

innovation and the report suggested that local authorities could do more to develop their offer to carers.

In all the report makes 22 recommendations including the following key recommendations

- It recommended that national and local Government, together with the NHS, urgently invest in the support needed to ensure that the new legal rights for carers are fully introduced in all areas, so that carers receive the assessment, support and breaks they need to be able to choose how and when they care.
- Local authorities ensure that all social workers and assessors are appropriately trained, and are able to reflect the wellbeing principle in assessment and care and support planning.
- Local authorities, with the Local Government Association (LGA) and the Association of Directors of Adult Social Services (ADASS), review their systems for monitoring progress in implementing the Act. The Short- and Long-Term (SALT) return should be reviewed, so that it captures all assessment and support activity for carers, including prevention.

The report concluded that there was still good reason to be optimistic about the transformative potential of the Care Act. However implementation support is still required, and it recommended that further study and evaluation should be put in place.

The report can usefully be read alongside:

- ADASS's *Making Safeguarding Personal Temperature Check 2016*, a [report](#)

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commissioned to review how the Making Safeguarding Personal approach has fared (and been improved) in light of the introduction of the Care Act;

- NHS Digital's most recent [safeguarding statistics](#), showing that between April 2015 and March 2016 there were 102,970 individuals subject to enquiries under *section 42 Care Act 2014*, 930 fewer than in 2014-15. Amongst other data, it shows that 27% of adults subject to an enquiry lacked the capacity to make decisions about their protection, including their ability to participate in the investigation and their capacity at the time the incident that triggered the enquiry took place.

*Beverley Taylor*

## World Guardianship Congress report

The 4<sup>th</sup> World Congress on Adult Guardianship was held at the end of September in Erkner, Germany. Two of your editors attended: one, Alex, as participant, and one, Adrian, as speaker. 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 Alex's 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 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 Alex’s 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 (a detailed article on this will be contained in the next 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. The process of revision had begun in advance of the Congress, coordinated by the International Guardianship Network and the organisers of the

Congress, with a working group chaired by Prof Dr Volker Lipp and Prof Dr Dagmar Brosey, of which both Adrian Ward and former Senior Judge of the Court of Protection Denzil Lush were members. Further input was provided by members of the [International Advisory Board](#). The outcome of this process was a Declaration (which, importantly, contains within it a recommendation that it is kept under review) which both stylistically and substantively rather different to the original declaration.

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.*

- (5) *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.

## **New capacity legislation in Jersey**

The [Capacity and Self-Determination \(Jersey\) Law 2016](#) was passed by the States Assembly in September 2016, with Royal Assent expected in November. It includes provisions relating to deprivation of liberty which – interestingly – are predicated upon a statutory definition of

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