**Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity**

**Responses by the Portuguese Authorities**

General legal framework:

The Constitution of the Portuguese Republic enshrines the right to the protection of privacy of one’s personal and family life (article 26). In this connection, it also establishes the right to legal protection against any form of discrimination and prohibits the improper procurement and misuse, or use contrary to human dignity, of information concerning persons and families, in which respect concrete safeguards are specifically established by law.

The Constitution includes a specific provision on protection of personal data in the context of use of information technology (article 35). Under par. 3 of this article, the treatment of sensitive data is, as a general rule, forbidden. Sensitive data concerns information which is more susceptible of generating unequal or discriminatory treatments, therefore including sexual orientation and gender identity. This data can only be treated by means of information technology if the data-subject gave express consent, there is an authorisation provided by law with guarantees of non-discrimination, or for the purpose of processing statistical data not individually identifiable.

The Portuguese Constitution also specifically prohibits discrimination on grounds of sexual orientation (article 13, par. 2).

Portugal is a Member State of the European Union and a State Party to the European Convention on Human Rights. In this regard, Portugal is bound to observe article 7 (Respect for private and family life) and article 8 (Protection of personal data) of the Charter of Fundamental Rights of the European Union, as well as article 8 (Right to respect for private and family life) of the European Convention on Human Rights.

The General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC) is binding in its entirety and directly applicable in all Member States since May 2018.

The Regulation sets out the principles which shall guide personal data processing, namely, that the data shall be: collected for specified, explicit and legitimate purposes; relevant and limited to what is necessary in relation to those purposes; kept in a form which permits identification of data subjects for no longer than is necessary and processed in a manner that ensures appropriate security of the personal data. The measures to ensure security of personal data are also laid out in the Regulation.

The Regulation also establishes the grounds for lawful processing, which include processing necessary for the performance of a task carried out in the public interest or for another legitimate interest. Pursuant article 9 of the Regulation, the processing of personal data concerning a natural person's sex life or sexual orientation is prohibited except if one of the situations foreseen therein applies, namely, the processing is necessary for reasons of substantial public interest or medical reasons.

Moreover, the Regulation establishes the data-subject rights and safeguards. In this regard, it is important to highlight article 22 of the Regulation that establishes that the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

Finally, the Regulation also regulates the obligations of the controllers and processors. Under the new framework, public authorities, at the exception of courts, and the private entities falling under the criteria, are obliged to designate a Data Protection Officer who shall be mainly responsible for ensuring compliance with the GDPR.

The new Portuguese legislation implementing the GDPR is undergoing legislative procedure. The current Portuguese law on data protection (Law no. 67/98, of 26 October), which transposed former EU Directive 95/46/CE, also foresees the applicable principles for the processing of personal data, the lawful grounds for processing, the data-subject’s rights, and the measures to ensure security and confidentiality of data. It also sets out the competences of the supervisory authority, indicates the administrative and judicial remedies available and sets out the applicable administrative offences and crimes.

This Law establishes specific safeguards for sensitive data. Pursuant article 7 of said law, the treatment of sensitive data, including information on an individual’s sex life, is generally prohibited. Under specific circumstances, the processing of such data could be authorized, namely, where important grounds of public interest so require, the data subject gives consent for its processing, or the processing is necessary for medical purposes.

Law 34/2009, of 14 July, regulates the collection, storage, security and protection, access, and erasure of personal data necessary in the context of judicial or alternative dispute resolution procedure. This concerns, namely, data necessary for the effect of conducting criminal investigation and prosecution. This Law also regulates the use of this information for statistical purposes. The collection of information on sexual orientation or gender identity of the persons concerned is not envisaged. However, it cannot be excluded the possibility that such information may be inferred from the information registered, vg., in the case of criminal procedures, the description of the facts.

This law also establishes specific sanctions applicable in cases of non-compliance with the rules set out therein, such as the misappropriation of data or its usage for purposes other than those that determined its collection, illegal interconnection of data, unauthorized access, or breach of professional secrecy.

1. What are the current efforts by States to increase their knowledge of the LGBT population? Specifically, are questions about sexual orientation and gender identity included in government surveys (e.g. the census, national health surveys, income and living condition surveys, or other surveys funded or mandated by the State), administrative records (e.g. birth certificates/birth registries, identity Cards, school records, professional licenses, social security and public benefit records, and other government documents)?

The scarcity of knowledge on experiences and needs of the LGBTI population has been identified as a concern to be addressed in the National Strategy for Equality and Non-Discrimination 2018-2030, approved by the Government in March 2018 (Council of Ministries Resolution 61/2018).

Therefore, one of the specific goals of the Action Plan to Combat Discrimination on the Grounds of Sexual Orientation, Gender Identity and Expression, and Sex Characteristics 2018-2021 (which is part of the National Strategy mentioned above) consists in “Deepening the knowledge, fostering the research and producing national statistical information in the LGBTI areas”.

The measures to attain this goal include a study (to be made until the end of 2020) to analyze the possibility of introducing categories relating to “gender identity”, “sexual orientation” and “sexual characteristics” in the forthcoming Gender-Based Violence Survey. Other measures are the development of statistics on crimes and violent acts based on homophobia, biphobia, transphobia and interphobia within the annual report of the police authorities (by 2020) and the identification by all ministries of LGBTI-related indicators in their respective areas (by 2021).

The implementation of this Action Plan, as well as the National Strategy for Equality and Non-Discrimination 2018-2030, is coordinated and monitored by the Commission for Citizenship and Gender Equality (CIG).

Surveys conducted by Statistics Portugal do not include questions that allow the sexual orientation of respondents to be established. There are also no known rules at the level of the European Statistical System to operationalize the collection of this type of information in household surveys. It should also be noted that statistics characterizing the LGBT population are not made available on the Eurostat website, not even at the level of experimental statistics. It should also be emphasized that, in the context of the United Nations Development Agenda 2030's Sustainable Development Goals, there are no explicit targets or statistical indicators directly or exclusively related to the LGBT population.

The household surveys conducted by Statistics Portugal, typically via sample surveys or censuses, in the current context, are not be the most appropriate vehicle for inclusion of this type of questions. In the case of matters still considered sensitive by the respondents, whose answers, according to the Portuguese Constitution, can not be compulsory (see reply to question 4), the number of responses to be obtained may be small and result from a process of self-selection, which raises problems in statistical inference and leads to biased and small precision estimates, jeopardizing the quality of the results obtained.

Nevertheless, it is worth noting that the possibility of including questions on sexual orientation and gender identity in the Gender-based Violence Survey is being assessed; but the date to carry out the survey is to be defined within Eurostat.

In addition, it should be mentioned that, based on administrative records, Statistics Portugal is able to provide information on the number of same-sex marriages.

The difficulty in obtaining information with the necessary statistical quality through conventional surveys would advise the evaluation of alternative ways of collecting data, in particular through administrative records that directly or indirectly provide relevant information on the characteristics of the LGBT population.

However, for this possibility to become effective it is necessary a social debate that determines the possible alteration of the current constitutional framework. It is also important to safeguard the appropriate operational conditions, with the consequent provision of financial resources, which ensure full compliance with the legislation on the protection of personal data.

Finally, it should be noted that, in any case, the production of official statistics by Statistics Portugal, in this and other matters, should merit discussion within the framework of the Statistical Council, a State body that, under the terms of the current National Statistical System Law, approves at the end of each year the work plan proposal to send to the Government for the following year, as well as the respective financial resources.

The educational authorities do not have any records on sexual orientation and gender identity. There is a wide acknowledgement within the services about the legal and constitutional constraints regarding such data collection in Portugal.

Government surveys and administrative records do not directly include information on sexual orientation. Indirectly, information on sexual orientation may result from other information collected, in particular, on the marital status of the person concerned where the name of the spouse or partner is also required.

Government surveys and administrative records include information on the person’s sex.

Recently approved Law no. 38/2018, of 7 August, establishes the right to gender identity and gender expression self-determination, as well as the right to the protection of each person’s sexual characteristics. This law foresees the procedure for gender identity legal recognition. Any adult whose gender identity differs from the sex assigned at birth can submit a request, in any Civil Registry office, to open a procedure for sex reassignment on their civil registration records and, consequently, their name. The individual may also request the issuance of a new birth certificate which cannot contain any reference to this change. This procedure is confidential.

Any person who has changed their sex on their civil registration records and consequently their name shall be, from that moment onwards, recognized in any identification document with the name and sex inscribed in the registry.

Within the scope of action of the National Commission for the Promotion of Rights and the Protection of Children and Young People, it is noteworthy to mention that the needs assessment protocols used by the Local Commissions of Protection of Children and Young People include a sexual orientation dimension, in order to ensure the respect for and the adequate treatment of the child or young person at risk or in danger, who may be subject of a promotion and protection process.

The importance of the sexual orientation and of the gender identity has been a concern for the National Commission over the recent years and is also highlighted in its Plan of Activities for 2019. As a matter of fact, the Plan is drawn upon the Major Planning Options for 2019, which foresees a new public policies cycle, encompassing the pursuance of a policy of equality warranty between men and women and the inclusion of the gender dimension across all policy areas, under the banner of the National Strategy for Equality and Non-Discrimination[[1]](#footnote-1), whose implementation has already begun.

1. What kinds of data can be collected by government to understand the nature and extent of violence (e.g. through statistics on LGBT-phobic hate crimes and hate speech), discrimination, and disparities in health, education, labour, civic participation, and other important areas?

The themes for which these types of data can be collected depend on the needs expressed by civil society and, in particular, on those resulting from the definition and monitoring of public policies.

In this perspective, it is necessary for the debate on this theme to have an orientation that facilitates the identification of the specific information needs, taking into account four important aspects: (i) the purpose of the information to be collected, (ii) the real possibility of obtaining the information (iii) the cost of inherent human and financial resources, and (iv) the international experiences that exist or are in development. Without this identification, it is difficult to anticipate the type of data to be collected.

The Sistema de Informação de Segurança Escolar (SISE) is an electronic platform developed by Direção-Geral de Estabelecimentos Escolares (DGEstE) where school authorities register cases of violence. The most severe situations are sent to the security forces for a common intervention. This system classifies the different violence types, including a category for acts of racial, religious and sexual discrimination, and other for acts against sexual freedom and self-determination. This record does not identify involved students and school staff, as a safeguard for their privacy and anonymity.

Any student, parent or school staff may also present a complaint regarding a situation of violence based on sexual orientation and gender identity to the Inspeção-Geral da Educação e Ciência. This service analyse all reports and, if necessary, carry out inspective procedures and disciplinary processes. The confidentiality is assured to all citizens involved, according to the legal framework, in all phases of the process (instruction, rights of defence, access to reports.

Discrimination and incitement to hatred against a person or group of persons on the grounds of, inter alia, sexual orientation and gender identity, are punished under Article 240 of the Criminal Code. Moreover, under the Criminal Code, if a crime is motivated by the victim’s sexual orientation or gender identity, that shall be valued as an aggravating circumstances for several crimes, including murder, assault, threat, coercion, harassment, forced marriage or preparatory acts of forced marriage. In these cases, increased penalties apply.

Currently, the justice statistics system does not enable the collection of disaggregated data on the specific discrimination factor underlying to the commission of hate crimes. However, this deficiency has already been identified and studies are underway for the development of a system that allows for the gathering and treatment of such information.

For police purposes, it should be noted that the statistical treatment stems from criminal participation. No data on sexual orientation are collected during the processing of personal data, taking into account the absolute respect for the privacy reserve, as well as fundamental rights, freedoms and guarantees.

In part, only in the crime associated to the concept of hate crime, the data about LGBT people can be found. . Which in Portugal has the following legal framework:

- A. In the crime of discrimination and incitement to hatred and violence, because of race, skin color, ethnic or national origin, ancestry, religion, sex, sexual orientation, gender identity or physical or mental disability, as provided for in Article 240. of the Penal Code.

- B. In the aggravation provided for in Article 132 nº2 item (f) for the crime of homicide, and for the crime of offense to qualified physical integrity, provided for in article 145, of the Penal Code. When determined by racial, religious, political or racially motivated by skin color, ethnic or national origin, gender, sexual orientation or gender identity of the victim.

The Republican National Guard (GNR), through the Article 3 of the Regulatory Decree No. 2/95, of January 25, establishes what kind of personal data, may be collected for automated treatment, which does not include sexual orientation. In the processing of information, does not record any Data, nor monitoring, regarding the sexual orientation of the victim and / or aggressor.

1. What safeguards are in place, and what safeguards are needed, to protect the human rights of individuals providing personal data as well as individuals collecting such data? This question includes the following:

The protection of personal data is currently governed by Regulation (EU) 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing the 95/46/EC Directive.

Article 9 of that regulation, entitled “processing of special categories of personal data”, establishes in paragraph 1 that “[…] data concerning a natural person’s sex life or sexual orientation shall be prohibited.” Paragraph 2 of that provision describes the cases in which this prohibition does not apply[[2]](#footnote-2).

The personal data collected are protected by the rules of statistical and professional confidentiality, provided for in Law nº. 22/2008, of May 13, and by the Data Protection Regulation.

Statistical confidentiality aims at safeguarding the privacy of citizens and ensuring confidence in the National Statistical System, and the individual data collected can not be given or disclosed nor used for purposes other than exclusively statistical ones. They also constitute professional confidentiality for all Statistics Portugal employees, even after the termination of their contract.

Violation of statistical confidentiality constitutes a very serious offense punished with a maximum fine of € 50,000 and € 100,000 (depending on whether it is a natural or a legal person).If it implies breach of professional secrecy it will be subject to criminal and disciplinary sanction.

According to the Data Protection Regulation, respect for the principle of data minimization must also be ensured in the processing of personal data for statistical purposes and technical and organizational measures should be applied which may include pseudonymization

According to the legal rights on citizens’ privacy, schools and the educational administration do not collect any data regarding individuals’ sexual orientation/gender identity. Individualized data collection and analysis is coordinated by Direção-Geral de Estatísticas da Educação e Ciência, which holds an integrated data model that includes the anonymization of identifying and semi-identifying attributes through suppression, pseudonymization and generalization techniques. Therefore, it is impossible to identify even the students who changed their name and gender.

Further to the information provided above, under the applicable legal framework, the data-subject has the right to request rectification, erasure and restriction of processing of their personal data. Moreover, several protection and security measures are envisaged such as the pseudonymisation and encryption of personal data. The data-subject may lodge a complaint with the supervisory authority if the data subject considers that the processing of personal data relating to him or her infringes the applicable rules. The data-subject may also resort to the generally available administrative and judicial remedies.

Information collected for statistical purposes is covered by Law no. 22/2008, of 13 May, which establishes the legal regime of the national statistical system, including rules on statistical secrecy. Statistical secrecy aims primarily at safeguarding the privacy of citizens. To that end, all individual statistical data collected by the relevant authorities are confidential and, in that connection, can only be disclosed in a manner that does not enable the identification, direct or indirect, of the people concerned. Accordingly, in justice statistics, when occurrences registered are in a number inferior to 3, the number is not revealed as such disclosure could enable the identification of a specific person or case.

As referred above, the procedure for gender identity legal recognition established in Law no. 38/2018, identified above, is confidential.

This Law expressly sets out that the practice of any discriminatory act, including by omission, grants the injured person the right to be compensated for both property and other damages under the general civil liability regime. Moreover, any act of retaliation directed at prejudicing a person who presented a complaint, claim, report or action, aiming at the defence of their right to gender identity and gender expression self-determination, shall be void.

* 1. Safeguards to protect the privacy of individuals who provide data about their sexual orientation/gender identity, and the confidentiality of the data provided by these individuals.
  2. Broader statutory rules or administrative policies to insure transparency and accountability of government institutions such as statistical bodies.

1. What are the risks associated with the collection and management of data on sexual orientation and gender identity and initiatives to overcome those?

The risks are essentially associated with the effectiveness of the collection, considering that these are sensitive personal data that cannot be obtained with a compulsory nature, in the terms provided for in article 4 nº 3 of law nº 22/2008, of 13 of May. This type of data is constitutionally protected, so there is no immediate way to go beyond this.

The greater risk associated with the collection and management of this information relates to enhancing the potential for discrimination. However, the current data protection regime ensures that such data is collected and processed only if strictly necessary for the purposes of realizing of a specific lawful ground. Further to this, there are safeguards in place which ensure the protection of such data and the data-subject’s rights, as well as remedies, both administrative and judicial.

In order to prepare all public entities to the entry into application of the GDPR, there has been an increased and wide offer in training on these subjects.

1. Are there circumstances where data collection is ill-advised, such as in countries that criminalize same-sex behavior or where particular government agencies have demonstrated a cause for concern regarding their treatment of issues related to sexual orientation and gender identity?

The data collected by Statistics Portugal can never be used for sanctioning purposes, as previously mentioned. Collection may be discouraged by the sensitive nature of the information, which, coupled with its facultative nature, may imply a low response rate and non-randomness of no responses, severely hampering statistical inference.

1. When States engage in data gathering activity, to what extent is civil society able to meaningfully participate in the design and implementation of these programs? This question includes the following:
   1. Do states have policies that guide the process of civil society participation national statistical programs and other State efforts to increase knowledge about LGBT populations?
   2. Does civil society have the capacity, in terms of expertise and technical knowledge, to meaningfully participate in State efforts to gather data?

There are no policies to guide the process of civil society’s participation in the gathering of data, despite a great part of the civil society’s organizations have the expertise and technical knowledge to do so.

However, regarding the capacity and competence (in terms of expertise and technical knowledge) of civil society to participate in data collection regarding violence and discrimination based on sexual orientation and gender identity, it is necessary to clarify that there were recently created (and financed by the State), in the scope of the National Network of Support to Victims of Domestic Violence, 3 Supporting Services for LGBTI Victims and 1 Emergency Shelter for LGBTI Victims. It is the work and data from these new supporting services specialized on the LGBTI population (and from others also working with LGBTI people within their broader work on discrimination) that has allowed the data collection on violence on the grounds of sexual orientation and gender identity.

Also, some NGOs representing and supporting LGBTI people produce their own data, such as the Observatory of Discrimination on the Grounds of Sexual Orientation and Gender Identity (on a yearly basis), by the NGO ILGA Portugal; or the Education Observatory (every 2 years), designed to collect and monitor homophobic and transphobic bullying at schools, by the NGO rede ex aequo. ILGA Portugal has also conducted and published the results of a National School Climate Survey in 2018, with very relevant data on experiences of discrimination by LGBTI young persons at school.

For the production of official statistics, suppliers and users participate in the Statistical Council. In the specific case of Censuses 2021 there was a public consultation on the variables to be included.

In addition, Statistics Portugal maintains a policy of openness to external requests of information and tries to satisfy them depending on the operational conditions and the public service it provides.

In what regards the justice statistics system, the planning of statistic collection is duly articulated with the National Institute of Statistics (“Instituto Nacional de Estatística” (INE)) and the Superior Council for Statistics, where several civil society organization participate.

The definition of indicators and data to be collected takes into account the needs communicated by users and recommendations of national and international organizations. For example, improvements have been implemented following the participation in the FRA’s “Hate Crime Awareness Raising Workshop”.

* 1. What constitutes meaningful participation in this area?

1. Does the lack of a global classification scheme carry risks that data will not be useful for international comparisons or will not accurately reflect the identities and lived realities of local populations?

Portugal considers that the standardization of indicators and methodologies at national and international level is a requisite for sound comparative analysis, both across countries and over time. Assessments made without methodological accuracy can feed populism and destructive movements, which eliminate years of achievements in the area of human rights, freedoms and guarantees.

Data gathering is key to any evidence-based policy making. In this sense, every State should create conditions in order to collect data and produce information on research, projects, training and awareness-raising activities, surveys, among others, that can be planned.

For the purposes of international comparability, it is essential to have a common classification, as well as guidelines, for the collection of such variables. In general, statistical production in Portugal is part of international programs, particularly within the European Statistical System, where Eurostat plays a central role. One of the advantages of this framework is that it allows internationally comparable information to help interpreting the information content of national statistics.

It is therefore advisable to address the issue of statistical characterization of the LGBT population within the European Union and, if relevant, to integrate it into the European statistics work plan. Statistics Portugal could contribute to this debate in this perspective.

The existence of an international classification regarding the sexual orientation is beyond the scope of the educational authorities. The existence of an international classification regarding acts of discrimination and violence in schools based on sexual orientation and/or gender identity could be useful for data collection and comparison. The Ministry Education is involved in the international discussion on the monitoring indicators regarding the Sustainable Development Goal no. 4 – “A quality Education for All”, including those concerning the right of all students to complete basic and secondary education, and through inclusive, safe and nonviolent learning environments.

1. Approved by Council of Ministers Resolution nr. 61/2018, of 21 May. [↑](#footnote-ref-1)
2. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679> [↑](#footnote-ref-2)