**Name of petitioner**

W Hunter Watson

**Petition title**

Review of mental health and incapacity legislation

**Petition summary**

Calling on the Scottish Parliament to urge the Scottish Government to conduct a wide review Scottish mental health and incapacity legislation and, when doing so, to take due account of recent developments in international human rights law.

**Action taken to resolve issues of concern before submitting the petition**

I have sent a number of papers to the Scottish Government in order to make clear why it is necessary to conduct a wide review of Scottish mental health and incapacity legislation. So far the Scottish Government has given me no hint that it is willing for that wide review to take place. Nor has it attempted to refute the arguments which I have been making in support of there being a wide review.

In addition, I have provided the Scottish Government with a paper entitled "Important Court Judgments 2". This paper contains details of many court judgments together with a brief explanation of their significance for Scottish mental health and incapacity legislation. These judgments include judgments of the European Court of Human Rights. These help to clarify the scope of the European Convention on Human Rights (ECHR).

**Petition background information**

In 1997 I began writing to my MP in an attempt to persuade Parliament to legislate to ensure that antipsychotic drugs were not concealed in the food or drink of elderly care home residents. After the establishment of the Scottish Parliament in 1999, I began writing to MSPs in an attempt to achieve the same aim. When it became apparent that this approach was not going to be successful I submitted a petition to the Public Petitions Committee. This petition, number PE867 (http://archive.scottish.parliament.uk/business/petitions/docs/PE867.htm), generated great media interest because it had not been generally realised that drugs were being concealed in the food or drink of some care home residents: I was interviewed on both radio and television and the story was covered in the UK press. Regrettably, this petition was unsuccessful. It was assumed that my concerns would be addressed by revising the Code of Practice for the Adults with Incapacity Act. Basically, the revision implied that covert medication is permissible provided that it is done in accordance with the provisions of the Adults with Incapacity (Scotland) 2000 Act (the AWI Act). However,
given developments in the field of human rights since the passage of that Act, it would seem to be now appropriate to review it.

In 2008 I was made aware of one particular case which made it clear that the Mental Health (Scotland) Act 2003 (the 2003 Act) was not working as well as the Scottish Parliament had expected. Basically, it suffers from the same flaw as does Part 5 of the AWI Act. In each case, too much power is given to health professionals who, like the rest of us, are not infallible. Nor do they always adhere to the laudable principles which are supposed to underpin both the AWI and the 2003 Act. As a consequence, many of the people who are treated under the provisions of those Acts have their human rights violated. Because of my concerns about the 2003 Act, and the absolute refusal of the Scottish Government to act to address those, I submitted petition PE01494 which called for the Scottish Parliament to urge the Scottish Government to amend the Mental Health (Care and Treatment) (Scotland) Act 2003 to ensure that it is compatible with the European Convention on Human Rights. Although I and the person who seconded my petition were both permitted to address the Public Petitions Committee and although that Committee gave various bodies and individuals an opportunity to submit evidence, the Committee agreed to close my petition without discussing it. I was informed that it agreed to do this as the consequence of an instruction from a senior official or civil servant.

The Mental Health (Scotland) Act 2015 reflected a limited review of the 2003 Act that was based upon the 2009 McManus Report and which was concerned largely with administrative rather than with human rights issues. In spite of calls from the General Assembly, from the Labour Party’s health spokesperson and others, the Scottish Government declined to widen the scope of that legislation. It is noteworthy that the Scottish Government chose not to give due consideration to the submission made by the Scottish Human Rights Commission (SHRC) to the Scottish Parliament’s Health and Sport Committee (http://www.scottish.parliament.uk/S4_HealthandSportCommittee/Inquiries/MHB027_.SHRC.pdf). In that submission, it is stated that the relevant law includes the "Scotland Act 1998 which requires that all legislation of the Scottish Parliament must be compatible with ECHR rights. It also requires that Scottish Ministers must observe and implement the UK’s other international obligations, which includes obligations under international human rights treaties the UK has ratified. There are several international human rights treaties that have application to mental health and mental disorder. This submission focusses on the UN Convention on the Rights of Persons with Disabilities". (My italics).

The Scottish Government should examine the possibility that if Scottish mental health and incapacity legislation is not amended to take due account of those judgments of the European Court of Human Rights to which I make reference in my paper entitled "Important Court Judgments 2" then it will not be ECHR compatible as is required by the Scotland Act.

My paper also contains relevant judgments of domestic courts. These have established case-law which makes clear that an adult with capacity can only be treated with that adult’s informed consent and that there must be a presumption of capacity. Among the cases to which reference is made is Montgomery v Lanarkshire Health Board, 2015. Comments on this case appeared in the May 2017 edition of the BMJ. Among those comments is the following: "The doctor might think that disclosure of certain information could lead the patient to a decision that is not in their best interests, as was true in the Montgomery case. But the ethical and legal position is clear: doctors must not withhold information simply because they disagree with the decision the patient is likely to make if given the information".

The need to provide full information about risks and to not assume that there is a complete lack of decision-making capacity is of particular importance when a doctor prescribes an antipsychotic drug for a person with dementia. The administration of an antipsychotic drug to such a person, especially if carried out for a significant period, increases the risk that that person will die prematurely or have a stroke.

In a 2009 report by Professor Sube Banerjee about the use of antipsychotic drugs for
people with dementia it was stated "The use of these drugs in those with dementia has substantial clinical risk attached, including a conservative estimate of 1,800 extra deaths and 820 extra serious adverse events such as stroke per year". (Numbers presumably referred to England and Wales.)

In a 2014 report prepared by the Mental Welfare Commission for Scotland (MWC) it was noted that of the 336 dementia patients in the 52 NHS units surveyed 166 patients (49%) were being given antipsychotic medication. The MWC commented "While this might be helpful in relieving symptoms such as hallucinations, delusions, agitation or aggression there are known risks for people with dementia. All antipsychotic medications increase the risk of stroke or death, many can impair mobility and increase the risk of falls".

In June 2010 there was published Scotland's National Dementia Strategy. In section 97 of the strategy it is stated "This strategy is making a commitment to a reduction in the level of prescription (of psychoactive medication) during 2011 and a further reduction for future years".

Regrettably the production of strategies is totally ineffective if they can be ignored with impunity: the document entitled "Medicines used in Mental Health" reveals that for the period 2009/10 to 2015/16 all NHS Boards showed an increased prescribing of antipsychotic drugs. Although the data does not indicate whether this increased prescribing applied to those with dementia, there can be no assumption that it did not.

In May 2017 there was published a report entitled "Scotland's Mental Health and Capacity Law: the Case for Reform". It was produced jointly by the Centre for Mental Health & Capacity Law and the Mental Welfare Commission for Scotland. This report notes that,"... in order to ensure compliance with developing international human rights standards ... there is a need to revisit and, where necessary reframe, our mental health and capacity law". The report draws attention to the possibility of small changes being made to the existing legislation prior to the production of a completely new and unified Act.

Account should also be taken of the UK submission to the committee which monitors compliance with the Convention on the Rights of Persons with Disabilities (CRPD) within those countries which have ratified and hence which agreed to comply with that international human rights treaty. Among the issues raised are the use of chemical restraint and the abuse of people in residential care.

If legislation were enacted which took full account of recent relevant developments in the field of human rights then it is likely it would follow that:
- doctors could no longer prescribe that unwanted drugs be concealed in the food or drink of care home residents;
- care home residents could no longer be given potentially harmful drugs as chemical restraint;
- mental health patients could no longer be held down and injected with psychiatric drugs against their will; nor could they continue to be given ECT even though they resist or object to that treatment.
- non-consensual treatment would be kept to an absolute minimum.

Unique web address
http://www.parliament.scot/GettingInvolved/Petitions/PE01667

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Comments to stimulate online discussion

Should the Scottish Parliament legislate to ensure that:

- medication is not used as restraint in care homes;
- unwanted medication is not concealed in the food or drink of care home residents;
- except in an emergency, mental health patients are not detained in hospital without a prior court hearing;
- no mental health patient is subjected to forced treatment unless it has been established that it is medically necessary;
- mental health patients have a fair hearing before an independent, impartial and competent tribunal or court at which witnesses are required to give evidence on oath;
- transcripts of hearings are made available to mental health patients, their representatives and others who have a legitimate interest in them;
- the Convention on the Rights of Persons with Disabilities is incorporated into Scottish law?