**German Comment regarding the Draft General Comment on Article 19 of the UNCRPD**

Germany thanks the Committee for the Draft General Comment and would like to convey the following remarks:

General preliminary remarks:

The wording in General Comment No. 5 is partly very generalising. Policies for persons with disabilities in Germany have a long tradition and go back to the second half of the 19th century. Since then a step-by-step paradigm shift has taken place in disability policy and legislation - from paternalism and a paternalistic welfare approach to the goal of a self-determined life for and participation of persons with disabilities. Hence the statements (e.g. in paragraph 1) are not true, at least not for Germany.

The comment disregards the German system of benefits and support for persons with disabilities which is highly relevant for their successful inclusion - support which includes in particular rehabilitation and participation benefits as well as benefits and services provided by health insurance funds, the public employment service and the pension insurance.

Moreover, the draft seems to be based on the idea that any institutionalisation automatically constitutes a violation of the Convention. In particular Germany cannot share the view that services provided in institutions (e.g. special needs schools, sheltered workshops, community living arrangements) are rejected across the board in several places in the text. Germany is not interested in “sticking” persons with disabilities in institutions, but in further developing/improving existing institutions and making them available as one option among many, also in an inclusive social environment. Germany would also like to draw the Committee’s attention to the fact that Art. 19 UNCRPD does not create subjective legal rights.

Likewise, the use of language like “States must...” which occurs throughout the document seems inappropriate. Any recommendations given in General Comments should be identifiable as such and not be phrased as legal obligations.

*Comments on individual paragraphs:*

*Paragraph 10*

Paragraph 10 makes explicit reference to the Convention on the Elimination of Discrimination against Women (CEDAW). Germany would like to suggest the following amendments:

* Reference to CEDAW should be worded more generally and should focus more on women’s rights. The background for this proposal is that in the meantime 188 States Parties ratified the CEDAW and have committed themselves under international lawto implement real equal rights for women. While there is nothing wrong with also including men (within the meaning of “equal rights for women and men”), CEDAW rather strives to end discrimination against women and to ensure respect of women’s rights.
* We would also like to propose to include the following CEDAW reference to women with disabilities:

“CEDAW also emphasizes the importance of eliminating especially of all forms of discrimination against vulnerable groups of women, among them women with disabilities. In its general recommendations of the 10th session (1991) the CEDAW-committee commends that all state parties should ensure equal and full participation in all spheres of social and cultural life for women with disabilities. CEDAW also commends equal access and opportunities for girls and women with disabilities with regards to education, training, the labour market as well as social security systems.”

*Paragraph 15c*

The source cited in the footnote does not constitute a general condemnation of housing persons with disabilities in institutional settings, but rather the explicit focus is on the context of (placement in) forced institutionalization. Germany proposes to either correct this paragraph or to highlight the appropriate context more clearly. It has to become clear that living in a group home does not preclude independent living and living in the community.

*On Paragraphs 16, 38 and 42*

In Germany, support for people with psychological disabilities can be provided as an outreach support service in the person’s own home. In some living arrangements for persons with psychological disabilities support and housing are delivered in one package. If, for instance, a person with a psychological disability moves into a therapeutical shared accommodation arrangement (Therapeutische Wohngemeinschaft) or to a shared accommodation arrangement for former drug addicts (Übergangswohnheim), support is always included in the package, too.

If this type of accommodation were to be abolished, the support instruments of *Therapeutische Wohngemeinschaft* or a *Übergangswohnheim* would be no longer available. This would be a dramatic loss for the persons concerned. Not all persons in need of support are able to make the necessary organisational arrangements themselves, in particular if they are in a psychological emergency.

*Paragraphs 23 and 62*

Insofar as concrete entitlements for particular groups of persons (such as migrants and asylum seekers with disabilities) are derived from Article 19 of the UNCRPD, this is not acceptable for Germany.

*Paragraphs 23, 69, 70 and 71*

Germany welcomes the fact that the cited paragraphs refer to the particular needs of women with disabilities.

*Paragraphs 26 and 78*

Germany does not share the Committee’s basic assumption that Art. 12 of the Convention affords unlimited capacity to exercise legal rights and duties to all persons with disabilities. All persons have, as affirmed by Art. 12 para 1 of the Convention, legal capacity in the sense of legal standing. But not all persons can exercise those rights and duties. For instance, unconscious or comatose persons are not able to exercise their rights; nor can infant children do so. It is thus obvious that not everyone can be considered able to exercise his or her rights and duties in the same way. The legal orders of States Parties recognize this fact by differentiating the legal capacity to exercise rights and duties (described as “legal agency” in No. 13 of the Draft General Comment) according to age or the absence of the necessary ability to make decisions. Art. 12 para 2 of the Convention seems to endorse this approach by stipulating that persons with disabilities enjoy legal capacity “on an equal basis with others”. Where legal capacity – in the sense of “legal agency” is recognized according to the power of making decisions, as described above, such legal provisions cannot be seen as contrary to the Convention.

While sharing the view that the provision of support for persons with disabilities is the best possible way to help them exercise their rights, Germany remains convinced that there are situations in which persons with disabilities simply are not able to make decisions even with the best support available. Therefore, while representing a shift in focus from substitute decision-making to supported decision-making, the Convention could not and in Germany’s view does not rule out the possibility of substitute decision-making in some cases. Most State Parties acknowledge in their legal systems the right of parents or legal guardians to represent children without distinction as to the existence of a disability. Where adults are in need of support, such support may be given by ordering legal representation or guardianship, also without distinction regarding the existence of a disability. All forms of representation or guardianship exist for the benefit of the supported person and may only be used according to the will and preferences or the best interests of the persons concerned.

For that reason, Germany does not find it appropriate to label national legislation designed for the protection of such persons as “discriminatory”.

*Paragraph 34*

Germany welcomes the fact that the cited paragraphs emphasise the importance of effective data collection. In 2016 the German government thus commissioned a representative survey which is to provide for the first time comprehensive data on the situation of persons with disabilities regarding their participation situation and will thus provide a reliable data basis for Germany. The findings from such a representative survey are intended to create the necessary preconditions for evidence-based policies in all relevant areas, if possible, and provide for a reliable monitoring of the UNCRPD.

*Paragraph 41*

Germany does not share the view that the right to choose one’s residence and to decide freely, where, how and with whom to live, is immediately applicable.

*Paragraph 58*

Germany does not share the view that support must be provided irrespective of a person’s income and assets in that very absoluteness.

*Paragraph 48*

In the German view paragraph 48 should clarify that the institutionalisation of psychically ill persons presenting a threat to others and involuntary treatment may be necessary options provided very strict prerequisites and the principle of proportionality are respected.

The German Federal Constitutional Court (BVerfG) decided that forced hospitalisation in a closed facility is permissible if the principle of proportionality is complied with, cf. BVerfG, decision of 2 June 2015 - 2 BvR 2236/14; BVerfG, decision of 7 October 1981 - BvR 1194/80. The Federal Constitutional Court also decided that the current legislation on involuntary treatment in psychiatric hospitals complies with the UN CRPD, cf. BVerfG, decision of 23 March 2011 - 2 BvR 882/09.

In Germany’s view, the right to choose one’s own living arrangement in accordance with Art. 19 UNCRPD cannot be interpreted as meaning that the institutionalisation of psychically ill persons who are a threat to others and/or forced treatment are completely ruled out. This applies also to paragraphs 14d, 15c, 26, 46, 79 and 94 insofar as they make reference to forced institutionalisation.

*Paragraph 65*

Paragraph 65 criticises the misallocation of resources for institutionalised support services and calls for immediate steps to end this practice as this can be interpreted as a violation of Article 19. As a States Party Germany does not share this view as this would mean that all *Therapeutische Wohngemeinschaften*, residential institutions, *Übergangswohnheime* etc. would have to be closed. Against the background of the long tradition of institutions for persons with disabilities and the efforts undertaken by the federation, Länder, municipalities, institutions and companies to shape an inclusive social environment, which are described in their action plans, the situation can only change gradually. It is not possible to immediately replace all existing institutions for persons with disabilities as the loss for the persons with disabilities affected by such a decision would be experienced as very dramatic and would also lead to irreparable collateral damages.

*Paragraph 88*

Germany considers the statement in paragraph 88: “Sheltered work prevents inclusion in and interaction with the community.” as too sweeping, by no means appropriate and hence unacceptable for Germany. An inclusive labour market means that persons with disabilities work in the same place where other persons work, if possible. However, this does not rule out the creation of a special working environment for people who require such an environment or support due to their disability. The right to independent living also includes the right of persons with disabilities to choose to work in a sheltered workshop for persons with disabilities. It is of decisive importance that persons with disabilities have options from which to choose. What is more is that persons with disabilities who even with the help of all the available support (such as wage subsidies, supported employment or the “budget for work”) cannot access the labour market, would be excluded from any employment context were it not for the education and employment offers in sheltered workshops.

An inclusive labour market therefore does not only include training and employment in companies and public authorities, including the support offered there to persons with disabilities due to their disability and their employers. It rather also encompasses special forms and places of training, e.g. occupational rehabilitation institutions, supported employment and state subsidized employment, as well as working in a sheltered workshop or at another benefit provider.

*Paragraph 89*

Germany proposes to swap sentence 3 and 4 in order to prevent readers from thinking that the sentence referring to costs only relates to subsidized housing.