



National Human Rights Commission of Indonesia

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

Presented at the National Partnership Dialogue • 18 March 2013





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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: A team from the National Human Rights Commission (KOMNAS HAM).

April 2013

1. INTRODUCTION AND BACKGROUND

A. KOMNAS HAM in the Legal and Social Contexts

On August 18th, 2000, the Second Amendment, to the 1945 Constitution of the Republic of Indonesia explicitly included Human Rights (Hak Asasi Manusia/HAM) as part of the Constitution; namely Chapter XA, Article 28A-28J. These articles represent an advancement relating to human rights issues within Indonesian law. While the original 1945 Constitution contained language regarding human rights norms, it did not explicitly delineate the provisions article by article.

The year 1999 was a milestone for human rights in Indonesia. *Law No. 39, Year 1999 on Human Rights* specifically established matters of human rights as the norm. This law also established The National Human Rights Commission (KOMNAS HAM) as an independent state organ under mandate of *The Human Rights Act* for the promotion and protection of human rights as well as strengthening the commission previously established through *Presidential Decree No. 50 of 1993*.

In the year 2000, *The Court of Human Rights Act* was enacted authorizing the KOMNAS HAM to be the competent authority to investigate allegations of human rights violations.

In the year 2008, *The Elimination of Racial and Ethnic Discrimination Act* was enacted authorizing KOMNAS HAM to oversee the elimination of all forms of racial and ethnic discrimination (Article 8, paragraph (1)): "Monitoring of the effort to eliminate all forms of racial and ethnic discrimination made by the National Human Rights Commission."

2. MANDATE AND FUNCTIONS

Under the terms of Article 1 paragraph 7 of *Law No. 39 Year 1999 on Human Rights* (Law 39), the National Human Rights Commission is an independent state agency whose position is a high level state agency assigned to do research, education and public dissemination, monitoring, and mediation for rights.

Article 75 of Law 39 states that the function of the Commission is to:

- a. develop conditions conducive to the implementation of human rights in accordance with *Pancasila*, the 1945 Constitution and the Universal Declaration of Human Rights;
- b. improve the protection and enforcement of human rights for the personal development of Indonesian people as a whole and the ability to participate in various aspects of life.

3. KOMNAS HAM IN RESPONDING TO ISSUES OF SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI) AND THE HUMAN IMMUNODEFICIENCY VIRUS (HIV)

One of the principles of human rights is the right to be free from discrimination. The concept of human rights states that human beings are born equal and equivalent. In regard to this principle of non-discrimination, the lesbian, gay, bisexual and transgender (LGBT) community and people with HIV can be categorized as a group vulnerable to human rights violation. Within the concept of human rights, the state must take affirmative action on behalf of vulnerable groups.

In 2011, Indonesia ratified the International Covenant on Economic, Social and Cultural Rights. Article 2, paragraph 2 states that:

States Parties to the present Covenant undertake to guarantee that the rights set forth in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other views, national origin or social origin, property, birth or other status."

The laws described above form the legal basis for KOMNAS HAM's work in monitoring the fulfillment of LGBT rights, including the right to health, with attention to issues of HIV as the LGBT community is particularly vulnerable.

4. AFFILIATIONS

KOMNAS HAM has accreditation status "A" of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). This accreditation level is reflected in full membership of the Asia Pacific Forum of National Human Rights Institutions (APF), and demonstrates full compliance with the Paris Principles which ultimately grants KOMNAS HAM the right to attend and speak at the Human Rights Treaty Bodies and the Human Rights Council. This accreditation has enabled Komnas HAM in participating for international fora.

5. KOMNAS HAM AND INTERNATIONAL HUMAN RIGHTS MECHANISMS

One function of KOMNAS HAM is to monitor, review and assess fulfillment of state obligations regarding human rights and periodically presenting reports to human rights treaty bodies such as the UN Committee on Torture and the Committee on the Elimination of Racial Discrimination.

KOMNAS HAM recently has also sent a report to the Committee on Human Rights. The report lists problems deemed worthy of consideration during the "Preliminary Report of Indonesia" on the implementation of the International Covenant on Civil and Political Rights (*The Indonesian National Commission on Human Rights Submission for the Preparation by the Human Rights Committee of a List of issues to be considered during the examination of the Initial Report of Indonesia*). This report was discussed at a session of the UN Human Rights Committee 107, 11-28 March 2013, in Geneva.

KOMNAS HAM expressed regret at the reluctance of Indonesian Government to accept recommendations related to the Universal Periodic Review (UPR) report. The recommendation concerning the issue of impunity, tolerance and religious freedom, end to violence in Papua and the protection of minorities and vulnerable groups such as women, children, LGBT, persons with disabilities, indigenous peoples and religious minorities. This regret was presented at the Session of Human Rights Council, 19 September 2012. KOMNAS HAM recommends that the Government of Indonesia optimize forums for consultation with stakeholders in the reporting process for the UPR session in 2016.

6. KOMNAS HAM AND THE NATIONAL HUMAN RIGHTS MECHANISMS

Article 97 of the Human Rights Act states that the Commission shall submit an annual report on the implementation of the functions, duties and responsibilities, as well as the condition of human rights, and matters handed to the House of Representatives of the Republic of Indonesia and the President with a copy to the Supreme Court.

Article 18 of the Human Rights Tribunal Act provides that the Court of Human Rights Commission is the agency authorized to investigate gross human rights violations. In the course of investigation, KOMNAS HAM may establish an ad hoc team consisting of officers from KOMNAS HAM and public representatives in order to obtain sufficient preliminary evidence of serious human rights violations. The report is then submitted to the Attorney General for further investigation and examination.

Article 8 of the Law on the Elimination of Racial and Ethnic Discrimination mandates KOMNAS HAM as a supervisor in the implementation of the law.

Public accountability of KOMNAS HAM is contained in an annual report. The 2010 Annual Report specifically addressed the treatment of vulnerable groups, especially LGBT. The report highlighted various acts of discrimination, violence and harassment experienced by members of LGBT community. Among incidents presented in the report were high profile cases of the use of organized violence to disrupt an LGBT conference in Surabaya and a Human Rights Training for Transgenders conference in Depok.

7. POLICIES AND INITIATIVES RELATED SOGI AND HIV

A. KOMNAS HAM Memoranda of Understanding

In order to carry out its duties and functions, KOMNAS HAM cooperates with organizations and institutions at the national, regional and international levels. Over the last few years the Commission has worked through the signing of a Memorandum of Understanding with various institutions.

At the national level the Commission signed a Memorandum of Understanding with the Government, Universities and Government Institutions. The Memorandum of Understanding has been signed by the Local Government Commission focused on improving the human rights network in coordination and cooperation among the parties in the framework of the promotion, protection and fulfillment of human rights enforcement. While the university is focused on cooperation in the promotion and enforcement of human rights through the Tri Dharma University. Some of the signed Memorandum of Understanding are:

- Memorandum of Understanding with the Indonesian National Police on Crime Management Partnership to do Monitoring, Assessment, Research and Mediation and Human Rights Education.
- Memorandum of Understanding with the Indonesian National Armed Forces on the Dissemination and Training on Human Rights / Humanitarian Law.
- Memorandum of Understanding with the Witness and Victim Protection Agency, the National Commission on Violence Against Women (Komnas Perempuan), the Indonesian Child Protection Commission (KPAI) and the Indonesian National Police on Witness and Victim Protection.
- Memorandum of Understanding with the National Archives of the Republic of Indonesia on the Management of Records Dynamic and Static Archival Preservation in the National Commission on Human Rights.

During the course of the election, the Commission participated in the signing of a Memorandum of Understanding with the Election Supervisory Body (Bawaslu) along with the Corruption Eradication Commission (KPK), Center for Financial Transaction Reporting and Analysis (PPATK), the Judicial Commission (KY), Witness and Victim Protection Agency (LPSK), the Indonesian Broadcasting Commission (KPI), the Public Information Commission (KIP), National Police Commission, Commission Attorney (Komjak), National Commission for Women and the Indonesian Child Protection Commission (KPAI).

At the international level, the Commission also signed several memorandum of understanding among these the Memorandum of Understanding Against Trafficking of Women and Children with other national human rights institutions incorporated in South East Asia National Human Rights Institutions (NHRI) Forum.

In addition, there is a Memorandum of Understanding between the Commission and the APF in the course of the workshop on NHRI's and the Yogyakarta Principles, which was held in May 2009 in Yogyakarta. This workshop discussed the role of NHRIs in the fulfillment of LGBT rights.

As of now there has not been a Memorandum of Understanding responding directly to SOGI and HIV issues. However, existing understandings covering issues of human rights in general can be used to respond SOGI and HIV issues.

B. B. KOMNAS HAM Activities Related to SOGI and HIV

KOMNAS HAM began to be actively involved in SOGI and HIV issues in 2004 with the establishment of the Sub-Commission on Special Protection Group. Structural changes from 2007 to 2012 formed a sub-commission based on the functions of assessment and research; education and public dissemination; monitoring and mediation, eliminating the Sub-Commission on Protection of Special Groups. However, this did not eliminate the work of the Commission relating to LGBT rights.

To better understand issues related to SOGI and increase the capacity of staff in carrying out its duties, the Commission sends staff to national and international forums for training in issues related to SOGI. In 2007 the Commission sent a staff of sub mediation commission to attend the International Training Course “LGBT and Human Rights” in Sweden.

In 2011 the Commission also sent two staff of the Sub-Commission on Education and Guidance to follow the “Training Sexuality, Gender, Health and Sexual and Reproductive Rights” held by Sexuality Forum Indonesia. They then performed internal training on sexual and reproductive health rights and socialization with discussions on of LGBT’s Rights.

The Commission looked at the need for knowledge and understanding of human rights for the LGBT community and began providing human rights training to the community. Training for LGBT on human rights was first conducted in 2009 in Malang. Training for LGBT on human rights was conducted again In 2010 in collaboration with the Forum for Transgender Communications of Indonesia (FKWI). Transgender groups in Indonesia suffer stigmatization and discrimination from both the government and society even more than the lesbian, gay and bisexual groups. This transgender training was successful and one transgender participant was chosen to become the Ambassador for Transgender Human Rights with the hope to help bring LGBT rights forward, despite strong pressure from fundamental religious organizations opposed to the LGBT community.

In 2011, KOMNAS HAM also conducted human rights training to raise LGBT issues among government officials. The training was preceded by a two day focus group discussion (FGD) to develop a training curriculum. On the first day of the FGD, KOMNAS HAM involved stakeholders from NGOs, government officials and law enforcement personnel. This FGD resulted in the recommendation that KOMNAS HAM prioritize training for the most influential institution in the fulfillment of fundamental rights in the LGBT group. On the second day of the FGD, the organizers mapped potential candidates for training and developing a training curriculum based on the input of stakeholders.

At the international level, KOMNAS HAM hosted a workshop for NHRIs on the Yogyakarta Principles in 2009 and the APF Annual Meeting 15 in 2010. One of the issues discussed at the 2010 APF Annual Meeting was SOGI and Human Rights.

Related to HIV, in 2006, KOMNAS HAM held a series of FGDs in Merauke, Surabaya, Batam and Medan. At these discussions, KOMNAS HAM invited members of government for questioning and opinions regarding stigma and discrimination experienced by people living with HIV. The results are compiled into a book discussion titled Stigmatization and Discrimination of PLHIV.

8. THE COMPLAINTS SYSTEM AND RIGHTS REPORTING MECHANISM

KOMNAS HAM receives complaints relating to alleged violations of human rights. KOMNAS HAM ensures the confidentiality of all complaints. Complaints can be filed in various ways, including coming in to the office, by phone, fax, mail or email, and for complainants who are out of town, KOMNAS HAM also receives complaints directly from six area representatives in Indonesia.¹

¹ The six Komnas HAM representatives are located in Aceh, West Sumatera, West Kalimantan, Moluccas, Central Sulawesi, and Papua

KOMNAS HAM divides complaints into ten categories, namely: the right to life, right to build a family, right to personal growth, right to justice, the right to personal liberty, the right to security, the right to welfare, the right to participate in government, women's rights and children's rights.

KOMNAS HAM is currently piloting a Complaint Handling System (CHS). This database is an application to manage human rights cases submitted to KOMNAS HAM. Under this application, KOMNAS HAM hopes that the complaints and recommendations related to complaints can be accessed by all levels of society.

KOMNAS HAM began to receive complaints from LGBT groups when the cultural performance activities done by members of the group came under attack by state apparatus and other groups. Often their activities are arbitrarily prohibited and have been violently disrupted by fundamental religious group. The first SOGI-related issue that got widespread public attention was the case of Alterina Hofan; this will be elaborated as a case study below.

From 2010 to 2012 the Commission received a total of 24 cases related to SOGI. Based on the data, 14 complaints are related to the right to justice (specifically related to police abuse during examination in the police station), 6 cases relate to the right to freedom of expression, 3 cases concern the right to personal security and liberty, and 1 case concerns the rights of a child.² The documentation of HIV cases is hard to do because of the complaints procedure at KOMNAS HAM is based on rights categories.

9. CASE STUDIES – THE KOMNAS HAM RESPONSE TO SOGI-RELATED RIGHTS

A. Indonesia Idol 2012

KOMNAS HAM received complaints from representatives of AMPATI (Alliance Community Care Television Indonesia) in conjunction with the Indonesian Idol 2012 on private television channel RCTI (Rajawali Citra Televisi Indonesia). In the complaint it is stated that there has been harassment and humiliation based on sexual orientation and gender identity. In addition, there are indications that RCTI has intended bully and exploit contestants based on their SOGI (particularly feminine men), to raise the ratings of the show. AMPATI has been reported to the Indonesian Broadcasting Commission (KPI) but there was no decision. For this reason, AMPATI submitted a complaint to KOMNAS HAM and asked that mediation be conducted and provide human rights perspective to RCTI. The mediation was held on 6 June 2012 and resulted in RCTI apologizing to AMPATI and committing to improve the approach of the Indonesia Idol judges on the show in 2013.

B. Alterina Hofan

Hofan Alterina case is a case of criminalization of a transgender person. Alterina Hofan was born as a female (biological sex). In 2006, he changed his identity to male and changed his name to Alter. In 2009, Alter married Jane. The couple did not get permission from Jane's parents who subsequently reported Alter to the Jakarta Police (on October 12, 2009). Alter was reportedly held for fake identity, kidnapping and fraud.³

In addition to criminalization of his identity, Alter also experienced discrimination while in he was in detention (Rumah Tahanan – Rutan) at Pondok Bambu. Rumah Tahanan refused to give him appropriate accommodation since he physically is a male, but the gender indicated on Alter's identity card is a female.

Alter and Jane submitted their case to KOMNAS HAM. KOMNAS HAM recommended that Alter not be detained in the female penitentiary and the detention be postponed. Eventually, Alter was held in segregation in the community clinic.

² The data gathered is from the Komnas HAM Annual Reports 2010 to 2012.

³ Alleged violations of Article 266, 263 and 378 of the Criminal Code.

When the matter went to trial, KOMNAS HAM did not intervene in the judicial process, but become an amicus curie.⁴ As amicus curie, KOMNAS HAM suggested to the court that the state was not authorized to regulate a person's gender. The court only authorized to granting the sex of Alterina Hofan. Alterina Hofan received the decision of Jayapura District Court on 29 March 2010 which granted him gender status as a male.

This case was appealed to the Supreme Court Level by the Attorney General but was rejected. The Supreme Court issued the verdict in the trial numbered 704 K/PID/2011 on 31 May 2011. With this decision, the marriage of Alter and Jane was not contested again.

C. The attack of the Front of Islamic Defenders (FPI) on a KOMNAS HAM human rights training

KOMNAS HAM conducted basic human rights training for transgender people in Depok, West Java, from 29 April-1 May 2010. This training was aimed to improve the capacity of transgender groups to defend their rights. The training session was disrupted when members of the FPI (Front of Islamic Defenders) launched a violent attack.

At this incident, the police did not respond and as a result some participants and trainers experienced physical violence. The training Committee eventually evacuated 25 participants to continue training at the offices of KOMNAS HAM.

KOMNAS HAM deeply regrets the incident, especially as the local police were informed before the event was held, which shows weakness of the state in protection and fulfillment of the rights of the LGBT community.

10. CONCLUSION: TOWARDS HUMAN RIGHTS FOR ALL

Based on the experience of KOMNAS HAM, some LGBT and HIV issues requiring attention have been identified, namely:

A. The power of the Commission related to SOGI and HIV Related Issues

KOMNAS HAM has a strong mandate to carry out its duties and functions, as described above. This mandate also applies to SOGI and HIV-related issues. The other power of KOMNAS HAM can be found in the organizational structure directly addressing SOGI issues. In the period 2002-2007 KOMNAS HAM had a Sub Commission that handled specific groups, including the LGBT community which allows for research, education, monitoring and mediation human rights. This became a basis for KOMNAS HAM to address the issues of SOGI including capacity building for the staff. In addition, using this structure KOMNAS HAM was able to build network with civil society organizations engaged in SOGI and HIV issues. Since then, KOMNAS HAM has been able to implement several programs related to SOGI with the involvement of LGBT networks. Those programs show that KOMNAS HAM has the perspective to protect LGBT rights. The trust from stakeholders on this issue to KOMNAS HAM is also a strong point that should be noted.

B. Challenges in Responding to SOGI and HIV Issues

In the organizational structure periods of 2007-2012 and 2012-2017 the Commission has not allocated staff or specialized a section to handle SOGI issues. KOMNAS HAM also has not formulated a policy and working plan to respond to current SOGI and HIV-related issues due to limited understanding of the issues, as well as limited human and financial resources. The knowledge and understanding about the issues of SOGI remained in particular individual staff members dispersed in various departments of KOMNAS HAM rather than a designated working group. As a result, the implementation of policy or programs related to HIV and SOGI were not related to each other. The lack of infrastructure to support the complaints or cases related to

⁴ Amicus Curiae (Latin: a friend of Court) Counsel who assists the court by putting arguments in support of an interest that might not be adequately represented by the parties to the proceedings (such as the public interest) or by arguing on behalf of a party who is otherwise unrepresented. (a Dictionary of Law, Oxford University Press, 1994)

SOGI and HIV is another problem. This can be seen specifically since the method of case submission does not specifically identify (disaggregate) the LGBT or HIV-related complaints.

The most obvious challenge is that Indonesians generally are resistant to accepting the LGBT community, resulting in the need for continuous efforts to promote and protect of the rights of LGBT and PLHIV. Community and religious leaders who advocate for non-discrimination of LGBT individuals or people living with HIV are still very few. The most significant impediment is the lack of State human rights protection of the LGBT community and PLHIV.

C. Opportunity in Responding to SOGI and HIV Issues

With the openness of KOMNAS HAM, competent human resources and networks, it is very possible for KOMNAS HAM to play an important role in addressing human rights issues related to SOGI and HIV. This is also reinforced by the stakeholders of SOGI and HIV groups who view KOMNAS HAM as important partner in the promotion and protection of human rights. For example, the trust of LGBT community is reflected in the selection process of KOMNAS HAM. Since 2007, the LGBT community nominated community representatives for the selection process for KOMNAS HAM members.

Other opportunities can be opened by adopting Yogyakarta Principles which is widely known as the foundation of LGBT rights among LGBT community. The Yogyakarta Principles can be a basis for work on SOGI and HIV issues since KOMNAS HAM was actively engaged as the host of the Yogyakarta Principles workshop.

D. Recommendations

Protection and promotion of the rights of the LGBT community and PLHIV are not new issues for KOMNAS HAM. The emergence of SOGI and HIV issues make the need for intervention by KOMNAS HAM even more evident, and therefore necessitating concrete action from KOMNAS HAM. Some recommendations that can be considered are:

1. KOMNAS HAM needs to review or reformulate the strategic plan that will allow response to the issues of SOGI and HIV in particular.
2. KOMNAS HAM needs to strengthen its capacity to address SOGI and HIV-related issues through an organizational structure that provides support for these issues, competent human resources, and build infrastructure that utilizes information technology.
3. KOMNAS HAM needs to build organizational capacity and strengthen existing networks to address SOGI and HIV-related issues, especially with government institutions, but also the involvement of civil society.

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>