acquire midwives' goodwill on just terms, or if the Commonwealth incited the States to extinguish their businesses by abolishing the common law title of “midwife”, it seems there are other Constitutional difficulties. The bills' effect would be to create civil conscription for midwives or parents by effectively forcing them to attend the national health system. This is the express intention of the Federal Department of Health and Aging's website, which states[5]**:**

   > *“the Rudd Labor Government made a commitment to developing a National Maternity Services Plan to ensure national coordination of maternal services.”*

10. With the compulsion with which this is being implemented, the National Materity Service Plan seems to cut accress the spirit if not the letter of section 51(xxiiiA) of the Constitution, which outlaws civil conscription in providing medical (in the constitutional sense) services. So unless independent midwives are given a fair go, to pass these Bills would be an open invitation for a High Court challenge to see how far the constitutional prohibition on Parliament regarding civil conspiration might extend.

11. <u>*Free trade commerce and intercourse among the States?*</u>
    Perhaps the biggest constitutional problem lies in the bills' express federalization of a trade that is already cross-border, such as in Albury-Wodonga. This means midwifery and homebirth midwifery in particular, enjoys the absolute freedom of section 92 of the Constitution. Of course we are only lay-people. But before E.G. Whitlam was Prime Minister, he had a distinguished legal career, and during that time Mr. Whitlam examined section 92 in his 1961 John Curtin Memorial Lecture:

    > *“Section 92 of the Constitution lays down that "trade, commerce and intercourse among the States shall be absolutely free". In a series of remarkable Court decisions this section has been interpreted to mean that interstate trade and commerce should be conducted on the principle of* ***free enterprise****. Any company, therefore, which conducts an industry or is engaged in production, distribution or exchange in more than one State is immune from nationalisation by legislation even if every member of*

5 http://www.health.gov.au/internet/main/publishing.nsf/Content/maternityservicesreview-discussionpaper

> *every parliament were to agree... No public monopoly can be established in any of these fields were a company already functions unless the Federal Parliament passes an act to establish it and the people approve that act as a referendum." [emphasis original]*

12. Thus it appears midwifery cannot be nationalised in ownership or control by either the laws of the Commonwealth or the States. This goes to the heart of Australian federalism, which only allows for the uniform regulation of absolutely free trade and commerce among the States, not a centralized trade and commerce plan which tells people where they can or cannot go (defence powers excepting). It is highly questionable therefore whether midwives may be told were they are allowed and not allowed to attend births in the usual carrying on of their trade. It is highly questionable whether parents can be told where they must attend to get midwifery services. Moreover, we say this constitutional guarantee cannot be circumvented even with the aid of State laws, since section 99 prevents border regions such as Albury-Wodonga being granted a preference in favour of homebirth midwives over other parts of Australia.

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13. The conclusion we reach is that constitutionally, the trade, livelihood and qualifications of independent midwives cannot be regarded as the chattel of the Commonwealth, to do with as it pleases. For this reason the Bills need redrafting.

PART C.

VIOLATION OF TREATY OBLIGATIONS

1. The discriminatory nature of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009* in light of its intended use is clearly demonstrated in Parts A and B of this submission. We hold the problems in the Bills we have highlighted so far make them manifestly unjust in their present form. However to put the matter beyond dispute, in 1975 Australia ratified the *International Covenant on Economic, Social and Cultural Rights*, without reservation. This treaty with the United Nations outlines some of the social obligations of the Commonwealth with respect to treating people fairly. Article 9 of the Covenant reads:

   > *"The States Parties to the present convention regognise the right of everyone to social security, including social insurance."*

2. The *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009* is a form of social insurance, since clause 3(1) states the first object as:

   > *"An object of this Act is to contribute towards the availability of professional midwife services in Australia by providing Commonwealth assistance to support access by eligible midwives to arrangements that indemnify them for claims arising in relation to their practice of the profession of midwifery."*

3. Article 2 paragraph 2 states such a social insurance right should be exercised *"without discrimination of any kind as to … birth or other status"* which naturally includes homebirth, especially from a baby's point of view. It goes without saying that babies should be supported with midwifery in a non-discriminatory fashion if it is available where they are born. Although this only natural justice, we also say this because the United Nation's Economic and Social Council's General Comment 19 (made in November 2007), which deals with the social security/insurance right, states that it includes *"the right to equal enjoyment of adequate protection from social risks and contingencies"*.

4. That is why clause 5 of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009* expressly breaks the treaty by its "eligible midwife" definition in section 5, as discussed in Parts A and B. We encourage the Senate to review this offending section again:

   > ***eligible midwife*** *means a person who:*
   > *(a) is licensed, registered or authorised to practice midwifery by or under a law of the Commonwealth, a State or a Territory; and*
   > *(b) meets such other requirements (if any) as are specified in the Rules for the purposes of this paragraph; and*
   > *(c) is not included in a class of persons specified in the Rules for 9 the purposes of this paragraph.*

5. It probably bears repeating that gross discrimination can be seen in part (c) of the above quote, which provides for the creation of excluded classes of people. As parts (a) and (b) indicate, these excluded people may be otherwise legally entitled to continue their practice and also meet all the "other requirements" of safe and medically collaborative conduct. But that doesn't matter, because they already have been excluded.

6. As previously established in Part B, the first group to be discriminated against like this will be independent midwives offering homebirth. That means fast-birthing women (such as Tracey) in particular, and other women more generally, will be denied assistance merely because they decide or need to birth at home. The Country Women's Association is therefore right to be alarmed about the intended effects of the legislation, since it discriminates against fast-birthing women and women in remote locations, contrary to the Convention Australia ratified in 1975.

7. This type of treaty violation can also be seen in item 25 of the explanatory notes to the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009*, The offending item relates to section 21, entitled "meaning of *eligible midwife*" [emphasis original]. Similar to the Health Legislation Amendment Bill, 21(2) of the Indemnity Bill shuts the door on ordinary midwives to indemnity insurance as the explanatory note states:

   > *This is to ensure that it will not be sufficient to be a midwife to satisfy the definition of* ***eligible midwife****. [emphasis original]*

8. Section 22(3) reveals that an eligible midwife, as opposed to an ineligible midwife who will be at a tremendous comparative disadvantage, may be one who is "credentialled by a particular body". Most likely this is a reference to the as yet un-presented *Health Practitioner National Law* which COAG has agreed to support and abide by (see Part A of this submission).

9. In view of the above, the Bills as they presently stand clearly contravene the *International Covenant on Economic, Social and Cultural Rights.* So if the Rudd Government wishes to pass them un-amended, it should at least be honest with the Australian people and the world, by withdrawing from the United Nations treaty signed by the Whitlam Government.

PART D.

HIGH COSTS OF REGULATORY COMPLIANCE

1. The sheer size of the Ministry of Health and Aging means that a Minister of any stripe would be completely reliant on the advice of the Department in deciding the *fate* of individual midwives. This will be the commercial reality as it is improbable that midwives will be able to meet the clinical requirements of premises for independent practice without access to the Medicare system. However the *Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009* is indefinite as to the precise criteria by which Midwives will be allowed to use the PBS or MBS. The Bill is only a skeleton upon which the flesh of the Minister's initiatives will be applied through delegated legislation.

2. There are a number of perils with this approach however we concede the practicalities may make it necessary. Yet one troubling aspect is the Regulations could be used to raise the bar of what constitutes a suitable premises for midwives, who as far as we can tell are not going to be funded the same way as hospital premises are funded. In effect, it could easily be that the entire MBS contribution for midwifery services could be swallowed up by largely unnecessary overheads (as Part F of this submission contends) demanded by the Commonwealth. Independent midwifery could wind up being more expensive for "health consumers" than it is today. This is because item 25 of the Bill's explanatory notes contains a worrying reference to 21A(2), in which a midwife could be required to give a common undertaking as to:

   > *"a specification of the premises at which the eligible midwife provides services of a kind to which the undertaking relates"*

3. While there may be a degree of fairness in that a common form of undertaking is a legislative instrument, the interpretation of the premises specification will of course be a matter for the Department to "recommend". This will be in both the general approach to the specification and also for each particular midwife as she tenders her undertaking for approval or not by the Minister (read: the Department). This premises specification is only one issue where midwives could be placed under duress, as the explanatory notes indicate:

   > *"Subsection 21A(2) provides that the common form of undertaking is to make provision for any matters that the Minister thinks appropriate"*

4. Thus compared with traditional midwifery, the proposed arrangements are likely to impose significant regulatory compliance costs. Without being offered any provision for relief, midwives would be foolish to make the kind of investment the Commonwealth may demand for some kind of 'clinical' premises. In an alternate scenario, independent midwives working in collaboration with a maternity hospital or other medical facility should be deemed on the merits to satisfy such a premises requirement.

5. In conclusion, we believe the Commonwealth's demand that midwives incur more overheads is unnecessary as per Part F of our submission. However if this has to be, then **the Commonwealth should also provide extra funding to help midwives meet its premises requirements as part of its national infrastructure programs.** This may alleviate the uncertainty the Bills will create through delegated legislation over the practice of independent midwives, and high regulatory compliance costs they foreshadow.

PART E

THE LAW OF BIRTHING OPTIONS

1. The 700-year old English legal principle habeas corpus ("you have the body") places a requirement on anyone holding a person to prove they are doing so with legal authority[6]. In the State of Victoria, where we live, this ancient tradition of bodily freedom is encoded in the State's *Imperial Acts Application Act 1980*, last amended in 2007. Quoting *3 Charles I (Petition of Right) c. I of 1627*, in which the liberty of the person was secured by making it subject only to the laws of Parliament, sub-section 8(8) of the Victorian Act reads in part:

   "(2) that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof (3) and that no freeman, in any such manner as is before-mentioned, be imprisoned or detained."

2. This quaint "you have the body" law is further expressed in section 10(c) of Victoria's more recently formulated Charter of Human Rights and Responsibilities Act 2006. This mandates that:

   "A person must not be subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent."

3. So the laws of Victoria emphatically affirm to birthing women in this State, "you have the body"- it's your body - not the government's body. What happens is your choice.

4. In accordance with Tracey's "you have the body" freedom to choose her maternity care[7], Victorian law further provides an additional statutory right of medical treatment refusal. Under the Medical Treatment Act 1988, women (or men) may refuse any treatment (barring food, water and palliative care). This right can also be assigned to the father under power of attorney. Victoria's Office of the Public Advocate advises[8]:

   "It is illegal for medical practitioners to continue to treat you if they know that there is a valid Certificate in force"

5. Moreover, to avoid doubt, the Office further advises a "Refusal of Treatment Certificate" can if necessary be made out in advance and registered with the State. Thus the clear intention of State Parliament and the common law is to safeguard a mother's freedom of choice of maternity care. This human right, embodied in the laws of our State, mandates Tracey's informed, full and free consent; and even when she gives such consent it's always subject to her statutory rights of refusal.

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6 Seminal English legal author Blackstone first identifies *Habeas Corpus* in the reign of King Edward I in 1305: *"The [court of the] King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."*

7 To compliment the State's legal right for residents to choose their maternity services without impairment, as a matter of public policy, the Victorian Government is encouraging the public health system to provide more birthing options. In the first paragraph of its of *Future directions for Victoria's maternity services* brochure, Health Minister Bronwyn Pike said in May 2004:
"Birthing services are always very important to the community. For a long time, many women have been calling for more control over this important life event.."

8 In a fact-sheet entitled "Refusal of Medical Treatment" (OPA FSRMT1 March 2004), in the ancient tradition of Parliament's guardianship of personal liberties, the Office of the Public Advocate describes itself as *"an independent statutory office accountable to the Victorian Parliament"*.

6. The Commonwealth should materially support these human rights and freedoms of choice for birthing women, since they attract the force of law in our State and of our culture for 700 years. The MBS (Medicare Benefits Schedule) Online Team said as much to us in the email concerning homebirth last year:

   "As advised previously, the Government is committed to maternity reform and recognises that women should have a range of birthing options available to them and be supported in their choice..."

7. Regrettably, the proposed legislation only supports that form of care provided in clinical settings[9]. The resulting subjugation of midwives to work in federally approved clinics or hospitals on pain of loosing their funding, has compromised the prerogative of women to choose the treatment that best suits their bodies and their circumstances. It entirely sensible women with normal pregnancies to chose a gentler approach, as per her freedoms and human rights according to law - such as choosing a homebirth assisted by a midwife. This model of care has been practiced for thousands of years[10], and modern homebirthing midwives have an excellent safety record[11]. But if the Bills pass unaltered, making that choice of minimal-treatment means women will we be cut off from from Medicare funding and midwifery altogether (see Parts A and B of this submission). This seems to be the intent even though homebirths are cheaper for the Commonwealth to fund than clinical models of care.[12]

8. Thus parents will be denied both Medicare assistance and midwifery services merely for exercising our freedom of choice and human rights guaranteed by State Acts of Parliament and 700 years of common law - by not being hospitalized when not even sick[13]. So if the new legislation passes, women who have done nothing more than live too far away from hospital, or choose a gentler approach in normal pregnancy, will be financially disadvantaged and forced to give birth un-assited.

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9 Media Release dated 24 June 2009 from the Hon. Nichola Roxon MP "Medicare benefits and PBS prescribing will not be approved for deliveries outside clinical settings".

10 See for example Genesis 38:27-30, where ancient midwives were required to record the birth order of twins for hereditary purposes.

11 The World Health Organisation's *Care in normal birth A practical guide* (*WHO/FRH/MSM/96.24)*, states in item 2.4 at the end of page 11: *"The Netherlands is a developed country with an official home birth system. The incidence of home deliveries differs considerably between regions, and even between large cities. A study of perinatal mortality showed no correlation between regional hospitalisation at delivery and regional perinatal mortality (Treffers and Laan 1986). A study conducted in the province of Gelderland,compared the "obstetric result" of home births and hospital births. The results suggested that for primiparous [previously had a baby] women with a low-risk pregnancy a home birth was as safe as a hospital birth. There was no evidence that this system of care for pregnant women can be improved by increasing medicalization of birth (Buitendijk 1993)."*

12 According to a costing released by the Maternity Coalition Inc on Thursday August 2003, Medicare wastes $200 million annually on unnecessary or avoidable medical procedures associated with maternity services. And in an AAP report published by theage.com.au titled "Protesters seek better midwife services" on 28 September 2007, it was claimed there had been a 269 percent increase in obstetricians' fees since the Medicare Safety Net was introduced in 2004. Anecdotally, the total cost to the Commonwealth of hospitalizating Tracey for induction in a maternity ward, if all went well (about a 50% chance), would be around $2000. For 25% less we received better professional care from our homebirth midwife.

13 Paragraph 1 of page 1 in *Future directions for Victoria's maternity services* states:
"Women must be the focus of maternity care. They should be able to feel they are in control of what is happening during pregnancy and childbirth, based on their individual needs and having discussed issues fully with their care providers. For women to feel this control, we must recognise that pregnancy and childbirth, while requiring quick and highly specialised responses to complications, are a normal physiological process, not a disease."
This was published by Programs Branch, Metropolitan Health and Aged Care Services of the Government of Victoria's Department of Human Services in May 2004.

PART F

AUSTRALIA'S DISTORTED POLITICS OF BIRTH

1. The question of whether or not midwives should be allowed to offer competitive primary care in maternity services, including homebirth, was settled in Victorian law 94 years ago. A historical article published in the *Medical Journal of Australia* in 1964 reveals a familiar story giving rise (or should we say 'birth') to the Victorian *Midwives Act 1915*:

   > *"This last step was not reached in Victoria until 1915 when pressure of public opinion, rather than agreement in the nursing and medical professions, led to a Midwives Act. This established a Midwives Board to control examination, registration and practice of midwives."*[14]

2. The consistent position of the Victorian Parliament ever since has been to allow midwives to "take or use the title of midwife"[15] throughput the State in their own right. The Victorian debate was informed by similar English legislation passed in 1902.

3. Unfortunately, when Medibank was conceived in the early '70s, the Imperial and State debates of the 1890's and 1900's concerning midwifery had been all but forgotten by Federal Parliament. So when the *Health Insurance Act 1973* was signed into law, the competition policy of the day was either directly legislated (such as with the "two-airlines policy") or regulated under the *Trade Practices Act 1965*. Consistent with this, the introduction of Medibank in effect legislated and regulated a number of competitive advantages for medical practitioners (doctors) and their union. Over the years, one of the most significant of these has been the omission of midwifery from the definition of the term *"professional service"* in section 3 of the Act. Maternity services rendered by midwives are thus un-claimable through Medicare, except via a doctor or under a doctor's supervision.

4. This near-monopoly of doctors has been established despite midwives being registered under State legislation in their own right for maternity care purposes. Another perk for doctors was the statutory inclusion of their union, the Australian Medical Association (AMA), in a *Medicare Consultative Committee.* The committee advises the Minister under section 66 of the Act. This gives doctors a direct say on which medical services are subsidised and which are not, while the Australian College of Midwives enjoys no such privilege.

5. A year after the *Health Insurance Act* was passed, the Whitlam Government's *Trade Practices Act 1974* started a new trend. Commonwealth competition policy switched from relying on regulatory approvals to simply outlawing restrictive trade practices[16] (generally speaking). Despite this, the *Health Insurance Act 1973* remained unchanged. Doctors continued to enjoy their traditional upper hand over midwives with both heavily subsidised access to drugs and exclusive government-funding of their maternity services, despite registered midwives' legal entitlement to carry on in independent practice. On 22 October 2008, the Health Minister Nicola Roxon was reported by *The Australian* as addressing the

14 Forester FMC, Mrs. Howlett and Dr. Jenkins; Listerism [use of antiseptics] and early midwifery practice in Australia, Medical Journal of Australia 1965 2:1047-1053.

15 This simple common law wording appears in section 21 of the Victorian *Health Professionals Registration Act 2005*.

16 Australain Parliamentary Libruary E-Brief 03 June 2003: *Australia's National Competition Policy: Its Evolution and Operation*, web.library@aph.gov.au

issue of competition at the *Consumers Health Forum* in Canberra:

> *"There will always be some interests who would prefer consumers to accept whatever they are told, and pay whatever they are charged," she said. "That's why we need a strong and vibrant consumer movement pressing the case for reform."* [17]

6. Until now, the Medicare reform process in relation to Midwives has been stymied. The problem dates back to the 1970s and 80s, when the *Trade Practices Act* mostly applied to corporate conduct and not sole traders, partnerships or government. Thus by 1991, unfair competition entrenched by State and Federal legislation, and those professional services not subject to the Act, had become a major political issue. In his *"Building a competitive Australia"* address, Prime Minister Bob Hawke said:

> *"The Trade Practices Act is our principal legislative weapon to ensure consumers get the best deal from competition. But there are many areas of the Australian economy today that are immune from that Act: some Commonwealth enterprises, State public sector businesses, and significant areas of the private sector, including the professions."*[18]

7. In order to level the playing-field, in April 1995 the *National Competition Policy Agreement* was signed between the Commonwealth, States and mainland Territories. Under the heading of *"Legislative review"*, Clause 5(1) of that agreement made the following provision:

> *(1) The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:*
> *(a) the benefits of the restriction to the community as a whole outweigh the costs; and*
> *(b) the objectives of the legislation can only be achieved by restricting competition.*

8. **The toughest competition for the medical industry (as opposed to the profession) comes from independent midwives offering homebirths. This is because they have much lower overheads and with proper referral pathways in place, have a similar or better safety record, with increased customer satisfaction.** The World Health Organisation reports a comparison between hospitalised births and homebirths in the Netherlands found concerning their government-funded homebirths:

> *"There was no evidence that this system of care for pregnant women can be improved by increasing medicalization of birth (Buitendijk 1993)."*[19]

9. Therefore, we believe the *Health Insurance Act 1973* cannot be excused from the rigours of review under the *National Competition Policy Agreement* between the Commonwealth and Victoria. The *Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009* should therefore go much further to support homebirth midwives pursuant to the *National Competition Policy Agreement*. They should not be discriminated against as per Parts A, B & C of this submission, or encumbered with overheads as per Part E of this submission, but rather encouraged.

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17 The Australian IT: *Roxon lost in e-health maze?* by Karen Dearne, October 22, 2008

18 Prime Ministerial Statement: *Building a more competitive Australia*, 12 March 1991. http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=220386&table=hansardr

19 See the World Health Organisation's *Care in normal birth A practical guide* (*WHO/FRH/MSM/96.24)* item 2.4 *"Pace of birth"*, page 12, 1st paragraph. The guide also states the Netherlands' experience is that homebirths were safe and in some cases safer than hospitalized births.

10. Quite naturally, the AMA seems to hold the opposite view. In its heart of hearts, the doctors' union opposes an independent midwifery providing competitive primary care that would only refer women to medical practitioners if and when they are needed. In a media release entitled *"Medical Supervision Key To Safe Maternity Services"*, the doctors' union on 11 September 2008 stated:

    > *"AMA President, Dr Rosanna Capolingua, said the AMA recognises that women like to have options and choice in relation to maternity services but it was critical that those options were safe and medically supervised."*

11. By *"medically supervised"* the AMA appears to refer to medical practitioners even though most birthing mothers aren't sick. This is because according to the AMA's *"Aims and Objectives"* published on its website[20]:

    > *"The AMA exists... to preserve and protect the political, legal and industrial interests of medical practitioners."*

12. Some of the other reasons published under the AMA's "*Aims and Objectives"* justifying the doctors' union's existence are to *"protect the integrity and independence of the doctor/patient relationship";* which of course is not a midwife-mother relationship; and to protect the *"economic independence and the well being of medical practitioners"* who must at some level compete with independent midwives.

13. Perhaps this is why the AMA has (probably unconsciously) adopted the incorrect starting point that "*women like to have options and choice in maternity services*". Options and choice are not a preference. Birthing mothers in Victoria "have the body" and are legally entitled to options and choice, with the level of medical services they themselves decide, not the doctors' union nor its members might prescribe. (See Part E of this submission.) Therefore the AMA's policy that Medicare should only fund medically (read: doctor) supervised births, though true to its own aims and objectives, seems to clash with the laws of this State.

14. In relation to homebirths, the AMA's position seems particularly anti-competitive. Its *"Medical Supervision Key To Safe Maternity Services"* media release of 11 September 2008 peddled a *"three times more likely to die"* scare campaign against homebirths. One would have thought this would be big world news, especially in the United Kingdom, where the Government funds homebirth midwives and has publicly encouraged mothers to use them. According to a *BBC News* report published on the broadcaster's web site dated 15 May 2006:

    > *"Women will be given every encouragement to birth at home if that is their preferred option. The Department of Health says it wants to end assumptions that a hospital is always the best place to have a baby."*

15. Some Australian medical practitioners have tried to discredit the British Government's policy by asserting the statistics it was based on were wrong. (Of course an independent statistician did not find this but a fellow medical professor.) But if the policy was dangerous,

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20 See Australian Medical Association Limited's website, *"AMA's main values"* link, *Aims and Objectives* page first published 08/11/2002

why after so many years has the British Government not withdrawn it? The World Health Organisation's *"Care in Normal Birth: a practical guide"* also offers a more balanced viewpoint to that of the medical profession:

> *"From the above account, the midwife appears to be the most appropriate and cost effective type of health care provider to be assigned to the care of normal pregnancy and normal birth, including risk assessment and the recognition of complications... In 1992 the House of Commons Health Committee report on maternity services was published in the United Kingdom. Among other things, it recommended that midwives should carry their own caseload and take full responsibility for the women in their care; midwives should also be given the opportunity to establish and run midwife-managed maternity units within and outside hospitals... In a few European countries midwives are fully responsible for the care of normal pregnancy and childbirth, either at home or in hospital."*[21]

16. Evidently, the World Health Organisation does not support the AMA's expensive *"medically supervised"* model but rather *"referral to a higher level of care, if risk factors become apparent or complications develop that justify such referral."*[22] This is plain common sense. It also seems to be the direction of the State Government of Victoria. According to our State's Department of Health and Human Services:

> *"The government acknowledges that the majority of women do not require medical attendance at the birth, but that this need is not always predictable."*[23]

17. Thus if the Victorian Government, World Health Organisation and health authorities in the UK and other European countries are credible, Medicare's present funding arrangements and the exclusion of homebirths seem to be designed to *"protect the integrity and independence of the doctor/patient relationship"* and the *"industrial interests of medical practitioners",* as set out in the AMA's *"Aims and Objectives"***.** Although the AMA does often fulfil its more noble aim and objective of promoting public health - and we are grateful to them for that - we think they still have been given too much weight with respect to midwifery. When it comes to independent midwifery. *The Health Insurance Act 1973* should really have been called the "Clinical Practitioner's Insurance Act", since it is not yet about health as much as it is about medicine.

18. Unfortunately the Bills before Parliament still formally entrench the above doctors' near-monopoly by failing to recognise midwives' qualification to render *"professional services"* in their own right <u>and on their own terms</u>. Medicare's operation is thus out of step with the laws of Victoria and other States in which registered midwives are presently free to practice as they have for well over 100 years[24]. This of course is set to change due to the Commonwealth's indemnity laws as set out in parts A, B & C of this submission.

    We believe if the Commonwealth wishes to fulfilled its *National Competition Policy*, it should have carefully reviewed and reformed the *Health Insurance Act 1973* to equitably

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21 See the World Health Organisation's *Care in normal birth A practical guide* (*WHO/FRH/MSM/96.24)* item 1.6 *"Caregiver in birth"* on page 6.

22 See the World Health Organisation's *Care in normal birth A practical guide* (*WHO/FRH/MSM/96.24)* item 1.5 *"Aim of care in normal birth, tasks of the Caregiver"* on page 4.

23 See page 4 of *Future directions for Victoria's maternity services*, published by Programs Branch, Metropolitan Health and Aged Care Services, Victorian Government Department of Human Services, Melbourne Victoria in May 2004.

24 Midwives conducted their practice in unregulated fashion prior to the Victorian *Midwives Act (1915)*. But until the Midwives Board was formed in December 1915, there was much angst about what constituted sufficient expertise to "take or use the title of midwife".

fund maternity services throughout Australia - without harmful discrimination. What the present Bills provide is far from that. Independent midwives will be confined to high-overhead clinics (see part D of this submission). If that doesn't finish them off, they can be easily re-medicalized later – perhaps after the present health Minister has moved on. Prediction: Unless it is amended, within seven years of the legislation's passing, all the midwife clinics will be run by doctors. A few *"three times more likely to die"* scare campaigns aught to do it.

19. The AMA seems completely satisfied. After all the protests of last year, on 24 June 2009, the AMA released the following statement in response to the Minister's historic introduction of the Bills into Parliament:

> *"The Australian Medical Association will work with the Federal Government to ensure patients benefit from the introduction of new prescribing rights for nurse practitioners and midwives... We have been assured by the Government that nurse practitioners and midwives will work collaboratively with medical practitioners to deliver quality care and ensure patient safety under the new arrangements," AMA Federal President, Dr Andrew Pesce, said."*

20. We hope we are wrong, but the deal appears to be, that the Minister gets the AMA's blessing if independent midwives become clinicalized. Forget women's rights. Forget the Constitution. Not likely.

We thank the Committee for its consideration,

Eric Wilson Tracey Wilson