



Executive Summary

Country Report Portugal 2010 on measures to combat discrimination

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1. Introduction

Portugal has a population of around 10.6 million, and a relatively homogeneous society. The Census of March 2001 revealed 10,356,117 inhabitants, a 4.8 per cent increase over a decade (an increase of almost 500,000 individuals). This is a result of transformation in migration experienced by Portugal in the 1990s (from a country of emigration to a country of immigration), and the high contribution of net migration to population growth. The number of foreign citizens living in Portugal is around 500,000, 5 per cent of the total population. A new Census will be carried out in 2011.

The Roma community (estimated at 50,000 people) experiences serious problems in relation to equal rights and integration. Members of this community face many difficulties in the fields of employment, housing and education, and cases are reported of discrimination in daily life. A high number of Roma in Portugal still live in encampments.

There are generally tense relations between members of Roma communities and the law enforcement agencies. There are allegations that the law enforcement agencies continue to discriminate against Roma, particularly when the latter attempt to engage in itinerant trading. There have been reports of arbitrary police raids on entire Roma camps. There have also been reports of racist violence, with Roma representatives stating that the victims do not report such matters to the police, as they say they have never heard of any cases where police officers have been punished for such behaviour against Roma.

The specialised body in Portugal, *Alto-Comissariado para a Imigração e Diálogo Intercultural I.P.* (ACIDI I.P.) [High Commission for Immigration and Intercultural Dialogue] considers the situation of the Roma to be a priority issue. It has established a new website on Roma, '*Ciga-nos*' ('Follow us') <http://www.ciga-nos.pt/>, where useful information about this community is available.

ACIDI has also launched a pilot project which aims to appoint Roma mediators in 10 Portuguese Town Halls.

The existence of Roma mediators will improve the access of Roma communities to services such as town hall facilities, healthcare centres, and hospitals, and will promote communication between the Roma community and others.

Discrimination based on sexual orientation is still frequent in society.

The *IV Plano Nacional para a Igualdade – Género, Cidadania e não Discriminação 2011-2013* [Fourth National Plan for Equality, Citizenship and Gender and Non-discrimination 2011-2013] approved on December 2010, foresees a need to train and raise the awareness of health professionals about discrimination on the grounds of sexual orientation and gender identity. However, there is still a lack of information and some discriminatory behaviour hindering access to health centres.

Since the adoption of the Lisbon Treaty, *Comissão para a Cidadania e Igualdade de Género* (CIG) [the Commission for Citizenship and Gender Equality] has begun to work in the fields of sexual orientation and gender identity. Two organisations representing the LGBT community are now members of the CIG Advisory Board and the 'first study on this subject at the initiative of a public institution was conducted by CIG. The conclusions of this study were integrated in the *IV Plano Nacional para a Igualdade – Género, Cidadania e não Discriminação 2011-2013* [Fourth National Plan for Equality - Gender, Citizenship and non-Discrimination 2011-2013].

According to the ILGA Portugal report (May 2008), a legal 'ghetto' is maintained in matters relating to access for same-sex couples to marriage and parenthood, and a social 'ghetto' continues in relation to sexual orientation and gender identity. Parenthood and marriage are fundamental issues where homophobic practices can still be perceived in Portugal. ILGA is willing to guarantee equal legal protection to children brought up by same-sex partners.

On 31 May 2010 Law 9/2010 was promulgated by Parliament, allowing civil marriage for same-sex partners.

Portuguese society is not yet fully aware of the issues involved in the relatively new field of age discrimination, and is only slowly becoming conscious of their implications. The Portuguese Government regards its law as already implementing the Directive in respect of age. We consider that the Directive has been implemented, but that positive measures have not so far been completely successful. The Portuguese Insurance Institute is trying to abolish the age limit for insurance by creating a non-term life insurance for older people.

With regard to religion, confessions other than Catholics still face problems attending to sick people in hospitals and prisons. In addition, meals in state schools are still not adapted to other confessions, and in particular Muslim students.

The European Commission has considered in a reasoned opinion that Portugal has failed to fulfil its obligations in respect of Articles 4, 7(2) and 9 of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

2. Main legislation

Portuguese Constitutional principles go beyond the areas covered by the Directives.



Portugal has ratified the European Convention on Human Rights (ECHR), the Convention on the Elimination of All Forms of Racial Discrimination, the Revised European Social Charter, the Convention on the Elimination of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights and ILO Convention 111 on Discrimination. In addition it has signed the Convention on the Rights of Persons with Disabilities.

The Criminal Code has been amended and its Article 240 covers discrimination based on race, colour, ethnic origin or nationality, religion, gender or sexual orientation. This article does not cover disability.

Article 240(1) makes it an offence to establish organisations or engage in organised propaganda activities which incite or encourage discrimination on grounds of race, colour, ethnic origin or nationality, religion, gender or sexual orientation.

Article 240(2) penalises anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, provokes acts of violence against an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender or sexual orientation with the intention of inciting to or encouraging racial or religious discrimination. It also penalises anyone who, in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, sex or sexual orientation.

Those who incite or encourage racial, religious or sexual discrimination will be subject to terms of imprisonment of from six months to five years.

These provisions do not cover disability, as sanctions are foreseen in Articles 9 and 10 of Law 46/2006 of 28 August 2006 (regulated by Decree-law 34/2007 of 15 February) prohibiting and punishing discrimination based on disability, and on the grounds that a person has a pre-existing aggravated risk to their health.

Law 134/99 forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin, and enshrines the principle of equal treatment of persons, without distinction on the basis of racial or ethnic origin, and established a legal framework to combat discrimination on the grounds of social or ethnic origin.

Article 24 of the Labour Code (Law 7/2009), which transposes Directive 2000/78, prohibits discrimination on the grounds of ancestry, disability or chronic disease, age, race, sex, ethnic origin, sexual orientation, religion, civil status, political or ideological convictions, family situation, trade union affiliation, genetic patrimony or reduced capacity for work.

Only in the field of labour law have rules been established against discrimination on the grounds of age, sexual orientation, disability, religion and political convictions, in addition to rules against discrimination on the grounds of race or ethnic origin. There is no specific protection in the field of self-employment, but the same principles are applicable. Article 10 of the Labour Code grants only limited protection, but the principle of non-discrimination is applicable in regard to access to and exercise of independent professions.

Two important legislative acts have been introduced in Portugal in the field of discrimination based on disability. These are Decree-law 163/2006 of 8 August 2006, which regulates accessibility of buildings and public premises, and Law 46/2006 of 28 August 2006 (regulated by Decree-law 34/2007 of 15 February) prohibiting and punishing discrimination based on disability, and on the grounds that a person has a pre-existing aggravated risk to their health.

The objectives of these laws are to prevent and forbid direct or indirect discrimination on the grounds of any kind of disability or on the grounds that a person has a pre-existing aggravated risk to their health; and to outlaw the practice of acts which may violate any fundamental rights, or the refusal or restrictions in the exercise of any economic, social, cultural or other rights, by any persons on the basis of any kind of disability. The fields covered by these laws include access to employment; health; economic activity; goods and services; rental or selling of estates; buildings and public premises; public transport; and educational establishments.

The Plan of Action for the Integration of People with Disabilities or Incapacities (PAIPDI), approved by the Council of Ministers in Resolution 120/2006 of 21 September 2006 set out integrated and cross-sectoral policy measures and actions that aim to promote the rehabilitation, integration and participation of people with disabilities in Portuguese society. A new plan will be rolled out in 2011 – *Estratégia Nacional para a Deficiência* (ENDEF/ 2011-2013)¹ in accordance with Council of Ministers Resolution 97/2010 under the mandate of the National Rehabilitation Institute (INR). This strategy will be a continuation of the PAIPDI.

Decree-law 3/2008 of 7 January² on special educational needs related to children with disabilities aims to promote inclusive schooling for all. This decree defines the support to be given to pre-schools, primary and secondary schools (public, private or co-operative) in order to ensure that the learning process meets the special educational needs of these children. This has increased the acceptance of children with disabilities in schools, but practical difficulties remain in connection to the lack of specialised teachers.

¹ ENDEF 2001-2013 strategy available at: <http://www.inr.pt/content/1/1487/estrategia-nacional-para-deficiencia-edef>

² Decreto-lei 3/2008 available at: http://sitio.dgicd.min-edu.pt/especial/Documents/dl_n_3_2008.pdf

The Portuguese retail sector is now beginning to make efforts to label many goods in Braille as per Law 33/2008 of 22 July 2008 “establishing measures to promote access to information about specific goods for blind and visually impaired people”.

In addition to the laws on sexual orientation (marriage and gender identity) mentioned above, Law 39/2009 of 30 July 2009 tackles violence, racial discrimination, xenophobia and intolerance at sports events.

Law 3/2011, which forbids any discrimination in access to and exercise of self-employment and which transposes into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC, entered in force on 20 February 2011.

3. Main principles and definitions

Racial discrimination is defined as “any distinction, exclusion, restriction or preference on the grounds of race, colour, ancestry, national or ethnic origin, which has the objective of, or results in invalidation or restriction of the recognition, enjoyment or exercise, in equal conditions, of rights, liberties or guarantees, or economic, social or cultural rights”. This definition is so broad that it also covers discrimination by association.

With regard to disability, a disabled person is defined as a person who, due to loss or abnormality of psychological, intellectual, anatomical structure or function, susceptible to limited capacity, may be considered at a disadvantage for the exercise of normal activities, taking into account age, sex and prevailing socio-cultural factors. The disability definition in Portugal goes beyond the simple disability concept as it includes those with a pre-existing aggravated risk to their health (*risco agravado para a saúde*).

Law 18/2004 forbids discrimination on grounds of racial or ethnic origin, nationality and colour, and Law 35/2004 forbids discrimination on grounds of ancestry, sex, race, colour, language, country of origin, religion, political or ideological convictions, education, economic situation, social condition and sexual orientation, civil status, family situation, genetic patrimony, reduced capacity to work, disability or chronic disease, nationality, or membership of a trade union. Direct discrimination exists when, on one of the grounds referred to in the directives and in Portuguese law, “a person is treated less favourably than another is, has been or would be treated in a comparable situation”.

Indirect discrimination exists “whenever an apparently neutral provision, criterion or practice would put persons with one of the characteristics referred to in the directives and in Portuguese law at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.

The Labour Code prohibits “discrimination by employers against workers or applicants for a job based on grounds of ancestry, age, sex, sexual orientation, civil status, genetic patrimony, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or trade union affiliation”, and so sets out the grounds of discrimination without any limitation concerning the actual situation of the worker and in such a broad way that it covers discrimination by association or perception.

In Article 29(1) of the Labour Code and in Article 3(4) of Law 18/2004, harassment is defined as any form of unwanted behaviour related to racial or ethnic origin which has the purpose or effect of infringing a person’s dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 24(1) and Articles 85 and 86 of the Labour Code establish that employers have a duty to provide reasonable accommodation for persons with disabilities. The State has a duty to give support to employers. The burden on an employer is not considered disproportionate when it is compensated for by the State (Article 86(3)).

Article 25(1) of the Labour Code prohibits in effect all practices of direct and indirect discrimination by employers on the grounds listed.

According to the same code, a difference in treatment which is based on a characteristic related to any of the grounds listed shall not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a justifiable and genuine occupational requirement, provided that the objective is legitimate and the requirement is proportionate [Article 25(2) of the Labour Code (Law 7/2009)].

Specific rules against victimisation only exist in relation to employment; there are no rules against victimisation in Law 18/2004, which is supposed to implement Directive 2000/43/EC.

Article 129(1)(a) of the Labour Code prohibits an employer from “opposing, in any way whatsoever, the exercise by a worker of his or her rights, as well as from dismissing an employee or imposing any sanctions on him or her or subjecting him or her to any adverse treatment because of that same exercise”.

Article 331(1)(a)(d) states that any disciplinary measure taken against a worker is to be considered abusive (and therefore illegal) if it is in retaliation to a complaint against working conditions or to the (present) exercise, the past exercise or the intention to exercise or invoke rights and guarantees on the part of the employee.

Instructions to discriminate are dealt with as discrimination. There are no specific rules for multiple discrimination but it can be considered an aggravating circumstance.

4. Material scope

Anti-discrimination provisions cover all the fields listed in the Directives, namely employment, social benefits, education, goods and services, and housing. Discrimination on the grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation are prohibited in employment and vocational training, including in prisons. Discrimination on the grounds of race or ethnic origin, colour, ancestry and nationality is also prohibited in relation to the exercise of any civil rights, liberties or social or cultural rights. With regard to employment, anti-discrimination provisions apply to both the public and the private sectors.

5. Enforcing the law

According to the Labour Code, only trade unions can act in support of the victim of any discrimination ground in administrative procedures for the imposition of fines. With regard to racial discrimination, Article 5 of Law 18/2004 states that “associations with the objective of combating discrimination based on racial or ethnic origin have the right to engage in judicial procedures on behalf or in support of the interested persons, with their approval”. The victim must give written authorisation. In case of minors or of persons under guardianship, the authorisation of parents or guardians is required. NGOs can support victims in criminal judicial procedures but they cannot engage on behalf of or in support of victims in administrative procedures. Action by all associations is discretionary: they must decide what to do and in which cases to intervene. Associations may seek and obtain the same types of remedies when they act on behalf of the actual victims.

NGOs only have the right, like any other body, to inform ACIDI and the *Autoridade para as Condições do Trabalho* (ACT) [High Authority for Working Conditions], formerly the Labour Inspectorate, of racist practices. Trade unions have the right to act on behalf of and support one or more complainants.

National law allows associations to act in the public interest. Under Article 26(a) of the *Código de Processo Civil* [Code of Civil Procedure] they can act in *actio popularis* when their aim is to protect unspecified persons or interests against discrimination or to protect fundamental rights. According to this article, any citizen, association or foundation, as well as the Public Prosecutor, has standing to intervene and propose actions in order to protect general interests.

Actio popularis is an action where the victim cannot be identified. In civil procedure, an action requires legitimacy and self-interest from the person who presents the action. *Actio popularis* can be used against discrimination as of yet no court cases have been brought. Under article 26(a), NGOs may use it.

Class actions are possible in civil, criminal and labour procedures. In labour law, under Article 5 of the Labour Procedure Code (Law 488/99), only trade unions can intervene to protect in general individual rights (class actions).



Trade unions may use all the types of proceedings available and the types of remedies foreseen in the Labour Code.

There are no specific rules concerning the shifting of the burden of proof for class actions or *actio popularis*.

Associations do not have any right to intervene in administrative procedures for the imposition of fines. Associations which work for people with disabilities may engage in criminal proceedings either on behalf of or in support of a person with a disability, provided his or her approval is given. In administrative procedures, these associations have the right to be informed about enforcement of the obligations that exist under the legal provisions that protect persons with disabilities. Legal entities (NGOs and associations) representing the interests of persons with disabilities people have legal standing in Court to take cases on behalf of these persons.

Once some elements of proof of the existence of discrimination have been established, the burden of proof will shift, since the respondent has the duty to prove that the facts alleged are not discriminatory. This principle does not apply to criminal procedure or to actions where, according to the law, it is the responsibility of a court or other jurisdiction to carry out the investigation.

Statistics, if available, can be used as evidence. They are considered as documents and can also be subject to analysis by experts appointed by the parties or by the court. It is the responsibility of the court to evaluate the evidence resulting from the statistics.

Situation testing is acceptable as evidence under the same rules as evidence given by witnesses. Under the general principles of the administration of evidence, 'situational testing' can be admitted as evidence, but is not defined by law. The procedural rules are those applicable to evidence given by witnesses (Articles 619–645 of the Civil Procedure Code and Articles 340–349 of the Criminal Procedure Code). However, the law is silent on the use of situational testing. So far there is no precedent for the use of situational testing in Portugal.

It is not easy to obtain statistical data on cases of discrimination as there are three institutions in Portugal which may receive complaints: the Ministry of Justice, ACT (the Inspectorate General of Labour) and ACIDI (the High Commissioner).

We must note that ACT has acted against discrimination on the grounds of nationality and disability. It has inspected nearly 2000 undertakings in 2008 for discrimination, either in the course of normal inspections or based on complaints. It should also be noted that the Ombudsman has paid special attention to discrimination cases.

According to the European Commission against Racism and Intolerance (ECRI) Third Report on Portugal (February 2007),³ the dispositions laid down in Article 240 of the Criminal Code have only been applied in two cases: once in 2001 and once in 2005.

Victims of discrimination may address their complaints to any police authority, to ACIDI or to ACT. In the case of a crime, the public prosecutor will conduct the case in the criminal courts.

In the case of minor offences, ACIDI or ACT will impose a fine on the perpetrator. There are very few cases of fines applied in discrimination cases.

Racial discrimination in general is a summary offence (petty administrative offence). The law considers that the practice of any discriminatory action is a summary offence punishable with fines of up to €2,425 and these are doubled in the case of legal persons.

The Labour Code considers discrimination a petty (administrative) offence punishable with fines that vary between €2,040 and €61,200, according to the circumstances of the case. Victims of discrimination have the right to compensation for pecuniary and non-pecuniary (moral) damages in accordance with the principles of the Civil Code.

6. Equality bodies

The core of the system to combat racial and ethnic discrimination is ACIDI. It is now the responsibility of ACIDI to promote equality of treatment among all persons, without any discrimination on grounds of racial or ethnic origin, and also to promote dialogue with and integration of immigrants, ethnic minorities and religions existing in the country. All the other competences of the former ACIME continue in the new ACIDI. ACIDI is governed by Decree-law 167/2007 of 03 May 2007,⁴ which approves the organisational structure of ACIDI.

In particular, it is mandated to coordinate the '*Programa Escolhas*' ['Choices Programme'], the *Estrutura de Missão para o Diálogo com as Religiões* [Structure for the Promotion of Religious Dialogue] and the *Secretariado Entreculturas* [Intercultural Secretariat].

The High Commissioner is assisted by the *Comissão para a Igualdade e Contra a Discriminação Racial* [Commission for Equality and Against Racial Discrimination (CEARD)], which is part of ACIDI, but a distinct body which only has power to issue advisory opinions. It does not have the power to bring any cases before the courts or to assist complainants in doing this.

³ ECRI Third Report on Portugal, available at: http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/Portugal/Portugal_eng_CBC_3.asp#TopOfPage

⁴ Decree-law 167/2007 available at: www.acime.gov.pt/modules.php?name=Downloads&d_op=getit&lid=291

CEARD consists of two members of the Portuguese Parliament, two government representatives and two representatives each from immigrants' groups, anti-racist organisations, trade unions, employers' associations and human rights organisations, as well as three prominent public figures appointed by the other members.

ACIDI is trying to increase the interest and participation of Roma citizens in legislation relating to street trading, the experience of other countries in this matter, the size of fines, the training needs of the Roma, the creation of specific places for street trading, the need for support from social services for the integration of Roma families in society, measures for positive discrimination, the awareness of town hall authorities of issues concerning street trading, the difficulties members of the Roma community experience with entering the Portuguese labour market, and other matters.

ACIDI also intends to use cultural mediators to achieve greater integration of this ethnic group. ACIDI has also set up a working group to look at the issue of itinerant trading as the most widespread means of subsistence among the Roma communities.

The *Gabinete de Apoio às Comunidades Ciganas* (GACI) [Cabinet for the Support of Roma Communities] was also established within ACIDI, and has published the '*Guia para o associativismo nas Comunidades Ciganas*' ['Guide for associative practices within the Roma Communities'] as part of the ROMA EDEM Project. GACI is also going to coordinate the development of institutional rules, mediation and communication for the mediation procedure.

We must also note the Commission for Equality in Labour and Employment (CITE), a tripartite entity created in 1979. It is composed of representatives from government and social partners (the Portuguese Retail and Services Confederation (CCP), the General Confederation of Portuguese Workers – National Trades Union (CGTP-IN), the Confederation of Portuguese Industry (CIP), and the General Workers' Union (UGT)).

The *Comissão para a Cidadania e Igualdade de Género* (CIG) [Commission for Citizenship and Equality of Gender], is now also dealing with sexual orientation discrimination issues beyond its former main strand which was gender equality.

The Commission for Equality in Labour and Employment (CITE) is entitled to initiate judicial proceedings through referral to the Public Prosecutor.

ACIDI, CITE and CIG provide guidance via websites and in some cases on a one to one basis, or through helplines, including *SOS Imigrante*, provided in five different languages by ACIDI (Tel. 808 257 257), a maternity and parenthood service provided by CITE (Tel. 800 204 684) and the CIG helpline for information for victims of domestic violence (Tel. 800 202 148).



CEARD has also created a new website to present complaints against internet websites where racist or xenophobic information exists ⁵ - *the LinhaAlerta – internet segura* which is a member of the International Association of Internet hotlines (INHOPE).

⁵ <http://linhaalerta.internetsegura.pt/>