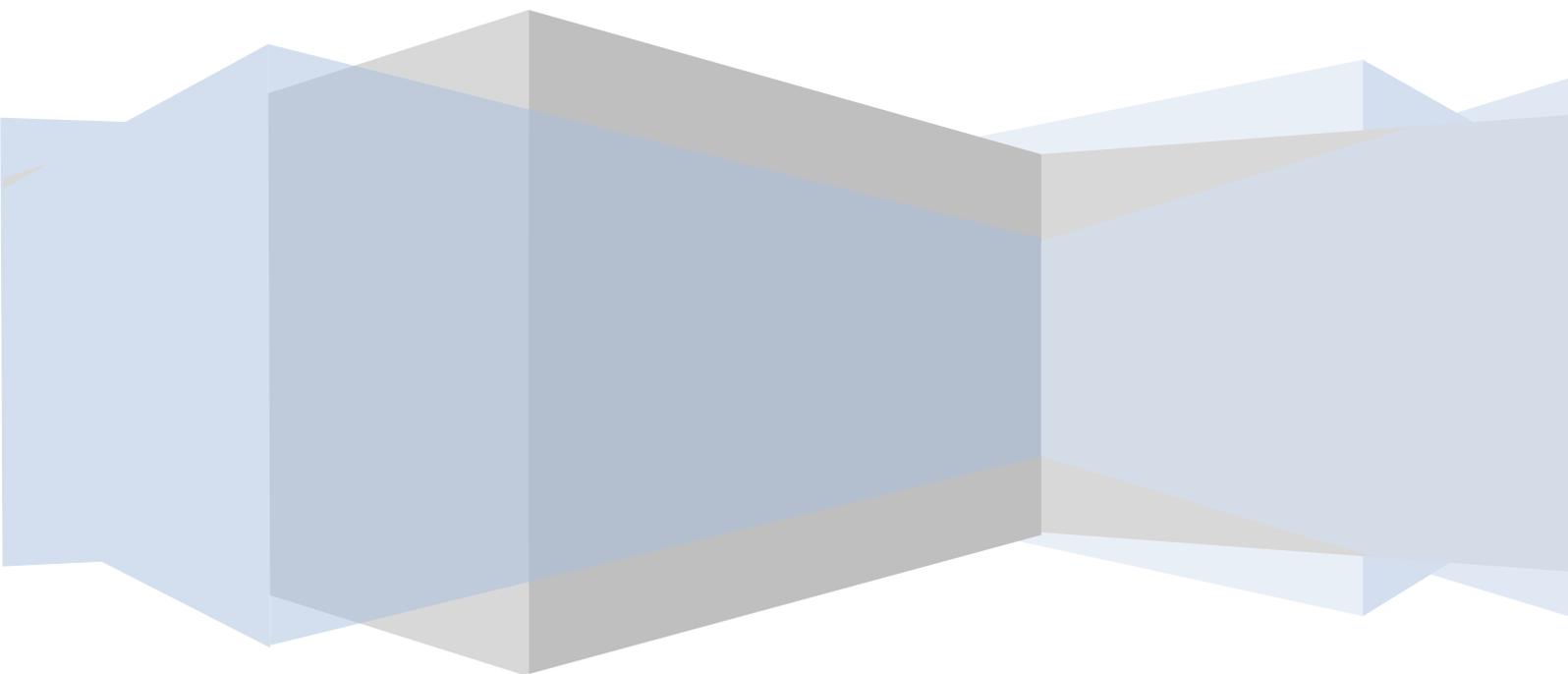


# **ACCESS TO JUSTICE PERSONS WITH DISABILITIES INDONESIA**

## **BACKGROUND ASSESSMENT REPORT**

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## **BACKGROUND ASSESSMENT REPORT**

### **ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES**

#### **ACKNOWLEDGEMENTS**

Thank you to all participants who kindly gave their time both during meetings and privately. Participants generously shared their extensive knowledge and provided information and empirical evidence, literature, articles and books. Thank you also to the staff at AusAID in Jakarta for the excellent organisational skills in arranging meetings and administrative support, for a great sense of humour, patience and wonderful engagement with this topic.

#### **SUMMARY**

There is a negative stigma associated with disabilities in Indonesia that interprets disability as identical to sickness or weakness. A person with a disability is seen as a person without capability who will only burden those around them. Policy and legislation is dominated and informed by the charity based approach, which means that in law disability is typically addressed as an aspect of social security and welfare legislation, health law or interdiction<sup>1</sup> law. Also reflecting this approach, the Ministry for Social Affairs has primary carriage for disability related issues. The medical model of disability is also apparent in law and policy, which views disability as a deficiency or deviation from the norm, located in the individual, which can be fixed. Both approaches are considered outdated, and are contrary to current international thinking on the topic, which views disability as a human rights issue and recognises disability as the consequence of interaction with an environment that does not accommodate that individual's differences and limits or impedes the individual's participation in society (see the Convention on the Rights of Persons with Disabilities).

In regard to access to justice, the state has made little progress towards ensuring equality before the law and access to justice for PwDs. Indonesia has legislation on PwDs but these are primarily welfare laws, and do little to protect and promote the rights of PwDs. The definition of PwDs set out in these laws is also problematic. It does not reflect a human rights based approach and in practice persons with psychiatric or psychological disabilities are not considered to be persons with disabilities. The Constitution contains clear statements promoting non-discrimination, equality before the law, and the right to equal treatment before the law, however legislation that includes references to PwDs does not realise these protections. Laws are piecemeal, inadequate and in some cases discriminate against PwDs.

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<sup>1</sup> Interdiction is a legal restraint upon a person incapable of managing his or her estate because of mental incapacity, from signing any deed or doing any act to his or her own prejudice, without the consent of his or her curator or interdictor. It may be voluntary or judicial.

Many laws cannot be implemented, either because there are no implementing regulations or no remedies can be sought for breach of the law. The legislation does not set out who is responsible, where and to whom a complaint can be made and what the sanctions are for breach. In other instances, laws are too general, or only partly regulate the subject matter. Where legislation does provide protection for PwDs, it is often not implemented or enforced. There is no law that addresses access to justice for PwDs, although this is not unusual in countries that have not yet ratified the Convention on the Rights of Persons with Disabilities.

It is not surprising that legislation neither protects nor promotes the rights of PwDs and does not provide them with equal recognition before the law or equal access to justice. The government does not regularly consult with or actively involve PwDs in developing services, policies or legislation. PwDs are not treated as subjects with legal rights, but as objects of the policy or law. This reflects the charity-based approach to disability.

PwDs generally have poor knowledge of their rights and the ability and willingness of PwDs to access the formal justice sector is low. Grievance handling does not tend to be effective as the knowledge of and sensitivity towards the rights of PwDs among law enforcement agencies<sup>2</sup> is limited. PwDs experience difficulties in accessing free legal aid and information, and they cannot physically access government buildings such as courtrooms and police stations without substantial assistance. PwDs have, however, shown a willingness to use semi-formal mechanisms such as the complaints mechanism offered by Komnas HAM and the Ombudsman, and court supported mediation. However, awareness of the role of these mechanisms is limited.

In relation to other issues in the terms of reference, there is no accurate and comprehensive data regarding PwDs, and official figures grossly under-estimate the number of PwDs; there is a small number of effective disabled persons organisations in Indonesia, although these are overworked, under-staffed and under-resourced. NGOs not specialised in the disability field tend to show little interest in disability rights. Indonesia's National Action Plan on Persons with Disabilities is based on the Biwako Framework, which has no provisions that directly relate to access to justice. There is a cursory reference to human rights in the National Action Plan (two paragraphs in a 107 page document), which is inadequate and does not provide any support or protection for PwDs; the Indonesian government is making slow, but steady progress towards ratification of the Convention on the Rights of Persons with Disabilities. It signed the Convention in 2007, and according to the draft 2010-2015 National Action Plan on Human Rights intends to ratify the Convention before 2015. There are challenges to ratification, and one significant problem is that persons with psychiatric or psychological disabilities are not represented on the ratification working group. This is not surprising as persons with psychiatric or psychological disabilities are especially vulnerable to discrimination, as are persons subject to double discrimination such as women with disabilities.

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<sup>2</sup> The term 'law enforcement agencies' and 'law enforcement officials' is used in this report to refer to the police, public prosecutors, the judiciary and court officials.

The background assessment report set out below discusses these issues as well as other challenges and successes in greater detail.

## **PART 1. INTRODUCTION**

The introduction below sets out the background to the report, as well as its framework and terms of reference. It also discusses terminology used in the report and cross-cutting issues in the field of disability rights and access to justice.

### **1.1. The Australia Indonesia Partnership for Justice (AIPJ)**

The AIPJ is a new five year Australian government program of assistance intended to support Indonesia's effort to achieve its long-term goal of entrenching the rule of law and upholding human rights.<sup>3</sup> It has been developed in line with the principles espoused in 'Development for All: Towards a Disability-inclusive Australian Aid Program 2009-2014.' AIPJ will seek to:

- improve awareness of the rights of PwDs among service providers, courts, judiciary, NGOs, the wider community and PwDs themselves,
- enable better access for PwDs to complaint mechanisms and redress when rights are breached, and
- strengthen the capacity of courts and human rights commissions to provide better access and deal with complaints.

This will necessarily involve an increase in public access to and use of legal information, and an improved framework and delivery of a legal aid system.

In order to better inform its work on PwDs in the justice sector, AusAID determined that a background assessment report should be prepared on the current state of access to justice for PwDs in Indonesia. The report is set out below.

The materials and information used as the basis for the report are both primary and secondary. Two in-country missions were held from 7 to 16 June and 26 July to 10 August 2010. Meetings were held with government agencies, judges, academics, the National Human Rights Commission, professional bodies, NGOs/disabled persons organisations (domestic and international), and other individuals active in the justice and/or the rights of PwDs sectors. A schedule of the meetings held is attached in Annex 1.<sup>4</sup> Laws, policies, books, articles, newspaper articles, internet reports and cases relevant to access to justice and the rights of PwDs were also reviewed. Having reviewed the primary and secondary

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<sup>3</sup> This long term goal is set out in Indonesia's National Long-Term Development Plan 2005-2025. This Plan also sets out a vision for 'A Just Indonesia' which means all people should have equal opportunity in all aspects of their lives without suffering discrimination in any form whatsoever: p.3 Executive Summary.

<sup>4</sup> Due to time constraints, no meetings were held with the Attorney-General's Office or the police. We tried to meet several times with the National Planning Agency (Bappenas) but were not able to arrange a mutually convenient time.

materials, it is apparent that there is little information available on access to justice for PwDs. There is no central government department, policy or legislation that deals comprehensively with PwDs, no foreign donors are active in the ‘justice-persons with disabilities’ sector,<sup>5</sup> and much of the information available is based on personal experience and personal observations of PwDs themselves and individuals active in the justice sector.

Many individuals were enthusiastic about AusAID’s interest in access to justice for PwDs (and its interest in PwDs more generally). For a number of years these individuals have been lobbying and advocating for the rights of PwDs with limited success, and they expressed the hope that an additional voice, particularly from the international donor community, may give the movement more strength.

## **1.2. Amendment to Original Terms of Reference**

The first step in preparing the assessment report was to develop a methodology which outlined the team structure and content of the report, among other things. Since the methodology was finalised both have been amended. Two reports will now be prepared instead of one, and the team has been divided into two. The first report will be a general report on PwDs in Indonesia, and in particular will contain:

- an assessment of available data on PwDs,
- an assessment of relevant government programs on PwDs,
- a broad overview of laws relevant to PwDs, particularly on the issue of inclusion and participation, and
- an assessment of NGOs working in the field.

This report will be written by Professor Irwanto, Eva Kasim and Asmin Fransiska.

The second report is the background assessment report set out below, and follows the original terms of reference set out in Annex 2. The report does not cover the information that will be provided in the more general report, unless it is directly relevant to the current state of access to justice for PwDs.

## **1.3. Terminology**

The Australia Indonesia Partnership for Justice will adopt the Indonesian government’s definition of access to justice, which is contained in the National Access to Justice Strategy developed by Bappenas. The Strategy analyses access to justice in terms of six elements, namely:

- the normative framework,
- legal awareness,

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<sup>5</sup> AusAID will meet separately with the World Bank, ILO and the Japanese Embassy, all of which have, or in the past have supported programs in the disability field more generally. Other donors and international NGOs active in the field of disability rights include Helen Keller International, Christian Blind Mission International, Leonard Cheshire Disability, USAID, International Foundation for Electoral Support, VSO Indonesia, Save the Children, World Vision, ASB (Arbeiter-Samariter-Bund Deutschland e.V.) and Handicap International.

- access to appropriate forums,
- effective grievance handling,
- attainment of satisfactory remedies, and
- overcoming problems of poverty for poor people and other disadvantaged groups.

It defines access to justice as the ‘means and ends by which the state guarantees the fulfilment of basic rights according to the Constitution of the Republic of Indonesia 1945 and international human rights principles, and guarantees access to every claim holder to know, understand, be aware of and make use of these rights through formal and non-formal institutions, supported by fair and responsive public complaint mechanisms, in order to obtain optimal outcomes and improve the quality of life.’<sup>6</sup>

In addition, AusAID has determined that its work in relation to PwDs will be guided by the rights based approach set out in the Convention on the Rights of Persons with Disabilities.<sup>7</sup> The Convention is also the reference point for this assessment report. Indonesia has signed the Convention, but is yet to ratify.<sup>8</sup> It has not yet signed the Optional Protocol.

The Convention has provisions that are both directly and indirectly relevant to access to justice for PwDs.

a. Directly Relevant

- Article 1: Purpose ‘Persons with disabilities’
- Article 2: Definitions ‘Discrimination on the basis of disability’
- Article 5: Equality and non-discrimination
- Article 12: Equal recognition before the law
- Article 13: Access to justice

Looking at these provisions in more detail, firstly the Convention does not define PwDs. However, paragraph (e) of the Preamble makes it clear that disability is conceptualised as the product of the interaction of persons with impairments with environmental barriers that hinder their full and effective participation in society on an equal basis with others.

Secondly, equal recognition before the law as set out in Article 12 focuses on legal capacity. All persons (including PwDs) have the right to make their own legal decisions. Where a person’s disability prevents them from doing so, all attempts must be made to support the person make such decisions. Where such support is provided, safeguards must be put in place to ensure that people who support PwDs respect their rights, choices and preferences, are free from conflict of interest and do not pressure the person into making certain decisions. PwDs should only be given as much help as they need and for the time they need it and any safeguards must reflect the level of interference with the person’s rights.

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<sup>6</sup> *National Access to Justice Strategy*, Part 1.4

<sup>7</sup> The full text of the Convention can be found at [www.un.org/disabilities/convention/conventionfull.shtml](http://www.un.org/disabilities/convention/conventionfull.shtml)

<sup>8</sup> Indonesia made no reservations when it signed the Convention.

Examples of laws which will violate the guarantee of equal recognition before the law include:

- legal mechanisms depriving PwDs of their legal capacity to act on the basis of their disability (such as interdiction laws),
- laws preventing PwDs from engaging in legal acts on an equal basis with others (such as marriage, divorce, opening bank accounts, voting, owning or inheriting property and controlling their own medical treatment), and
- laws that fail to support PwDs so that they may participate in legal proceedings, for example failing to provide for the use of sign language, Braille or plain language.

Thirdly, the requirement that PwDs have the same access to justice as other persons is the first time access to justice has appeared as a substantive right in a UN human rights instrument.

Provisions that are indirectly relevant to access to justice for PwDs are as follows:

b. Indirectly Relevant

- Article 3: General principles
- Article 4: General obligations
- Article 9: Accessibility
- Article 21: Freedom of expression and opinion, and access to information
- Article 27: Work and employment
- Article 31: Statistics and data collection

These directly and indirectly relevant provisions are summarised in Annex 3.

## **1.4. Connection between Access to Justice and Other Rights of Persons with Disabilities**

It became increasingly apparent during the in-country missions that any access to justice programs will be inherently linked to other challenges faced by PwDs. For example, if a person is unable to travel unassisted to a police station, ombudsman's office, the national human rights commission or courtroom because of a lack of accessible transportation then this factor alone will affect access to justice for PwDs. If a person with psychiatric or psychological disabilities cannot access adequate affordable<sup>9</sup> healthcare, the current stigma and discrimination faced by such persons will continue.

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<sup>9</sup> Typical medication to treat schizophrenia is haloperidol, which is only Rp.100 (1 cent) per tablet, but it has profound negative side effects. Risperidone, a more advanced drug with fewer side effects, costs Rp.2,500 (30 cents) per tablet which is too expensive for most Indonesians. Out of a population of over 245 million people, 52% of Indonesians live on less than Rp.20,000 (AUD 2.45) a day, with an estimated 35 million living on less than 80 cents a day (Rp.6,500).

## PART 2. KEY FINDINGS: GENERAL

General attitudes and approaches by government and the community to PwDs influence policy and legislation in Indonesia. They also influence the way both are formulated. These attitudes and approaches also have an impact on the priority given to disability related issues, budget decisions and budget allocation within the disability field. The report therefore addresses these issues before considering access to justice more specifically.

### 2.1. Stigma Surrounding Persons with Disabilities

There is a negative stigma associated with disabilities in Indonesia that interprets disability as identical to sickness or weakness.<sup>10</sup> A person with a disability is seen as a person without capability who will only burden those around them. Disability is also seen by some as a curse or punishment for previously committed sins of the parents. PwDs are rarely visible in society and are often hidden by their family in shame at home or in an institution.

Even the Ministry for Social Affairs, the ministry with primary carriage for disabilities,<sup>11</sup> contributes to this stigma, stating for example that the International Day of People with Disability allows PwDs the opportunity to ‘prove that behind their shortcomings (kekurangan), they have extraordinary potential.’<sup>12</sup>

### 2.2. Charity Based Approach and the Medical Model of Disability

The charity based approach dominates and informs policy and law relating to PwDs in Indonesia. The approach implies that PwDs can be cared for through charity or welfare programs. According to this approach, the lives of persons with disabilities are handed over to professionals who control such fundamental decisions as where they will go to school, what support they will receive and where they will live. PwDs are therefore rarely involved in the decision making process. They are not depicted as subjects with legal rights, but are in effect objects of the welfare and charity they receive. The charity based approach can also create a dependency on hand-outs and other benefits. It tends to affect the way PwDs view themselves – as unequal citizens who should be pitied.

The charity based approach also means that in law disability is typically addressed as an aspect of social security and welfare legislation, health law or interdiction law. In Indonesia, the lead ministry for disabilities, the Ministry for Social Affairs, classifies PwDs as

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<sup>10</sup> As will be seen below, this greatly affects the right to work of PwDs.

<sup>11</sup> The Ministry for Social Affairs does not oversee psychiatric or psychological disabilities. The Directorate of the Development of Mental Health at the Department of Health has primary responsibility for this issue. Currently however, its focus is only on the medical aspects of mental health and not other issues related to the disability. During our meeting with the Director-General, it was not clear exactly what the Directorate’s role is. A number of areas and issues important to mental health (such as subsidies for medicine, public information campaigns, education campaigns and psychiatric health hospitals) are the responsibility of other divisions within the Department of Health.

<sup>12</sup> Secretary of the Directorate-General of Services and Rehabilitation for Persons with Disabilities, quoted in *Berita: Rapat Pokja Direktorat Bina Rehabilitasi Penyandang Cacat*, 8 January 2010, <http://yanrehsos.depsos.go.id/modules.php?name=News&file=article&sid=607>

‘Penyandang Permasalahan Kesejahteraan Sosial’ (persons with social problems). Such persons are considered unable to fulfil their basic needs (mind, body and socially) in an adequate and proper way due to difficulties or disturbances. Included in this group are PwDs, neglected children, street children, the homeless, prostitutes, beggars, former prisoners, isolated indigenous persons and victims of natural disasters.<sup>13</sup>

This approach also influences the way government interacts with PwDs and disabled persons organisations (DPOs). PwDs and DPOs are often directed to agencies responsible for welfare or social issues. A number of DPOs recently conducted research on the physical accessibility of the trans-Jakarta busway. The Jakarta regional government is responsible for the operation of the busway network, and so the DPOs contacted this government to inform it of their intention to carry out the research. The DPOs were immediately referred to the central government’s Coordinating Ministry for Welfare (Menkokesra). Eventually, the DPOs did meet with representatives from the Jakarta regional government, but the representatives who attended the meeting were responsible for welfare benefits such as free rice for the poor.

The other approach that is apparent in Indonesian laws, policies and programs is the medical model of disability. This model views disability as a deficiency or deviation from the norm located in the individual. It implies that action must be taken to treat or change the person so that they can conform to existing social processes and structures.<sup>14</sup> This treatment is typically provided in service systems and settings isolated from the general community.<sup>15</sup> This is evident in rehabilitation centres in Indonesia, where PwDs are compelled to live in residential institutions because these are the only environments in which state assistance is available.

Legislation that reflects the medical model of disability usually uses terminology such as ‘special care’ or ‘special treatment’ for PwDs. This is evident in Indonesian laws and policies such as Law No.39/1999 on Human Rights.

The Convention on the Rights of Persons with Disabilities does not adopt the charity based approach or the medical model, but rather the social model of disability, recognising disability as a human rights issue. The social model takes the focus away from what is wrong with the person. Instead, it recognises disability as the consequence of the interaction of the individual with an environment that does not accommodate that individual’s differences and limits or impedes the individual’s participation in society. The Convention and this approach heavily inform this report.

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<sup>13</sup> See for example, the definition of ‘persons who experience social dysfunction’ in Art.7 of Law No.11/2009 on Social Welfare. See also [www.dinsos.pemda-diy.go.id](http://www.dinsos.pemda-diy.go.id)

<sup>14</sup> See for example, the definition of rehabilitation in Law No.4/1997 on Persons with Disabilities and in the National Action Plan for Persons with Disabilities 2004-2013.

<sup>15</sup> R. Kayess and P. French ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ in *Human Rights Law Review* 8:1 (2008), 1-34 at 6

## 2.3. Data and Statistics

There is no accurate and comprehensive data regarding PwDs in Indonesia<sup>16</sup> and data that is available tends to grossly underestimate the number of PwDs in Indonesia. This is a major impediment in the disability field as it hinders proper evidence-based advocacy, needs assessment, policy formulation, monitoring progress over time and evaluation. Data and Statistics are discussed in more detail in Part 4 below.

## PART 3. KEY FINDINGS: ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

The discussion below analyses the key findings according to the six elements of access to justice contained in the National Access to Justice Strategy and the rights based approach set out in the Convention on the Rights of Persons with Disabilities.

### 3.1. Normative Framework

The normative framework for the protection and promotion of the rights of PwDs is primarily contained in the 1945 Constitution and Law No.39/1999 on Human Rights. It is also set out in the international human rights instruments that Indonesia has agreed to and which have therefore become Indonesian law.<sup>17</sup>

Indonesia also has legislation that specifically relates to PwDs, namely Law No.4/1997 on Persons with Disabilities and Government Regulation No.43/1998 on Efforts to Improve the Social Welfare of Persons with Disabilities. However these laws are primarily welfare laws and do little to protect and promote the rights of PwDs. The definition of PwDs set out in these laws, and as applied more generally, is also problematic.

Legislation relating to PwDs (often through use of the term ‘vulnerable groups’) does not realise the protections provided for in the Constitution. Laws are piecemeal, inadequate and in some cases discriminate against PwDs. Many laws cannot be implemented, either because there are no implementing regulations, or no remedies can be sought for breach of the law. The legislation does not set out who is responsible, where and to whom a complaint can be made and what the sanctions are for breach. In other cases, laws are too general, or only partly regulate the subject matter. Where legislation does provide protection for PwDs, it is often not implemented or enforced. There is no law that addresses access to justice for PwDs, although this is not unusual in countries that have not yet ratified the Convention on the Rights of Persons with Disabilities.

It is not surprising that legislation neither protects nor promotes the rights of PwDs and does not provide them with equal recognition before the law or equal access to justice. The

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<sup>16</sup> This is also recognised in the National Action Plan of Persons with Disabilities 2004-2013. See for example p.22 of the Plan.

<sup>17</sup> Art.7(2), Law No.39/1999

government does not regularly consult with or actively involve PwDs in developing services, policies or legislation. PwDs are not treated as subjects with legal rights, but as objects of the policy or law. This reflects the charity-based approach to disability.

The section below discusses the 1945 Constitution, Law No.39/1999 on Human Rights and select international human rights instruments from the perspective of equality and non-discrimination, equal recognition before the law and equal access to justice for PwDs. It then goes on address Law No.4/1997 on Persons with a Disability and Government Regulation No.43/1998 on Efforts to Improve the Social Welfare of Persons with Disabilities. Problems with the definition and general understanding of ‘persons with disabilities’ is set out in detail in Annex 4. Finally it critically examines examples of legislation relating to PwDs and explains why the laws discriminate against PwDs, deny them equal recognition before the law and/or deny them access to justice.

### 3.1.1. The 1945 Constitution

The 1945 Constitution has no specific references to PwDs, but contains clear statements promoting non-discrimination, equality before the law, and the right to equal treatment before the law.

The guarantee of equality before the law and government is set out in Article 27(1), and Article 28D(1) states that each person has the right to just legal recognition, guarantees, protection and certainty as well as equal treatment before the law.<sup>18</sup>

The right to be recognised as a person before the law may not be derogated from in any circumstance,<sup>19</sup> however limitations may be put in place by law in order to satisfy just demands based upon considerations of morality, religious values, security, and public order in a democratic society.<sup>20</sup>

The Constitution also mandates that every person has the right to facilitation and special treatment (kemudahan dan perlakuan khusus) in order to obtain equal opportunities and benefits for the achievement of equality and justice.<sup>21</sup> The idea of ‘special treatment’ reflects the medical model approach to disability discussed above.<sup>22</sup>

Finally, the Constitution stresses that every person has the right to be free from discriminatory treatment on any basis and has the right to protection from discriminatory behaviour.<sup>23</sup>

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<sup>18</sup> Art.28D(1)

<sup>19</sup> Art.28I

<sup>20</sup> Art.28J(2)

<sup>21</sup> Art.28H(2)

<sup>22</sup> It is preferable for example to design a system or environment that is usable by all and therefore inclusive.

No facilitation or special treatment is then necessary.

<sup>23</sup> Art.28I(2)

### 3.1.2. Law No.39/1999 on Human Rights

In the same manner as the Constitution, Law No.39/1999 states that each person has the right to just legal recognition, guarantees, protection and treatment as well as certainty and equal treatment before the law.<sup>24</sup> Each person, without discrimination, has the right to obtain justice.<sup>25</sup>

Law No.39/1999 also contains the same provisions as the Constitution in relation to derogations and limitations, but does not permit limitations based upon considerations of religious values. It does allow limitations in the national interest which is not included in the Constitution.<sup>26</sup>

Law No.39/1999 stresses that every person has the right to protection of human rights and basic freedoms without discrimination.<sup>27</sup> Reflecting the Constitution, it goes on to state that vulnerable groups (which include PwDs) have the right to particular treatment and protection (lebih berkenan dengan kekhususan),<sup>28</sup> and that each person with a disability has the right to facilitation and special treatment (kemudahan dan perlakuan khusus).<sup>29</sup>

There are several problems with the protections provided by Law No.39/1999. The definition of ‘discrimination’ in Article 1(3) does not include discrimination on the basis of a disability, and therefore on a literal reading, discrimination on this basis is not prohibited by the Law. For the effective implementation of the right to equality and non-discrimination, a general guarantee of equality and prohibition of discrimination on the basis of disability must be included in legislation, and it must apply to all public and private actors. Persons without disabilities should also be entitled to protection, for example, a parent caring for a child with a disability who is discriminated against in employment because of the status of the child.

A second issue is that Law No.39/1999 does not provide for a right of action for victims of human rights violations. While the law defines ‘violation of human rights’ in Article 1(6), it does not contain or refer to procedural laws, does not contain sanctions, and does not state which court human rights violations may be referred to. Consequently, no case has ever been referred to a court on the basis of a breach of Law No.39/1999.

### 3.1.3. International Conventions and Instruments Agreed to by Indonesia

#### *International Convention on the Rights of Persons with Disabilities (signed but not ratified)*

The Convention on the Rights of Persons with Disabilities is the first human rights treaty that comprehensively details all human rights of PwDs and clarifies the obligations of states to respect, protect and fulfil these rights. It entered into force on 3 May 2008.

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<sup>24</sup> Art.3(2)

<sup>25</sup> Art.17

<sup>26</sup> Arts.4, 70 and 73

<sup>27</sup> Art.3(3)

<sup>28</sup> Art.5(3)

<sup>29</sup> Art.41(2)

The Convention marks a paradigm shift in attitudes and approaches to PwDs. It embraces a human rights based approach and reaffirms that persons with disabilities enjoy the same human rights as everyone else in the civil, cultural, economic, political and social spheres. In order to ensure an environment conducive to the fulfilment of the rights of PwDs, the Convention also includes articles on awareness-raising, accessibility, situations of risk and humanitarian emergencies, equal recognition before the law, access to justice, personal mobility, habilitation and rehabilitation, as well as statistics and data collection.

As Indonesia has signed the Convention, it must refrain from acts which would defeat the object and purpose of the Convention<sup>30</sup> which is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’

### ***Law No.12/2005 on the Ratification of the International Covenant on Civil and Political Rights***

Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR) in 2005, and has made no reservations other than in relation Article 1(1) on self-determination. Once Indonesia ratified this treaty it became national law,<sup>31</sup> and the government was immediately obliged to respect, protect, implement and advance the human rights contained in it.<sup>32</sup> The ICCPR contains general provisions in relation to equality and non-discrimination; the right to a fair trial including equality before the law; the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law; and the right to be informed promptly and in detail in a language which the person understands of the nature and cause of the charge against them. Article 16 also requires the recognition of all persons before the law. The ICCPR does not however specifically mandate the right to access to justice.

### ***Biwako Millennium Framework for Action towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific (the Biwako Framework)***

This Framework, adopted in May 2002, sets out a draft regional framework for action that provides regional policy recommendations for action by Governments in the Asia Pacific Region and concerned stakeholders to achieve an inclusive, barrier-free and rights-based society for persons with disabilities in the new decade, 2003-2012. The Framework identifies seven areas for priority action in the new decade. None of these specifically refer to access to justice.

Indonesia has agreed to the Framework, although it is not a legally binding document. The Framework will be discussed in more detail in the general report on PwDs to be prepared by Professor Irwanto, Eva Kasim and Asmin Fransiska.

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<sup>30</sup> Art.18, Vienna Convention on the Law of Treaties

<sup>31</sup> Art.7(2), Law No.39/1999

<sup>32</sup> Art.71, Law No.39/1999

### 3.1.4. Law No.4/1997 on Persons with Disabilities and Government Regulation No.43/1998 on Efforts to Improve the Social Welfare of Persons with Disabilities

Law No.4/1997 and its implementing regulation, Government Regulation No.43/1998 on Efforts to Improve the Social Welfare of Persons with Disabilities specifically regulate persons with disabilities. While the laws have aspirational principles regarding equal rights and accessibility for PwDs,<sup>33</sup> both are an inadequate, piece-meal attempt to protect and promote the rights for PwDs. They are predominantly welfare legislation although in certain sections reflect a medical model approach to disability. It has been said that Law No.4/1997 is more like a law for the Ministry of Social Affairs than a law protecting and promoting the rights of PwDs.<sup>34</sup> As such, it is highly unlikely that the legislation will be an instrument by which PwDs can seek remedies. In turn, courts cannot be expected to be instrumental in respecting, protecting, implementing and advancing the human rights and fundamental freedoms of PwDs on the basis of this piece of legislation. No cases have been brought, and Komnas HAM has not received any complaints on the basis of the Law.

Looking to the content of the Law, it regulates six issues in a general manner, namely education, employment, accessibility, rehabilitation, social assistance and social welfare. Political rights and other issues such as equality before the law, access to justice, culture and sport are not mentioned. This is particularly problematic because of the formalistic approach to legal interpretation in Indonesia. The approach means that legislation is interpreted and applied literally, and is considered to be a comprehensive statement on a topic, irrespective of whether the legislation actually is or not. This approach is reflected in the public statement by the Ministry for Social Affairs that Law No.4/1997 together with Government Regulation No.43/1998 and the National Action Plan for Persons with Disabilities is sufficient to protect the rights of PwDs.<sup>35</sup>

The definition of ‘persons with disabilities’ contained in the Law is also problematic and this is explained in detail in Annex 4.

Where Law No.4/1997 does provide some protection for PwDs, it is difficult to seek remedies and the sanctions are very weak. No party is clearly responsible for fulfilling the obligations and it is not clear who should carry out the investigations where a breach has occurred. There is also no real way to make a complaint under the Law. For example Article 29 states that persons who do not provide access as required in Article 10 or who do not provide equal opportunities for PwDs in accordance with Article 12 will be subject to administrative sanctions. These will be regulated further by government regulation. The subsequent government regulation (Government Regulation No.43/1998 on Efforts to

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<sup>33</sup> See Art.5, Law No.4/1997 which states that PwDs have the same rights and opportunities in all aspects of livelihood and life.

<sup>34</sup> Saharrudin Daming, Commissioner of the Indonesian National Human Rights Commission

<sup>35</sup> *Berita: Peringatan Hari Internasional Penyandang Cacat (Hipenca) Tahun 2009*, 27 November 2009, <http://yanrehsos.depsos.go.id/modules.php?name=News&file=article&sid=433>

Improve the Social Welfare of Persons with Disabilities) was passed in 1998 but has no chapter on sanctions.

In spite of its shortcomings, Saharrudin Daming, a commissioner at Komnas HAM, has stated that Law No.4/1997 is unlikely to be challenged before the Constitutional Court.<sup>36</sup> The preference is to wait until the Convention on the Rights of Persons with Disabilities is ratified before any substantive effort to amend the Law is made.

### 3.1.5. General Laws on PwDs

While the Constitution contains clear statements promoting non-discrimination, equality before the law, and the right to equal treatment before the law, legislation relating to PwDs does not realise these protections. HWPCI (the Indonesian Disabled Womens' Association) has stated that if DPOs and individuals are not vigilant, legislation is drafted and finalised without reference to, or consideration of, PwDs.<sup>37</sup>

Set out below are examples of legislation relating to PwDs that are not in accordance with, or are not applied in accordance with, Articles 12 and 13 of the Convention on the Rights of Persons with Disabilities. An in-depth examination of the interdiction law and the legal requirement that job applicants be healthy in mind and body ('sehat rohani dan jasmani') is presented in Annexes 5 and 6.

#### *Laws and the implementation of laws that prevent PwDs from engaging in legal acts on an equal basis*

**Law No.1/1974 on Family:** this Law permits a husband to practice polygamy in certain situations, one of which is where his wife has or suffers a physical disability or an illness that cannot be cured.<sup>38</sup> The Committee for the Elimination of All Forms of Discrimination against Women has commented that the article is extremely discriminatory and strongly recommends that it be totally amended.<sup>39</sup> The implementing regulation for the Law also permits divorce if a spouse is physically disabled or has an illness or disease that means that they are unable to fulfil their obligation as husband or wife.<sup>40</sup>

**Law No.36/2009 on Health:** this Law guarantees equal rights to health care facilities<sup>41</sup> and non-discriminatory health care treatment.<sup>42</sup> However in practice, many current and former sufferers of leprosy are refused treatment at hospitals on the basis of their condition. Proving

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<sup>36</sup> S. Daming 'Undang-Undang Penyandang Cacat Akan Direvisi', *Tempointeraktif*, 17 May 2010. The Indonesian Constitutional Court was established in 2003 and has the authority to review the constitutionality of the highest level legislation passed since 1999. Its decisions are final: 1945 Constitution, Art.24C(1). See also Arts.10(1) and 50, Law No.24/2003 on the Constitutional Court

<sup>37</sup> There are several bills under consideration, or that will be under consideration by Parliament, that impact on the rights of PwDs.

<sup>38</sup> Art.4(2)

<sup>39</sup> Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined fourth and fifth periodic reports of States parties, Indonesia, CEDAW/C/IDN/4-5, 27 July 2005, para.161

<sup>40</sup> Art.19, Government Regulation No.9/1975 Concerning the Implementation of Law No.1/1974

<sup>41</sup> Art.5(1)

<sup>42</sup> Art.54(1). This requirement is to be monitored by the government at all levels.

this is difficult and no action has been taken against a hospital for refusing to treat patients on the basis of their disability. However, refusing to treat a person prevents the person from controlling their own medical treatment and hence their ability to engage in legal acts on an equal basis with others.

### *Access to justice: no remedies for violations*

**Law No.4/1997 on Persons with Disabilities:** on first reading, the Law appears to protect and promote the right to work of PwDs. Article 14 requires private entities and state-owned enterprises to employ PwDs according to a quota system.<sup>43</sup> For every 100 employees, one must be a person with disabilities. The penalty is even set out: failure to do so may attract a six month prison sentence, and/or a maximum fine of Rp.200 million (AUD 24,500).<sup>44</sup> However, there are no implementing regulations setting out who a complaint may be made to, how a complaint may be investigated and who has power to investigate it. The Ministry for Social Affairs claims it does not have the competence to monitor the implementation of the Law: its only function is in relation to rehabilitation, which means to train/educate and prepare PwDs to interact with the community.<sup>45</sup> The provision has never been enforced and the majority of employers are not aware of its existence.

**Law No.15/1992 on Aviation:** in some cases, legislation is repealed even before implementing regulations are passed. Law No.15/1992 on Aviation requires special treatment for PwDs and sick people, and the required treatment is to be regulated in implementing regulations.<sup>46</sup> However, no implementing regulations have been passed. The Law has now been repealed and replaced by Law No.1/2009. Article 12(2) of the new Law again contains requirements for the treatment of PwDs. And again, implementing regulations have not yet been passed.

When a void exists because legislation cannot be implemented, entities tend to make their own regulations, many of which are discriminatory. For example, Indonesian airlines, including the national carrier Garuda, refuse to allow vision impaired persons to travel unaccompanied. If the person is accompanied, then they must sign a waiver indicating they will not hold the airline responsible for any further injuries or loss if there is an accident.

A perceived void is also exacerbated by the formalistic approach to legal interpretation in Indonesia. Government officials, including law enforcement officials, interpret and apply the legislation literally. If an issue is not directly regulated, then an official will not act. For example, in the Wuri Handayani case outlined in Annex 5, the Surabaya local government argued that although Article 13 of Law No.4/1997 clearly states that PwDs have equal rights to employment in accordance with the type and level of their disability, it could not accept PwDs as public servants until the central government clearly and in detail regulated

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<sup>43</sup> This quota system does not apply to government in relation to public servants.

<sup>44</sup> Art.28

<sup>45</sup> 'Perlakuan Diskriminasi Masih Terjadi pada Penyandang Cacat', *Hukumonline*, 24 December 2008

<sup>46</sup> Art.42

employment of public servants with a disability, especially in connection with the type and level of disability and the type of duties and tasks that may be given to PwDs.<sup>47</sup>

***Law No.25/2009 on Public Services:*** this Law requires public service providers to be fair and not to discriminate in the provision of public services.<sup>48</sup> Article 29 requires public service providers to provide special treatment to PwDs, in accordance with regulations. Breach of this requirement will result in salary deductions,<sup>49</sup> and where failure to comply results in injury, disability or loss of life, the person will be subject to criminal sanctions as set out in further regulation.<sup>50</sup>

However, there are no implementing regulations, and the entities themselves are responsible for monitoring and punishing persons who violate the requirement. In Indonesia, entities tend not to admit mistakes or violations, and do not self regulate. In other words, the wage deduction penalty set out in the Law is unlikely to be implemented in practice.

### ***Access to justice: failure to implement or enforce legislation***

***Law No.28/2002 on the Construction of Buildings:*** this Law clearly mandates that facilities must be accessible for PwDs. For example, Article 27 requires facilities (including places for worship, change rooms/areas, toilets, parking, rubbish bins and communication and information services) and accessibility (which includes entrances, exits, horizontal connection rooms, vertical connections inside the building, vertical transport facilities, as well as evacuation access) which is easy, safe and pleasant, especially for PwDs.<sup>51</sup> In spite of this, fewer than 3% of buildings in Jakarta are accessible to PwDs.<sup>52</sup>

## **3.2. Legal Awareness**

With limited exceptions, awareness among PwDs of their rights and the means to realise these rights is low. Many PwDs have low education, are poor, are viewed with a negative stigma and are accustomed to being seen as objects of charity. There is also a lack of active, informed and strategic DPOs, particularly outside the major centres. A select few are particularly strong, focused and provide much needed information and assistance to PwDs. That said, they are overworked, under-staffed and under-resourced. DPOs are discussed further in Part 4 below.

Many PwDs are also unaware of programs, services, policy and laws because it is difficult to access information from relevant government agencies such as the Ministry for Social

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<sup>47</sup> Decision No.595 K/TUN/2005, p.12

<sup>48</sup> Art.34(1)

<sup>49</sup> Art.54(5)

<sup>50</sup> Art.55(2). Complaints regarding the provision of public services may also be made to the Ombudsman, and the national, regional and district parliaments: Art.40(1)

<sup>51</sup> See also Government Regulation No.36/2005 on the Implementing Regulations for Law No.28/2002 on the Construction of Buildings

<sup>52</sup> 'Jakarta Akses', an accessibility survey conducted by HWPCI (Himpunan Wanita Penyandang Cacat Indonesia: Indonesian Disabled Women's Association), the Bina Paraplegia Foundation, Trisakti University's Civil Planning and Engineering Faculty, and the Jakarta branch of the Indonesian Architects Association in 2001 and 2003.

Affairs. Government agencies also do not systematically consult with or involve PwDs in developing the programs, services, policy and law which contributes to this lack of awareness of current developments.

The National Strategy on Access to Justice acknowledges the need for improved transparency and involvement of stakeholders in the formulation of law.<sup>53</sup>

### **3.3. Access to Appropriate Forums and Effective Grievance Handling**

Based on the primary and secondary materials reviewed, a number of issues impact on access to appropriate forums and effective grievance handling for PwDs in Indonesia. Aside from the inadequacies of legislation outlined above, these issues include inadequate government funded legal aid; a lack of physical access to government buildings such as police stations and courtrooms; a lack of awareness among law enforcement officials and government officials of the rights of PwDs; and a lack of adequate information for PwDs regarding the judicial process.

#### **3.3.1. Legal Aid**

Free government-funded legal aid is rare in Indonesia.<sup>54</sup> Most lawyers are unwilling to provide assistance free of charge as it is unclear who will cover the costs of these services. It is unsurprising therefore that PwDs experience difficulties in accessing legal aid and are often unassisted and unrepresented, even in the most serious cases.

The inadequacy of free legal aid means that the guarantee of legal representation set out in the Criminal Procedure Code is often violated. The Code states that persons who are unable to pay must be provided with free legal aid where they face a gaol term of over five years.<sup>55</sup> The impact of failure to provide legal aid for PwDs was apparent in a recent case heard by the Rantau Perapat District Court in North Sumatra. In this case, a vision impaired couple were accused of trafficking drugs, and therefore faced a gaol term of over 5 years. They were not represented, and were sentenced to 15 years and 18 years respectively. In spite of a Supreme Court ruling to the contrary, failure to provide legal representation does not affect the legal validity of a court's decision.<sup>56</sup>

Non-government legal aid offices are also often unwilling to assist PwDs, and those that have assisted PwDs commented that they are in fact difficult to represent: PwDs are not well coordinated and often want different outcomes; they are not well informed; and as most are extremely poor, can lose interest in a case very quickly if there appears to be no progress.

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<sup>53</sup> Executive Summary, p.5

<sup>54</sup> Certain regional and local governments do provide free legal aid but this is limited. For example, in Palembang, the amount is limited to IDR 80 million (AUD 9,800) at the provincial level, and may not be used for certain cases such as drug cases, corruption cases and rape cases.

<sup>55</sup> Art.56, Criminal Procedure Code

<sup>56</sup> This is in spite of Decision No.1565K/Pid/1991 which states that a decision is not legally binding if a person is not represented in accordance with the law.

When legal aid offices decline to assist, PwDs often turn to ‘their own organisations,’ meaning a person with a vision impairment will seek assistance from a DPO representing persons with vision impairments and so on. However, the majority of DPOs do not have the skills or experience in handling legal cases and courtroom proceedings.

The National Access to Justice Strategy acknowledges the failure of the government to fulfil a right to legal aid and the need to rectify this. The Strategy outlines the need to ensure that poor and marginalised people can access legal assistance when confronted with legal issues and can obtain legal defence by advocates when they claim their rights in court.<sup>57</sup>

### **3.3.2. Physical access to police stations, courtrooms and government offices**

The majority of government buildings in Indonesia are not physically accessible by PwDs and do not have facilities within the building for PwDs (eg. toilets, lifts). The Constitutional Court and the Judicial Commission buildings are the most accessible, but neither of these is ideal.

Court proceedings and police investigations are often held on the 2<sup>nd</sup> or 3<sup>rd</sup> floor of buildings that do not have lifts. PwDs must then rely on security guards or family and friends to assist them. In 2009 in Probolinggo, a person suffered a disability because of police violence. He was shot and his injuries caused blindness, paralysis and deafness. A complaint was made to the Division on Professionalism and Security of the Police, but the investigation process was held on the 3<sup>rd</sup> floor of the building. The victim could not get up the stairs and was not assisted so his statement was not taken. Unsurprisingly, there have been no developments in the case.<sup>58</sup>

The Supreme Court is currently designing a prototype for the construction of court buildings in the future. The draft design does not ensure physical accessibility for PwDs. During our visit to the Directorate of the Religious Courts Body the issue was discussed with the Director-General, Pak Wahyu Widiana, who undertook to look into the possibility of rectifying this shortcoming to ensure that the prototype is in accordance with Indonesian law (such as Law No.28/2002 on the Construction of Buildings).

### **3.3.3. Awareness of the rights of persons with disabilities**

There is an extreme lack of awareness of the rights of PwDs among law enforcement officials. This includes a failure to facilitate their effective role as participants in the judicial process. Police officers frequently do not accept victim or witness statements from persons who are deaf or who have intellectual or learning disabilities despite the requirement in the Criminal Procedure Code that everyone who experiences, sees, witnesses and/or is a victim of a crime has the right to submit a report or complaint to the police, either orally or in

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<sup>57</sup> Executive Summary, p.6

<sup>58</sup> In spite of this practice, the Criminal Procedure Code requires the following: if a suspect or witness is summonsed to give evidence, and for good reason cannot come to the investigator, then the investigator must come to the witness or suspect's house: Art.113

writing.<sup>59</sup> This may be because at the investigation level, the Code only makes reference to the rights of a suspect or accused who is deaf and/or mute to assistance, and not to a victim or witness.<sup>60</sup>

The general lack of awareness among law enforcement officials also extends to the treatment of offenders. For example, in North Sumatra, a 27 year old man murdered three people, set fire to the family home and to the village church. He was in prison for six months, during which time the authorities realised he was mentally ill. He was immediately returned to his family without any formal psychiatric assessment or treatment.<sup>61</sup>

Contributing to this lack of awareness are the discriminatory provisions contained in legislation such as the Criminal Procedure Code. The Code for example, allows extended detention of a suspect or the accused if they have a physical or mental disability in the interests of questioning the accused. This applies at all stages of the trial, including investigation and on appeal.<sup>62</sup> In so doing the Code facilitates the unequal treatment of PwDs by law enforcement officials.

A lack of awareness of the rights PwDs (and of the need to make accommodation to facilitate the effective role of PwDs in the judicial process) was apparent during our visit to one government body. For some of the staff of this body, the low awareness was because they had not previously given the issue any thought. However, they demonstrated a willingness to listen, framing discussion around Law No.4/1997 on Persons with Disabilities and a charity based approach to disability. Others were hesitant about the concept of access to justice for PwDs, and a third group appeared reluctant to accommodate PwDs in the justice sector as it was just too hard and expensive.

In comparison to this was our meeting with the Director-General of the Religious Courts Body, Pak Wahyu Widiana. Pak Wahyu admitted he had not previously given much thought to the issue, but was quick to engage, to recognise discrimination and that reasonable accommodation needed to be made. For example, he immediately undertook to include a specific reference to PwDs as a vulnerable group in the Supreme Court circular letter on legal aid.<sup>63</sup> The circular letter was released on 30 August 2010, and the Annex on Religious Courts contains a specific reference to PwDs in Arts.19 and 27. These articles set out who may receive services from a legal aid post, namely persons who are unable to pay for a

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<sup>59</sup> Art.108(1)

<sup>60</sup> Arts.53(2) states that a deaf and/or mute suspect/accused has the rights set out in Art.178. Art.178 states that where a witness or accused is deaf and/or mute, and cannot write, then the chair of the panel of judges must appoint a translator who is able to understand the accused or the witness. If the accused or the witness is deaf and/or mute but is able to write, then the judge must direct all questions or statements to him or her in writing and the accused or witness must reply in writing which is then read out loud.

<sup>61</sup> H. Minas and H. Diatri 'Pasung: Physical Restraint and Confinement of the Mentally Ill in the Community', *International Journal of Mental Health Systems* 2008, 2:8, p.2

<sup>62</sup> Art.29(1)(a) and (3)

<sup>63</sup> Circular Letter No.10/2010 on Guidelines for Providing Legal Aid No.10/Bua.6/Hs/ SP/VIII/2010, dated 30 August 2010.

lawyer, especially women, children and PwDs. This also appears to be the first time the term ‘penyandang disabilitas’ has been used in an official government document. This term was agreed upon by a consortium of experts as the preferred, politically correct term for persons with disabilities.<sup>64</sup> The Annex in relation to the General Courts does not refer to PwDs.

The Director-General also undertook to lobby the Supreme Court to accommodate physical accessibility for PwDs in its draft prototype for the construction of court buildings in the future. Attached as Annex 8 is a report that appeared on Badilag’s website regarding our visit to their offices.

It is worth noting that the Code of Ethics and Guidelines for the Behaviour of Judges agreed on by the Judicial Commission and the Supreme Court in April 2009 prohibits unfair treatment by judges on the basis of a difference in physical or mental capacity. In carrying out his or her duties, a judge must not show that he or she likes or does not like, favours, holds a prejudicial view towards a person, and may not harass the person on the basis of a difference in physical or mental capacity (perbedaan kemampuan fisik atau mental).<sup>65</sup> The Code is used to monitor the conduct of judges at all levels (except the Constitutional Court) and complaints regarding judicial conduct may be made to the Judicial Commission on the basis of the Code.<sup>66</sup> The most severe penalty that the Commission may recommend is dishonourable dismissal.<sup>67</sup>

### **3.3.5. Legal information available to persons with disabilities**

The National Access to Justice Strategy has acknowledged that public participation in legal and judicial reform continues to encounter barriers, among which is the absence of access to information.<sup>68</sup> There are requirements in law to make information accessible, for example, Supreme Court circular letter regarding accessibility of information<sup>69</sup> and the 2009 laws on the general courts, religious courts and administrative courts.<sup>70</sup> However, this information is only available for ‘normal people’ (quoting a judge who was interviewed). There is no requirement in the laws to make information available to all persons, including those with a disability, for example by providing information in easily understandable language. This fails to support PwDs in participating in legal proceedings on an equal basis with others.

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<sup>64</sup> Memorandum of Understanding dated 31 March 2010, signed in Bandung by over 35 representatives from government, DPOs, Komnas HAM and language experts.

<sup>65</sup> Arts.1 and 1(1)(5)

<sup>66</sup> Arts.13, 20 and 22(1), Law No.22/2004

<sup>67</sup> See for example, Art.20, Law No.49/2009 on the Second Amendment to Law No 2 of 1986 on General Courts; Art.19, Law No.50/2009 on the Second Amendment to Law No 7 of 1989 on Religious Courts; and Art.20, Law No.51/2009 on the Second Amendment to Law No 5 of 1986 on Administrative Law Courts.

<sup>68</sup> Executive Summary, p.4

<sup>69</sup> Decree of the Chief Justice of the Supreme Court No.144/KMA/VIII/2007 on Freedom of Information in the Courts. Art.2 states that everyone has the right to obtain information from courts in accordance with the prevailing laws. This information must be provided in an open manner and be accessible to the public (Art.3(1)).

<sup>70</sup> For example, Art.52A, Law No.49/2009 on the Second Amendment to Law No.2/1986 on the General Courts requires the courts to provide public access to information regarding decisions and court costs.

However, we understand that with AusAID assistance, the Religious Courts Body has made significant progress towards developing ‘how to’ guides for justice seekers in religious courts. These provide information in plain language for persons who want to use the courts services and are available in print and audio format.

### **3.3.6. Attitudes of PwDs to Judicial Forums**

Many PwDs who participated in discussions stated that they are reluctant to use formal justice mechanisms such as police and courts. This appears to be the case for PwDs more generally as well.

Many PwDs avoid formal mechanisms all together, either because they are unaware of their rights, lack the confidence and education to use these systems, do not have assistance or access to legal representation, or are unwilling to subject themselves again to the systematic discrimination that exists within the bureaucracy. PwDs are often too embarrassed to admit when their rights are denied, and so they become even more invisible. Invisibility means complete disempowerment.

PwDs also experience the same problems with formal justice mechanisms encountered more generally. Such problems include the cost of court proceedings, the transparency of proceedings, and the timeliness of proceedings.

PwDs have, however, shown a willingness to use semi-formal dispute mechanisms, such as conciliation/mediation and the complaint mechanisms provided by Komnas HAM and the Ombudsman. These are discussed in Part 3.4. below.

## **3.4. Attainment of Satisfactory Remedies**

For rights to have meaning, effective remedies must be available to redress violations. However, such remedies are rarely available to PwDs through formal justice mechanisms such as the courts. This is either because legislation does not yet have the required implementing regulations, or does not set out who is responsible, how they can be held accountable or what remedies can be sought. In other cases, legislation is simply not enforced. The Ministry for Social Affairs does not monitor the implementation of Law No.4/1997 on Persons with Disabilities because it ‘does not have the capacity to do so.’<sup>71</sup> Administrative sanctions are also seldom applied, and self regulation has not yet proven successful.

PwDs have however had some success obtaining satisfactory remedies through alternative dispute resolution and semi-formal dispute mechanisms. One case from 1999 regarding the unilateral dismissal of PwDs by SPP Sanggar Karya Industri Penyandang Cacat was eventually settled through mediation. The case was originally brought before two courts in Jakarta, the administrative court and the district court. After 10 years, there was still no resolution in either of the cases. A request was submitted to the Supreme Court to accelerate

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<sup>71</sup> ‘Perlakuan Diskriminasi Masih Terjadi pada Penyandang Cacat’, *Hukumonline*, 24 December 2008

the decision because of the particularly negative effects the delay was having on the 80 persons involved, but no response was received. Eventually, a third claim was lodged for forced eviction in the Central Jakarta District Court. As required by Supreme Court regulation,<sup>72</sup> the judge proposed mediation, which the applicants accepted. The mediation resulted in the applicants receiving IDR 3 billion in compensation.

In regard to semi-formal dispute mechanisms, Komnas HAM and the Ombudsman offer a complaints mechanism that provides PwDs with the possibility of attaining satisfactory remedies. Under Law No.39/1999, Komnas HAM may receive complaints from persons who believe their human rights have been violated.<sup>73</sup> In the first 6 months of 2010, Komnas HAM received a number of complaints from PwDs. The nature of the complaints were varied and included:

- an unfair dismissal complaint in West Sumatra.<sup>74</sup>
- two forced eviction complaints in Jakarta<sup>75</sup>
- various complaints in regard to education services<sup>76</sup>
- a discrimination complaint in regard to the recruitment process for public servants in Central Java<sup>77</sup>
- a complaint in regard to the ‘3 Musketeers’ television comedy on Globaltv which was considered to be insulting to PwDs.<sup>78</sup>

The Ombudsman’s primary role is to supervise the administration and provision of public services at the central and regional government levels.<sup>79</sup> To this end, the Ombudsman may receive and investigate complaints in relation to the administration of public services. In 2008, the Ombudsman received a complaint from a student with a vision impairment regarding the provision of education services. In addition to addressing the complaint, the Ombudsman conducted a comprehensive study of the implementation of inclusive education policies in Jakarta. The results of the assessment were delivered to the Minister for Education and the Governor of Jakarta together with recommendations on improving inclusive education in Jakarta and on implementing existing policy. According to the Ombudsman, a number of these recommendations have since been actioned.

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<sup>72</sup> Art.4, Regulation of the Supreme Court No.01/2008 on Mediation Procedure in the Courts

<sup>73</sup> Art.90(1)

<sup>74</sup> Complaint received on 18 January 2010. Komnas HAM has sent a letter to the employer informing them of their responsibilities.

<sup>75</sup> Complaints received on 8 and 10 February 2010. In the first Komnas HAM was asked to act as mediator between the two parties and in the second Komnas HAM facilitated communication between the parties and advocated on behalf of the complainants.

<sup>76</sup> Meeting held on 11 March 2010. Komnas HAM met with a representative of the Minister for Education to discuss discrimination in the education field as well as the need to progress inclusive education.

<sup>77</sup> Complaint received on 19 April 2010. Komnas HAM also followed up a second complaint in regard to such discrimination on 17 May 2010.

<sup>78</sup> Complaint received on 3 June 2010. Komnas HAM was asked to admonish the manager of Globaltv and to stop the airing of the comedy.

<sup>79</sup> Arts.6 and 7, Law No.37/2008 on the Ombudsman

However, there are disadvantages and challenges in utilising both these mechanisms. The complaint mechanism of Komnas HAM is notoriously slow and extremely bureaucratic. One reason for its apparent success in handling complaints is that most complaints are directed personally to one of the Commissioners who is himself blind. He responds directly, rather than submitting the complaints through Komnas HAM's formal complaint mechanism procedure.

In regard to the Ombudsman, in the same manner as Komnas HAM, the decisions of the Ombudsman are not legally binding and therefore are ultimately unenforceable. An example of this weakness was seen in a case heard by the Yogyakarta and Central Java Regional Ombudsman. Here the complainant was accepted to the Construction Faculty (Teknik Bangunan) at IKIP, the teachers college in Yogyakarta. But after the registration process, when the university discovered he had a vision impairment, the complainant was told to enrol in special education teaching (pendidikan khusus). After a year, because he had no interest in the field, he dropped out. He asked the Ombudsman to write a letter to the Department of Education to ensure that other students did not face the same discrimination. The Department of Education has not responded.

### **3.5. National Action Plan on Persons with Disabilities**

The National Action Plan is based on the Biwako Framework, which has no provisions that directly relate to access to justice. The National Action Plan does not therefore refer to access to justice. There is a cursory reference to human rights (two paragraphs in a 107 page document). These references are inadequate and do not provide any support or protection for PwDs. One of the two paragraphs refers to Law No.12/2003 and states that it guarantees the rights of PwDs to participate in general elections, when in fact Art.14 of this law takes away the right to vote of persons with psychiatric or psychological disabilities.<sup>80</sup> A more detailed account on the implementation of the National Action Plan will be provided in the first report prepared by Professor Irwanto, Eva Kasim and Asmin Fransiska.

The 2004-2009 National Action Plan on Human Rights, which has now concluded, contained several brief references to PwDs. It referred to the need to eliminate discrimination in all forms, and more specifically to the right to an adequate standard of living, the right to self development for children with disabilities, and the implementation of the National Action Plan on Persons with Disabilities (2004-2013). Responsibility for the implementation of programs related to these issues was allocated to the Ministry for Social Affairs. However, the three specific issues contained in the National Action Plan on Human Rights remain problematic, and in some cases retrogressive measures have been taken. For example, in 2007 the Jakarta regional government passed a regulation prohibiting persons who have an illness that causes unrest in the community (such as leprosy or psychosis (mental illness)) from being in public places such as streets and parks.<sup>81</sup> If such persons are found in public places then the Social Police may arrest them. This is not done for the benefit of the person

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<sup>80</sup> Art.14(2)

<sup>81</sup> Art.41, Jakarta Province Regional Regulation No.8/2007 on Public Order

concerned, but rather because the person is considered to be a social nuisance or to disturb public order. Following arrest, the person may either be returned home, committed to a rehabilitation centre (panti sosial), or if the centre is full, taken elsewhere and dumped.<sup>82</sup> The Ministry for Social Affairs has since acknowledged that it is not capable of taking full responsibility for managing issues related to PwDs.

The 2010-2015 National Action Plan on Human Rights has not yet been released. However, the Directorate-General for Human Rights has stated that ratification of the Convention on the Rights of Persons with Disabilities is one of the Conventions listed for ratification before 2015.

### **3.6. Ratification of Convention on the Rights of Persons with Disabilities**

The Indonesian government has stated that it intends to ratify the Convention on the Rights of Persons with Disabilities in the next 5 years.<sup>83</sup> The agency leading the ratification process is the Ministry for Social Affairs. The government has not signed the Optional Protocol.

A working group has been formed to move towards ratification of the Convention and the academic paper that must be submitted to parliament prior to ratification is at an advanced stage. However, the working group acknowledges that there are many challenges to ratification. These include:

- concern over the financial costs of ratification,
- concern over the technicalities of ratification (for example construction requirements to ensure physical accessibility for PwDs),
- a lack of consensus over which government entity or third party will monitor the implementation of the Convention (a requirement under the Convention<sup>84</sup>), and
- bureaucratic barriers and challenges.

Also problematic is the lack of representation of all disabilities in the working group. Persons with a psychiatric or psychological disability are not represented, and the relevant government entity, the Directorate for the Development of Mental Health Services, has not been included in the working group. Persons who are affected, or who have been affected, by communicable diseases such as leprosy do not appear to be represented either.

Part of the ratification process is to consider harmonisation of legislation to ensure that existing legislation is not contrary to the Convention.<sup>85</sup> The August 2010 draft of the

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<sup>82</sup> Rusman Widodo *Orang dengan Masalah Kejiwaan (ODMK) & Pelanggaran Hak Asasi Manusia* in 'Mewujudkan Pemenuhan HAM ODMK', Jurnal HAM Komisi Nasional Hak Asasi Manusia, Vol.5 Tahun 2009, p.6

<sup>83</sup> An intention to ratify the Convention was also expressed in the National Action Plan for Persons with Disabilities.

<sup>84</sup> Art.33(1): States Parties must designate one or more focal points within government for matters relating to the implementation of the Convention. They must also give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

academic paper appears to make conflicting statements in this regard. According to the draft paper, ratifying the Convention does not mean that the government must change existing legislation (see p.15). Elsewhere, the paper acknowledges that laws relating to PwDs are very general, tend to be partial, and that some contradict the Convention.<sup>86</sup>

## **PART 4. OTHER FINDINGS IN RELATION TO THE TERMS OF REFERENCE**

### **4.1. Data and Statistics**

There is no accurate and comprehensive data regarding PwDs in Indonesia.<sup>87</sup> Agencies collect data using different methods and criteria which results in widely different outcomes. For example, according to Ministry of Health, 39% of the population are PwDs (around 100 million people), to the World Health Organisation, 10% are PwDs (around 25 million people),<sup>88</sup> to the Ministry for Social Affairs, 0.5% are PwDs (1,544,184 people),<sup>89</sup> and to the National Statistics Body around 1.38% (3 million people) are PwDs.<sup>90</sup>

In terms of a general breakdown of incidence by disability type, an Indonesia Country Report to the 2004 Workshop on Protection and Promotion of the Rights and Dignity of Persons with Disabilities estimated that there are 1,480,000 PwDs in Indonesia which can be broken down as follows: physical 162,800 (11 %), blind 192,400 (13%),<sup>91</sup> deaf 503,200 (34%),<sup>92</sup> intellectual and mental 348,800 (26 %), persons who have been affected by chronic disease (leprosy and tuberculosis) 236,800 (16%). These estimates are for persons with disabilities who live with family or community and do not include people who live in institutions.<sup>93</sup>

The lack of accurate and comprehensive data on PwDs is a major impediment in the disability field, as it hinders proper evidence-based advocacy, needs assessment, policy formulation, monitoring progression over time and evaluation. Available data tends to

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<sup>85</sup> Art.4(b), Convention on the Rights of Persons with Disabilities: States Parties must ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.’

<sup>86</sup> See *Naskah Akademik Rancangan Undang-Undang tentang Pengesahan Convention of the Rights of Persons with Disabilities (Konvensi Mengenai Hak-Hak Penyandang Cacat/Orang Dengan Disabilitas)*, draft dated August 2010, p.16

<sup>87</sup> This is also recognised in the National Action Plan of Persons with Disabilities 2004-2013. See for example p.22 of the Plan.

<sup>88</sup> Eva Kasim *Addressing the Needs of Indonesian Disabled People. From Welfare to Rights-Based*. Paper presented to ADS Alumni Conference 22-23 October 2008.

<sup>89</sup> Data Pusdatin (Pusat Data Kemiskinan) Depsos, 2008

<sup>90</sup> Badan Pusat Statistik dan Departemen Sosial *Buklet PMKS (Penyandang Masalah Kesejahteraan Sosial) Tahun 2006 (Berdasarkan Hasil Survei Sosial Ekonomi Nasional)*

<sup>91</sup> By contrast, PERTUNI (Indonesian Blind Association) estimates that there are 3.5 million persons with total and low vision impairments in Indonesia

<sup>92</sup> By contrast, GERKATIN (Indonesian Movement for the Welfare of Deaf Persons) estimates that there are 6 million persons with hearing impairments in Indonesia

<sup>93</sup> <http://www.worldenable.net/convention2004/slidesindonesia.htm>. Note that this breakdown does not add up to the total number of PwDs quoted (1,480,000).

grossly underestimate the number of PwDs in Indonesia.<sup>94</sup> A narrow understanding of disability contributes to this problem, as does the fact that many families do not recognise or admit that members have a disability. Many persons with psychiatric or psychological disabilities and persons who have been affected by leprosy will not admit they have a disability either.<sup>95</sup>

The Committee on the Rights of the Child has also commented on the lack of adequate data relating to children with disabilities, noting in particular that ‘the Committee remains concerned at the lack of an adequate data-collection mechanism within the State party to permit the systematic and comprehensive collection of disaggregated quantitative and qualitative data for all areas covered by the Convention.’<sup>96</sup>

Perhaps the most comprehensive (although not necessarily accurate) data on PwDs is that collected by the National Statistics Body (BPS). BPS conducts a national household survey once every three years on persons with social problems. One group in this category is PwDs and PwDs who have recovered from communicable diseases.<sup>97</sup> For the first time in 2006 BPS combined two reference points for its survey, namely the International Classification of Functioning, Disability and Health (ICF),<sup>98</sup> and the criteria utilised by the Ministry of Social Affairs based on Law No.4/1997 on Persons with Disabilities.<sup>99</sup>

The 2006 survey was conducted by surveying 278,352 households throughout each province, in both the city and rural areas.<sup>100</sup> Institutions such as boarding houses, rehabilitation centres, prisons and hospitals were not included in the survey, nor were homeless persons. The surveys were conducted by interview and therefore relied on the interviewee openly answering questions (for example, by knowing and/or acknowledging that someone in the house has a mental or physical disability).

According to the 2006 survey, there are 3 million PwDs in Indonesia (around 1.38% of the population). This appears to be spread relatively evenly between provinces, with the lowest number recorded in Riau province (0.52%) and the highest in Yogyakarta province (2.06%).

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<sup>94</sup> By contrast for example, Australia and New Zealand have indicated 20% of the population has a disability: *Review of the Progress Made and Challenges Faced in the Implementation of the Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for PwDs in Asia and the Pacific, 2003-2012*, 22 August 2007, Bangkok, E/ESCAP/APDDP(2)/1, Figure 1

<sup>95</sup> Note however, that Law No.23/2006 on Population Administration requires governments at all levels to collect and record certain information on persons who live in the region over which the government has jurisdiction. Information that must be collected relates, among others, to physical and/or mental disability (Art.58(2)(k)). The government entity responsible for this is the Department of Interior, a department with no other real link to disability issues.

<sup>96</sup> Committee on the Rights of the Child, Concluding Observations: Indonesia CRC/C/15/Add.223, 26 February 2004, p.5

<sup>97</sup> Badan Pusat Statistik dan Departemen Sosial *Buklet PMKS (Penyandang Masalah Kesejahteraan Sosial) Tahun 2006 (Berdasarkan Hasil Survei Sosial Ekonomi Nasional)*, p.3

<sup>98</sup> ICF is a classification of the health components of functioning and disability produced by the World Health Organization (WHO) in 2001. It is intended to provide a unifying framework for classifying the health components of functioning and disability.

<sup>99</sup> Badan Pusat Statistik dan Departemen Sosial *Buklet PMKS (Penyandang Masalah Kesejahteraan Sosial) Tahun 2006 (Berdasarkan Hasil Survei Sosial Ekonomi Nasional)*, pp.5, 24

<sup>100</sup> *ibid.*, p.10

There are more women with disabilities than men (52.7% compared with 47.3%). Around 70% or more PwDs come from middle (40.63%) to low income (38.07%) households. Of these two groups, the majority of middle income households suffer from visual, hearing, hearing and speech, and physical impairments, while the majority of persons with speech, mental and physical and mental impairments come from low income households.

The survey also analysed the cause of disabilities. The categories are since birth; accident (such as traffic accidents, natural disasters, war/conflict); leprosy; chronic illness or disease (such as diabetes, tuberculosis, asthma, heart condition, high blood pressure); other illness or disease; old age; malnutrition; stress. The highest number of disabilities is caused by malnutrition, followed by disability since birth and then leprosy.

The survey also revealed that only 26.78% of PwDs over the age of 10 years work more than one hour per week, and over half of these work in the agriculture sector. Only 1.29% of children with disabilities go to school.

The Department of Health also conducts regular surveys in relation to mental health. According to its survey in 2007, 11.6% of the population suffer from mild emotional mental disturbance, such as anxiety and depression, while those who suffer from severe mental disturbance such as psychosis, schizophrenia and severe depression number 0.46% of the population.<sup>101</sup> However, again these figures are based on household surveys and only record the two categories referred to above. The figures appear quite low, especially for areas that suffer from or that have suffered from high levels of conflict, natural disaster and poverty. For example, research in Aceh suggested that in 2003, when the province was declared to be in a state of military emergency, 70% of the population suffered some form of psychiatric or psychological disability.<sup>102</sup>

More detailed information in regard to data on PwDs will be provided in the first report prepared by Professor Irwanto, Eva Kasim and Asmin Fransiska. This report will also comment on the effectiveness of relevant government programs on PwDs, and therefore also on responsibility for disability within government and budgeting issues. However, it is important to note that the national budget for disability related issues is low, and appears to be getting lower. Komnas HAM stated that only Rp.700 billion (AUD 85.7 million) each year is allocated to disability issues, which is less than 1% of the National Budget and Expenditure (APBN). This money is predominantly earmarked for welfare related projects (peningkatan kesejahteraan).

At the local level, the picture is no better. For example, the Social Affairs Agency in Surabaya allocated Rp.110 million (AUD 13,450) for PwDs in 2006. The money was used for the re-skilling of 55 PwDs. Essentially, Rp.2 million (AUD 240) was allocated for each

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<sup>101</sup> *Perempuan dua Kali Lebih Banyak Terkena Gangguan Jiwa Ringan Dibandingkan Laki-Laki*: <http://www.depkes.go.id/index.php/berita/press-release/1101-perempuan-dua-kali-lebih-banyak-terkena-gangguan-jiwa-ringan-dibandingkan-laki-laki.html>

<sup>102</sup> Yosep Adi Prasetyo *ODMK dan Pemenuhan HAM* in 'Mewujudkan Pemenuhan HAM ODMK', Jurnal HAM Komisi Nasional Hak Asasi Manusia, Vol.5 Tahun 2009, p.42

person. The budget is also often received late. In 2005 and 2006, it was received in November-December.

The budget for mental health is particularly low. Until recently, the budget for health generally was 2% of the APBN. 1-2% of this 2% has typically been allocated to mental health. Now, Law No.36/2009 on Health states that the central government must allocate a minimum of 5% of the APBN to health, and at the provincial and regional level it must be a minimum of 10% of the budget.<sup>103</sup> However, priority in budget allocation must be given to the poor, elderly and neglected children, not to disabilities.<sup>104</sup>

The low budget and allocation of the budget primarily to rehabilitation and welfare reflects the stigma attached to PwDs and the charity based approach to disabilities.

#### **4.2. DPOs and NGOs Active in the Field of Disability Rights<sup>105</sup>**

On the whole, there is a lack of active, informed and strategic DPOs in Indonesia, particularly outside the major centres. Many DPOs are very traditional in their approach to lobbying and advocacy and continue to favour focus group discussions, seminars and demonstrations. Few have media or promotional units in their organisational structures.

A select few DPOs are particularly strong, focused and provide much needed information, resources and assistance to PwDs. That said, they are overworked, under-staffed and under-resourced. NGOs that are not specialised in the field of disability rights tend to show little interest in PwDs or do not think they have the capacity to assist.

The major DPOs active in Indonesia are PPCI (Persatuan Penyandang Cacat Indonesia),<sup>106</sup> PERTUNI (Persatuan Tunanetra Indonesia),<sup>107</sup> HWPCI (Himpunan Wanita Penyandang Cacat Indonesia)<sup>108</sup> and GERKATIN (Gerakan untuk Kesejahteraan Tunarungu Indonesia).<sup>109</sup> These organisations have branches at the regional level, but often there is no real relationship between the central office and regional office. There appears to be only one DPO (LAPPCI) working in the field of access to justice, providing free legal assistance to PwDs in need. LAPPCI is discussed further below.

PPCI is the umbrella organisation for DPOs. It was formed in 1987 by the Ministry of Social Affairs. Membership is by application and GERKATIN, HWPCI and LAPPCI sit under its auspices.

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<sup>103</sup> Art.171

<sup>104</sup> Art.172

<sup>105</sup> The general report will include an assessment of DPOs working in the field. This section is therefore limited to comments made by participants during the in-country missions and observations made during these missions.

<sup>106</sup> PPCI – Indonesian Disabled Persons’ Association

<sup>107</sup> PERTUNI – Indonesian Blind Association

<sup>108</sup> HWPCI - Indonesian Disabled Womens’ Association

<sup>109</sup> GERKATIN – Indonesian Movement for the Welfare of Deaf Persons

In addition to underfunding, a lack of adequate staffing and huge workloads, DPOs face further challenges, one of which is coordination between DPOs. A congress was held from 4-6 June 2010 in Surabaya (National Congress for the Indonesian Disability Movement) to address concerns that the disability movement has stalled and that communication among proponents has broken down, making the movement seem disjointed. There is also discrimination between DPOs. DPOs representing persons with a psychiatric or psychological disability are rarely, if ever, invited to focus group discussions and they are not represented on the working group that is preparing for ratification of the Convention.

DPOs also appear to experience difficulties accessing information and services provided by various government agencies, in particular the Ministry of Social Affairs. The main complaint was that such information was only available to certain persons and organisations, usually those with a close relationship with the department, or to former public servants who have established their own NGO or DPO. The Ombudsman for Yogyakarta and Central Java confirmed this problem, commenting that the biggest problem with public services is accessing the services in the first place. Handicap International, an international NGO working on disability issues, has also experienced similar problems stating that it is difficult to get clear, accurate information from the Ministry for Social Affairs.

During the in-country mission, we met with several DPOs. Outlined below are some observations in relation to these DPOs.

### **LAPPCI (Lembaga Advokasi dan Perlindungan Penyandang Cacat Indonesia) Organisation for the Advocacy and Protection of PwDs in Indonesia**

LAPPCI was established to address the lack of legal protection and human rights protection for PwDs. It provides legal aid and legal training for PwDs and their families, arranges academic activities such as seminars and research on issues relevant to PwDs, conducts awareness raising in relation to laws related to PwDs, and is developing an advocacy network for PwDs.

LAPPCI sits under the auspices of PPCI.

During the short time we visited the offices of LAPPCI (around 90 minutes), two PwDs sought assistance from Heppy Sebayang, a lawyer who is the Chair of the Organising Committee of LAPPCI. The first was a young woman who had been assaulted by her uncle. She had gone to the police, but because she was deaf and mute, the police had refused to take her statement. She had then gone to Komnas HAM which referred her to LAPPCI. The second was a young man from Bengkulu in Sumatra. He had come to seek assistance because he was the victim of fraud. He had lent money to a third party, but when the agreement had been put in writing, the opposite was written down (ie. that he had borrowed the money from the third party). Because he was blind, he had relied on the third party to prepare the contract. The third party was now seeking to enforce the contract.

## **HWPCI (Himpunan Wanita Penyandang Cacat Indonesia) Indonesian Disabled Women's Association**

HWPCI was established in 1997 and its members consist of women with a range of disabilities (blindness, deafness, muteness, physical disabilities and intellectual disabilities). It was established with government support following several international forums focusing on women with disabilities, including the International Leadership Forum for Women with Disabilities held in Washington in 1997. It sits under the auspices of PPCI,

HWPCI has conducted education trainings for women, journalistic trainings and productive skills trainings, provided material benefits for women with disabilities, including wheel chairs, prosthetic legs, hearing aids; has provided voter education programs and training; has translated a number of international documents into Indonesian, has published collections of legislation that relate to the rights of PwDs; and conducted accessibility surveys.

HWPCI has previously co-operated with foreign donors. For example, in 2005 it worked with the Asia Foundation to hold 3 regional workshops for its own staff from 30 provinces. It has also sent members to leadership trainings overseas, including India and Japan.

## **D'Care (Diffabel Care)**

D'Care is based in Surabaya and was established in 2006 by Wuri Handayani. Wuri successfully challenged the Surabaya local government's decision to reject her application to become a civil servant on the basis of her disability (she uses a wheel chair). During the court process, Wuri established D'Care or Diffabel Care which opposes discrimination and advocates for the rights of PwDs. She also completed her Masters at the University of Leeds, UK in 2007-2008.

D'Care is different from a number of DPOs in that it has no permanent staff. Its coordinating body consists entirely of volunteers who have other jobs. For example, Wuri works as a lecturer at Surabaya University. Its main activities are research, advocacy and education.

## **Perhimpunan Jiwa Sehat (Association for Good Mental Health)**

The Association for Good Mental Health was established in 2008 to assist people with mental health issues and their families. Its aim is to provide support to sufferers and their families, education for patients and their families and to advocate for persons with mental health issues. It is the first organisation of its kind.

The Association has successfully lobbied to include references to mental health in the 2009 Health Law. Its next main aim is to ensure that community health centres (puskesmas) provide mental health care to patients; that all persons with psychotic disorders are entitled to free medical treatment; and that a meeting is held with Committee IX in the Parliament to address the conditions in rehabilitation centres.

## **PerMaTa (Perhimpunan Mandiri Kusta) Association for the Independence of Persons Affected by Leprosy<sup>110</sup>**

PerMaTa was established in February 2007 to represent persons who have suffered leprosy in endeavours to realise their human rights. Its vision is to ensure former sufferers do not suffer from stigma and discrimination and have an adequate standard of living. Its current activities involve capacity building for persons who have suffered leprosy and their families, advocacy and campaign work to reduce discrimination and stigma, and to ensure leprosy is correctly understood. PerMaTa has also developed a scholarship program for families of persons who have suffered leprosy. The Nippon Foundation provides some support for PerMaTa (the Foundation is particularly active in relation to leprosy treatment and prevention).<sup>111</sup>

One of the challenges for PerMaTa is that many persons who have been affected by leprosy do not want to become members of PerMaTa because of the stigma attached to leprosy and the discrimination that then results. PerMaTa is aware of at least one person who was fired from their job because they joined PerMaTa. Many members of the public also do not want to come to PerMaTa's offices.

### **4.3. Vulnerable Groups**

In Indonesia, groups that are particularly vulnerable in the field of disability rights are those that suffer from certain disabilities. Persons with psychiatric or psychological disabilities are the most vulnerable to discrimination. They are also the least likely to attain satisfactory remedies when their rights are violated. They do not use the courts and are yet to lodge a complaint with Komnas HAM or the Ombudsman. Persons with psychiatric or psychological disabilities as a vulnerable group is discussed further in Annex 7.

Several groups also suffer from double discrimination. Persons who have been affected by leprosy suffer from the stigma of having previously been affected by leprosy and from the disability they have acquired as a result of leprosy. Women with disabilities also experience double discrimination and are more prone to domestic violence and sexual assault than women without disabilities. Women with disabilities also face greater difficulties in reporting the violence or assault and therefore in having it investigated. Time is of the essence when reporting domestic violence and sexual assault because of the importance placed on physical evidence, and women with disabilities face difficulties and delays in making statements and giving evidence. The victim of sexual assault must also often prove that she has been overpowered by her attacker. Women with physical impairments have difficulties in this regard as they are not considered capable of physical resistance.<sup>112</sup>

Although women with disabilities are particularly vulnerable, Komnas Perempuan's Strategic Plan 2010-2014 does not appear to refer to women with disabilities.

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<sup>110</sup> Note preferred terminology here: orang yang pernah mengalami kusta – persons who have been affected by leprosy (not mantan kusta or eks kusta), and penderita kusta – persons affected by leprosy.

<sup>111</sup> In 2001 the World Health Organisation asked Yohei Sasakawa, Nippon Foundation's chairman, to be its Goodwill Ambassador for Leprosy Elimination.

<sup>112</sup> Wuri Handayani *Catatan Kasus Hukum di Kalangan Penyandang Cacat di Surabaya*

Indonesia has ratified the Convention on the Elimination of All Forms of Discrimination against Women, but it is yet to provide information on women with disabilities in either of its implementation reports, submitted in 1997 and 2005. In its 2007 concluding observations, the Committee on the Elimination of All Forms of Discrimination against Women requested that information be provided in Indonesia's next report on the situation of women with disabilities.<sup>113</sup>

The terms of reference raised the question whether war veterans face a greater level of discrimination than other persons, but this does not appear to be the case. Interestingly, the military generally appears to provide excellent care, workplace adjustments and pensions for soldiers who are injured in the course of their duty, as well as for those who are injured otherwise (for example in a car accident). Government Regulation No.39/2010 outlines specific requirements,<sup>114</sup> but in practice the military tends to go above and beyond what is required by law.

Due to time constraints, no first hand field work was done in relation to children with disabilities or prisoners with disabilities. In relation to prisoners with disabilities, several persons we spoke to indicated that this group is particularly vulnerable. In addition to prisoners with a pre-existing disability, many prisoners suffer from extreme stress due to poor conditions in prison, but no counselling or psychiatric treatment is provided. Rather, the prisoners are often assaulted, abused and put in solitary confinement.<sup>115</sup> Facilities such as toilets are also not easily accessible by persons with physical impairments.

The government also appears to provide little support for carers of PwDs. There are few DPOs for families of PwDs and for parents of children with disabilities. One example is the Association of Parents and Families of Persons with Mental Disabilities, which was established by the Ministry for Social Affairs in late 2008. We did not have time to meet with these DPOs during the in-country missions. We understand from Handicap International that many carers have problems accessing clear, accurate information from the Ministry for Social Affairs regarding possible assistance and support.

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<sup>113</sup> Concluding comments of the Committee on the Elimination of Discrimination against Women: Indonesia, Thirty-ninth session 23 July-10 August 2007, CEDAW/C/IDN/CO/5, para.40

<sup>114</sup> See for example Arts.46, 66, 67 and 68

<sup>115</sup> Rusman Widodo *Orang dengan Masalah Kejiwaan (ODMK) & Pelanggaran Hak Asasi Manusia* in 'Mewujudkan Pemenuhan HAM ODMK', Jurnal HAM Komisi Nasional Hak Asasi Manusia, Vol.5 Tahun 2009, p.11

## ANNEX 1: TERMS OF REFERENCE

The background assessment report will include the following:

- Basic facts and figures around the percentage of people in Indonesia with a disability. If possible a general breakdown of incidence by disability type (avoiding a head counting exercise), and an assessment on the reliability/accuracy of statistics should also be included.
- An outline of the current legal and regulatory frameworks for addressing the rights of PwDs in Indonesia, particularly in the law and justice sector, assessed against the Convention on the Rights of Persons with Disabilities. This should include:
  - summaries of relevant laws, legislation, regulations, administrative policies, international commitments, national/regional plans and policies, and financial commitments
  - analysis of the effectiveness of this framework (and identification of any gaps or constraints) against the CPRD to support the rights of PwDs
  - information on agencies responsible for progressing rights of PwDs
  - legal information available to PwDs and legal services for PwDs, including legal aid
  - an assessment of existing disability-specific coordination mechanisms and mechanisms for monitoring implementation
- An outline of the range of organisations, institutions and community groups (including disabled peoples organisations) working to promote the rights of PwDs or promoting a disability-inclusive approach in Indonesia, together with an assessment of the capacity (and constraints) of the organisations to achieve their objectives.
- Indicative costed recommendations for Australian assistance to support the rights of people with disability in Indonesia through activities in the following areas:
  - supporting greater access to courts and/or alternative dispute resolution mechanisms;
  - supporting greater public access to legal information about the rights of PwDs and legal services to PwDs;
  - strengthening the provision of legal aid and PwDs; and
  - building the capacity of civil society organisations supporting PwDs in the law and justice sector.

The assessment will also consider the following questions:

- To what extent has Indonesia implemented its national action plan on disability as it related to the justice sector? (identifying any areas where progress is slow or not yet occurring). To what extent is the plan matched by an adequate budget for effective implementation?
- What is required for Indonesia to ratify the CRPD? Is there any indication of whether GoI will ratify CRPD? What are some of the primary impediments to Indonesia's ratification of the CRPD? What role is there for donors to assist in overcoming them?

Which agency is responsible for ratification? To what extent is Indonesia engaged in or committed to the Biwako Millennium Framework for Action?

- How prevalent, accessible and appropriate is the provision of information and analysis on disability rights issues to the public? Are data sources available to be able to measure progress in this issue overtime?
- How significant are the challenges faced by people with disability in Indonesia, particularly in being aware, accessing and asserting their rights? What types of discrimination do PwDs face in the formal legal system?
- Are there particular sub-groups of PwDs who face more discrimination than others? Ie. women, children, war veterans, carers of PwDs, people in rural areas, those living with particular types of disabilities?
- What role have Indonesian courts played in promoting or upholding (or otherwise) the rights of people with disability? Do people with disability face any particular obstacles in accessing justice? Are they adequately aware of their rights (both disability specific rights and general rights enjoyed by all) and are they able to assert them through formal systems and dispute resolution systems?
- Are any other donors (bilateral, multilateral or charitable) currently working in Indonesia to promote the rights of persons with disability? Who are they and what is the nature of this support? What can donors hope to achieve in providing support to this area?

## **ANNEX 2: RELEVANT PROVISIONS IN THE CONVENTION**

### **Article 1: Purpose**

‘Persons with disabilities’ (‘PwDs’) include people who have long-term physical, mental, intellectual or sensory impairments which may hold them back from doing things or sharing in society in the same way other people do.

‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’ From this perspective, persons with disabilities’ participation in society - be it having a job, going to school, visiting a doctor or running for elections - is limited or excluded not because of their having an impairment, but because of various barriers, which might include physical barriers but also legislation and policies in some cases.

The Convention does not preclude the use of definitions in national legislation and, in fact, definitions might be particularly necessary in some sectors, such as employment or social security. It is important, however, for such definitions to reflect the social model of disability enshrined in the Convention and for definitions based on a list or a description of impairments or on functional limitations to be revised.

### **Article 2: Definitions**

‘Discrimination on the basis of disability’ is when a person is excluded, prevented from doing something or treated differently because of that person’s disability, in a way that prevents that person from exercising or enjoying all human rights and freedoms in the same way other people do. This includes denying the person reasonable accommodation.

### **Article 3: General principles**

The general principles of this Convention are:

- Respect for inherent dignity, individual autonomy and independence;
- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of PwDs as part of humanity and human diversity;
- Equality of opportunity;
- Accessibility;
- Equality between men and women;
- Respect for the capacities of children with disability and their right to preserve their identities.

#### **Article 4: General obligations**

Countries are to make sure that PwDs enjoy all human rights and fundamental freedoms without discrimination of any kind because of disability.

To do this, countries agree to:

- apply the rights in the Convention;
- remove or change laws, policies or ways of doing things that discriminate against PwDs;
- take into account the rights of PwDs in policies and programs;
- make sure that government officials act consistently with the obligations in the Convention;
- remove discrimination because of disability caused by any person or organisation;
- carry out or promote research and development of goods, services and facilities that can be accessed by PwDs, and at the lowest cost;
- provide accessible information on new technologies which assist PwDs, mobility aids and devices;
- promote training in the rights of PwDs for people who work with PwDs;
- carry out the parts of the Convention that apply immediately according to international law and, taking into account available resources, gradually carry out the parts relating to economic, social and cultural rights;
- make sure PwDs, including children, have a say in the way the Convention is carried out, through organisations that represent them.

#### **Article 5: Equality and non-discrimination**

Countries agree that everyone is equal before the law. They are to make sure PwDs are not treated unfairly just because of their disability and are protected by the law in the same way other people are.

#### **Article 9: Accessibility**

PwDs have the right to live independently and take part in all aspects of life.

To let them do that, countries need to take appropriate steps to give PwDs access, in the same way other people have access, to things, places, transport, information and services that are open to the public. This applies in the cities as well as in rural areas.

To do that, countries should:

- find out what is making it hard for PwDs to access all aspects of the community those things and take steps to remove them;
- make sure PwDs have equal access to buildings, roads, transport and public facilities like schools, housing, hospitals, clinics and workplaces; and
- make sure PwDs have equal access to information, communications and other services, including electronic services like the Internet and emergency services.

Countries are also to take appropriate steps to:

- set standards and guidelines for access to facilities and services that are open to the public;
- make sure that private businesses that provide facilities or services to the public take into account access for PwDs;
- provide training for people involved with access for PwDs;
- use signs that are in Braille and easy to read and understand in buildings and other facilities open to the public;
- provide a person to assist in buildings and other facilities open to the public, like guides, readers and professional sign language interpreters;
- promote other types of help to PwDs to make sure they can access information;
- promote access for PwDs to new information and communications technologies and systems, like the Internet; and
- have those who make information and communications technologies take into account access for PwDs, so that these technologies and systems can be available at a low cost.

### **Article 12: Equal recognition before the law**

Countries agree that PwDs have the right to be treated as people before the law who can make their own legal decisions. They are people who can own and inherit property, control their money and financial affairs and get bank loans, mortgages and other credit just like everyone else. Their property should not be taken away from them for no reason or illegally.

Some PwDs need support to make such decisions. Countries are to take appropriate steps to make sure PwDs who need it get the support they need to make decisions about their legal and financial affairs.

Countries must also make sure that:

- people who support them respect the rights, choices and preferences of the person with disability;
- people who support them are free from conflict of interest;
- people who support them do not pressure the person with disability into making a certain decision;
- the person with disability is given only as much help as they need and for the time they need it;
- the support given is checked by a court or other authority that is not biased; and
- any safeguards reflect the level of interference with the person's rights.

### **Article 13: Access to justice**

Countries are to make sure that PwDs have the same access to the justice system as other people.

If needed, they are to change the way some things are done in order to let PwDs take part in all stages of legal proceedings. They must also promote training for people working in the justice system, such as judges, magistrates, police and prison staff.

## **Article 21: Freedom of expression and opinion, and access to information**

Countries are to take appropriate steps to make sure PwDs have the right to say what they think and share their ideas like other people do. This includes being free to ask for, get and share information and ideas through sign languages, Braille, large print or other types of communication.

Some steps that countries should take include:

- providing public information in other formats (such as Braille or electronically) in a timely way and at no extra cost;
- letting PwDs use Braille, sign language and other types of communication when they deal with government agencies;
- urging private companies that provide services to the public, including through the Internet, to provide information and services in formats that PwDs can access;
- encouraging the media and Internet providers to make their services accessible to PwDs; and
- accepting and promoting the use of sign languages.

## **Article 27: Work and employment**

Countries agree that PwDs have the same right to work as other people.

Countries are to take appropriate steps to make sure PwDs can exercise this right, including by:

- banning unlawful discrimination against PwDs in areas of employment, including getting a job, keeping a job, getting a promotion and having safe and healthy work conditions;
- making sure PwDs have fair work conditions, such as equal opportunities, equal pay for doing the same sort of work, protection from harassment and a way to have work complaints or problems dealt with;
- making sure PwDs are free to join a union like other people can;
- encourage job opportunities, work experience, training, career advancement and self-employment opportunities for PwDs;
- hiring PwDs in the government and encourage private businesses to hire PwDs; and
- protecting PwDs from being forced to work, in the same way other people are protected.

## **Article 31: Statistics and data collection**

Countries agree to collect appropriate information to:

- help put this Convention into practice;
- help measure how well this Convention is being put into practice; and
- find and fix problems faced by PwDs in exercising their rights.

The information must be collected and kept in a way that respects the confidentiality and privacy of PwDs and meets internationally accepted ethical standards.

The data must be accessible to PwDs and people without disability.

### ANNEX 3: DEFINITION OF 'PERSONS WITH DISABILITIES'

The Convention on Persons with Disabilities does not define 'persons with disabilities.' It does however make it clear that disability is conceptualised as the product of the interaction of persons with impairments with environmental barriers that hinder their full and effective participation in society on an equal basis with others.

Indonesian law does define 'persons with disabilities,' however the definition is problematic. The term is defined in Law No.4/1997 on Persons with Disabilities and reads:

A 'Person with Disabilities' is every person who has a physical and/or mental impairment which can disturb or present a challenge for that person in functioning the way he or she should, who is (a) physically disabled; (b) mentally disabled; (c) physically and mentally disabled,<sup>116</sup> where physically disabled means a disability which results in a disturbance to the way the body functions, among others, movement of the body, sight, hearing and the ability to speak; mentally disabled means a mental impairment and/or behavioural impairment, both inherent and as a result of disease/illness; physical and mental disability means a person who has both disabilities.<sup>117</sup>

The definition is problematic for a number of reasons. Firstly, a person claiming to be a person with disabilities must prove that they cannot function 'the way they should.' A person should not be required to prove this, and the connection between the two concepts limits the application of discrimination laws. By linking the two concepts, a person who has received treatment for an impairment and therefore can function 'the way they should,' but who still faces discrimination, would not be covered. Nor would a person who has an impairment but does not face 'disturbances' or 'challenges' because of their particular circumstances (such as wealth).

If 'persons with disabilities' is defined in legislation, the definition must adopt a human rights based approach and the impairment (physical or mental) of the person must trigger protection mechanisms such as anti-discrimination laws. Any definitions based on the notion of daily life activities, which link the incapacity to carry out such activities to the impairment, must be repealed.

Secondly, the definition also denies recognition that disability is just one element of human diversity and that there is no 'should' or 'normal.' The universalist approach, which influenced the Convention, is based on the concept of impairment as 'an infinitely various but universal feature of the human condition.' A universalist approach to equality focuses on

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<sup>116</sup> Art.1(1): Penyandang cacat adalah setiap orang yang mempunyai kelainan fisik dan/atau mental, yang dapat mengganggu atau merupakan rintangan dan hambatan baginya untuk melakukan secara selayaknya, yang terdiri dari: a. penyandang cacat fisik; b. penyandang cacat mental; c. penyandang cacat fisik dan mental.

<sup>117</sup> Art.5: Yang dimaksud dengan penyandang cacat adalah sebagaimana dimaksud dalam Pasal 1 angka 1 yang terdiri dari : a. cacat fisik adalah kecacatan yang mengakibatkan gangguan pada fungsi tubuh, antara lain gerak tubuh, penglihatan, pendengaran, dan kemampuan bicara; b. cacat mental adalah kelainan mental dan/atau tingkah laku, baik cacat bawaan maupun akibat dari penyakit; c. cacat fisik dan mental adalah keadaan seseorang yang menyandang dua jenis kecacatan sekaligus.

ensuring that legislation, social policies and environments reflect the full range of 'repertoires' that exist in society.<sup>118</sup>

Thirdly, in practice the definition of 'persons with disabilities' does not include persons with a psychiatric or psychological disability, and hence such persons are not considered to have a disability.

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<sup>118</sup> R. Kayess and P. French 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' in *Human Rights Law Review* 8:1 (2008), 1-34 at 10-11

## ANNEX 4: HEALTHY IN MIND AND BODY

Individuals who apply to become public servants, including police, public prosecutors and judges, must fulfil a number of criteria set out by law. One of these criteria is that the person must be ‘capable in mind and body of carrying out his or her duties’,<sup>119</sup> or ‘healthy in mind and body.’<sup>120</sup> The law does not explain what these phrases mean<sup>121</sup> but in practice both are interpreted in the same way to mean ‘not disabled.’<sup>122</sup> Applicants must prove they fulfil the criteria through a medical certificate. In some cases, doctors will not provide PwDs with a certificate<sup>123</sup> or if they do, employers, schools or other authorities still presume PwDs do not meet the criteria.<sup>124</sup>

The Indonesian Judicial Commission, which is now responsible for the appointment of judges at all levels together with the Supreme Court<sup>125</sup> and for appointment of Supreme Court judges,<sup>126</sup> has stated that it interprets ‘capable in mind and body of carrying out their duties’ as not blind or intellectually disabled. This interpretation was decided upon with government doctors, without involving PwDs or considering reasonable workplace adjustments.

Once appointed, public servants may also be dismissed if they suffer a disability. Article 27 of Government Regulation No.9/2003 on the Authority to Appoint, Transfer and Dismiss Public Servants permits the dismissal of public servants who suffer from a disability while working.<sup>127</sup> This also applies in certain elements of the private sector. For example, a notary will be honourably dismissed from their position if they are considered no longer capable over a 3 year period.<sup>128</sup> Capability is determined by letter from a medical expert.<sup>129</sup> The notary has no right to dispute the medical expert or make any other defence. If the notary is

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<sup>119</sup> ‘mampu secara rohani dan jasmani untuk menjalankan tugas dan kewajiban’: See for example, Art.14, Law No.49/2009 on the Second Amendment to Law No 2 of 1986 on General Courts; Art.13, Law No.50/2009 on the Second Amendment to Law No 7 of 1989 on Religious Courts; and Art.14, Law No.51/2009 on the Second Amendment to Law No 5 of 1986 on Administrative Law Courts.

<sup>120</sup> ‘sehat rohani dan jasmani’: See for example Art.21 of Law No.2/2002 on the Indonesian National Police.

<sup>121</sup> An example of an exception to this is Law No.14/2005 on Teachers and Lecturers which states that while teachers and lecturers must be ‘healthy in mind and body,’ ‘healthy in mind and body’ means having a level of mental and physical health that allows a teacher or lecturer to carry out his or her tasks well. The level of mental and physical health is not directed at PwDs (see Arts.8 and 45 and the elucidation)

<sup>122</sup> This interpretation appears to be based on a 1977 Regulation issued by the Minister for Health (Peraturan No.143/Menkes/Per/VII/1977 dated 1 July 1977) concerning health tests for public service candidates. One requirement in this Regulation is that ‘applicants must be healthy (not disabled).’

<sup>123</sup> S. Daming ‘Potret Diskriminasi dan Marjinalisasi Layanan Kesehatan Bagi Masyarakat Khususnya Penyandang Disabilitas’ paper provided at Focus Group Discussion organised by Komnas HAM on *Penguatan HAM Dalam Sistem Layanan Kesehatan Bagi Penghormatan, Perlindungan, Pemenuhan Hak Bagi Penyandang Disabilitas di Indonesia*, 29 June 2010, p.24

<sup>124</sup> Wuri Handayani, unpublished Masters’ thesis, Leeds University, 2007, p.57

<sup>125</sup> Art.14A(2), Law No.49/2009 on the Second Amendment to Law No 2 of 1986 on General Courts; Art.13A(2), Law No.50/2009 on the Second Amendment to Law No 7 of 1989 on Religious Courts; and Art.14A(2), Law No.51/2009 on the Second Amendment to Law No 5 of 1986 on Administrative Law Courts

<sup>126</sup> Art.13 of Law No.22/2004 on the Judicial Commission

<sup>127</sup> Peraturan Pemerintah No.9/2003 tentang Wewenang Pengangkatan, Pemindahan dan Pemberhentian Pegawai Negeri Sipil jo. Keputusan Bersama Menteri Pendayagunaan Aparatur Negara dan Menteri Dalam Negeri No.01/SKB/M.PAN/4/2003 No.17/2003

<sup>128</sup> Art.8(1)(d), UU No.30/2004

<sup>129</sup> Elucidation, Art.8(1)(d)

placed under interdiction for a 3 year period, they will be dishonourably dismissed.<sup>130</sup> Again the notary has no apparent right to dispute this.

The interpretation of ‘healthy in mind and body’ as not disabled is very problematic. It reflects the general attitude towards disability as a sickness, and it prevents PwDs taking an active part in society and from earning a living. Many PwDs are rejected at the application or interview stage when their disability is discovered, irrespective of whether it prevents the person from carrying out the core requirements of the job.

The interpretation of ‘healthy in mind and body’ was challenged in 2005 by Wuri Handayani in the Surabaya Administrative Court. She challenged the Surabaya local government’s decision to reject her application to become a public servant on the basis of her disability (she uses a wheel chair). In December 2009, the Supreme Court rejected the interpretation given by the Surabaya local government, and upheld Wuri’s right to be considered on her merits.<sup>131</sup>

In challenging the Surabaya local government, Wuri and her supporters were very tactical in their approach. Leading up to the case, they held a number of public discussions on the topic, inviting journalists to ensure wide coverage. Komnas HAM was also invited to provide an opinion on the issue and to attend each court hearing. The intention of bringing the action was to create jurisprudence that addressed systematic discrimination against PwDs as a whole and not just individual discrimination.

However, in spite of the successful outcome, there are downsides to the case. Firstly, legal aid organisations and women’s organisations would not assist Wuri, either because they felt unable to do so or that the matter was outside their level of expertise. Secondly, the process was very expensive. Just to register the case cost Rp.600,000 (AUD 73), and each item of evidence needed a seal (materai) at a cost of Rp.6,000 (75 cents) per page. Thirdly, it took two years from the time the decision was reached by the Supreme Court in 2007 to the time the decision was released in 2009. By the time the Supreme Court released its decision, Wuri was no longer under the age limit to apply for a position in the public service. Fourthly, Wuri had to pay to receive a copy of the judgement (it should have been free). The judgement is not publicly available and according to a Supreme Court judge it is the responsibility of DPOs to publicise the decision. Fifthly, there is no indication that the decision will become a precedent; that employers are now obliged to re-interpret the requirement of ‘healthy in mind and body;’ or that Parliament will include an authoritative interpretation of this phrase in the elucidation of legislation. The recent law on health, Law No.36/2009, is silent on the association between disability and health.

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<sup>130</sup> Art.12(b)

<sup>131</sup> Decision No.595 K/TUN/2005

## ANNEX 5: THE INTERDICTION LAW

Indonesian law allows the interdiction (pengampuan) or declaration of incapacity of persons on the basis of their mental or intellectual impairment, and the attribution of legal capacity to act on their behalf to another person. The relevant provisions are contained in the Dutch era Burgerlijk Wetboek (Kitab Undang-Undang Hukum Perdata-Belanda) or BW. While most of the BW has been replaced by Indonesian legislation passed since 1945, certain provisions such as the interdiction provisions are yet to be replaced. They provide strong guidance rather than binding law on the topic. Art.433 states that any adult who has a mental or intellectual impairment (dalam keadaan dungu, gila) may be placed under interdiction, even though he or she might be 'capable' from time to time. Only a blood relative may seek interdiction, or if the person has no family and is not married, then a public prosecutor may do so (Arts.434 and 435).

Any attempt to place a person under interdiction must be submitted through the general courts, usually by a notary, on behalf of the person seeking interdiction.<sup>132</sup> The application must be accompanied by evidence and witness statements (Art.437),<sup>133</sup> and the court must hear from both the family and the person against whom interdiction is sought (Art.438-439). Courts may grant interdiction generally (secara luas) or specifically (secara khusus), for example in relation to the sale of specific assets. According to the Indonesian Notaries Association, courts tend to grant interdiction for specific purposes.

Granting interdiction gives total control to the interdictor over the matters indicated in the court decision. Any action taken by the person under interdiction is legally void (Art.446) and the person is treated in the same way as a child (mempunyai kedudukan yang sama dengan seorang belum dewasa) (Art.452).

If a person placed under interdiction has children who are not yet adult, then the person who seeks interdiction will also become guardian of the children while ever the original person is under interdiction (Art.453).<sup>134</sup>

If the person is badly behaved (it is unclear what this means) and a court decision as to the interdiction has not yet been reached, then the person may be placed in detention until a decision is made by the court (Art.456-7).

The interdiction may not continue for more than eight years, except where the interdictor is the person's spouse or blood relative (Art.459). Otherwise, the interdiction may cease if the

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<sup>132</sup> Here, the cost for a notary's services is around IDR 5 million (AUD 610). It is unclear how long the process takes before interdiction is granted.

<sup>133</sup> To grant interdiction, the court will generally require a family card (kartu keluarga), a marriage certificate, a birth certificate and an opinion from a psychiatrist.

<sup>134</sup> Where a parent is not capable of making their own legal decisions (tidak cakap melakukan perbuatan hukum) another person will be appointed guardian of their children (wali) which gives the person the authority to perform legal acts on behalf of the child. Where possible, a guardian will be selected from family members of the child or will be an adult who is of sound mind (berpikiran sehat), is just, reliable and of good behaviour: Arts.51(2), Law No.1/1974 on Family; Art.33(1), Law No.23/2002 on the Protection of Children; Art 49(2) Elucidation, Law No.7/1989 on Religious Courts.

cause of the interdiction disappears. The person under interdiction must seek a binding court order to enforce the cessation of the interdiction (Art.460).

While the law states that a court order must be sought before a person can be placed under interdiction, the NGO Association for Good Mental Health states that in practice persons with psychiatric or psychological disabilities are automatically considered incapable of making their own legal decisions. They are therefore automatically under interdiction without any court process. The same applies for persons with an intellectual disability.<sup>135</sup> To regain their capacity, a person must get a letter from a psychiatrist stating that they are ‘cured.’

Both the law and what happens in practice deprives PwDs of their legal capacity to act on the basis of their disability. They do not have legal capacity on an equal basis with others, and they lose their legal capacity to act just because of their disability. The law does not make any attempt to support individuals who need assistance to exercise their legal capacity, and there is no safeguard against abuse of the interdiction (or the support).

The law and the concept of interdiction also create confusion over when a person will be considered ‘capable’ of acting on their own behalf and of making their own decisions. Komnas HAM has received informal complaints from PwDs about notaries requiring persons with visual impairments or an intellectual disability to act through a guardian (wali) in order for their acts to be notarised. In practice this means that PwDs cannot make a will or buy and sell land, for example, without a guardian acting on their behalf.

Komnas HAM was under the impression that the Indonesian Notaries Association may have an internal policy or regulation mandating this requirement. The Association confirmed that they did not. The two legal instruments which regulate their work are Law No.30/2004 on Notaries and the Code of Ethics for Notaries. None have such a provision. However, Law No.30/2004 does contain the requirement that a prospective client must be ‘capable of making their own legal decisions’ (cakap melakukan perbuatan hukum).<sup>136</sup> It is unclear what this means or how it is applied in practice. The BW states that a person is not capable of making an agreement if the person is under interdiction.<sup>137</sup> The Notaries Association stated that the way they would normally determine if a person was capable of making their own legal decisions was by asking basic questions, and then if there was any doubt, asking the person to bring a letter from a doctor confirming their state of mind.

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<sup>135</sup> LAPPCI (Lembaga Advokasi dan Perlindungan Penyandang Cacat Indonesia - Organisation for the Advocacy and Protection of PwDs in Indonesia)

<sup>136</sup> Art.39(1)(b)

<sup>137</sup> Art.1330(3)

## ANNEX 6: PERSONS WITH PSYCHIATRIC OR PSYCHOLOGICAL DISABILITIES

The situation of persons with psychiatric or psychological disabilities is of particular concern in Indonesia. Such persons are not considered to have a disability, and mental health is not generally thought of as a medical issue. Rather, it is considered a supernatural one which can be cured by healers, traditional medicine and prayer. There are only 33 psychiatric hospitals in Indonesia (eight provinces do not have one at all) and only 600 trained psychiatrists, 200 of which are in the major cities.<sup>138</sup> Many general hospitals refuse to treat persons with mental health issues<sup>139</sup> as do community health centres.

Where persons with psychiatric or psychological disabilities are treated, they are often treated without their consent. Custodial treatments dominate in psychiatric hospitals and involuntary treatment in hospitals and rehabilitation centres is common, even though the legal basis for involuntary admission is limited to persons with extreme mental health issues.<sup>140</sup> In practice, a person can be brought to hospital without his or her consent by anyone who feels uneasy about the person's behaviour. There is no requirement for legal review of the need for involuntary hospitalisation and treatment,<sup>141</sup> although Law No.36/2009 on Health states that every person has the right to independently and responsibly determine themselves what health care they need.<sup>142</sup>

Once a person has been 'cured', often the family refuses to take the person back or has moved house. In Jakarta it has been recorded that 30-50% of families refuse to take their family member back once they are discharged from psychiatric hospitals.<sup>143</sup> Patients with a psychiatric or psychological disability are also often subjected to verbal and physical violence in an effort to subdue them or to ensure they take their medicine. A study in two hospitals in Jakarta indicated that 61.7% of patients with schizophrenia had been subjected to violence by their families, members of the community, police, social workers, nurses and doctors.<sup>144</sup>

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<sup>138</sup> In universities, only nine of Indonesia's 71 medical faculties have specialised training in psychiatry. Only six of these faculties are active, and only 10-20 students graduate each year. *Perempuan dua Kali Lebih Banyak Terkena Gangguan Jiwa Ringan Dibandingkan Laki-Laki*: <http://www.depkes.go.id/index.php/berita/press-release/1101-perempuan-dua-kali-lebih-banyak-terkena-gangguan-jiwa-ringan-dibandingkan-laki-laki.html>

<sup>139</sup> Irmansyah *Masalah Bioetika dan HAM pada Layanan Kesehatan Jiwa* in 'Mewujudkan Pemenuhan HAM ODMK', Jurnal HAM Komisi Nasional Hak Asasi Manusia, Vol.5 Tahun 2009, p.63

<sup>140</sup> Persons with extreme mental health issues may not refuse treatment (see Art.56 of Law No.36/2009). What constitutes extreme mental health issues is not defined, and it is not clear what treatment may be administered against their will.

<sup>141</sup> Irmansyah, YA Prasetyo and H Minas 'Human Rights of Persons with Mental Illness in Indonesia: More than Legislation is Needed' *International Journal of Mental Health Systems* 2009, 3:14, p.2

<sup>142</sup> Art.5(3)

<sup>143</sup> Rusman Widodo *Orang dengan Masalah Kejiwaan (ODMK) & Pelanggaran Hak Asasi Manusia* in 'Mewujudkan Pemenuhan HAM ODMK', Jurnal HAM Komisi Nasional Hak Asasi Manusia, Vol.5 Tahun 2009, p.7-8

<sup>144</sup> S Dharmono *Naskah Akademis Undang-Undang Kesehatan Jiwa 2006*, Psychiatry Department, University of Indonesia, Jakarta, quoted in Irmansyah *Masalah Bioetika dan HAM pada Layanan Kesehatan Jiwa* in 'Mewujudkan Pemenuhan HAM ODMK', Jurnal HAM Komisi Nasional Hak Asasi Manusia, Vol.5 Tahun 2009, p.61

Where a person is refused treatment, or the family does not recognise or acknowledge the existence of a mental health issue, the person is often taken to healers (dukun) or treated with herbal medicines and prayer. Unsurprisingly, the treatment is mostly unsuccessful and many persons are then shackled by chain or stocks, or confined in cages because they are considered a danger to themselves and the community. Some sufferers have been confined for decades, and can no longer stand, suffer from malnutrition and skin diseases. Women shackled in this way also suffer sexual abuse. In one case in Jombang, East Java, a 33 year old woman had been shackled by her father since she was 18, and had given birth four times. In each case, her child was taken from her.<sup>145</sup>

The conditions in many rehabilitation centres (panti sosial) are equally disturbing. In 2008 in four rehabilitation centres in Jakarta (Cengkareng, Cipayung, Ceger and Kalideres), 381 patients died from malnutrition, diarrhoea and chronic anaemia.<sup>146</sup> The conditions in such centres have also been reported in the Australian press. See for example ‘Shackled to Ignorance’ which appeared in *The Age* and *Sydney Morning Herald*:  
<http://www.theage.com.au/world/shackled-to-ignorance-20100618-ymx3.html>

There is no way for persons in rehabilitation centres to lodge a complaint for mistreatment. Patients in mental health institutions are also afraid to lodge complaints for mistreatment on the basis that they will lose any benefits they may receive such as their free health care card.

There is no legal protection for persons with psychiatric or psychological disabilities in Indonesia other than that set out in Law No.36/2009 on Health (Arts.144 – 151). These provisions have several positive provisions,<sup>147</sup> but are inadequate and allow for the denial of equal rights for persons with psychiatric or psychological disabilities.<sup>148</sup> The provisions do not cover essential issues such as:

- provision of the least restrictive type of mental health care,
- self determination (free, informed and documented consent before any type of interference with a person including diagnostic procedures, medical treatment such as use of drugs, electroconvulsive therapy and irreversible surgery),
- right to be assisted in the exercise of self-determination, and
- availability of review procedure for any decision made by an official (judge) or surrogate decision-makers and by health care providers.<sup>149</sup>

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<sup>145</sup> Rusman Widodo *Orang dengan Masalah Kejiwaan (ODMK) & Pelanggaran Hak Asasi Manusia* in ‘Mewujudkan Pemenuhan HAM ODMK’, *Jurnal HAM Komisi Nasional Hak Asasi Manusia*, Vol.5 Tahun 2009, p.9

<sup>146</sup> *ibid*, p.6

<sup>147</sup> For example Art.144(1) requires that efforts on mental health are directed towards guaranteeing that every person can enjoy good mental health, free from fear, pressure and other disturbances that can disturb mental health; Art.146(1) states that the community has the right to obtain correct and educative information about mental health.

<sup>148</sup> For example, Art.148 states that persons with psychiatric or psychological disabilities have the same rights as other citizens **unless the law determines otherwise**.

<sup>149</sup> *Mental Health Care Law: Ten Basic Principles*, World Health Organisation, Geneva 1996, WHO/MNH/MND/96.9

Indonesian law does not provide a clear definition of mental disorders or guidance on determining whether a person has a mental disorder. General terminology such as ‘gangguan jiwa’, ‘gila’ ‘terganggu jiwa’ and ‘seseorang yang dianggap mengalami gangguan kesehatan jiwa’ is used in law and policy, but no explanation is provided as to what these mean. In English they translate roughly to mean ‘a disturbance of the soul’ or ‘mad.’ There is nothing to distinguish types of mental disorders or degrees of the disorder. For example, a previous law on general elections (Law No.12/2003) took away the right to vote of persons with a mental disorder (sedang terganggu jiwa/ingatannya) without any explanation of what this meant.<sup>150</sup> This provision has since been repealed but in practice it still applies. In the 2009 elections no ballot boxes were provided in psychiatric hospitals or in general hospitals.<sup>151</sup> Any assessments in regard to mental health should be made in accordance with internationally accepted medical principles and instruments (such as WHO’s ICD-10 Classification of Mental and Behavioural Disorders – Clinical Descriptions and Diagnostic Guidelines, Tenth Revision, 1992)

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<sup>150</sup> Art.14(2)(a)

<sup>151</sup> Rusman Widodo *Orang dengan Masalah Kejiwaan (ODMK) & Pelanggaran Hak Asasi Manusia* in ‘Mewujudkan Pemenuhan HAM ODMK’, Jurnal HAM Komisi Nasional Hak Asasi Manusia, Vol.5 Tahun 2009, p.11

## ANNEX 7: BADILAG WEBSITE REPORT

### Penyandang Disabilitas Perlu Perhatian Khusus



**Dirjen Badilag (kanan) ketika berdiskusi dengan Nicola Colbran dan Syaiful Doena dari IAJPT-AusAID tentang perhatian terhadap penyandang disabilitas.**

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Para penyandang disabilitas (cacat fisik dan mental) perlu mendapat perhatian khusus ketika mereka berurusan dengan pengadilan. Perlakuan dan fasilitas khusus juga perlu diatur sedemikian rupa sehingga kelompok orang yang kerap terlupakan ini mendapatkan akses keadilan yang sama dengan kelompok masyarakat lainnya.

Wacana ini mengemuka dalam pertemuan antara Konsultan IAJPT-AusAID, Nicola Colbran dan Syaiful Doena, dengan Dirjen Badilag Wahyu Widianana, Kamis sore (29/7/2010) di ruang kerja Dirjen.

Nicola mengunjungi Badilag untuk melakukan mapping dan info gathering terkait penanganan penyandang disabilitas di Indonesia. Badilag adalah salah satu dari berbagai lembaga negara yang dikunjungi wanita yang lama menetap di Norwegia ini.

“Betul, hampir saja ini terlupakan. Kita sudah membuat pedoman bantuan hukum untuk masyarakat miskin. Pedoman ini sedang menunggu untuk dibuatkan SEMA oleh Ketua MA. Disana disebut bahwa Posbakum diperuntukkan bagi orang yang tidak mampu, terutama

perempuan dan anak,” ucap Dirjen yang merespon secara spontan.

“Nah, saya kira penyandang disabilitas pun perlu disebut secara eksplisit dalam pedoman ini,” katanya lagi.

Meski dalam prakteknya para penyandang disabilitas sudah diperlakukan secara khusus, tambah Dirjen, namun penyebutan secara eksplisit diperlukan guna menekankan komitmen yang lebih tegas.

Hal lain yang perlu mendapat perhatian adalah fasilitas di pengadilan. Nicola Colbran menuturkan bahwa menurut data yang dimilikinya, masih sangat sedikit gedung-gedung pelayanan publik di Indonesia yang menyediakan fasilitas khusus untuk penyandang disabilitas.

“Penyediaan ramp (tangga khusus untuk kursi roda penyandang disabilitas) dan toilet khusus, masih sangat jarang kita lihat. Padahal untuk menyediakannya tidak membutuhkan biaya yang terlalu mahal” kata Nicola.

Terkait masalah ini Dirjen pun meresponnya secara positif. Dirjen Badilag sendiri terlibat aktif dalam menyusun revisi prototype gedung pengadilan seluruh Indonesia yang sedang dilakukan oleh Badan Urusan Administrasi (BUA) MA RI.

“Ini ide bagus. Jika misalnya penyediaan ramp di semua gedung pengadilan bisa diwujudkan, saya kira bagus sekali. Tangga-tangga di pengadilan sebaiknya memang menyediakan ramp ini. Kan juga nantinya bisa multi fungsi, tidak hanya untuk penyandang disabilitas,” imbuh Dirjen.

Dirjen menuturkan hal ini akan dikomunikasikan dengan BUA MA RI agar gedung-gedung baru pengadilan nantinya menyediakan fasilitas khusus untuk para penyandang disabilitas, seperti ramp dan toilet khusus.

Penyediaan fasilitas khusus untuk penyandang disabilitas sejatinya sudah diatur dalam Undang-Undang No. 28/2002 tentang Bangunan Gedung, terutama pada pasal 27.

#### Hakim Tanpa Toga

Akan halnya tentang penanganan hakim di persidangan terhadap para penyandang disabilitas, Nicola mengemukakan bahwa para penyandang disabilitas merasa minder dan takut ketika harus berhadapan dengan hakim yang memakai toga.

Menurutnya, hakim dengan berbagai aksesorisnya terlihat seperti sosok yang ‘menakutkan’ bagi kelompok masyarakat yang kurang beruntung ini. Apalagi jika bahasa yang digunakan hakim juga bahasa hukum yang terkesan kaku. Alih-alih mau mengemukakan apa yang diinginkan, untuk masuk ruang sidang saja mereka mungkin tidak berani.

Dirjen Badilag menyebut pengaturan tentang pemakaian toga serta penanganan para

penyandang disabilitas di persidangan adalah hal teknis yang menjadi wewenang judicial Mahkamah Agung.

“Yang saya tahu, hakim di pengadilan anak di Indonesia juga tidak memakai toga. Kalau untuk penyandang cacat saya belum melihat. Ini bidang teknis judicial-nya MA,” kata Dirjen.

Dari pengamatan badilag.net yang mengunjungi Melbourne Magistrates’ Court di Australia beberapa waktu lalu, hakim yang menangani para penyandang disabilitas memang tidak memakai toga ataupun wig. Mereka memakai baju casual dan tidak duduk di tempat biasa bersidang, melainkan duduk berdekatan di satu meja dengan para pihak dan kuasa hukumnya.

(c)

[http://www.badilag.net/index.php?option=com\\_content&task=view&id=5691&Itemid=28](http://www.badilag.net/index.php?option=com_content&task=view&id=5691&Itemid=28)