



INDONESIAN FEDERATION OF WOMEN'S LEGAL AID SOCIETY

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Endang Rahayu Sedyaningsih
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Jakarta 12950
Minister of Health
Indonesia

25 February 2010

RE: OPEN LETTER TO THE MINISTER OF HEALTH ON THE HEALTH LAW IN INDONESIA

Dear Minister,

On behalf of Amnesty International and the Indonesian Federation of Women's Legal Aid Society (Federasi Apik, Federasi Lembaga Bantuan Hukum Asosiasi Perempuan Indonesia Untuk Keadilan), we would like to welcome you in your new position as Minister for Health. It is our hope that we will be able to develop a positive relationship with you in areas of mutual interest.

In this letter we would like to bring to your attention our concerns about the Health Law passed in September 2009 (Law No36/2009), some of the provisions of which violate, among others, women's rights to the highest attainable standard of sexual and reproductive health; their rights to decide freely and responsibly¹ on the number and spacing of their children; and to have access to the information, education and means to enable them to exercise this right.

As a state party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the International Covenant on Economic, Social and Cultural Rights, the Indonesian government has the duty to ensure that the right to the highest attainable standard of physical and mental health and other human rights are respected, protected and fulfilled. This requires that health services, including in this case sexual and reproductive health care, be accessible to all, free from discrimination and from the threat of criminalisation. Laws and policies which impair the ability of women to decide freely on matters related to their sexuality, including sexual and reproductive health, free from coercion, discrimination and violence, are in violation of international human rights law and should be repealed immediately.

¹ According to Article 16.1 (e) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

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We hope that your Ministry will pay particular attention to the discriminatory laws and policies that are currently in place at the central and local levels. As an example, we enclose a copy of an open letter to the House of People's Representatives on the review and passing of a new Criminal Code which was published jointly by the Community Legal Aid Institute (LBH Masyarakat, Perkumpulan Lembaga Bantuan Hukum Masyarakat) and Amnesty International in November 2009. This letter sets out some of Amnesty International's key concerns about the lack of adequate provisions in the existing Criminal Code to combat violence against women and gender-based discrimination in all its forms, and to ensure that abortion services are decriminalized and access to information about sexuality and reproduction is free from discrimination.

We also include a copy of an open letter to the Minister for Home Affairs on the passing of the Aceh Criminal Code which was published by Amnesty International in November 2009. This law, which provides for stoning to death for adultery and caning of up to 100 lashes for homosexuality, contravenes the Indonesian constitution and the 1999 Law on Human Rights. Amnesty International is campaigning for the Code to be repealed immediately so that the criminalization of adultery and homosexuality contained in this bylaw is abolished, and that penalties allowing for capital punishment and caning, which constitute cruel, inhuman and degrading treatment, are no longer in place.

We would like to urge your Ministry to take the lead in ensuring that discriminatory legal and policy provisions, at the central and local levels, are repealed in the near future and that future legislation and policies are in line with international human rights law and do not infringe upon women's human rights, in particular their right to access sexual and reproductive health information and services. A particular role for your Ministry could be to support public and parliamentary discussion of laws and policies, by providing comprehensive information on the impact of existing or proposed legislation and policies on the health and well-being of affected individuals and groups, as well as information on clinical and public health best practice and Indonesia's obligations under international human rights law. Your Ministry also has an important role to play in ensuring that any review of law and policies benefits from the participation and expertise of relevant stakeholders, including members of the general public, medical professionals and civil society organizations at all stages of the consultation and decision-making process.

At a time where your government may be assessing its progress towards meeting the Millennium Development Goals (MDGs) to promote gender equality and empower women, reduce maternal mortality, improve child health, combat HIV and AIDS, and review its National Strategic Plan on Making Pregnancy Safer (MPS), effective government action is necessary to abolish discriminatory laws and policies that obstruct women's access to sexual and reproductive health information and services and their ability to make informed decisions concerning sexuality and reproduction. The abolition of discriminatory laws would remove some of the underlying obstacles to achieving the MDGs and would contribute to respecting Indonesia's obligations under international human rights law. It would also place implementation of human rights protection at the centre of future health policies and practices.

DISCRIMINATORY PROVISIONS IN THE HEALTH LAW PERTAINING TO SEXUAL, MATERNAL AND REPRODUCTIVE HEALTH

Although Amnesty International and Federasi Apik welcome provisions in the Health Law which specifically provide for the Right to Health (Article 4), and access to health services and information free from discrimination (Article 5, Article 54), our organizations are concerned that some provisions in the Health Law, which pertain to sexual and reproductive rights, are discriminatory and violate women's and girls' right to the highest attainable standard of physical and mental health.

ACCESS TO EDUCATION ABOUT SEXUALITY AND REPRODUCTION

Under Articles 72 and 78 of the Health Law, access to information on sexual and reproductive health may only be provided to 'legal partners' ('pasangan yang sah'; 'pasangan usia subur'), which implies that in practice only married couples can have access to family planning provisions.²

² See "Pendapat Komnas Perempuan terhadap amandemen Undang-undang Kesehatan", Masukan untuk Pansus Amandemen Undang-undang Kesehatan Komisi IX DPR RI, Jakarta, 25 August 2009.

These provisions, which exclude unmarried couples, are discriminatory, and thus in direct violation of the Indonesian constitution and international human rights treaties Indonesia has ratified, including legal provisions on the right to non-discrimination and equality before the law.³

While also disempowering boys and men, denial of access to sexual and reproductive health information has a differential and disproportionate impact on girls and women because of biological and socio-economic factors. Specific groups of girls and women — in particular those living in poverty and isolation such as female domestic workers⁴ who are unable to obtain information on sexual and reproductive health in any other way unless it is provided by the state — will experience even worse effects. This situation is in direct violation of Indonesia's commitment towards eradicating gender discrimination in all its forms, and in particular its obligations under CEDAW.⁵

Articles 72 and 78 also constitute direct barriers to combating the high number of unwanted pregnancies and may impede effective action to reduce maternal death and ill-health and contain HIV in Indonesia. For instance, rather than being provided with age-appropriate information, adolescents may be excluded entirely from government information campaigns on sexuality and reproduction, including on sexually transmitted infections.⁶ As a result, advancement on indicators for MDG 5 (contraceptive prevalence rate, birth rates among adolescents) and MDG 6 (indicators include HIV prevalence among population aged 15-24 years, condom use at last high-risk sex and proportion of population aged 15-24 years with comprehensive correct knowledge of HIV/AIDS) is made less—not more—attainable.

Amnesty International and Federasi Apik recommend that the Minister of Health takes the lead in supporting the following actions:

- ***The removal of all discriminatory legal provisions from the Health Law, the Criminal Code and other laws which discriminate against those who are not in a married relationship who seek access to sexual and reproductive health information and services, so that they can exercise autonomous sexual and reproductive decision-making;***
- ***Ensuring that young people are provided with age-appropriate information and services on sexual and reproductive health.***

3 See Article 27; 28 D; and 28H of the Indonesian constitution. See also Articles 2 and 23 of the International Covenant on Civil and Political Rights ; Article 2 of the International Covenant on Economic, Social and Cultural Rights; and Article 1 of CEDAW which defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

4 See Amnesty International, "Exploitation and Abuse: The plight of women domestic workers", ASA 21/001/2007, 14 February 2007. Weblink: <http://www.amnesty.org/en/library/info/ASA21/001/2007>, accessed on 9 December 2009.

5 See in particular Article 2, CEDAW.

6 It is worth noting that in the new Health Law Article 136 provides provisions on adolescent health and reproduction. In particular, the elucidating comments state that "Every school age child and adolescent has the right to obtain information and education as well as health services including adolescent reproductive health by paying attention to the problems and needs in order to be free from a variety of health disorders and diseases that can hamper development of child potencies. However it remains unclear how these particular provisions will be implemented in practice in light of other provisions which provide restriction over access to sexual and reproductive rights information and services.

PROVISIONS ON ABORTION

The Health Law, although more progressive than the Criminal Code,⁷ criminalizes abortion (Article 75.1). Moreover, under Article 194 of the Health Law, any person who performs an abortion may be sentenced to 10 years' imprisonment or a fine of up to one billion Indonesian Rupiah. There are only two exceptions in which a woman may legally seek and medical practitioners perform an abortion: (1) when a woman (and/or the infant) is at risk of future life-threatening complications due to pregnancy⁸ and (2) in the case of pregnancy resulting from rape. Although Amnesty International and Federasi Apik welcome these two exceptions, the law pertaining to safe abortion services continues to violate women's human rights.

ACCESS TO ABORTION SERVICES UNDER ARTICLES 75 AND 76 OF THE HEALTH LAW

Currently, a woman who is pregnant as a result of rape, or a woman experiencing life threatening complications as a result of pregnancy, has to pass five selection criteria⁹ to access abortion services under the Health Law (see Articles 75 and 76). These criteria can be very difficult to meet in practice, especially for women who live in remote areas and who have a low level of access to health care services generally due to distance and/or other socio-cultural factors.

1. In cases where women may be experiencing life threatening complications, the Health Law provides that a woman needs to have the consent of her husband before seeking an abortion (Article 76.d). This discriminatory provision is clearly in violation of the right for women to freely decide on matters related to their sexuality and health. As provided for by the CEDAW Committee *"[s]tates parties should not restrict women's access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health authorities, because they are unmarried"*.¹⁰ Enshrining husbands' entitlement to a veto regarding life-saving treatment constitutes a violation of women's rights to life, to physical and mental integrity and to the highest attainable standard of health and their freedom from torture and cruel, inhuman or degrading treatment.

2. According to the Law, a female victim of rape¹¹ may only access a legal abortion if her pregnancy is less than six weeks old.¹² This short time frame makes it impossible for most women with a need for abortion services to access such services legally: many women do not even realise they are pregnant in such a short time, and because of the trauma experienced by rape victims, they may only discover or feel able to acknowledge their pregnancy after the six week period has expired.

7 See Articles 346, 348, and 349 of Indonesia's Criminal Code. Article 346 provides that "any woman who with deliberate intent causes or lets another cause the drifting off or the death of the fruit of her womb, shall be punished by a maximum imprisonment of four years". Article 348 provides that (1) "Any person who with deliberate intent causes the drifting off or the death of the fruit of the womb of a woman with her consent, shall be punished by a maximum imprisonment of five years and six months" (2) "If the act results in the death of the woman, he shall be punished by a maximum imprisonment of seven years". Article 349 provides that "If a physician, midwife or pharmacist is an accomplice to the crime in article 346, or is guilty or is an accomplice to one of the crimes described in articles 347 and 348, the sentences laid down in said articles may be enhanced with one third, and he may be deprived of the exercise of the profession in which he commits the crime".

8 Article 75.2(a) provides that the provision on abortion may be lifted in case there are "Indications of medical emergencies detected from the early age of pregnancy, both threatening the life of the mother and/or infant, suffering from severe genetic diseases and/or congenital defects, or which can not be repaired so as to make the infant difficult to live outside the womb".

9 Articles 75 and 76 provide that the exceptions to the illegality of abortion services as provided for in Article 75.2 can only be provided (1) following the intervention of a health adviser ("konseling dan/atau penasehatan") before and after the medical intervention who is competent and has the authority to do so; (2) Before the end of the six week period from the date of first day of the woman's period' except in cases of medical emergencies; (3) By a health practitioner who has the skills and a certificate delivered by the Ministry which acknowledges his/her authority; (4) With the woman's consent; (5) With the permission of the husband, except for victims of rape; (6) and provided the services meet the requirements set out by the Minister.

10 CEDAW Committee, General Recommendation 24 on Women and Health, No14.

11 This provision does not apply in cases of life threatening complications for the mother or the child.

12 The six week timeframe starts from the date of a woman's last period.

An absolute six week gestational limitation constitutes a restriction on women's access to abortion services which does not fulfil a human rights or public health goal, is not strictly necessary and proportionate and, therefore, should be eliminated.¹³

Moreover, the Health Law requires rape victims to seek pre- and post-counselling by counsellors¹⁴ in order to access legal abortion services but does not specify the procedure by which a woman made pregnant by an act of rape can raise her concerns with a counsellor for the purposes of obtaining an abortion. The multiple signatures or approvals required for victims of rape to obtain a legal abortion together with the failure to clarify the process puts both women and counsellors in a position where their respective rights to access medical services, and responsibilities to provide access to abortion services, are entirely unclear. In particular, Amnesty International is concerned that this lack of clarity means that women may be subjected to re-traumatisation in recounting details of rape, or denied access to an abortion to which they are entitled, because a counsellor does not know when s/he is legally able to provide an abortion on the grounds of rape.¹⁵

Amnesty International and Federasi Apik recommend that the Minister for Health support or initiate the following actions:

- ***Repeal legal provisions in the Health Law and other laws pertaining to a husband's consent;***
- ***Ensure specific awareness raising programmes about abortion provisions and services, which are permitted under the law, so that women and girls who live in remote areas and who have a low level of access to health care services due to distance and/or other socio-cultural factors are not prevented from accessing these legal services;***
- ***Ensure specific awareness raising programmes of abortion provisions and services, which are permitted under the law, so that counsellors, service providers and other relevant stakeholders are not prevented from offering these legal services ;***
- ***Review the time limit regarding access to legal abortion services within the Health Law;***
- ***Ensure that the process of legally seeking an abortion does not re-traumatize rape victims, and is not so cumbersome that it might actually discourage most victims, especially those living in poor, marginalized and remote communities, from accessing these services in practice;***
- ***Ensure that specific programmes with counsellors, service providers and other stakeholders are undertaken so that rape victims can have access to the services that are permitted under the law.***

CRIMINALIZATION OF ABORTION SERVICES AND UNSAFE ABORTIONS

The criminalization of other cases of abortion means abortion services can only be provided illegally in many cases. Where women's access to safe and legal abortion services is restricted, it could endanger their lives and contribute to an increase in maternal deaths resulting in the violation of the right to life as provided for in the International Covenant on Civil and Political Rights (ICCPR).¹⁶

¹³ World Health Organisation, Safe abortion: Technical and policy guidance for health systems, 2003 Weblink: http://www.who.int/reproductivehealth/publications/unsafe_abortion/9241590343/en/index.html, accessed on 10 February 2010.

¹⁴ Article 75.3 provides that victims of rape (and in cases of life threatening complications) must undertake "pre-action counselling and/or mentoring concluded with post-action counselling carried out by competent and authorized counsellors" which are defined as "every person who possesses a certificate as a counsellor through education and training. Those who become counsellors are doctors, psychologists, community leaders, religious leaders and every person who has an interest and skill to become a counsellor".

¹⁵ This situation can be particularly difficult for certain vulnerable groups such as girls and women domestic workers (see Amnesty International report on women domestic workers, Chapter 3, Supra No5.), or victims of violence by police officers. See Amnesty International "Unfinished Business – Police Accountability in Indonesia", AI Index: ASA 21/013/2009, pp30-33, Weblink: <http://www.amnesty.org/en/library/asset/ASA21/013/2009/en/619e8559-7fed-4923-ad6c-624fbc79b94f/asa210132009en.pdf>, accessed on 20 January 2010.

¹⁶ See Article 6, ICCPR.

In its concluding observations and recommendations, while monitoring states' implementation of the ICCPR and obligations in relation to the right to life, the Human Rights Committee has consistently expressed concern over high maternal mortality rates.¹⁷ It has recommended: “[s]o as to guarantee the right to life, the State party should ... help women avoid unwanted pregnancies, including by strengthening its family planning and sex education programmes, and ensure that they are not forced to undergo clandestine abortions, which endanger their lives.”¹⁸

The UN Special Rapporteur on the right to the highest attainable standard of health has also clarified that “[w]omen with unwanted pregnancies should be offered reliable information and compassionate counselling, including information on where and when a pregnancy may be terminated legally. Where abortions are legal, they must be safe: public health systems should train and equip health service providers and take other measures to ensure that such abortions are not only safe but accessible. In all cases, women should have access to quality services for the management of complications arising from abortion. Punitive provisions against women who undergo abortions must be removed.”¹⁹

In this context and taking into account Indonesia's human rights legal obligations, Amnesty International and Federasi Apik are concerned that provisions in the Health Law and Criminal Code that criminalize abortion constitute barriers to the prevention of unsafe abortions. Given that unsafe abortion is the cause of an estimated 11 % of maternal deaths in the country, decriminalizing abortion in Indonesia would be a positive step towards combating maternal mortality. It would ensure that neither women nor medical practitioners would face criminal prosecutions simply for seeking care or providing appropriate medical assistance.

The criminalisation of abortion itself is a barrier to access, even in the two instances under Indonesian law where a woman is entitled to legal access. This is because criminalisation leads to stigmatisation, and the potential assumption that all abortions are criminal. Rather than women being given access where they are entitled, they end up in a situation where they need to prove their entitlement against a background assumption of abortion being a criminal act. The exceptions may be interpreted narrowly rather than inclusively, excluding eligible women from access.

Amnesty International and Federasi Apik recommend that the Minister for Health support or initiate the following actions:

- ***Repeal provisions in the Health Law and Criminal Code that criminalize abortion services;***
- ***Revise the Health Law, in particular Article 77 which deals with the issue of unsafe abortions,²⁰ to ensure that a woman who suffers from complications arising from an abortion, has the explicit right to seek access to the medical services she needs, whether she obtained the abortion legally or illegally.***

17 See for example, Concluding Observations of the Human Rights Committee on Zambia, CCPR/C/ZMB/CO/3/CRP.1, 2007, para 18. For other examples see Centre for Reproductive Rights, *Bringing Rights to Bear: Preventing Maternal Mortality and Ensuring Safe Pregnancy*, October 2008, available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_Maternal%20Mortality_10.08.pdf, pp 9, 30.

18 Concluding Observations of the Human Rights Committee on Mali, CCPR/CO/77/MLI, 16 April 2003, para 14.

19 Special Rapporteur's 2004 report on the right to health, para 30.

20 Article 77 provides that “The Government shall protect and prevent women from committing abortion as referred to in Article 75 paragraph (2) and paragraph (3) which is not qualified, safe and accountable as well as contradictory with religious norms and laws and legislations.”

Should you require more information on our current concerns, please do not hesitate to let us know. We would be pleased to discuss this matter further with you.

Yours sincerely,

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