In my opinion, when the Health and Sport Committee considers the Mental Health (Scotland) Bill it should consider the issues raised in the two attached papers even though the Government has made clear that it does not wish any substantial amendments to be made to the 2003 Act. However, if Parliament does not take account of the many developments since the passage of the 2003 Act and the evidence that the Act is not being implemented as Parliament expected then there is a risk that a mental health patient will raise an action on the grounds that his or human rights have been breached. That could not only lead to Parliament being require to amend Scottish legislation to bring it into line with judgments of the European Court of Human Rights but could also lead to many past and present mental health patients being awarded significant compensation, a possibility that the Committee might wish to avoid.

I hope that the Committee will permit me to give oral evidence. It was I who submitted petition PE01494 which called on the Scottish Parliament to amend the Scottish mental health legislation to ensure that it is compatible with Convention rights. As a result of the information received from the many people who contacted me, I learned much about how the 2003 Act was being implemented. Unfortunately, the Petitions Committee was instructed to close my petition and did so without discussing any of the many submissions made. I had expected that it would refer my petition to the Health and Sport Committee so that it could examine the important issues that had been raised. I hope that, notwithstanding the views of the Government, this can happen.

W. Hunter Watson
August 2014
AMENDMENT OF 2003 MENTAL HEALTH ACT

When the 2003 Act is amended full account should be taken of the following five judgments of the European Court of Human Rights. These judgments are legally binding and it is possible, therefore, that if the 2003 Act is not suitably amended then an individual subjected to forced treatment would have grounds for raising an action under section 7(1) of the Human Rights Act. (This does not require medical negligence to be established; it only requires it to be shown that, on the balance of probability, the complainant’s human rights had been breached.) If the action were successful and compensation awarded then other patients might also be awarded compensation which could amount in total to many millions of pounds. Parliament (i.e. the Scottish Parliament) should consider carefully whether it wishes to expose Health Boards, and ultimately taxpayers, to this risk. Parliament should note that in 2004 a judge awarded compensation to a prisoner on the grounds that being forced to “slop out” had breached his human rights and that this set a precedent which gave rise to similar claims and ultimately to huge compensation payments.

As well as judgments of the European Court, this paper also draws attention to a number of other matters of which account should be taken when amendments to the 2003 Act are being considered.

Winterwerp v the Netherlands (para 39), 1979
In this judgment it was made clear that the detention of an individual on the basis of unsoundness of mind is unlawful unless, at a minimum, he or she has reliably been shown to be of unsound mind. However, there is no requirement in the 2003 Act to reliably show someone is of unsound mind either prior to or after their detention. Even though an individual’s liberty is at stake, the Act requires mental health tribunals to assume that the individual in question was of unsound mind when detained. Tribunal transcripts reveal that tribunals are prepared to accept that the individual continues to be of unsound mind if that is the opinion of the responsible medical officer. Parliament should take account of the David Rosenhan experiment which demonstrated that psychiatrists cannot reliably tell the difference between people who are sane and those who are insane.

Herczegfalfy v Austria (para 82), 1992 The Court found that where patients are “entirely incapable of deciding for themselves”, forced treatment does not constitute inhuman or degrading treatment, if it can convincingly be shown to be a medical necessity. As far as the 2003 Act is concerned there are three points to note:

1. The ruling does not authorise forced treatment unless legal capacity is lacking.
2. Beyond reasonable doubt not all forced treatment can convincingly be shown to be a medical necessity.
3. The 2003 Act does not provide for an appeal on the grounds that legal capacity is not lacking or that the proposed forced treatment is not a medical necessity.
One questionable feature of the 2003 Act is that it permits forced treatment to begin before the patient has an opportunity to appeal. The Health Committee should discuss whether this part of the Act should be reviewed in the light of developments since the passage of the Act.

Pretty v U.K. (para 52), 2002:
This ruling provides a definition of inhuman and degrading treatment, something that is prohibited in all circumstances. Yet it is clear that in psychiatric institutions treatment does occur which falls into this prohibited category. Unless Parliament addresses this issue, mental health patients will continue to be subjected to inhuman or degrading and hence be exposed to the risk of dying prematurely: two of those who made submissions to my petition blamed the deaths of loved ones on the inhuman and degrading treatment to which they had been subjected while another two who made submissions were fortunate to have survived since prescribing guidelines had not been followed when they were forcibly injected with drugs for quite indefensible reasons.

The transcripts of the debates that preceded the passage of the 2003 Act reveal that no MSP raised the possibility that certain forms of forced treatment, notably involuntary ECT and drug treatment that could not convincingly be shown to be a medical necessity, might be inhuman or degrading. Parliament should not neglect to examine this possibility when the 2003 Act is amended.

Salontaji-Drobnjak v Serbia (paras 143, 144, 155), 2009: According to this judgment, individuals can only be deprived of their legal capacity by a court at which they receive a fair hearing. In Scotland it is in practice considered sufficient for a psychiatrist to assert that patients “lack insight” for them to be deprived of their legal capacity and hence of their right to refuse treatment. This would appear to provide grounds for patients who have been subjected to forced treatment to raise a court action.

Ibrahim Gurkan v Turkey (para 14), 2012: This judgment emphasised that a tribunal must be “impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in that respect”. However, a mental health tribunal set up under the 2003 Act cannot be regarded as impartial for the following reasons:

1. One of the tribunal members is a psychiatrist who is likely to give undue weight to the views of the fellow psychiatrist who is opposing the patient’s appeal.
2. When a tribunal considers an appeal against detention, it is required to determine whether the conditions “continue to be met” Any assumption that they had been met when the patient was detained must militate against impartiality.
3. The tribunal is expected to assume that mental health professionals are always truthful because the Act does not require them to give evidence on oath at tribunals. This also makes impartiality less likely.
The empirical evidence confirms that mental health tribunals are not impartial and that not all witnesses are truthful. (See submissions to petition PE01494.) Parliament should not assume that there can be no doubt concerning the impartiality of the mental health tribunals set up under the 2003 Act and should, therefore, consider whether appeals should again be heard in sheriff courts.

Council of Europe Recommendation Rec (2004) 10
This Recommendation is concerned with “the protection of the human rights and dignity of persons with mental disorder”. Article 20.1 states that “The decision to subject a person to involuntary placement should be taken by a court or another competent body”. Under the 2003 Act it is too easy for a psychiatrist to have an individual detained in hospital. The adoption of Article 20.1 from the Council of Europe Recommendation would reduce the risk of individuals being wrongly deprived of their liberty in breach of Article 5 of the European Convention.

General Comment No 1 issued in April 2014 by the UN Committee on the Rights of Persons with Disabilities.
This General Comment gives the views of the UN Committee about legal capacity. The legal capacity to make a treatment decision is highly relevant to the issue of forced treatment since, as the legal annex to the GMC’s consent guidance makes clear, case law has established that “A competent patient has the right to refuse treatment and their refusal must be respected, even if it will result in their deaths”. That, however, is not the only reason why this UN Committee has instructed states which have ratified the Convention to abolish legislative provisions that allow forced treatment. Another reason is that the effect of the forced treatment on the individuals concerned is such that it can fall within the definition of inhuman or degrading treatment. As far as Scotland is concerned, this is made clear in the 2013 report commissioned by the Mental Welfare Commission entitled “Individual’s rights in mental health care” (see page 12), in submissions supportive of petition PE01494 and in other evidence in my possession.

Salduz v Turkey, 2008
This case concerned the fairness of a criminal trial of a juvenile (under 18) but the judgment has relevance to Scottish mental health legislation. Mr Yuzuf Salduz was convicted of a criminal charge by a Turkish court mainly on the evidence of a statement which he had allegedly made to the police. However, he repeatedly denied the content of his statement to the police, both at the trial and on appeal and there was no lawyer present when Salduz was being questioned. The European Court found that this constituted a breach of Article 6 of the European Convention (right to a fair hearing) since “the absence of a lawyer while he was in police custody irretrievably affected his defence rights”.

Cadder v HM Advocate, 2010
Peter Cadder had been convicted of a criminal offence in 2009. He appealed against his conviction on the grounds that no lawyer had been present when
he was interviewed by the police. His appeals failed even though he cited the case of Salduz v Turkey: the Scottish courts maintained that there were sufficient safeguards in the Scottish legal system for there to be no need to ensure that a suspect had access to legal advice when detained for questioning! However, Cadder was able to appeal to the UK Supreme Court on the grounds that his appeal related to Scotland’s compliance with Convention rights. The Supreme Court took account of the Salduz judgment and found that Cadder’s right to a fair hearing under Article 6 of the European Convention had been breached because he had been denied access to a lawyer before being interviewed by the police. As a consequence, the Scottish Parliament passed emergency legislation to amend the Criminal Procedure (Scotland) Act 1995 which had permitted a person suspected of having committed a criminal offence to be detained and interviewed by the police for up to 6 hours without a right of access to a solicitor.

**The Scottish Parliament should consider whether the Cadder judgment might have implications for Scottish mental health legislation:** if the purpose of an interview by a psychiatrist is to determine whether an individual should be detained in a psychiatric institution then perhaps that individual should have the right to be accompanied by a lawyer or a trusted friend.

**Police and Criminal Evidence Act 1984**

Under this Act, when a suspect is taken into custody and questioned, a recording is made of the interview. It would help to protect the rights of patients if it were made obligatory to make a recording of an interview if its purpose is to determine whether forced treatment is necessary: there is compelling evidence that mental health professionals do not always give truthful accounts of interviews and that, in one case, no interview had taken place even though the consultant psychiatrist claimed it had! Of course, if as recommended by the UN Committee, psychiatrists were deprived of the right to subject their patients to forced treatment then such a safeguard might not be necessary.

**Concluding remarks**

The Government is opposed to any fundamental changes being made to the 2003 Act. It may have been for this reason that the Petitions Committee was instructed to close petition PE01494 and provided with a spurious reason for doing so. As can be confirmed by referring to section 25 of the analysis of responses to proposals for a Mental Health (Scotland) Bill, the Government is attempting to use the same pretext to dissuade the Health Committee from considering human rights issues, including the legally binding judgments of the European Court of Human Rights.

One recent judgment of that Court that is obviously relevant to the Bill is the ruling that individuals can only be deprived of their legal capacity by a court in which they receive a fair hearing. The Health Committee will be failing in its duty to carefully scrutinise the proposed Mental Health (Scotland) Bill if it does not discuss the implications of this ruling.
The Health Committee will also be failing in its duty if it does not properly discuss the General Comment issued in April 2014 by the UN Committee on the Rights of Persons with Disabilities. This explains the significance of Article 12 of the Convention on the Rights of Persons with Disabilities, an Article which guarantees persons with disabilities equal recognition before the law. The UN Committee stated that “forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law... This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention”.

It is possible that the Government’s opposition to fundamental changes being made to the 2003 Act is a consequence of advice given to it by those whom it regards as “experts”, namely psychiatrists. Psychiatrists have a vested interest in maintaining the status quo which they have sought to defend by implying that Scotland need not fundamentally amend its mental health legislation unless a court requires it to do so. This is hardly an adequate reason for failing to comply with legally binding judgments of the European Court. Parliament should recognise this and also take account of the fact that not only do psychiatrists lack expertise in the field of human rights but that they may even lack expertise in the field of psychiatry! Doubts have been expressed of late about both the validity of psychiatric diagnoses and the theoretical basis of the drug treatments upon which psychiatrists rely. What is certain is that patients find those drug treatments unpleasant, that they not always effective and that they can do more harm than good. It is time that Parliament took account of information that has been supplied by mental health patients, their families and their representatives. This reveals that some mental health professionals are incompetent, dishonest and callous and that the safeguards within the 2003 Act are virtually worthless. However, the Government is not prepared to fulfil its obligations under the Convention on the Rights of Persons with Disabilities and legislate to ensure that mental health patients have the same rights as other NHS patients. As an alternative, the Government proposes to produce a “disability delivery plan”. It seems safe to assume that the Government is producing this plan merely as an excuse for not complying with the instructions of the UN monitoring Committee. Parliament should not accept that there is no need to make fundamental changes to Scottish mental health legislation merely because the Government is opposed to them. It should recognise that a patient with legal capacity cannot lawfully be subjected to forced treatment and also that a patient lacking in legal capacity cannot lawfully be subjected to forced treatment unless it is both a medical necessity and not inhuman or degrading. Parliament should, therefore, legislate to ensure that no patient can be subjected to forced treatment unless a court has properly tested the evidence that the following three conditions are satisfied:

1. the patient lacks legal capacity;
2. the proposed forced treatment is a medical necessity;
3. the proposed forced treatment is not inhuman or degrading.
In addition, Parliament should legislate to ensure that persons allegedly of unsound mind are no more likely to be wrongfully deprived of their liberty than persons who are suspected of having committed a criminal offence. Given the resources that are currently allocated to the detention and/or the forced treatment of mental health patients such legislation would have the potential to significantly reduce expenditure on the National Health Service though that, of course, would not be the principal justification for reducing compulsory measures to the absolute minimum consistent with the rights of those patients and the rights of others.

GOVERNMENT GAMBLING

In April of this year a UN Committee issued a General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). This General Comment requires various countries, including Scotland, to “abolish policies and legislative provisions that allow or perpetrate forced treatment...” If the Government does not comply with this instruction and a court later rules that the forced treatment of mental health patients breaches their human rights as set out in the European Convention on Human Rights (ECHR) then the total of compensation awarded to them could run into many millions of pounds. It would appear, therefore, that the Government is gambling by assuming that no involuntary mental health patient will raise a successful action on the grounds that the forced treatment inflicted on him or her breached Article 3 ECHR, i.e. that it was or was inhuman or degrading. That is not a safe gamble because in 2004 a court ruled that “slopping out” in jails amounted to degrading treatment: the judge ruled that there had been a violation of Article 3 ECHR because he was “entirely satisfied that the petitioner was exposed to conditions of detention which taken together, were such as to damage his human rights, his human dignity and to arise in him feelings of anxiety, anguish, inferiority and humiliation”. This ruling was based on a judgment of the European Court of Human Rights: the European Court in its judgment in the 2002 case of Pretty v UK emphasised that Article 3 ECHR “is cast in absolute terms, without exception or proviso” and that states which have ratified the ECHR must “take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment.” It also ruled that “Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3”.

It clearly follows from this definition that involuntary ECT falls within the prohibited category of treatment. During the debate that preceded the passage of the 2003 Mental Health Act, Shona Robison quoted from an appraisal consultation document on ECT produced by NICE, the National Institute for Clinical Excellence. This stated that some patients given ECT “report feelings of terror, shame and distress, and find it positively harmful and an abusive invasion of personal autonomy”. Further, in 1996
it was reported in the Houston Chronicle that a woman called Melissa Holliday stated “I’ve been through a rape, and electroshock therapy is worse”. (Electroshock therapy = ECT). It may be that, as far as an unwilling patient is concerned, being given a course of ECT is as bad as being repeatedly raped. A course of ECT involves electricity being passed through the patient’s brain from six to twelve times over a period of weeks. On each occasion the patient is held down and injected with an anaesthetic and a muscle-paralysing agent prior to electrodes being placed on his or her head. This must be found highly distressing by any patient who fears, not unreasonably, that this procedure could damage his or her brain. Nevertheless, Parliament agreed that ECT could be given to patients who resist or object to the treatment provided that an approved medical practitioner consents. That is an inadequate defence of involuntary ECT since inhuman or degrading treatment, which involuntary ECT appears to be, is prohibited in all circumstances. Parliament should not fail to debate this matter merely because the Government is opposed to any fundamental changes being made to the 2003 Act. Article 1 of the European Convention on Human Rights requires states to secure to everyone within their jurisdiction the rights and freedoms set out within the Convention. Parliament should consider carefully, therefore, whether the comments which the judge made in the 2004 “slopping out” case might be equally applicable to the forced treatment of mental health patients, particularly to forced ECT. If they are, then Parliament should comply with Article 1 ECHR and hence with the instruction from the UN CRPD Committee. Those who seek to rebut the allegation that forced treatment is inhuman or degrading do so by referring to the judgment of the European Court in the 1992 case of Herczegfalfy v Austria; they point out that the Court ruled that forced treatment is not inhuman or degrading if it can convincingly be shown to be a medical necessity. Those apologists for forced treatment, however, conveniently omit to acknowledge that this 1992 judgment applied only to patients who “were entirely incapable of deciding for themselves”, i.e. who lacked legal capacity. The apologists also fail to acknowledge that, as a consequence of the 2009 judgment of the European Court in the case of Salontaji-Drobnajak v Serbia, adults can now only be deprived of their legal capacity, and hence of their right to refuse treatment, by a court at which they receive a fair hearing. When Parliament discusses the forced treatment of mental health patients during the forthcoming debate on the Mental Health (Scotland) Bill it should consider the implications of this judgment. When considering whether forced treatment might be inhuman or degrading, Parliament should take account of the views of Juan Mendez since he is a UN Special Rapporteur. His report of 1 February 2013 to the General Assembly’s Human Rights Council focused “on certain forms of abuses in health-care settings …” and made reference to “non-consensual treatment, such as forced medication and electroshock procedures”. (Electroshock = ECT). He also expressed the opinion that it was appropriate to question the doctrine of “medical necessity” established by the European Court of Human Rights in the case of Herczegfalfy v Austria in 1992. Thus the only possible defence of forced treatment is being questioned by this UN Special Rapporteur. That
might be considered significant if an involuntary mental health patient raised a court action, especially since the “medical necessity” doctrine was formulated prior to that 2002 definition of inhuman or degrading treatment provided by the European Court of Human Rights.

If an involuntary mental health patient were able to find a good lawyer to raise an action on his or her behalf under section 7(1) of the Human Rights Act within the one year time limit then he or she would have a reasonable chance of success, especially if the alleged breach of Convention rights concerned involuntary ECT: given the facts, it would be difficult to argue successfully that involuntary ECT did not fall within the definition of inhuman or degrading treatment. If the court then found that compensation should be paid on the grounds that the treatment complained of had been inhuman or degrading then the consequences could be serious if, as in the “slopping out” case, another court later ruled that all victims of such treatment were entitled to compensation. Each year there are over 3000 people detained on the basis of a short-term detention certificate and then subjected to forced treatment before they can appeal. Also each year there are over 100 people given ECT against their will. The judge who ruled that “slopping out” constituted degrading treatment awarded £2400 to the prisoner who had raised the action. If a judge ruled that the forced treatment of a patient was inhuman or degrading then it possible that the compensation awarded to that patient would be greater than £2400 by a factor of 100 or more, especially if the patient had experienced a serious and irreversible side-effect of the treatment.

When it discusses the Mental Health (Scotland) Bill, Parliament should not fail to consider the feelings of mental health patients who are subjected to forced treatment since, by virtue of the 2002 judgment of the European Court, these are relevant when a decision is made as to whether that treatment is inhuman or degrading. Parliament should take note of reports that the forced treatment of mental health patients is at best only 75% effective but that it causes them great distress, that it can cause significant harm and even causes some to die prematurely. When it debates the Bill, Parliament should consider carefully the implication of the ruling of the European Court concerning inhuman and degrading treatment and also of the ruling regarding legal capacity. Parliament should consider whether it is necessary for it to act in order to comply with Article 1 ECHR and Article 12 CRPD and hence legislate to ensure that mental health patients have their Convention rights safeguarded and are not unlawfully deprived of their right to refuse treatment nor, indeed, of their liberty without a fair hearing.