

World Guardianship Congress Report

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The 4th World Congress on Adult Guardianship has just been held in Erkner, Germany, and I attended the first (international) part. The congress was attended by many professional guardians from around the world (most, very crudely, discharging functions akin to those of deputies under the MCA 2005), academics, lawyers and judges. The single biggest national contingent – understandably – came from Germany, but delegates attended from every inhabited continent. In both plenary sessions and parallel workshops, a multitude of issues were addressed – a flavour being found from the abstracts and working papers to be found on the Congress website [here](#).

From my perspective perhaps the most fruitful debates arose in consequence of the search to explain across and between jurisdictions the principles underlying the relevant national legislation (and its operation in practice). In this regard, Adrian Ward set the ball rolling in expert fashion with a wide-ranging and very well-received comparative review of international protection of adults, which is available [here](#) (together with a [continuation piece](#) from a subsequent session on decision makers within formal support mechanisms). Both of these will be reworked and revisited in due course for publication.

A particular theme – at least from my perspective – was the extent to which current regimes comply with the CRPD; a theme given particular emphasis given the presence of and contributions from Professor Theresia Degener, Vice-Chairperson of the Committee on the Rights of Persons and Disabilities, and also the discussions throughout of the implications of the very recent German Constitutional Court decision in [1 BvL 8/15](#) relating to forced medical treatment. This case, and the discussion therein of the obligations imposed by the CRPD, will be discussed further in our November [Mental Capacity Law Newsletter](#). The discussions around this theme at the conference felt, in many ways, much like a continuation of the intensive discussions which went into the [EAP 3 Jurisdiction report](#) relating to compatibility of (in)capacity legislation in the UK with the CRPD, and – like those discussions – revealed new areas for investigation and work as much as they did give answers and solutions.

The Congress had a very important practical outcome in the shape of the adoption of the [revised Yokohama Declaration](#), setting out principles for the development of regimes for the legal support and protection of adults. How far the CRPD has already produced movement towards systems which are centred around the adult in question since the original Declaration was adopted in 2010 can be seen not just in the removal of the term “guardianship” from all substantive parts of the declaration, but also in comparing the first key declarations from the two documents.

In the original declaration, the first declaration read:

WE DECLARE that in the context of adult guardianship:

(1) a person must be assumed to have the mental capacity to make a particular decision unless it is established that he or she lacks capacity;

(2) a person is not to be treated as unable to make a decision unless all practicable steps to help him or her do so have been taken without success;

(3) legislation should recognize, as far as possible, that capacity is both “issue specific” and “time specific” and can vary according to the nature and effect of the decision to be made, and can fluctuate in an individual from time to time; and

(4) measures of protection should not be all-embracing and result in the deprivation of capacity in all areas of

decision-making, and any restriction on an adult's capacity to make decisions should only be imposed where it is shown to be necessary for his or her own protection, or in order to protect third parties.

measures of protection should be subject to periodic and regular review by an independent authority wherever appropriate.

By contrast, in the revised document, the first declaration reads:

WE DECLARE *that in the context of the legal support and protection of adults:*

(1) all adults must be assumed to have the capability to exercise their legal capacity without support unless it is established that they require support or need protection in relation to a particular act or decision;

(2) support and protection includes taking all practicable steps to enable the adult to exercise his or her legal capacity.

(3) law and practice should recognize that requirements for support and protection are both "issue specific" and "time specific", that they can vary in intensity and can vary according to the nature and effect of the particular act or the decision to be made, and that they can fluctuate in an individual from time to time.

(4) measures established autonomously by an adult should have precedence over other measures relating to the exercise of legal capacity.

(5) the imposition in any individual case of any measure of support and protection should be limited to the minimum necessary intervention to achieve the purpose of that measure.

(6) measures of support and protection should be subject to periodic and regular review by an independent authority. The adult should have an effective right to institute such a review irrespective of his/her legal capacity.

(7) measures in relation to the exercise of legal capacity should only be imposed where it is established that they are necessary and in accordance with international human rights law. They should not be applied in order to protect third parties.

(8) all forms of incapacitation which restrict legal capacity irrespective of the existing capabilities of the adult should be abolished.

These revised principles certainly do not represent an end-point in our journey towards regimes that properly comply with the CRPD. However, it is suggested that they represent a model of best (current) practice that should serve both as a yardstick to test current national legislation against and as a goad to further action. For bringing about the adoption of the revised Declaration alone – but indeed for very much more – the organisers of the Congress are very much to be congratulated.

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