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Response from the Government of Denmark with regards to Draft General Comment on Article 19 of the Convention on the Rights of Persons with Disabilities – Living independently and being included in the community

Denmark presents its compliments to the Committee on the Rights of Persons with Disabilities and thanks the Committee for the opportunity to comment on the Draft General Comment on Article 19 of the Convention on the Rights of Persons with Disabilities.

Denmark welcomes the Committee’s comprehensive and inclusive work on the elaboration of Article 19 of the Convention. While not of a binding nature, a General Comment on Article 19 may assist the States parties in the interpretation of the substantive content of the obligations under this key provision. However, there are certain aspects of the current draft which it is imperative that the Committee considers further before it seeks to issue a definitive General Comment on Article 19.

Above all, the Draft General Comment should take into account that institutional living does not automatically result in persons with disabilities being deprived of or limited in their choice and control of day-to-day decisions and living arrangements. It is a guiding principle in the Danish disability policy that it is the need of the individual, and not the type of living arrangement, that determines what assistance should be provided by public authorities. Consequently, decisions on eligibility regarding help in form of living arrangements and support services are made separately, and although some institutions in Denmark might be rather large they are organized in groups of individual homes. Such individual homes are built pursuant to the Danish Act on Social Service or the Act on Social Housing and individuals who are found eligible, are entitled to choose between such homes and to move from one to another.

*Legal capacity and equal recognition before the law*

Denmark finds that the Draft General Comment should take into account that some individuals are unconscious, living in a persistent vegetative state, have very advanced dementia, or have the most profound intellectual disabilities, and who will not be in a position to understand that a decision is to be made, the nature or consequences of that decision or of any expressed will or preference.

If substitute care and treatment decisions are not made for these individuals, they will risk being exploited, neglected, or even left to die. To assume that no one would ever require someone else to make a decision on their behalf would under these circumstances not only be flagrantly wrong but ultimately irresponsible.

The paragraphs in the draft general comment concerning legal capacity and/or equal recognition before the law for all persons with disabilities in relation to the rights enshrined in Article 19, do not sufficiently take these individual cases into consideration. This includes paragraphs 19, 26, 40 (a) and 78.

With regard to paragraphs 19, 26, 40 (a), 48 and 78, Denmark suggests a moderation of the wording of the paragraphs to also include considerations in the individual cases where persons with certain forms of disabilities are not capable of exercising their legal capacity, and allow for substitute care and treatment decisions for their own health and safety.

With regard to paragraph 40 (a), Denmark would like to suggest that the wording “irrespective of impairment” is removed and that the wording “in accordance with national legislation” is inserted so that the sentence reads as follows: “To have legal capacity to decide where and with whom and how to live is a right for all persons with disabilities, in accordance with national legislation.”

In regards to paragraph 48, Denmark once again emphasizes the importance of being able to differentiate in appropriate cases and in accordance with national legislation. Denmark therefore suggests a moderation of the wording whereby “aim to” is inserted, so that the sentence reads as follows: “[…] States parties should aim to reform laws […].”

In relation to paragraph 67, Denmark suggests that the Committee elaborate on the term “reasonable and procedural accommodation”, since the meaning hereof is unclear. Furthermore, Denmark suggests an addition to paragraph 67, whereby the wording “in line with national legislation” is inserted so that the sentence reads as follows: “In line with national legislation, states parties should ensure access to justice […].”

In regards to paragraph 78, Denmark suggests that the general comment acknowledge, that Article 12 of the Convention permits supported and substitute decision-making arrangements under appropriate circumstances and in accordance with national legislation. This allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.

*Participation in political and public life*

In order for Denmark to comply with its constitutional obligations, Denmark finds that the first line in paragraph 90, should also include the wording; “in line with national legislation”, so that the sentence reads as follows: “In order to influence and take part in decisions impacting the development of their community, all persons with disabilities should enjoy and exercise their rights to participation in political and public life (art. 29) on an equal basis with others in line with national legislation.”

*Final remarks*

Finally, Denmark would in general and in light of the abovementioned like to invite the Committee to clarify the parts of the Draft General Comment which set out the scope of the legal obligations of the State Parties under the Convention. The clarification should be made with due regard to the States' margin of appreciation, including the immediate and progressive nature of the obligations in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights respectively.

With these remarks in mind, Denmark strongly urges the Committee to reconsider its draft and take into account the issues raised.