

Submission No. 89
Date Received

RECEIVED
14 DEC 2006
BY: LACA *NH*

House of Representatives
Standing Committee on Legal and Constitutional Affairs

Inquiry into
Older People and the Law

Submission

from
Christian Science Committee on Publication
Federal Representative for Australia

*For further information please contact:
Margaret Clark
Christian Science Committee on Publication
Federal Representative For Australia
Suite 16/9 Wrights Rd Drummoyne NSW 2047
Mail: PO Box 181 Drummoyne NSW 1470*

Christian Science Committee on Publication
Federal Representative for Australia

**Submission to
Standing Committee on Legal and Constitutional Affairs
Inquiry into Older People and the Law**

OVERVIEW

This submission outlines an important need to address in laws that affect older people their right to choose the health care method of their choice, including spiritual treatment through prayer, as practiced in Christian Science; and, their right to refuse medical treatment. In addition, such laws need to accommodate an older person's choice to rely on spiritual treatment through prayer, in lieu of medical treatment, by clarifying that such a choice does not constitute abuse or neglect in either civil or criminal codes.

The office of the Christian Science Federal Representative for Australia is part of a worldwide network of individual Christian Scientists who present accurate information to the media and government about Christian Science. The position of Christian Science Federal Representative for Australia includes the authority to represent the practice of Christian Science to the Australian Federal Parliament.

Note that Christian Science is *not* Scientology.

EXECUTIVE SUMMARY

We welcome the invitation by the Standing Committee on Legal and Constitutional Affairs to comment on the Inquiry into Older People and the Law. Our submission addresses two areas of focus raised in the invitation for submissions:

- ξ Health Services, including Abuse and Neglect Issues
- ξ Delegation of Authority - with Regard to Advance Directives for Health Care, including Competency Issues

1. INTRODUCTION

Most older people desire to maintain freedom of choice for health care services, which includes a full range of alternative health options in addition to the traditional medical model.

Christian Science is one of the religious non-medical forms of treatment that relies on spiritual means through prayer to heal illness, injuries and other conditions. The experience of those practicing Christian Science is that this healing method has both preventative and curative effects. Christian Science approaches health from a spiritual standpoint - through prayer - affirming that each individual is spiritual, made in the image and likeness of God. The application of this religious non-medical method of healing does not involve any type of medical care.

Those individuals who choose a religious non-medical method of healing for their health care, such as Christian Science, should be able to refuse medical treatment without being characterized as being abused or neglected from a civil or a criminal standpoint in elder abuse or neglect statutes that may be developed.

Moreover, in adult abuse and neglect reporting statutes that may be developed, there should be an exception provided from reporting requirements for information that is learned by clergy, including ministers of religion, priests, and Christian Science practitioners, through sacred confidences, including confessions, that are required by the relevant religion not to be divulged.

In addition, individuals should have assurance that their health care preferences, as set forth in an advance directive for health care, should be honored in any Australian State, even apart from the State where the advanced health directive was made. Such stated preferences in an advance directive for health care may include spiritual treatment through prayer, as practiced in Christian Science, and that medical treatment, including heroic medical measures such as artificial nutrition and hydration, be not employed. Moreover, an individual should be able to specify in an advance directive for health care that someone who is not a physician can make a determination of capacity.

As invited by the invitation to submit we include by way of example, reference to some useful statutes from other jurisdictions such as the United Kingdom and the United States to illustrate the issues we address in this submission. Because of its size and format - a separate file is attached to this electronic submission for the (US) *Uniform Health Care Decision Act 940207.pdf* which forms part of this submission.

We commend the Standing Committee on Legal and Constitutional Affairs investigation of whether current legislative regimes are adequately addressing the legal needs of older Australians. We appreciate the opportunity to submit our concerns.

Christian Science Committee on Publication
Federal Representative for Australia

1.1 Overview of Points Considered:

- 1.1.1 It is important that older Australians be allowed to choose the health care option of their preference. Moreover, patient-directed care should be a hallmark of strategies for health services of older people. Those relying on spiritual healing through prayer, in lieu of medical treatment, (for example, Christian Science) need to have the ability to choose the form of health care they find effective.
- 1.1.2 There is a need for Australian governments, at State and Federal levels depending on where the responsibility lies, to provide religious accommodations in laws that may be developed to protect older people. These accommodations would allow competent individuals to continue to choose spiritual healing through prayer, in lieu of medical treatment, without being considered "abused" or "neglected".
- 1.1.3 There is also a need for governments to provide religious accommodations in elder abuse reporting laws that may be developed to exclude from reporting requirements information that is learned by members of the clergy, including ministers of religion, priests, and Christian Science practitioners through sacred confidences, including confessions that are required by religious doctrine to be kept confidential.
- 1.1.4 There is a need for all Australian governments to harmonize new or existing State laws relating to advance directives for health care that support an individual's right to refuse medical treatment and their preference to rely on spiritual treatment through prayer, for their health care.

2.0 Older People's Freedom of Choice for Health Care Services

- 2.1 Australian governments, at all levels, may be considering drafting and implementing legislation that is aimed at protecting and caring for older people. While such legislation may be well intended, elder abuse and neglect laws may unintentionally have the effect of restricting an older person's autonomy relative to their health care choices.
- 2.2 Many individuals choose alternatives to conventional medical treatment for their health care. Christian Scientists' choose to use spiritual healing through prayer, in lieu of medical treatment, for their health and well being.
- 2.3 Christian Scientists choose spiritual healing through prayer for their health care, because they have found this spiritual method of healing effective in their lives whenever they have been faced with illness or injury.
- 2.4 An individual's choice to rely on spiritual treatment through prayer for health care, may involve that individual's choice to refuse medical treatment. Reliance on prayer is practiced not out of opposition to medical practices, but as an alternative choice of care.

Christian Science Committee on Publication
Federal Representative for Australia

- 2.5 There is a well-established common law right that permits a competent individual to refuse medical treatment. At common law, the unwanted touching of one person by another without legal justification was a battery. For example, the United States Supreme Court has observed that, "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."¹ This idea of bodily integrity has been embodied in the general requirement that medical treatment or procedures should not be performed without the informed consent of the patient.² Common law rights of competent adults to refuse medical treatment as may be recognized in the Australian States should be maintained.
- 2.6 When seeking healing through Christian Science, individuals may choose to employ a Christian Science practitioner. Christian Science practitioners are available full time to pray for any member of the public seeking spiritual solutions to the challenges of daily living, including illness or injury. The services of a Christian Science practitioner are purely spiritual and religious in nature. (See <http://www.tfccs.com/aboutchristianscience/practitioners.jhtml>)
- 2.7 Christian Science practitioners do not use medical means in their approach to healing; they do not diagnose, neither do they advise or counsel patients; the healing services they offer are wholly spiritual and religious.
- 2.8 Individuals may also choose to employ a Christian Science nurse if there is a need for physical care during an illness or injury. Christian Science nurses carry out an important role in supporting patients by providing religious non-medical Christian Science nursing care. (See <http://www.tfccs.com/aboutchristianscience/nurses.jhtml>)
- 2.9 A Christian Science nurse is trained to carry out bedside care, to assist with basic cleanliness, washing and bandaging of wounds, to help with mobility and to provide an optimal environment for healing.
- 2.10 Individuals who join The First Church of Christ, Scientist, and its worldwide branch churches, are completely free to choose whatever health care method they think appropriate for their needs. Free choice is a basic part of Christian Science.
- 2.11 As laws may be formulated that seek to protect an older person from abuse or neglect, it is critical that provision be made for those individuals who choose spiritual healing through prayer, in lieu of medical treatment, in the form of a clarifying accommodation in those laws.

¹ *Cruzan v. Director*, 497 U.S. 261, 267 (1990).

² *Id.*

Christian Science Committee on Publication
Federal Representative for Australia

- 2.12 In the United States for example, most States have enacted laws for the care and protection of adults, including older people and adults with disabilities. Many of those laws, in both civil and criminal codes, include a religious accommodation. There are thirty-four (34) States plus the District of Columbia in the United States that have religious accommodations in their civil codes. In addition, there are twenty-four (24) States plus the District of Columbia that have religious accommodations in their criminal codes. Fifteen (15) States plus the District of Columbia have religious accommodations relative to adult abuse and neglect in both their civil and criminal codes. For a brief summary of religious accommodations in the United States, see Exhibits A, B, and C.
- 2.13 The following are several examples of religious accommodations in the civil codes of some jurisdictions in the United States:

**LOUISIANA ADMINISTRATIVE CODE
TITLE 4 ADMINISTRATION
PART VII. GOVERNOR'S OFFICE
CHAPTER 11. ELDERLY AFFAIRS
SUBCHAPTER E. UNIFORM SERVICE REQUIREMENTS**

§ 1239. Adult protective services for the elderly.

"A. Overview of Elderly Protective Services . . .

4. Client Rights

a. The elderly protective services client, if mentally able, has the right to . . .

ii. participate in all decisions regarding his/her welfare; . . .

iv. refuse medical treatment if it conflicts with his/her ethical values, and/or religious beliefs and practices; . . .

6. Definitions . . .

Self-Neglect. No adult who is being provided treatment in accordance with a recognized religious method of healing in lieu of medical treatment shall for that reason alone be considered to be self-neglected."

Cite: La. Admin. Code tit. 4, § 1239(A)(4)(a)(ii)(iv),(6) (2006).

AUTHORITY NOTE: Promulgated in accordance with R.S. 14:403.2.

**CODE OF IOWA
TITLE VI. HUMAN SERVICES
SUBTITLE 6. CHILDREN AND FAMILIES
CHAPTER 235B. ADULT ABUSE**

§ 235B.2. Definitions.

"As used in this chapter, unless the context otherwise requires: . . . 5.a. 'Dependent adult abuse' means: . . . b. 'Dependent adult abuse' does not include any of the following:

(1) Circumstances in which the dependent adult declines medical treatment if the dependent adult holds a belief or is an adherent of a religion whose tenets and practices call for reliance on spiritual means in place of reliance on medical treatment.

(2) Circumstances in which the dependent adult's caretaker, acting in accordance with the dependent adult's stated or implied consent, declines medical treatment if the dependent adult holds a belief or is an adherent of a religion whose tenets and practices call for reliance on spiritual means in place of reliance on medical treatment.

(3) The withholding or withdrawing of health care from a dependent adult who is terminally ill in the opinion of a licensed physician, when the withholding or

Christian Science Committee on Publication
Federal Representative for Australia

withdrawing of health care is done at the request of the dependent adult”
Cite: Iowa Code § 235B.2(5)(a), (5)(b) (2005).

- 2.14 The following are some examples of religious accommodations in criminal codes of some States in the United States:

**MINNESOTA STATUTES
CRIMES, CRIMINALS
CHAPTER 609. CRIMINAL CODE
CRIMES AGAINST THE PERSON
609.2325. Criminal abuse.**

“ . . . Subdivision 2. Exemptions. For the purposes of this section, a vulnerable adult is not abused for the sole reason that: . . . (2) the vulnerable adult, a person with authority to make health care decisions for the vulnerable adult, or a caregiver in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the vulnerable adult in lieu of medical care, provided that this is consistent with the prior practice or belief of the vulnerable adult or with the expressed intentions of the vulnerable adult; . . .”

Cite as: Minn. Stat. § 609.2325(2)(2) (2005).

**MASSACHUSETTS GENERAL LAWS ANNOTATED
PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES
TITLE I. CRIMES AND PUNISHMENTS
CHAPTER 265. CRIMES AGAINST THE PERSON
§ 13K. Assault, Abuse, Neglect and Financial Exploitation of an Elderly or Disabled Person.**

“ . . . (f) Conduct shall not be construed to be wanton or reckless conduct under this section if directed by a competent elder or person with a disability, or for the sole reason that, in lieu of medical treatment, an elder or person with a disability is being furnished or relies upon treatment by spiritual means through prayer if such treatment is in accordance with the tenets and practices of the established religious tradition of such elder or person with a disability, and is provided at the direction of such elder or person with a disability, who shall be competent, or pursuant to the direction of a person who is properly designated a health care proxy under chapter two hundred and one D.”

Cite as: Mass. Gen. Laws Ann. ch. 265, § 13K(f) (2006).

- 2.15 As governments in Australia consider formulating legislation that aims at protecting older persons, we anticipate that in defining “abuse” or “neglect,” drafters will likely set forth certain “necessities of life,” which if not provided to an older person, might constitute elements of possible “abuse” or “neglect.” In this regard, and in view of an increasing interest in alternative therapies, including spiritual healing through prayer, we recommend that the term “health care” be employed, rather than the more restrictive and narrower term “medical care.” The broader term “health care” better reflects the spectrum of viable health care options that Australians want today; also, the term “health care” would certainly include medical care as a subset of health care.

Christian Science Committee on Publication
Federal Representative for Australia

- 2.16 Australian governments may be considering mandatory reporting of the suspected abuse or neglect of older persons. (Many States in the United States require specified categories of persons to report instances of suspected adult abuse and neglect).
- 2.17 If members of the clergy, including ministers of religion, priests, and Christian Science practitioners are listed as mandated reporters of abuse or neglect of older persons, there should be an exception made for information learned through sacred confidences, including confessions, that are required to be kept in confidence and not divulged, by the rules of the relevant religion. An example of accommodating sacred confidences in adult abuse and reporting statutes is set forth in a statute in Wisconsin in the United States, as follows:

WEST'S WISCONSIN STATUTES ANNOTATED

SOCIAL SERVICES

CHAPTER 46. SOCIAL SERVICES

§46.90. Elder abuse reporting system

(ae) A person specified in par. (ab) to whom any of the following applies is not required to file a report as provided in par. (ad):

1. If the person believes that filing a report would not be in the best interest of the elder adult at risk. If the person so believes, the person shall document the reasons for this belief in the case file that the person maintains on the elder adult at risk.
2. If a health care provider provides treatment by spiritual means through prayer for healing in lieu of medical care in accordance with his or her religious tradition and his or her communications with patients are required by his or her religious denomination to be held confidential.

Cite as: Wis. Stat. Ann. §46.90(4)(ae) (2005).

- 3.0 **Delegation of Authority - with regard to Advance Directives for Health Care, including Competency Issues**
- 3.1 Individuals should be allowed to have their health care treatment preferences described within the provisions of an advance directive for health care and to have those preferences followed by those persons responsible for their care.
- 3.2 Moreover, individuals should be allowed to specify in an advance directive for health care someone, other than a physician, to determine if the principal lacks capacity or has regained capacity to make their own health care decisions. This approach is recognized in the United States in the *Uniform Health-Care Decisions Act*.³ (See Exhibit D). That Act acknowledges the right of a competent individual to decide all aspects of his or her own health care in all circumstances, including the right to decline health care or to direct that health care be discontinued, even

³Uniform Health-Care Decisions Act (1994)

Christian Science Committee on Publication
Federal Representative for Australia

if death ensues.⁴ The pertinent section from that Act and a correlative explanatory comment read, as follows:

"2(d) Unless otherwise specified in a written advance health-care directive, a determination that an individual lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, must be made by the primary physician."⁵

Comments to "Subsection 2(d):

"Subsection (d) provides that unless otherwise specified in a written advance health-care directive, a determination that a principal has lost or recovered capacity to make health-care decisions must be made by the primary physician. For example, a principal might specify that the determination of capacity is to be made by the agent in consultation with the primary physician. Or a principal, such as a member of the Christian Science faith who relies on a religious method of healing and who has no primary physician, might specify that capacity be determined by other means. . . ."⁶

3.2 Some jurisdictions in the United States have adopted the Act's concept in this regard; the following are two examples:

**NEW HAMPSHIRE REVISED STATUTES ANNOTATED
TITLE X. PUBLIC HEALTH
CHAPTER 137-J. DURABLE POWER OF
ATTORNEY FOR HEALTH CARE**

§ 137-J:2. Scope and Duration of Authority.

" . . . II. After consultation with the attending physician and other health care providers, the agent shall make health care decisions in accordance with the agent's knowledge of the principal's wishes and religious or moral beliefs, as stated orally or otherwise communicated by principal to agent, or as contained in the durable power of attorney for health care or in

a terminal care document executed pursuant to the provisions of RSA 137-H; or if the principal's wishes are unknown, in accordance with the agent's assessment of the principal's best interests and in accordance with accepted medical practice.

III. . . . A durable power of attorney for health care may include a provisions that, if the principal has no attending physician for reasons based on his religious or moral beliefs as specified in the durable power of attorney for health care, a person designated by the principal in the durable power of attorney for health care may certify in writing, acknowledged before a notary or justice of the peace, as to the lack of decisional capacity of the principal. The person so designated by the principal shall not be the agent, or a person ineligible to be the agent."

Cite as: N.H. Rev. Stat. Ann. § 137-J:2(II), (III) (2005).

⁴Id., Prefatory Note, page 1.

⁵Id., Section 2(d), page 6.

⁶Id., comment to Section 2(d), page 8.

GENERAL STATUTES OF NORTH CAROLINA
CHAPTER 32A. POWERS OF ATTORNEY
ARTICLE 3. HEALTH CARE POWERS OF ATTORNEY
§ 32A-20. Effectiveness and duration; revocation.

"(a) . . . A health care power of attorney may include a provision that, if the principal does not designate a physician for reasons based on his religious or moral beliefs as specified in the health care power of attorney, a person designated by the principal in the health care power of attorney may certify in writing, acknowledged before a notary public, that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to his health care. The person so designated must be a competent person 18 years of age or older, not engaged in providing health care to the principal for remuneration, and must be a person other than the health care agent. . . ."
Cite as: N.C. Gen. Stat. § 32A-20(a) (2005).

- 3.3 There is much debate, in many parts of the world - including Australia, about "end of life decisions." For example, in the United States the *Schiavo* case generated much discussion and proposed legislation centering around a determination of who makes critical decisions involving heroic measures, including artificial hydration and nutrition, for critically ill patients who are unable to communicate. We clarify that patients who choose spiritual healing through prayer, as practiced in Christian Science, do so with the full expectation of healing - it's never a surrendering to God's will or acceptance that death is imminent and unavoidable. We recommend that the Standing Committee not endorse any proposal that establishes a legal presumption that in the absence of a valid written advance directive for health care, a patient wished to be kept alive through heroic measures, including artificial hydration and nutrition. Each case should be judged on its own merits and particular facts, including parol evidence as to the patient's wishes and life practices.
- 3.4 In considering new or existing advanced health directive legislation in Australia it should be noted therefore that a statement which merely indicates a general desire not to have medical treatment, may not sufficiently constitute an Advance Health Directive if the person has quite specific requests based on religious beliefs such as those held by a Christian Scientist. Specified treatment needs to be clear and specified, so as to illustrate exactly what is being refused. The more detail an advanced directive provides, the less room for doubt about what the maker intended for his future care.
- 3.5 **Useful example from the United Kingdom:** Some issues raised at the time of the passing of the UK Mental Capacity Act 2005 are worthy of note.

One issue formed a key part of the approach made by the London office of the Christian Science Committee on Publication by the District Manager for UK and Eire, during the passage of the *Mental Capacity Bill* in that country. The Minister, Baroness Ashton of Upholland wrote to our UK office in response to assurance sought regarding the Act during the period of consultation of the Draft Code of Practice, that if a Christian Scientist specifies that he/she rejects all medical treatment in all circumstances in an advanced health directive based on religious

Christian Science Committee on Publication
Federal Representative for Australia

belief it would be understood and honoured. Baroness Ashton responded - "We are well aware that some forms of advance refusal, especially those based on religious conviction, make it clear that they apply in all circumstances. There is nothing in the terms of clause 24 [of the Act] to prevent such forms being just as effective in future. The importance of the idea of a "specified treatment" is that it must be clear, and "specified", exactly what is being refused. Nothing in the Bill prevents a Christian Scientist specifying that he rejects all medical treatment in all circumstances - although the additional formality requirements will apply where treatment is to sustain life."⁷

4.0 Conclusion

We recommend that the Standing Committee address in its considerations and recommendations the desire of older Australians to maintain their freedom to choose health services that best meets their needs. We request that there will be recognition that many Australians choose alternative methods of healing, including spiritual treatment through prayer (for example, Christian Science), other than medical care, and that such choices should be honored by health care providers and others who may be responsible for the care of older persons.

We welcome any questions or requests for further information the House Standing Committee on Legal and Constitutional Affairs may have concerning this submission.

An opportunity to discuss these issues at a face-to-face meeting would also be welcome any time by contacting the undersigned.

Respectfully submitted by
Mrs. Margaret Clark
Christian Science Federal Representative for Australia

December 12, 2006

Exhibits

- A. Civil Adult Abuse & Neglect laws in United States (Survey)
- B. Criminal Adult Abuse & Neglect laws in United States (Survey)
- C. Civil and Criminal Adult Abuse & Neglect laws in United States (Survey)
- D. Uniform Health Care Decisions Act
- E. Letter from Baroness Ashton of Upholland, letter to District Manager, Christian Science Committees on Publication for UK & Eire, 25 February 2005

⁷ Baroness Ashton of Upholland, letter to District Manager, Christian Science Committees on Publication for UK & Eire, 25 February 2005 See Attachment E