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## OPINION

of 30 June 2010

of the Controller General of places of deprivation of liberty

on the care and management of transsexual prisoners

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Pursuant to the provisions of Article 6 of Law No 2007-1545 of 30 October 2007, several prisoners applied to the Controller General of Places of Deprivation of Liberty, describing their feeling of belonging to the opposite sex and the difficulties encountered in obtaining medical treatment. In the course of the lengthy and detailed investigation which ensued, several actions were taken: two inspectors interviewed first the prisoners concerned, then health professionals and managerial and supervisory staff within the prison administration. They discussed the matter with representatives of the directorate of prison administration and the directorate general of care provision in order to identify more clearly the nature of the difficulties encountered. Lastly, documents produced by other bodies and independent administrative authorities, such as the High Authority against Discrimination and for the Promotion of Equality (HALDE) and the High Authority for Health (HAS), were consulted.

This enabled three findings to be made:

- The prisoners concerned received no detailed information about the arrangements for providing them with long-term medical care and underestimated the effects this would have on their conditions of detention. At best, this information was supplied to them belatedly.
- In any event, they had no access to relevant care provision available outside the prison. Only one of them was able to be included in a protocol run by a specialist team, but only more than three years after taking the first steps.
- The prison regimes for these persons vary because, in the absence of guidelines, each prison director assesses the measures to be implemented on a case-by-case basis (whether or not the wearing of women's clothes is allowed, whether beauty products can be bought at the prison shop, normal detention or isolation, etc).

These findings therefore raise the issue of management of transsexual prisoners.

### 1. Definition of transsexualism

The European Court of Human Rights defines transsexualism as being a term “applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other” and who “often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature” (ECtHR, 17 October 1986, *Rees v. United Kingdom*, Series A no. 106).

The international classification of diseases (ICD-10) describes transsexualism as the “desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort

with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex”.

## **2. The rights protected**

### **- The right to personal development**

Article 8 of the European Convention on Human Rights provides that “everyone has the right to respect for his private and family life... There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

According to the European Court of Human Rights, in France “no legal formality or authorisation is required for hormone treatment or surgery intended to give transsexuals the external features of the sex they wish to have acknowledged” (ECtHR, 25 March 1992, *B. v. France*, Series A, no 232-C). In this same judgment, the Court holds that the refusal to rectify civil status documents violates Article 8 of the Convention because in this case, even having regard to the State’s margin of appreciation, “the fair balance which has to be struck between the general interest and the interests of the individual has not been attained”.

In its Grand Chamber judgment of 11 July 2002 in the case of *Christine Goodwin v. United Kingdom* (no 28957/95), regarded by all commentators as a leading case, the European Court of Human Rights notes that “transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief” and fully affirms the right to personal development and to physical and psychological security. The Court holds that “the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved” and that States have no discretion to refuse to recognise the legal implications of the result to which the treatment leads given that no insuperable difficulties arise with regard to the situation of operated transsexuals.

As a result of this case-law, the following rights are

recognised to everyone in France:

- The right of access to hormone and surgical treatments
- The right to modification of civil status records following the change of gender.

### **- Prisoner access to health-care**

Under the terms of the Law of 18 January 1994 (Article L.6112-1 of the Public Health Code), the public hospital service is responsible for diagnosis and treatment in prisons. Furthermore, Article 46 of the Prisons Act provides that “quality and continuity of care shall be guaranteed to prisoners under equivalent conditions to those enjoyed by the population as a whole”.

It follows that prisoners are entitled not only to the care available in prison but also, should the need arise, to that which is available outside prison.

## **3. Recognition of transsexualism in France**

- Care provision

There are currently a number of specialist multidisciplinary teams working not only in the public hospital service but also in private practice. Owing to the lack of a consensus on the care procedure to be implemented and following a request from the Ministry of Health, the organisations representing transsexuals and the sickness insurance funds, the High Authority for Health proposed<sup>1</sup> on the one hand the official setting up of multidisciplinary reference teams responsible for the assessment and overall management of transsexuals, and on the other, the implementation of a care procedure (differential diagnosis, real-life experience, hormone substitution and re-assignment surgery if appropriate).

- Modification of civil status records

In two judgments of 11 December 1992 marking a reversal of precedent (*Marc X.* and *René Y.* cases), the plenary assembly of the Court of Cassation allowed the modification of a person's civil status records subject to four cumulative conditions being met:

- Gender dysphoria syndrome must have been medically certified;
- The person must adopt the social behaviour of the preferred sex;
- The person must have undergone medical and surgical treatment;
- The change of gender must be certified by a court expert.

The requirement with regard to a gender reassignment operation has been challenged inter alia by the Council of Europe Commissioner for Human Rights<sup>2</sup>, who recommended that changes in civil status should no longer be subject to an obligation to undergo medical or surgical treatment.

In a circular of 14 May 2010, the Minister for Justice and Freedoms informed public prosecutor's offices that they can give a favourable opinion on applications for modification of civil status records "if hormone treatments resulting in permanent physical or psychological changes, combined where appropriate with plastic surgery, have brought about an irreversible change of gender, without however requiring the removal of genital organs".

**Accordingly, in accordance with Law No 2007-1545 of 30 October 2007, the Controller General of Places of Deprivation of Liberty gives the following opinion on the management of transsexual prisoners:**

1. The care structure recommended by the High Authority for Health must include care for prisoners. The multidisciplinary reference team(s) able to provide such care must be clearly identified.
2. For the time being, an existing specialist team should be identified which could provide care for transsexual prisoners.
3. An information and awareness campaign aimed at health-care personnel in the Out-patient Consultation and Care Units (UCSA) and Regional Medical and Psychiatric Departments (SMPR) should be promptly carried out.
4. Any prisoner who expresses the feeling of belonging to the other sex should be able to obtain assistance and be referred to the prison medical services.
5. Transsexual prisoners should receive clear and precise information from the UCSA about the care procedure (treatment stages, management by a multidisciplinary team,

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<sup>1</sup> Current situation and prospects for change in the management of transsexualism, HAS, report published on 18 February 2010 ([www.has.fr](http://www.has.fr))

<sup>2</sup> Issue paper on "Human rights and gender identity" 2009 ([www.coe.int](http://www.coe.int))

- coverage of costs etc) and from the prison administration about the implications for their conditions of detention.
6. Throughout the care procedure, transsexual prisoners should be able to receive psychological assistance within the prison if they feel the need.
  7. During the preliminary differential diagnosis stage, the prison administration should, if necessary, assign transsexual prisoners to an establishment located close to the multidisciplinary team. Once the care procedure has started, the prison administration must guarantee the continuity and regularity of medical consultations that have to be conducted outside the prison and, for this purpose, the reference medical team must inform it as soon as possible of the dates of such consultations.
  8. Throughout the care procedure, the prison administration must ensure that the physical integrity of transsexual prisoners is protected without this leading necessarily to their being placed in isolation, and must ensure that they are not subjected to any pressure or bullying of any kind from any other person by reason of their choice. If they ask to be placed in an individual cell, their wishes must be respected.
  9. In view of the need to respect the right to privacy, transsexual prisoners should be able to wear clothes and use health and beauty products appropriate to their preferred gender when in their cells. They should therefore be able to purchase such items from the prison shop.
  10. Once the care procedure has started, body searches should be conducted with particular restraint, in such a way as to respect prisoners' dignity. Once the irreversibility of the sex change process has been medically certified by the multidisciplinary team responsible, body searches must be conducted, in a manner that preserves the dignity of both prisoners and staff, by officers of the same sex as the prisoner following the sex change, without waiting for civil status records to be modified. These searches must be conducted by officers specially trained for this purpose by the prison management.
  11. The interests of the particular individual and the imperatives of prison management must be reconciled as fully as possible when assigning transsexual prisoners to a prison or prison wing. For this reason, they should be assigned to a prison or prison wing corresponding to their new sexual identity at the earliest possible opportunity, once the irreversibility of the sex change process has been established<sup>3</sup> and, at the latest, when the person's civil status records are modified.
  12. In the judicial process for modifying civil status records<sup>4</sup>, priority must in any case be given to prisoners in view of the implications which that modification has for their conditions of detention.

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<sup>3</sup> Article D248 of the Code of Criminal Procedure might therefore be amended as follows: "Men and women shall be imprisoned in separate establishments unless authorisation to the contrary, justified by exceptional circumstances, has been given by the authority responsible for prisoner assignment.

<sup>4</sup> As defined in the circular issued by the Minister of Justice on 14 May 2010.