



Executive Summary

Country Report Portugal 2011 on measures to combat discrimination

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1. Introduction

Provisional results for the 2011 census, with reference to 21 March 2011, show that the Portuguese population numbers 10,561,614. Around 19% of the Portuguese population is aged 65 and over. There are approximately 340 immigrants per 1,000 inhabitants, and there are around 300,000 legally resident foreigners. As regards religion, the Catholic Church predominates with 94% of the population.

The Roma community (estimated at 50,000 people) experiences serious problems in relation to equal rights and integration.

Relations between members of Roma communities and the law enforcement agencies are generally tense. There have been reports of racist violence, with Roma representatives stating that victims do not report such matters to the police as they have never heard of any cases where police officers have been punished for such behaviour against Roma.

The specialised body in Portugal, the *Alto-Comissariado para a Imigração e Diálogo Intercultural* (ACIDI) [High Commission for Immigration and Intercultural Dialogue] considers the situation of the Roma to be a priority issue.

The ACIDI launched a pilot project in 2010 which aimed to appoint Roma mediators in 10 Portuguese Town Halls. It is worth mentioning the project 'Intercultural Mediation in Public Services' – a pilot project developed under the European Fund for the Integration of Third Country Nationals, coordinated by the ACIDI. This project placed 28 intercultural mediators, whose goal was to promote interculturalism, in 25 public services (mostly health and municipal services). Mediators were also placed in the following areas: public security police, social security, housing, employment, and education. An estimated 14,000 people benefited from this programme and a new phase will start in March 2012 with 20 mediators.

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] approved on December 2010, specifies the need to train health professionals and raise their awareness of discrimination on the grounds of sexual orientation and gender identity.

The *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.

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

With regard to age discrimination, Portuguese society is not yet fully aware of the issues involved in this relatively new field, and is only slowly becoming conscious of their implications. The Portuguese Government believes that the law already implements the Directive in respect of age, but positive measures have not so far been completely successful. The Portuguese Insurance Institute is trying to abolish the age limit for insurance by creating non-term life insurance for older people and some insurance companies have already created health insurance policies with no age limit.

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

2. Main legislation

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.

Those who incite or encourage racial, religious or sexual discrimination will be subject to terms of imprisonment ranging between six months and 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 a pre-existing aggravated risk to a person's health.

Law 134/99 forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin, enshrines the principle of equal treatment of persons without distinction on the basis of racial or ethnic origin, and establishes 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 heritage 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.

A new plan has been rolled out from 2011 – the *Estratégia Nacional para a Deficiência* (ENDEF/ 2011-2013, *National Disability Strategy*)¹ in accordance with Council of Ministers Resolution 97/2010 under the mandate of the National Rehabilitation Institute (INR). This strategy aims to give persons with disabilities a better quality of life in terms of access to goods and premises as well as in respect of justice and autonomy, and to fight against discrimination on grounds of disability.

Law 3/2011, which forbids any discrimination in access to and exercise of self-employment and transposes into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC, entered in force on 20 February 2011. It has correctly clarified aspects of anti-discrimination legislation concerning self-employment and the rights of associations to intervene in labour, administrative and judicial procedures and changes the legal standing of NGOs and organisations that defend people against discrimination. It now guarantees the right of associations to intervene in cases which fall under their scope if the victim consents. Article 8 of Law 3/2011 states the following:

Legal standing:

Organisations whose purpose is the defence or promotion of the rights and interests of individuals against discrimination in access to employment, training or to the conditions for the provision of self-employment or employment, have legal standing to intervene on behalf of the person concerned, provided that:

- a) the associations explicitly include protection of the specific interests in their assignments or by-law objectives; and
- b) there is express authorisation from the person represented.

¹ ENDEF 2011-2013 strategy available at: <http://www.inr.pt/content/1/1487/estrategia-nacional-para-deficiencia-endef>.



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 of 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 a psychological, intellectual, anatomical structure or function, likely to limit capacity, may be considered at a disadvantage for the exercise of normal activities, taking into account age, sex and prevailing socio-cultural factors. The definition of disability 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 heritage, reduced capacity to work, disability or chronic disease, nationality, or membership of a trade union. The concepts of direct and indirect discrimination have been correctly transposed into national law, in accordance with the Directives’ wording.

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 heritage, 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 discrimination by association or perception is covered.

In Article 29(1) of the Labour Code and Article 3(4) of Law 18/2004, harassment is defined as any form of unwanted behaviour relating 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.



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.

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 private sectors.

5. Enforcing the law

According to the Labour Code, 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 the case of minors or 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 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 actual victims.

National law allows associations to act in the public interest. Under Article 26(a) of the *Código de Processo Civil* [Civil Procedure Code] they can act in an *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 Prosecution Service, has standing to intervene and propose actions in order to protect general interests. Until recently, associations had no legal standing in administrative or legal proceedings to impose fines concerning minor offences of discrimination at work. The new Law 3/2011 has changed the legal standing of NGOs and organisations that defend people against discrimination.

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

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 has been no precedent for its use 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, the ACT (Authority for Working Conditions, formerly the General Inspectorate of Labour) and the High Commissioner for Immigration and Intercultural Dialogue.

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

The Labour Code 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.



6. Equality bodies

The core of the system to combat racial and ethnic discrimination is the ACIDI. It is the ACIDI's responsibility 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.

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 the High Commission, 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.

The 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.

The ACIDI has developed the use of cultural mediators to achieve greater integration of the Roma ethnic group.

We must also note the *Comissão para a Igualdade no Trabalho e no Emprego* (CITE) [Commission for Equality in Labour and Employment], 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 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 the ACIDI (tel. 808 257 257), a maternity and parenthood service provided by the CITE (tel. 800 204 684) and the CIG helpline providing information to victims of domestic violence (tel. 800 202 148).