

20 February 2014

## **Contribution by the**

### **FEDERAL REPUBLIC OF GERMANY**

#### **German Statement on the Draft General Comment on Article 12 CRPD**

Germany thanks the Committee on the Rights of Persons with Disabilities for the Draft General Comment under reference and would like to offer the following comments:

Germany regards the instrument of General Comments drawn up by the Treaty Bodies of the United Nations as a valuable tool in the interpretation and development of the universal Human Rights treaties. General Comments, however, can neither extend the scope of the respective treaty obligation nor do they have binding effect on the contracting states.

This is particularly relevant when the Committee itself concedes that its understanding of Article 12 diverges from the understanding common to the Contracting States, as evidenced by all the initial reports of State Parties so far. This is also evident from the declarations made by many State Parties upon ratification which explain their firm intent to retain the necessary options of substitute decision-making. It is, in the view of the German government, also obvious that the provision of an adequate network of support for decision-making will present many difficulties, not least financial, for many States Parties. It seems therefore that the Committee's interpretation is not shared by the State Parties in general; not even by a substantial minority. Germany doubts that it is appropriate to call an understanding of Article 12 common to the States Parties a "misunderstanding".

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".

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.