

UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

ILGA Portugal Shadow-Report

Complementing the Eighth and Ninth periodic country reports of the Portuguese Government to the CEDAW Committee for its 62nd Session

This report is submitted by ILGA Portugal in the framework of the CEDAW Committee Periodic Review of Portugal. It was prepared with the technical assistance of ILGA – the International Lesbian Gay, Bisexual Trans and Intersex Association.

INTRODUCTION

The range of women seeking protection in the human rights framework has expanded to include women from marginalised groups that experience discrimination on the grounds of sexual orientation, gender expression and gender identity. As such, Lesbian, Bisexual and Trans (LBT) women have also articulated their claims for equality and for protection under international human rights law. According to the CEDAW Convention, all women are equally entitled to, and deserving of, human rights' protection, including freedom from violence and discrimination for both women who do and who do not conform to dominant sexual and gender norms. LBT women experience human rights abuses both because they are women and because of their sexual orientation and/or gender identity. The CEDAW Committee has already acknowledged that LBT women are protected under the CEDAW Convention by raising such issues in countries' periodic reviews.¹

This report provides a brief overview of the challenges that women (in particular, LBT women) still face in Portugal, and provides suggested recommendations for the Portuguese Government within the CEDAW Convention legal framework. The report examines five areas: the legal and institutional framework, education, employment, health, and marriage and family relations.

Legal and institutional framework

OVERVIEW and CHALLENGES

Portugal has come a long way in protecting the LGBT community. As an example, same-sex marriage is possible as of 2010, a gender identity law was enacted in 2011 and the current V National Plan for Equality, Gender, Citizenship and Non-Discrimination (2014-2017) is the second national plan to include sexual orientation and gender identity issues (in its 4th strategic area). However, despite progress in the creation of a national legal framework on LGBT rights, discrimination on the grounds of sexual orientation and gender identity still exists and specific public policies in key social areas are largely absent.

In January 2013, the Criminal Code was amended to integrate "gender identity" as a discriminatory ground that requires special attention from the law. Along with the sexual orientation ground (included in 2007), gender identity was added to the articles related to qualified homicide and qualified offense

¹ As for example, in the Concluding Observations on Denmark (2015) and Kyrgyzstan (2015) or in the Questions to Trinidad and Tobago (2002) or Singapore (2007).

to physical integrity, establishing aggravating circumstances if there is motivation related to the victim's sexual orientation and/or gender identity of the victim. However, **though it is possible to present charges, the complaint registration system does not register the motivation of the crime, and as such there is no available official data on hate crimes committed against LBT women.** As a result of this disregard of the rates of such crimes, **there is no public policy to combat hate crimes against the LGBT community nor any appropriate training available to key stakeholders** (i.e. security forces, the judiciary and prison guards), which undermines the adequate response capacity of key professionals (including victim support services) and effective investigation and redress for such crimes.

ILGA Portugal annually contributes to the OSCE Hate Crime Report with specific data on hate crimes committed against the LGBT community in Portugal. Furthermore, and as of 2013, the organisation collects hate crime reports via the Observatory on Discrimination.² **According to the 2014 Report, out of the 339 reports, 198 are hate crimes according to the OSCE definitions; 43% of the victims identified themselves as women, 2% as trans women and 0,6% as intersex. In 93% of the reports, the situation was not reported to the competent authorities.**

In addition, though the V National Plan for Prevention and Combat of Domestic and Gender Violence 2014-2017 (the first of its kind to include LGBT issues) mandates, under measure no. 48, that key professionals should be trained for interactions with LGBT people, these trainings are clearly not sufficient, also in number, to reach out to the various stakeholders involved in the domestic violence phenomena and victim support services. On the one hand **there are several misconceptions about domestic violence in same-sex couples³ and very little data available on the topic, on the other hand the large majority of professionals in the field fail to frame ill-treatment, abuse and consequent homelessness of young LGBT people as domestic violence** (and activate the legal framework and protection measures available in the context of domestic violence). Furthermore, **emergency shelters' staff are not prepared to deal with sexual orientation and gender identity issues** and are largely run by religious institutions that have been known to engage in discriminatory practices.

Additionally, though the Labour Code has been recently amended to also include the prohibition of discrimination on the grounds of gender identity - it already included sexual orientation - **there are no specific public policies, strategies or guidelines for an inclusive workplace environment nor a public body mandated to address complaints of discrimination on the grounds of sexual orientation and gender identity in the workplace.**

Finally, **there is no specific legislation prohibiting discrimination on the grounds of sexual orientation and gender identity in access to goods and services.**

RECOMMENDATIONS:

- The Government should include gender identity as a prohibited ground for discrimination under Article 13 of the Constitution, and adopt a comprehensive anti-discrimination law inclusive of sexual orientation and gender identity issues. In addition, it should include references to sexual orientation and gender identity in existing legislation on specific issues (e.g. in health and social protection areas).

² More information is available, in Portuguese, at: www.ilga-portugal.pt/observatorio.

³ E.g. domestic violence is less frequent in same-sex couples than in different-sex couples; physical violence is less common in lesbian couples because they are both women, etc.

- In the context of crimes committed against LGBT persons, the Government should: equip emergency shelters structures to accommodate LGB women and girl victims of crimes, including domestic violence; review the complaints registration system to enable the collection of crimes bias motivation and collect official data on hate crimes against LGBT persons; collect data and encourage research on domestic violence in same-sex couples and against LGBT young people and include sexual orientation and gender identity issues in the mandatory training curricula of key stakeholders (e.g. civil servants, law enforcement personnel, victims support services, health and education professionals).

Education

OVERVIEW and CHALLENGES

The Law for Sexual Education in Schools, enacted in 2009, includes sexual orientation as a subject be considered for inclusion included in school programmes. **The law does not include gender identity issues.** This same legislation leaves way for each school, and even class, to decide on the contents to be lectured under the sex education programme. Furthermore, in a separate legal instrument that provides more information on the contents and procedures pertaining this Law, **all possible topics to be lectured are listed in accordance to an adequate educational level, except sexual orientation which is not mentioned.** In fact, **this results in very few schools actually offering the subject and even fewer including topics on sexual orientation.**

Furthermore, in 2012 the Student's Statute entered into force, prohibiting any person in the school environment to discriminate and/or be discriminated also on the grounds of sexual orientation and gender identity. Notwithstanding, **homophobic and transphobic bullying is a widespread reality in the school context and there are no specific education strategies or public policies designed to prevent and address such a phenomena.**

RECOMMENDATIONS:

- The Government should review the Sexual Education legislation to ensure that the course is a requirement in all schools (and at all educational levels), and guarantee that sexual orientation and gender identity issues are specifically mentioned as topics that must be included in such courses;
- The Government should adopt a comprehensive public policy to combat discrimination and violence on the grounds of sexual orientation and gender identity issues in education.

Employment

OVERVIEW and CHALLENGES

In April 2015 the Labour Code was amended to also include gender identity as a prohibited ground for discrimination - sexual orientation was already foreseen. Despite this significant progress, **there are no specific employment programmes designed to encourage the integration of trans persons in the workplace nor are there any public policy or guidelines encouraging employers to adopt inclusive codes of conduct or to promote an equality strategy.**

RECOMMENDATION:

- The Government should adopt an inclusive public policy and encourage private employers to design strategies to combat discrimination and harassment on the grounds of sexual orientation and gender identity in the workplace.

Health

OVERVIEW and CHALLENGES

Legal gender recognition is possible in Portugal as of March 2011 upon presentation of a diagnosis report of a gender identity disorder. Despite the fact that this law does not mention who is competent or not to diagnose this disorder, **a list of 'competent' clinical professionals to authorise this report has been developed and disseminated through civil registries.** This clearly counters Law n.º 7/2011, as it **limits the patient's free choice of medical practitioners and imposes greater distress on trans people,** further delaying their gender identity to be recognised by law. In addition, there are also **records of difficulties encountered in Portuguese external representation offices⁴ due to staff's reluctance to abide by this law.**

Furthermore, Portugal, to our knowledge, is the only country where **the Portuguese Medical Association holds a gatekeeping role in analysing each trans person's eligibility to access genital surgeries⁵** in clear contravention of existing international guidelines in this area. Additionally **there are no assurances of the expertise of health professionals selected to perform gender reassignment-related surgeries.**

Regarding intersex people there is an absolute void of medical guidance on procedures and no information if surgeries are performed at birth or if an intersex child gives full consent prior to any surgery being performed. Medical professionals do have sufficient information or knowledge of issues of bodily diversity and so are unable to provide support and information to parents of intersex children.

Moreover, **there is a lack of appropriate knowledge, specific training and awareness raising of health professionals** in Portugal in the area of sexual orientation and gender identity issues, thus leaving LGBT patients with ill-prepared professionals who are not aware of specific medical needs. According to recent research conducted by ILGA Portugal,⁶ around 80% of the health professionals presume that their patients are heterosexuals, thus **not questioning their patients about their sexual orientation, possible risk behaviours and not providing adequate guidance or treatment.** Furthermore, 11% of the study's respondents mentioned that they have met **mental health professionals who have suggested they can cure their sexual orientation.**

Finally, in 2015, via a public citizen's initiative that reached Parliament, the **abortion law - decriminalised in 2007 after a referendum - was revised to include compulsory psychological and social assessment prior to an abortion intervention and to eliminate the public knowledge of**

⁴ I.e. Embassies and Consulates.

⁵ In final stages of the clinical process, trans people who want to proceed to genital surgeries have to submit two clinical reports (made by two independent multidisciplinary teams) to the Portuguese Medical Association. The work group in the PMA responsible for approving the genital surgeries may take until one year to give a final answer. Furthermore, because Portugal is a small country, the group is constituted by some of the same clinicians who made the two initial clinical reports. The need of this gatekeeping function of the PMA is not written in any official document, but it is an institutionalised procedure.

⁶ *Saúde em Igualdade. Pelo acesso a cuidados de saúde adequados e competentes para pessoas lésbicas, gays, bissexuais e trans*, Associação ILGA Portugal. Available, in Portuguese, at: http://www.ilga-europe.org/sites/default/files/Attachments/portugal_0.pdf

which health professionals and institutions practice conscientious objection. These restrictions undermine women's dignity and autonomy as well as their right to free choice of medical decisions. Furthermore, by not disclosing which medical facilities perform abortions, it **creates barriers to access to legally permitted health services and jeopardises health services' transparency.**

RECOMMENDATIONS:

- The Government should review the gender identity law to exclude the medical diagnosis report requirement and abolish procedures that limit access to legal gender recognition, thus fully separating the legal system from the clinical needs. In addition, it should ensure that international guidelines on gender identity issues are being implemented and provide adequate and comprehensive training on sexual orientation and gender identity issues to health professionals. Furthermore, the government should adopt and implement a health policy on intersex issues that ensures respect for bodily autonomy and support for intersex children and their families.
- The Government should review and eliminate the barriers to access legal and safe abortion.

Marriage and family relations

OVERVIEW and CHALLENGES

While same-sex marriage is legal in Portugal since 2010, family law provisions are largely neutral as regards sexual orientation and silent as regards gender identity. However, this is not the case for laws pertaining to access to assisted reproduction techniques and adoption rights. **Assisted reproduction techniques include a requirement of infertility, and are only legally available to different-sex couples, whether married or in a *de facto* union,** thus excluding single women and same-sex couples. Adoption is currently only possible for single persons, regardless of their sexual orientation, and to different-sex couples, hence **same-sex couples, even if married, are not eligible either for second-parent adoption or for adoption.**

In 2013 and 2014, **the Portuguese Parliament** discussed a draft law on second-parent adoption and **chose to ignore both a ruling of the European Court of Human Rights (ECtHR)** on the case *X and Others v. Austria* - **expressly mentioning Portugal as one of the European countries where the principle of non-discrimination and the right to respect for private and family life are being violated** as only same-sex couples are prohibited to access second-parent adoption - and a **letter of the Council of Europe Commissioner for Human Rights** highlighting the need to bring the existing legal framework in line with international human rights standards and with the ECtHR above mentioned decision, thus enabling same-sex couples to exercise their parental rights free from discrimination. This draft law was rejected in plenary and subsequent draft laws on second-parent, full adoption rights and access to assisted reproduction techniques have also been rejected.

RECOMMENDATIONS:

- The Government should review legislation on access to assisted reproduction techniques, removing the infertility requirement and granting access to single women and same-sex couples;
- Review existing family law provisions to recognise all forms of parenting rights to same-sex couples, including the right to adoption, and to uphold the principle of the best interests of the child.