

PORTUGAL

Closing the gap on the full enjoyment of Human Rights by Lesbian, Gay, Bisexual and Transgender Persons

Submission to the United Nations Human Rights Council for its Universal Periodic Review of Portugal

INTRODUCTION:

This report is submitted by ILGA Portugal,¹ with ILGA-Europe's² support, in the framework of the United Nations' Universal Periodic Review of Portugal.

While providing a brief overview on the situation of lesbian, gay, bisexual and transgender (LGBT) persons in Portugal it also aims at drawing the attention of the United Nations Human Rights Council on the existing legal gaps in Portugal.

OVERVIEW:

Portugal has come a long way in terms of recognising LGBT persons' human rights and is sometimes pointed out as a worldwide example and a European trendsetter; nevertheless, there are still achievements to be made and secured and this report strives to highlight them.

The Portuguese Constitution specifically includes sexual orientation as a prohibited ground of discrimination (Article 13^o) and separate legislation includes references to sexual orientation. In

¹ ILGA Portugal is the oldest and largest Portuguese non-governmental organisation working for the promotion and protection of the rights of lesbian, gay, bisexual and transgender persons in Portugal. It is a member organisation of the Portuguese Commission for Citizenship and Gender Equality consultative council, of ILGA-Europe's network, of the European Union Agency for Fundamental Rights' network of civil society organisations (the Fundamental Rights Platform) and a founding member of NELFA (Network of European LGBT Families Association).

² ILGA-Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, enjoys consultative status at the Economic and Social Council of the United Nations (ECOSOC) and participative status at the Council of Europe. ILGA-Europe is an international non-governmental umbrella organisation bringing together 408 organisations from 45 of the 49 countries in Europe.

particular, the Criminal Code establishes increased penalties for hate-motivated crimes and hate speech (with the particularity that as of February 2013³ the Criminal Code not only foresees expressly sexual orientation but also gender identity); and, some legal provisions in the areas of education and employment specifically address issues related to sexual orientation issues.

However, there is no legal protection from discrimination in regards to goods and services, health and social security.

Furthermore, though the Criminal Code establishes increased penalties for bias-motivated crimes, the existing complaints registration mechanism does not record data on the specificity of the motivation (in this case, on the grounds of sexual orientation and gender identity). Hence, there is no official data collection on crimes committed against the LGBT community in Portugal, which is not consistent with existing, although non-binding commitments made by the government in international fora such as the OSCE (Ministerial Council Decision 9/09) and the Council of Europe [CM/Rec(2010)5].

While same-sex marriage is possible in Portugal since 2010,⁴ family law provisions are largely neutral as regards sexual orientation and silent as regards gender identity.

The exception to the full enjoyment of the right to respect LGBT persons' private and family life is the access to assisted reproduction techniques, which are only legally available to married different-sex couples, and adoption rights, which are only possible for single persons, regardless of their sexual orientation, and to different-sex couples, excluding same-sex couples even if married. This restriction includes joint adoption and second-parent adoption.

Recently, the judgment of the European Court of Human Rights (ECtHR) on the case *X and Others v. Austria*⁵ expressly mentions 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. Accordingly, on March 2013 ILGA Portugal filed a class action, representing 10 same-sex families, against the Portuguese State demanding the recognition of the children's right to have their family legally recognised, as it has already been defined in existing ECtHR case-law.⁶

On 17 May 2013, the Portuguese Parliament approved, in general terms, a draft law on second-parent adoption but this legal diploma is still under discussion at the appropriate parliamentary committee. Therefore, in July the Council of Europe Commissioner for Human Rights sent a letter to the Parliament's Working Group on Second-Parent Adoption highlighting that need to bring the existing legal framework in line with international human rights standards and with the ECtHR

³ Law n.º 19/2013, of 21 February, included gender identity in the Portuguese Criminal Code.

⁴ Law n.º 9/2010, of 31 May, recognises civil marriage equality.

⁵ *X and Others v. Austria*, ECtHR, application no. 19010/07, decision issued on 19 February 2013.

⁶ A press release is available in English at: http://www.ilga-europe.org/home/guide_europe/country_by_country/portugal/litigation_ilga_portugal_files_class_action_with_10_families_demanding_second_parent_adoption (last consulted on 13 September 2013). The class action is available, in Portuguese only, at: <http://ilga-portugal.pt/ficheiros/pdfs/AcaoPopularesemids.pdf> (last consulted on 13 September 2013).

recent decision, thus enabling same-sex couples to exercise their parental rights free from discrimination.⁷

Law n.º 7/2011, of 15 March recognises the possibility for transgender persons, who possess a clinical diagnoses of gender identity, to alter their name and sex at the civil registry. By adopting specific legislation and solely requiring this diagnosis as a legal pre-requisite, this legal diploma is considered the most advanced legislation in Europe on this issue.

Notwithstanding, there are documented cases of distress caused by the Institute of Registries and Notaries (IRN), which has published a list of competent clinical professionals authorised to sign the diagnosis report.⁸ This list clearly runs counter Law n.º 7/2011's spirit, which was to facilitate the legal recognition of gender reassignment and where there is no mention of different types of professionals authorised or not to sign such reports.⁹ Furthermore, there is no available information on expertise and specific training (especially surgical) of the clinical practitioners working in gender reassignment services.

ILGA Portugal's regular activities and documentation projects have systematically concluded that **Portuguese public officials and service providers lack awareness and specific training in issues of sexual orientation and gender identity.** Comprehensive codes of conduct, internal policies and programmes need to be adopted in order to sustain daily practice when dealing with such issues and to be tailored to take account of the particular circumstances and needs of LGBT people.

RECOMMENDATIONS:

In light of the above, we commend Portugal to:

1. Adopt a comprehensive anti-discrimination law covering all areas of social and economic life and including the grounds of sexual orientation and gender identity;
2. Include gender identity as a prohibited ground for discrimination under Article 13º of the Constitution;
3. Include references to sexual orientation and gender identity in specific scattered legislation (such as in health, access to housing, etc);
4. Amend existing family law provisions that restrict same-sex families' parenting rights;

⁷ The Commissioner's letter is available at: <http://ilga-portugal.pt/ficheiros/pdfs/cartaCEDH.pdf> (last consulted on 13 September 2013).

⁸ More information on this list is available, in Portuguese, at: <http://www.irn.mj.pt/sections/irn/doutrina/pareceres/civil/2011/p-c-c-29-2011-sic-ct/> (last consulted on 1 August 2012).

⁹ More information on this issue is available, in Portuguese, at: <http://expresso.sapo.pt/transexuais-queixam-se-da-burocracia-do-irn=f712231> (last consulted 1 August 2012).

5. Amend the criminal complaints registration system in order to reflect the nature of the crime's motivation in cases of bias crimes;
6. Develop and adopt specific policies for combating discrimination on the grounds of sexual orientation and gender identity;
7. Collect appropriate and relevant data in order to effectively combat discrimination on grounds of sexual orientation and gender identity;
8. Create specific public services clearly mandated to address and redress situations of discrimination on grounds of sexual orientation and gender identity;
9. Provide specific and appropriate training on human rights and sexual orientation and gender identity-related rights to public officials.