



Office of the Provedor for Human Rights of Timor-Leste

**REPORT TO THE REGIONAL NATIONAL HUMAN RIGHTS
INSTITUTIONS PROJECT ON INCLUSION, THE RIGHT TO
HEALTH AND SEXUAL ORIENTATION AND GENDER IDENTITY**





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Published by:

International Development Law Organization
Viale Vaticano, 106
00165 Rome, Italy
Tel: +39 06 4040 3200
Fax: +39 06 4040 3232
idlo@idlo.int; www.idlo.int

United Nations Development Programme
UNDP Asia-Pacific Regional Centre
United Nations Service Building, 3rd Floor
Rajdamnern Nok Avenue, Bangkok 10200, Thailand
Tel: +66 (2) 304-9100
Fax: +66 (2) 280-2700
aprc@undp.org, <http://asia-pacific.undp.org>

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This Report was prepared for the Regional National Human Rights Institutions Project on Inclusion, the Right to Health, and Sexual Orientation and Gender Identity (SOGI), implemented by the International Development Law Organization (IDLO) and the United Nations Development Program (UNDP) in partnership with the Asia Pacific Forum. The Project was designed to build an understanding of the response of National Human Rights Institutions (NHRIs) in South Asia and Southeast Asia to SOGI-related human rights issues.

The Project advocates for greater employment of the Yogyakarta Principles; builds upon the outcomes of the South Asia Roundtable Dialogue: Legal and Policy Barriers to the HIV Response (Kathmandu, 2011); and supports the commitments of the Economic and Social Commission for Asia and the Pacific (ESCAP) under Resolutions 66/10 and 67/9.

The Project is a direct response to the recommendations of the Report of the Asia Pacific Forum (APF) Advisory Council of Jurists: Human Rights, Sexual Orientation and Gender Identity, 2010 (ACJ Report). Specifically, the ACJ Report recommends that NHRIs:

- undertake an internal dialogue on issues relating to the human rights of people of diverse SOGI and build the capacity of the institution to understand the issues and to react appropriately;
- build relationships with people of diverse SOGI, including civil society organizations, in order to inform the work of the NHRI; and
- research, identify and document human rights violations against people of diverse SOGI, and the impact of discriminatory laws and practices.

National report prepared by: Mr Geordie Fung, Research Intern, IDLO, and Ms Naomi Burke-Shyne, Consultant, IDLO.

Review and inputs by the Provedoria for Human Rights and Justice and the UNDP Timor-Leste Country Office, Ms Barbara Oliveira.

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1. INTRODUCTION

Since gaining independence in 2002, the people and State of the Democratic Republic of Timor-Leste have strived towards greater political and socio-economic development. This collective optimism is evidenced in the National Development Plan (2011-2030), which highlights the need for development of social capital in areas including education and training, health and social inclusion.

2. BACKGROUND

The Office of the Provedor for Human Rights and Justice (PDHJ or the Provedoria) is the national human rights institution and the Ombudsman Office of Timor-Leste, established by Law 7/2004: *Approving the Statute of the Office of the Ombudsman for Human Rights and Justice* (the PDHJ Act).¹ The PDHJ began operating in March 2006, nine months after the Provedor was sworn in by Parliament.

The PDHJ is composed of the Provedor, the Deputy Provedors, a Director General, Investigation, Monitoring and Education and Promotion Officers and other staff members as deemed necessary to provide the Provedoria with the necessary technical and administrative support. After being sworn in to office, the Provedor appointed a Deputy to focus on Human Rights, and a Deputy to focus on Good Governance and Anti-Corruption. The Provedor's mandate in the area of corruption was assumed by the Anti-Corruption Commission in July 2009.²

The Provedoria is located in Dili, the capital of Timor-Leste; the PDHJ has four regional offices located in the districts of Oecussi, Baucau, Maliana and Same.

There are no laws in Timor-Leste that expressly protect people from discrimination on the basis of sexual orientation and gender identity (SOGI). Article 16 of the Constitution, which prohibits discrimination, does not expressly prohibit discrimination on the grounds sexual orientation. The Constituent Assembly voted against the inclusion of sexual orientation in this article in a vote on 12 December 2001 (the vote was 52 to 88 members).³ There is, however, scope for constitutional interpretation in accordance with international human rights standards to provide protection against SOGI-related discrimination.

Discrimination on the basis of sexual orientation is recognised in the Penal Code (approved by Decree-Law No. 19/2009). Article 52 of the Penal Code considers crimes motivated by discriminatory sentiment on the grounds of gender or sexual orientation (among other grounds) to be aggravating circumstances which may incur greater penalties.⁴ Moreover, the Penal Code includes no provisions that criminalise same sex conduct between consenting adults, nor does it make a distinction between the age of consent for heterosexual and homosexual sexual conduct.

This report considers how the work of the PDHJ relates to human rights issues on SOGI and HIV.

1 The PDHJ Act was amended in 2009; Law 8/2009, of 15 July.

2 On 29 June 2009, the National Parliament approved the law *Creating the Anti-Corruption Commission* which repealed provisions of the law of the Provedor relating to corruption. This was part of the amendment of the PDHJ Act under Law 8/2009, of 15 July.

3 See LUSA: Sexual Orientation Clause Removed From Constitution, 14 Dec 2001 East Timor: Sexual Orientation Clause Removed From Constitution.

4 Article 52(2)(e) of the Penal Code of the Democratic Republic of Timor-Leste.

3. MANDATE AND POWERS

The PDHJ has two specific mandates: human rights and good governance. These mandates are executed with the vision to protect human rights, strengthen integrity and promote good governance in Timor-Leste. The PDHJ aims to achieve this mandate through:

- i. *Education*: by enhancing public awareness through the promotion of a culture that respects the principles of human rights, law and order and good governance.
- ii. *Promotion of cooperation*: by encouraging and assisting public entities and agencies to develop policies, procedures and internal trainings, and complaint mechanisms that promote human rights and good governance;
- iii. *Resolution*: by effectively resolving cases of human rights abuses and misadministration through effective processing of complaints and through a process that promotes mediation and conciliation;
- iv. *Investigation, Survey and Monitoring*: by providing recommendations relating to the protection of human rights and the promotion good governance based on the results of investigations, research and monitoring (directly or in partnership with civil society partners) and to ensure that legislation is based on the Constitution.

The PDHJ Strategic Plan (2011-2020) focuses on the vulnerable groups of women, children and people living in rural areas; and recognises the right to health and access to public services as priorities. The Strategic Plan further recognises the importance of vulnerable groups accessing the services provided by the Provedoria.⁵ The Strategic Plan further includes a strong awareness raising component; this encompasses both awareness raising about the PDHJ's mandate areas, as well awareness raising about the mandate of the PDHJ.

For the purpose of performing his or her mandate, the Provedor's powers include, but are not limited to:

- i. receiving complaints;
- ii. investigating and inquiring into matters under his or her competence;
- iii. visiting any place of detention, treatment or care; to inspect the conditions therein and conduct a confidential interview of the persons in detention;
- iv. referring a complaint to a competent jurisdiction or mechanism;
- v. acting as a mediator or conciliator between the complainant and the entity which is the subject of a complaint (with the consent of parties);
- vi. making recommendations for redress in complaints brought before him or her, notably by proposing remedies and reparations;
- vii. providing advice including opinions, proposals and recommendations for the purpose of improving respect for human rights and good governance by the entities within his or her jurisdiction; and
- viii. reporting to the National Parliament in relation to the findings of an investigation or in relation to his or her recommendations.⁶

The PDHJ has a mandate to deal with the actions and omission of public authorities. The PDHJ cannot look into issues which involve only private persons.

⁵ Strategic Plan of the PDHJ 2011 – 2020; informal English translation

⁶ Article 28: 'Scope' of Law No. 7/2004 (the PDHJ Act)

4. INDEPENDENCE AND AFFILIATIONS

The PDHJ is an independent statutory organ (section 27 of the Constitution of the Democratic Republic of Timor-Leste and article 5 of the PDHJ Act).

The PDHJ is a full member of the Asia Pacific Forum of National Human Rights Institutions (APF) and is part of the International Coordinating Committee of National Human Rights Institutions (ICC). The PDHJ was awarded a 'Status A' accreditation by the ICC in 2008, indicating full compliance with the Paris Principles. The PDHJ will undergo its first re-accreditation procedure under the ICC Sub-Committee on Accreditation in May 2013.⁷

The PDHJ is also a member of the ASEAN NHRI Forum (SEANF) and in 2013 holds the position of Chair. The PDHJ is soon to become a member of the International Ombudsman Association (IOA) and Asian Ombudsman Association.

5. THE PDHJ AND INTERNATIONAL HUMAN RIGHTS MECHANISMS

In 2002, Timor-Leste joined the United Nations and has since ratified seven of the nine core human rights treaties; including:

- i. The International Covenant on the Elimination of All Forms of Racial Discrimination (ratified 16 April 2003);
- ii. The International Covenant on Civil and Political Rights (ratified 18 September 2003), Second Optional Protocol (ratified 18 September 2003);
- iii. The International Covenant on Economic, Social and Cultural Rights (ratified 16 April 2003), Optional Protocol (signed 28 September 2009);
- iv. The Convention on the Elimination of all Forms of Discrimination Against Women (ratified 16 April 2003), Optional Protocol (ratified 16 April 2003); and
- v. The Convention Against Torture (ratified 16 April 2003), Optional Protocol (signed 16 September 2005).

The Yogyakarta Principles on the application of international human rights law in relation to SOGI draw on the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The PDHJ is responsible for making presentations before members of the treaty bodies and the UPR process and contributes regularly to regional and international human rights forums.⁸ During the 2011 UPR process, PDHJ worked with civil society organisations to develop a joint report, intervened directly in the UPR session and devised and implemented an advocacy campaign with diplomatic representations in Geneva (relying on its A accreditation status as a national human rights institution).

In 2012, the PDHJ spearheaded a new procedure at the Human Rights Council by making statements via video. This cost effective intervention measure may be an accessible mechanism for the PDHJ and LGBT community to utilise to advocate for SOGI-related rights.

⁷ PDHJ has submitted a request for a delay to the second UPR session in 2013.

⁸ In July 2009, PDHJ presented a report to the CEDAW Committee in New York on the issue of discrimination against women in Timor-Leste.

There have been no specific mentions of discrimination against members of the LGBT community in Timor-Leste documented or reported by the PDHJ in its annual report or specific public report, under the UPR and special procedures.⁹

6. THE PDHJ AND DOMESTIC MECHANISMS

The PDHJ is required by law to submit an annual report to the National Parliament of Timor-Leste.¹⁰ The annual report makes recommendations concerning reforms and other measures, whether legal, political or administrative, which could be taken to achieve the objectives of the Provedoria, prevent or redress human rights violations and promote fairness, integrity, transparency, responsibility and accountability in public administration.

It is required by law that the PDHJ annual report be published through any means accessible to the general public.¹¹ To date, annual reports have been made available through the publication of hard copies and online.¹²

The PDHJ may also submit to the National Parliament special reports on cases or matters of a serious nature, and publish public interest or specific reports on the exercise of its functions.¹³

Under Article 33 of the PDHJ Act, the PDHJ has an obligation to maintain strong ties with other institutions, including State entities and NGOs. During 2009, PDHJ worked closely with the UNMIT Human Rights and Transitional Justice (HRTJ), the Office of the Prosecutor General and district-based NGOs to establish monitoring networks for human rights violations inflicted by the actions of public authorities.¹⁴

The PDHJ's Human Rights Monitoring Network, a network of ten non-governmental organisations (NGOs) set up by the PDHJ to assist with monitoring activities, also has members in every district of Timor-Leste. To date, the NGO network working with the PDHJ have not raised SOGI-related issues with the PDHJ.

7. POLICY AND INITIATIVES RELATED TO SOGI AND HIV

Desk review research failed to identify any documentation to indicate the existence of HIV or SOGI policy, work streams or focal points by the PDHJ. This was verified by the PDHJ on review of this report.

Notwithstanding this, a reference to sexual orientation is included in the Provedor's declaration when taking-up office: 'I will carry out my functions without discrimination on any ground such as... sexual orientation.'¹⁵

Notably, the PDHJ specifically considered whether the lesbian, gay, bisexual and transgender (LGBT) community should be a focus group for the Provedoria's activities during Strategic Plan planning sessions in May 2010. Following discussion, it was concluded that, although there is inadequate legal protection afforded to LGBT persons under Timor-Leste law; LGBT persons in Timor-Leste do not experience systematic or generalised violations of their rights. On this basis, the Provedor did not select LGBT as a priority focus group under the Strategic Plan.¹⁶

9 One specific allegation of discrimination relating to the exclusion of homosexuals from a HIV/AIDS reduction program coordinated by the Red Cross was reported on the East Timor Law and Justice Bulletin (<http://easttimorlegal.blogspot.com>). This allegation was determined to be unfounded.

10 Article 34: 'Duty to Report' of Law No. 7/2004 (the PDHJ Act)

11 Article 46: 'Progress Report' of Law No. 7/2004 (the PDHJ Act)

12 Prior to 2010, reports have been published in Tetun, English and Portuguese. More recent publications on the PDHJ website have been in Tetun only.

13 Article 46(4) and (5): 'Progress Report' of Law No. 7/2004 (the PDHJ Act)

14 Chapter 6: *National and International Cooperation*, PDHJ 2009 Annual Report.

15 Article 15 'Taking-up of functions' of Law No. 7/2004 (the PDHJ Act)

16 UNDP technical assistance notes, developed for the PDHJ Strategic Plan planning sessions, May 2010.

While SOGI and HIV-related human rights issues are not explicitly provided for in the PDHJ's mandate, they fall within the scope of the protection and promotion of human rights and fundamental freedoms. The PDHJ has noted that it would respond to discriminatory acts against the LGBT community as part of its broader response to discrimination.¹⁷

In August 2010, the PDHJ participated in the 15th Annual Meeting of the APF in Bali, Indonesia. In conjunction with the annual meeting, the APF's Advisory Council of Jurists considered a reference on domestic laws and policies relating to sexual orientation and gender identity in the countries of the APF's 17 member institutions.

In September 2011, the PDHJ participated in the 16th Annual Meeting and Biennial Conference of the APF in Bangkok, Thailand. At this meeting, participants examined the situation facing LGBT people in the Asia Pacific region, as well as steps being taken by national human rights institutions to advance their human rights.

On 22 March 2013, the PDHJ responded to a request from ISEAN-HIVOS (an NGO working with the LGBT population in TL), to deliver a human rights training session (ISEAN-HIVOS Session). At this session, participants discussed how they could foster closer collaboration and working relationships, including the district level relationships and representation of the LGBT community.

On 27 March 2013, the Provedoria held their Monthly Discussion Meeting focusing on LGBT rights. On the invitation of the PDHJ, representatives of the LGBT community actively participated in the discussion. At this meeting:

- The PDHJ noted it has the mandate and institutional will to respond to LGBT-related human rights issues.
- The PDHJ believes there is scope for district level relationships between PDHJ and ISEAN-HIVOS; the PDHJ acknowledges its resources are limited and that it needs to further strengthen its capacity to positively interact with district based NGOs. The PDHJ will support the initiative and leadership of the LGBT community.
- In Timor-Leste, there is some opposition to LGBT rights from the church, but in general, the population are accepting of LGBT individuals.
- The PDHJ acknowledged that the legal protection framework could be improved and noted that the PDHJ will consider options for its improvement.
- The PDHJ confirmed that they could work with ISEAN-HIVOS to improve people's understanding of LGBT rights and to empower LGBT members to demand equality.
- The PDHJ requested ISEAN-HIVOS ensure the LGBT community is aware that the PDHJ can deal with cases which violate their rights (when the violations are acts or omissions from public authorities).
- The PDHJ encourages ISEAN-HIVOS to continue engaging, inviting and seeking support from the PDHJ.

8. RIGHTS REPORTING MECHANISMS

One of the PDHJ's core functions is to receive, investigate and make recommendations for the redress of complaints.

¹⁷ PDHJ Monthly Discussion Meeting on 27 March 2013.

Any person may, directly or through a representative, submit complaints to the PDHJ about violations and infringements to the Provedoria central office in Dili, or to any of the PDHJ's four regional offices. Complaints can be made either orally or in writing. Complainants are not required to pay a fee, compensation, tax or charge in respect of the lodgement of a complaint, or in respect of handling of such complaint or services provided by the Provedoria.

Notwithstanding the PDHJ's four regional offices, limited of infrastructure (including the limitations of a postal system) and the costs of travel may mean that the PDHJ's complaint service is difficult to access for rural populations.¹⁸ Notwithstanding this, in 2011 52% of complaints came from people living outside of the capital, Dili.¹⁹

Recognising the importance of reaching rural populations, the PDHJ decided to put complaints boxes in every sub-district.²⁰

Desk review research and interviews with UNDP technical assistance partners, failed to reveal evidence of complaints of homophobic acts, violent or non-violent, against LGBT persons made to the PDHJ.²¹ This was verified by the PDHJ on their review of this report; as of the end of 2012, the PDHJ had not received a complaint dealing specifically with LGBT rights.

9. CONCLUSION

Although the PDHJ has no specific focus on SOGI or HIV, the scope of the PDHJ's mandate ensures that should complaints be lodged, or should violations occur on the basis of SOGI, such cases will fall within the PDHJ's mandate. Both the PDHJ's investigation and monitoring powers are relevant. Dealing with LGBT-related rights will require scaled up PDHJ monitoring and increased PDHJ capacity at a local level, as well as bilateral efforts to strengthen PDHJ-NGO relationships.

The PDHJ's Strategic Plan (2011-2020) emphasises the protection of vulnerable people against human rights abuses, access to public services and the right to health. Implementation of the Strategic Plan will involve increasing protection mechanisms for vulnerable groups and strengthening NGO networks. Following the above mentioned meetings (the Monthly Discussion Meeting of 27 March 2013, and the ISEAN-HIVOS Session), there is potential for LGBT rights to be encompassed under these components of the PDHJ's work.

Although there is anecdotal evidence that Timor-Leste is a relatively tolerant and accepting society; wider social and cultural attitudes and contextual challenges may negatively impact upon people of diverse SOGI lodging complaints. The following factors may influence potential complainants:

- i. poverty, limited infrastructure and a large rural and remote population may mean a lack of awareness of human rights or rights reporting mechanisms;
- ii. similarly, poverty, lack of infrastructure and a large rural and remote population may make access to the PDHJ difficult;

18 PDHJ does not have an online complaints system, however, much of the Timor-Leste population does not have regular access to a computer.

19 The PDHJ aims to increase this percentage to 65% by 2015. See Strategic Plan of the PDHJ 2011 – 2020, page 7.

20 Usage of these boxes has been limited; commentators suggest that this is related to Timor-Leste's strong oral communication culture.

21 The 2009 Annual Report provides: out of the 234 complaints lodged with PDHJ in 2009, 92 fell outside of PDHJ's mandate, 50 were forwarded to other institutions (as they were already being investigated by these other institutions), 74 complaints were on alleged human rights violations, 138 on maladministration and abuse of power and 22 on corruption.

- iii. complainants may be unaware that the PDHJ has the mandate or power to address SOGI or HIV-related rights;²² and
- iv. stigma associated with SOGI and/or HIV status in Timor-Leste may impede potential complainants from approaching the PDHJ.

The PDHJ's intensive work on socialization and educational activities in Dili and rurally will be key in addressing these challenges. Further, and importantly, the PDHJ has welcomed further engagement with the community of people of diverse SOGI in Timor-Leste.

²² However, there has been a recent reduction in the number of complaints that did not fall within PDHJ's mandate (16% in 2010 compared with 39.3% in 2009), indicating an increase in public awareness of PDHJ's role. See Strategic Plan of the PDHJ 2011 – 2020, page 7.

International Development Law Organization

Viale Vaticano, 106
00165 Rome, Italy
Tel: +39 06 4040 3200
Fax: +39 06 4040 3232
idlo@idlo.int; www.idlo.int

United Nations Development Programme

UNDP Asia-Pacific Regional Centre
United Nations Service Building, 3rd Floor
Rajdamnern Nok Avenue, Bangkok 10200, Thailand
Tel: +66 (2) 304-9100
Fax: +66 (2) 280-2700
aprc@undp.org, <http://asia-pacific.undp.org>