Opinion of 25 May 2021

of the *Contrôleur général des lieux de privation de liberté*

on the treatment of transgender persons in places of deprivation of liberty

After an initial opinion published in the *Journal officiel de la République francaise* in 2010[1], the *Contrôleur général des lieux de privation de liberté* (CGLPL) considers it necessary to express its views once again on the situation of transgender*[2] persons deprived of their liberty, given the persistence of serious violations of their fundamental rights and the evolution of the legislative framework. This new opinion covers all places of deprivation of liberty, all of which are concerned by this issue. Although the CGLPL has never noted any violations of the fundamental rights of transgender persons in mental health establishments, closed educational centres and juvenile detention centres, the violations observed in other places are likely to occur there too. The recommendations contained in this opinion can also to apply to intersex* or non-binary* persons.

To prepare this opinion, the CGLPL relied on the referrals received since 2010 concerning the situation of some forty transgender persons, as well as on interviews with associations of transgender persons and European experts. The observations of the Ministers of the Interior, Justice and Health were sought. On-site and document inspections were organised[3].

Finally, many of the difficulties encountered by transgender people deprived of their liberty reveal the more general problems that the authorities are struggling to address: protecting vulnerable persons without imposing additional constraints on them, such as the use of isolation, guaranteeing the safety of persons in overcrowded or overly large establishments, preventing the risk of suicide by acting not only on the immediate causes of the act but on their structural factors, thinking about mixing genders in establishments in a context where the question of sexuality is rarely addressed other than from the point of view of the risks of sexual assault. The purpose of this opinion is to provide information that may help the authorities to reflect on these issues.

[1] CGLPL, opinion of 30 June 2010 on the care and management of transsexual prisoners, published in the *Journal officiel de la République française* of 25 July 2010.

[2] Words marked with an asterisk are defined in a glossary attached to this opinion.

[3] In the Fleury-Mérogis remand prison (men's prison and women's prison), the Caen prison, the Saint-Martin-de-Ré prison, the Toulouse-Seysses prison, and the Toulouse central police station. Eight transgender women and one transgender man were interviewed, the files of several other people were examined and several dozen professionals were interviewed. The reports on these on-site inspections are available on the CGLPL website.

1. Understanding the specific challenges of transgender persons deprived of their liberty in order to implement standards that respect their fundamental rights

1.1. Conducting research on a population that is largely unknown today

The experiences of transgender people have been the subject of numerous scientific and institutional studies showing that, due to the discrimination they face, they are over-represented among the populations exposed to depression and self-harm, addiction and risk behaviours, homelessness and deprivation of liberty measures.

In France, however, there is no public data[4] on the number of transgender people deprived of liberty by administrative or judicial decision, and studies on the particular challenges they face for their transidentity* are incipient[5]. The public authorities therefore lack objective data enabling them to effectively assess the measures to be put in place to protect transgender people.

The CGLPL recommends public authorities to finance and carry out research on the situation of transgender persons deprived of their liberty in France. To this end, data collected in places of deprivation of liberty could be usefully mobilised, in strict compliance with the principles governing the protection of personal data.

1.2. Adapting the currently obsolete and contradictory legal framework

International and European standards are steadily moving towards greater recognition of access to fundamental rights for transgender people. The World Health Organisation (WHO) removed transidentity from the classification of mental disorders on 27 May 2019. In the more specific field of deprivation of liberty, Principle 9 of the *Yogyakarta*[6] *Principles* sets out seven obligations for those responsible for detention (guaranteeing access to appropriate care, involving the person in their assignment, staff training, etc.), while the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, known as the *Nelson Mandela Rules*[7], provide for self-determination in matters of gender identity* during imprisonment. The European Court of Human Rights (ECHR) has ruled that respect for gender identity, including when it differs from the assigned gender, is a component of respect for human dignity and considers it "one of the essential foundations of self-determination"[8]. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recommends the establishment of policies to combat the discrimination and exclusion faced by

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[4] Contrary to the recommendation formulated in the *Ninth Annual Report of the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)*, CAT/C/57/4, § 75, p. 17, SPT, 2016.

[5] La *Haute Autorité de santé* (High Authority on Health) thus underlined «l'invisibilisation, la sensation d'anormalité et la stigmatisation, [ainsi que les] risques d'angles mort dans la prise en charge, sanitaire ou sociale» (the invisibility, the feeling of not being normal and the stigmatisation, [as well as the] risks of blind spots in health or social care) to which transgender people deprived of their liberty are subjected. *Sexe, genre et santé. Rapport d'analyse prospective 2020* (Sex, gender and health. 2020 prospective analysis report), High Authority on Health, December 2020.

[6] *Yogyakarta Principles, Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007 - Principle 9 on human rights in detention. See also *Additional Principles and Additional State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to supplement the Yogyakarta Principles*, adopted 10 November 2017, Geneva.

[7] *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules),* Rule 7.a, United Nations Office on Drugs and Crime (UNODC), 1955.

[8] ECHR, 19 September 2003, *Van Kück v. Germany* (Appl. No. 35968/97), § 73.

transgender prisoners and a comprehensive strategy to combat harassment[9]. The Association for the Prevention of Torture (APT) has published a monitoring guide that outlines the state of the law and provides guidance on how to protect the human rights of LGBTI+* persons deprived of their liberty[10].

In France, since the law n° 2016-1547 of 18 November 2016 on the modernisation of justice in the 21st century, the modification of the mention of gender in civil status is no longer subordinated to a medical transition* and therefore to a modification of sexual characteristics through hormone therapy and genital[11] reassignment surgery*. Thus, a person with a penis can be registered as a woman in civil status, just as a person with a vagina can be registered as a man. However, no normative provision has been added to the provisions governing the treatment of persons deprived of their liberty[12]. The procedures for searching or assigning persons whose civil status sex does not correspond to their anatomical sex are not defined by the texts to date.

Within the Ministry of the Interior, the Directorate General of the National Police (DGPN) introduced in 2018[13] the appointment and training of a 'racism, antisemitism, LGBT and discrimination' focal point in each public security district and, in 2019, issued instructions to its services on the search and accommodation of apprehended transgender persons[14]. The Directorate General of the National *Gendarmerie* (DGGN) is currently drafting a memo on the reception of LGBTI+ persons. There are no general instructions from the Minister of Justice, but work is underway at the Directorate of Penitentiary Administration (DAP), based on a survey conducted in 2019[15]. Furthermore, local directorates can now call upon a focal point specialised in the care of transgender persons for individual situations. The Minister of Health has not issued any directives other than the sheet on transgender people in the methodological guide on health care for people in custody[16]. However, the content of this sheet does not provide any medical advice on the care that can be provided to transgender people. Health care staff are only invited to accompany them and refer them to external professionals. However, these three ministries are committed to the 2020-2023 governmental action plan for equal rights and against LGBT+ hate and discrimination.

With this uncertain legal framework and in the absence of national instructions[17], the management of places of deprivation of liberty face challenges in dealing with transgender people. Although protocols have sometimes been formalised at local level, for example at the Caen prison, they have not been validated by the hierarchical authorities or are not used anymore with the departure of their authors. Other establishments use individual measures to respond to each of the specific problems of the individuals, such as at the Saint-Martin-de-Ré prison, where a transgender person was given permission to access the communal showers alone, without any other measures to adapt her care.

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[9] *Report on the visit to Malta (3-10 September 2015)*, CPT/Inf(2016)25, § 53, CPT, 2016.

[10] *Promoting the effective protection of LGBTI persons deprived of their liberty: a monitoring guide*, APT, 2019.

[11] As the latter often requires the prior agreement of a psychiatrist, this legislative change corresponds to a de-psychiatrisation of the legal transition.

[12] The terms "sex", "women" and "men" in the Code of Criminal Procedure are not defined (in particular in Articles 63-7, R. 57-6-18, R. 57-7-81 and D. 74 on assignment and searches).

[13] Command Instruction of 17 December 2018 on the designation of racism, anti-Semitism, LGBT and discrimination referents.

[14] Telegram DGPN/CAB/N° 2019-289D of 24 January 2019 on the reception and care of LGBT persons within police services.

[15] Survey on the care arrangements for prisoners who are vulnerable because of their sexual orientation or gender identity, to be carried out in July 2019 across all prisons.

[16] Sheet 3 of Book 2 of the interministerial instruction n° DGS/SP/DGOS/DSS/DGCS/DAP/DPJJ/2017/345 of 19 December 2017 relating to the publication of the methodological guide relating to the health care of persons in custody.

[17] With the sole exception of those issued by the national police.

Legislative and regulatory changes must be made as soon as possible to draw all the consequences of the changes brought about by the law of 18 November 2016. New clear provisions must be adopted to respect the gender identity of persons deprived of their liberty, accompanying them in their transition process* and taking into account their specific needs. In the meantime, administrations must issue instructions to guarantee the protection of the fundamental rights of transgender persons. All these measures should be based on the recommendations made in this opinion.

Focal points should be appointed and trained to inform and collect the views of those concerned in a safe manner and to assist local management in their decision making.

1.3. Training professionals working in places of deprivation of liberty

Apart from the recent graduating classes of security and prison officers, few professionals have been taught about transidentity during their initial or further training, although awareness of discrimination is developing in the various schools.

The CGLPL found that staff in places of deprivation of liberty generally train themselves as best they can, by conducting their own research. Good and bad practices are gradually perpetuated, without taking into account legal developments and subsequent recommendations. Although staff generally take a common sense approach and respect the rules, in reality the care they provide to transgender people deprived of their liberty is often profoundly prejudicial to their fundamental rights. This occurs in particular as a result of their assignment to a ward that does not correspond to their self-identified gender*, the misgendering* that this entails, and the many difficulties they encounter in the course of their transition. Furthermore, sometimes they face demeaning or even openly transphobic acts or comments.

Moreover, these repeated attacks on the dignity and rights of transgender people can have detrimental consequences for their mental health, even leading to suicide. Outside prison, transgender people commit about nine times more suicide attempts and self-harm than the general population[18], especially when their transition has not started or is denied[19]. In addition, prisoners are seven times more likely than free people to attempt suicide[20]. Thus, transgender people deprived of their liberty are exposed to a particularly high risk of self-harm, which is even greater in the case of isolation. However, this risk of suicide seems to be largely unknown or even ignored.

The initial training of professionals dealing with persons deprived of their liberty should include in-depth modules on discrimination against gender minorities.

Staff in places of deprivation of liberty should have permanent access to up-to-date information about the care of transgender persons, including through designated focal points, ongoing training and the development of a regularly updated database.

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[18] *The Report of the 2015 U.S. Transgender Survey,* JAMES, S. E., HERMAN, J. L., RANKIN, S., KEISLING, M., MOTTET, L., & ANAFI, M., National Center for Transgender Equality (NTCE), Washington DC, 2016, p. 5.

[19] "63% [of trans respondents] felt that they had resorted more to self-harm before they started transitioning, and 3% more after they had transitioned", *Trans Mental Health Study 2012*, MCNEIL Jay, BAILEY Louis, ELLIS Sonja, MORTON James, REGAN Maeve, Scottish Transgender Alliance, TransBareAll, the Trans Resource and Empowerment Centre, Traverse Research, and Sheffield Hallam University, Sept. 2012, p. 55

[20] For 2005-2010, the suicide rate was 18.5/10,000 for detainees and 2.7/10,000 for men aged 15 to 59 in the general population of France (age group and gender equivalent to that of the detained population). Source: *Suicide des personnes écrouées en France: évolution et facteurs de risque* (Suicide among prisoners in France: trends and risk factors), DUTHE Géraldine, HAZARD Angélique, KENSEY Annie, Institut national d'études démographiques, "Population" 2014/4, Vol. 69, pp. 519 to 549.

Training for health care personnel should address the legal framework of medicalised transitions*, hormone prescription and psychological support.

In addition, all professionals must be aware of the risk of self-harm to which transgender people are particularly exposed, and trained on the structural prevention of suicide, particularly through comprehensive care that respects gender identity. Finally, the voice of transgender people, who are the primary experts on their situation and their needs, should be considered as a resource that can be mobilised. Training could usefully be organised jointly with associations defending the rights of transgender people.

2. Respecting the gender identity of persons deprived of their liberty on a daily basis

2.1. Consult transgender people on arrival to involve them in their care and not deny their preferred title

When a transgender person arrives in a place of detention, there is no way for the administration to identify their transidentity if there is no mention of it in their file or if the mismatch between their physical appearance and the gender mentioned on their identity documents is not obvious. Often, the transidentity is only revealed when they are asked to strip. Searches are sometimes carried out for the sole purpose of establishing the person's sexual characteristics. This practice is a serious violation of dignity.

Any person arriving in a place of deprivation of liberty should be invited to express any fears they may have for their safety or dignity, particularly on the grounds of their gender identity. A procedure should be formalised for this purpose and implemented in a caring and confidential manner. Transgender persons should be free to disclose or not disclose their transidentity. Strip or pat-down searches for the purpose of identifying anatomical sex should be prohibited.

As regards the services under the authority of the Ministry of the Interior, in the premises of the gendarmerie, in the absence of other directives, persons are only placed in individual cells. The Directorate General of the National Police (DGPN), in its telegram of 24 January 2019, gave instructions to respect the title and first name under which the persons apprehended present themselves and to include this information on the reports in addition to the information on the identity documents, after obtaining the consent of the persons concerned. Their placement in an individual cell is also encouraged. In practice, however, in the vast majority of cases, only civil status data are included in the proceedings. Misgendering is frequent, including against people whose gender expression* is not ambivalent. Unethical comments or acts are sometimes reported.

As regards arrival in premises under the authority of the Ministry of Justice, treatment is based exclusively on civil status: choice of establishment or ward (male or female), entries in the registers and detention procedures, gender used to address the person, etc. Only a few establishments proceed differently (see below the practice implemented at Fleury-Mérogis remand prison).

When a transgender person is identified by the administration or the court, they shall be placed in an individual cell upon arrival in a place of deprivation of liberty. The person should be asked to indicate the title and first name by which they wish to be referred to verbally and in writing, including in the proceedings and medical records, in addition to the information contained in the civil status records. The preferences thus expressed should be respected and the person concerned should be able to change them at any time. If the confinement is to be prolonged, the person concerned should be received by a member of the management or staff for a more detailed examination of their, and further and permanent measures should be decided upon.

People arriving in a place of deprivation of liberty should be asked which categories of professionals they wish to disclose their transidentity to, which should never be revealed without their consent. Restrictions on access to this information should then be arranged.

All the information collected must be formally recorded before notifying the person concerned and gathering their free and informed consent to the measures envisaged.

2.2. Adapting search procedures to respect the dignity of transgender persons

In the area of searches, scrupulous respect for ethical rules and dignity is particularly important for transgender people as their life paths have often exposed them to discrimination and acts that violate their dignity.

Articles 63-7 and R. 57-7-81 of the Code of Criminal Procedure provide that the search must be carried out by an officer of the same sex as that of the person being searched, without further specification.

In accordance with the instructions of the Directorate General of the National Police (DGPN), the police in principle gives preference to the notion of gender over that of anatomical sex, so that each person is searched in accordance with their gender[21]. However, compliance with this instruction is uneven, whether in police custody, administrative detention centres or waiting areas. In the gendarmerie, searches are carried out by an officer of the same sex as that shown on the civil status documents of the person in custody[22]. A new memo is being drafted to allow a dialogue between the officer and the person being searched and to ensure that physiological status prevails over civil status. In case of disagreement, administrative identity will prevail.

The prison administration has not issued any instructions in this regard and, in the vast majority of cases, the search is carried out by an officer of the same anatomical sex as the person being searched, regardless of the person's registered sex or gender identity. In some institutions, the search is even carried out by two officers so that a witness can testify to any inappropriate actions by the other officer or the transgender person, which exacerbates the resulting violation of the latter's dignity. Although male officers currently search transgender women* who already have developed breasts, some directors refuse to allow female officers to search transgender women with male genitalia. However, several female officers met by the CGLPL indicated that they would not be opposed to performing such searches on a voluntary basis.

Some establishments are reducing the frequency of searches and are using magnetic sensors rather than pat-downs.

The adaptation of search rules and practices to transgender persons does not constitute an additional or exorbitant right, but simply the adaptation of the general principle of equal respect for dignity to the particular situation of these persons. This must be translated into concrete measures to ensure that the bodies exposed are viewed neutrally. The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment considers that "full-body searches and the humiliation they cause can constitute a form of torture or ill-treatment, particularly for transgender detainees"[23] and recommends that "all transgender detainees should be guaranteed the possibility to choose to be searched by male or female staff"[24].

[21] Telegram DGPN/CAB/N° 2019-289D of 24 January 2019, *op. cit*.
[22] Memo n° 060882 GEND/DOE/SDPJ/PJ of 27 June 2011 relating to the regime of measures and searches during a police custody measure.
[23] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/31/57, 5 January 2016, § 36.
[24] *Ibid,* § 70 u).

The decision to search transgender persons or any other person "must be necessary in view of its objectives and proportionate to the individualised risks". Its practical arrangements must be implemented gradually and "always preserve the dignity and fundamental rights of the persons concerned"[25].

Thus, the use of the over-the-clothes magnetic sensor, which is less intrusive and likely to be used by both male and female officers, should be preferred to any other search method.

During full body searches, any request from the person concerned that limits the invasion of privacy without hindering the search (e.g. hiding the chest or sex with the hands, undressing in two stages, etc.) must be granted.

In any case, upon arrival in a place of deprivation of liberty, transgender persons should be invited to express their preference as to the gender of the officers by whom they will be searched through a systematic and formalised interview, the minutes of which should be notified to them. Their wishes, which they should be able to revoke at any time, should be respected.

2.3. Respecting the placement wishes of transgender people and allowing free gender expression

The conditions in places of deprivation of liberty are conducive to discrimination and violence. Transgender people are a particular target[26]. Therefore, in places where accommodation is not mixed, the question of whether they should be placed in male or female accommodation is of paramount importance. Furthermore, it marks the recognition - or too often the denial - of their gender identity and affects their daily life (access to activities, showers, certain objects or products commonly associated with one gender such as bras, etc.).

Faced with the challenges of placement, many professionals wonder at what stage a person should be considered transgender and receive special care. However, transidentity is a self-determination process, which is not systematically accompanied by physical transformations or a change in civil status. Any transgender person who identifies as a woman is a woman and must be recognised as such. Any transgender person who identifies as a man is a man and must be recognised as such as well.

In administrative detention centres and facilities, while the placement of transgender people in the area corresponding to their anatomical sex or in a segregation room has long been the norm, they are now generally assigned to the area corresponding to their gender or to "family" areas.

In prisons, where the standards provide that "men and women are incarcerated in separate establishments or in separate quarters of the same establishment"[27], the majority of placements are determined on the basis of the sex recorded in the civil status register, although some directors rely instead on anatomical sex, as in the Fleury-Mérogis remand prison. Neither of these practices is fully satisfactory. The first ignores the situation of people who have not changed their civil status or who do not wish to or cannot take such a step, particularly those of foreign nationality. The second ignores the situation of people who have not yet undergone gender reassignment surgery* or do not wish to do

[25] *Les Recommandations minimales du CGLPL pour le respect de la dignité et des droits fondamentaux des personnes privées de liberté* (The CGLPL's Minimum Recommendations for the Respect of the Dignity and Fundamental Rights of Persons Deprived of Liberty, Recommendation No. 213.

[26] "The risk of being sexually assaulted by prison officers was more than five times higher for transgender people than for the rest of the U.S. prison population, and more than nine times higher for sexual assault by fellow inmates', *The Report of the 2015 U.S. Transgender Survey, op. cit.* , p. 15.

[27] Article 1 of the standard internal regulations for prisons annexed to Article R. 57-6-18 of the Code of Criminal Procedure.

so. Finally, only transgender people who have undergone a change of civil status and genital reassignment surgery are guaranteed to be assigned to a sector that conforms to their gender.

The vast majority of transgender people are incarcerated in institutions or wards that do not correspond to their gender identity. The prison administration tries to protect them from the risk of aggression by taking measures that make them invisible.

Firstly, they are frequently placed in isolation or in particular areas (e.g. nurseries) when there are no other people or not used much, which reduces or eliminates their possibilities for human contact and access to work, physical activity, appropriate care, etc. This situation can lead to a deterioration in their psychological health, or even to suicide.

Secondly, there is a specific ward for transgender people at the Fleury-Mérogis men's prison. Located on the floor of the solitary confinement area, it follows the same rules as the solitary confinement area, which is designed to keep the prisoners away from the eyes of others (walking in a small screened courtyard on the floor, moving around in areas emptied of other prisoners, etc.).

Such a regime certainly prevents the risk of aggression but compromises the effectiveness of many other fundamental rights. Moreover, given its unique nature in France, people from all over the country may be placed there. This can be detrimental to the maintenance of family ties. In any case, it is a discriminatory and segregative practice.

Thirdly, transgender persons are assigned to ordinary detention but their ability to express themselves in their gender is then restricted or even annihilated (in male institutions, prohibition to wear so-called female clothing for example). In addition, the preservation of their security is almost exclusively their responsibility (not going to the communal showers and washing at the cell sink, befriending influential people in detention, etc.) and this may even lead some of them to have sexual relations with fellow inmates who could protect them.

In these three situations, access to and use of accessories and products commonly associated with one gender or the other are difficult because they are conditioned by the sector of assignment. Thus, objects considered to be feminine (dresses, bras, jewellery, make-up, etc.) are most often prohibited in men's prisons. They are then withdrawn during the inventory on arrival, prohibited from being handed over during visits to the visiting room and absent from canteen catalogues. Sometimes, they are admitted to the cell, with express authorisation and under certain conditions (discretion of clothing, medical transition, altered civil status, etc.). The rules thus established by the heads of prisons and their application evolve according to requests, the officers on duty and what they consider to be common sense in terms of equal treatment of prisoners. However, taking into account a specific basic need does not constitute a breach of equality but, on the contrary, it guarantees it. In this regard, the *Nelson Mandela Rules* state: "In order to give effect to the principle of non-discrimination, the prison administration shall take into account the needs of each prisoner, in particular those of the most vulnerable categories in the prison environment. Measures required to protect and promote the rights of prisoners with special needs shall be taken and shall not be considered discriminatory"[28]. These situations are the cause of serious violations of the dignity, privacy and physical and psychological integrity of the persons concerned. Having their identity denied, they are particularly exposed to the risk of self-harm.

Transgender persons deprived of their liberty should not be isolated solely on the basis of their transidentity, unless it is a brief measure of last resort and an emergency.

Like any other person who may be particularly vulnerable to violence in places of deprivation of liberty, transgender persons may be subject to special care. As such, they should be able to be allocated to a vulnerable area if they so request, or following an assessment of the risks to which

[28] Rule 2.2 of the *Nelson Mandela Rules, op. cit*.

they are individually exposed in the ordinary sector. Transidentity alone should not lead to automatic placement in a secure unit. Within the protected area, they should not be subject to separation measures other than those strictly necessary to improve the quality of their care and should be able to participate in common activities.

Transgender persons should be free to keep or acquire objects and accessories commonly associated with the gender with which they identify. Prohibitions in this area should only be justified on the basis of detailed security requirements and should be subject to an adversarial discussion and a reasoned, notified and appealable decision, and alternatives should be offered. In addition, it would be useful to have joint shopping catalogues for men's and women's wards.

Currently, prison authorities are reluctant to assign a person to their self-identified gender when they have a physical appearance or genital characteristics of the opposite gender and most often refuse, for example, to assign a transgender man to the men's group if he has a vagina.

Firstly, the risk of physical assault was mentioned, with management fearing that transgender women, who are sometimes described as imposing in size and voice, would attack staff or other women in prison. Risks of sexual assault were also highlighted, with transgender people alternately described as potential aggressors or victims. However, it is the responsibility of the administration to guarantee the safety of any person in a vulnerable situation, without affecting the protection of their other fundamental rights. The CGLPL refers here to its thematic report on interpersonal violence in places of deprivation of liberty, which recommends the implementation of an effective policy to combat verbal, physical or sexual violence[29].

Risks of pregnancy are then put forward. However, persons deprived of their liberty retain the right to freely dispose of their bodies and, in this respect, to have free and consensual sexuality and to have a child if they so wish. It is the responsibility of the administration to organise preventive actions in sexual and reproductive health, and to improve access to contraception and voluntary termination of pregnancy.

The CGLPL recalls that the absence of steps to change civil status or physical modifications does not call into question a person's transidentity. There are therefore no transitional conditions necessary for assignment to the self-identified gender area. The only criterion to be taken into account is the self-determination of the person concerned.

The assignment of transgender persons should be subject to an adversarial procedure.

Individuals should therefore be systematically consulted about their wishes to be assigned to a male or female sector. To this end, they must be informed of the protective measures that can be deployed in the event that they feel unsafe there. Their request must be granted, except in exceptional and justified cases (which excludes organisational and architectural constraints). The decision on the assignment must then be notified and subject to appeal.

Transgender people should be able to request a review of their situation at any time.

Exclusion from the selected area should only be considered if it is established that the original request was abusive. Changes between male and female wings should be based only on gender identity and never on disciplinary or internal order grounds.

If incidents occur despite the observance of these principles, the personal responsibility of the authorities staff cannot be engaged more than for any other incident.

[29] CGLPL, *Les violences interpersonnelles dans les lieux de privation de liberté (*Interpersonal violence in places of deprivation of liberty), Dalloz, 2020.

3. Supporting transgender people who wish to change their civil status

While the easing of the rules for obtaining a change of first name or sex at the civil status office since 18 November 2016 has broadened the spectrum of people who can claim administrative recognition of their gender, some remain excluded *de jure* (people of foreign nationality) or *de facto* (those who do not have access to information, do not have the necessary codes or resources to carry out these procedures, do not consider them a priority in relation to other concerns, have given up on asserting their rights, etc.). The deprivation of liberty measure, insofar as it is supposed to be accompanied by social, legal and administrative support that is sometimes lacking for people on the outside, can be a particularly opportune moment for those who wish to do so to apply for a change of first name or sex at the civil registry, particularly with a view to facilitating their return to freedom.

However, due to a lack of training, the prison integration and probation services do not always consider themselves competent to support people in their application to change their civil status. The persons concerned must therefore often carry out these procedures themselves or seek the services of a lawyer, which entails a financial cost.

In addition, the testimonies gathered by the CGLPL show that the civil registrars or magistrates responsible for processing these applications sometimes require the persons concerned to produce, as proof of life in the gender of destination, elements that they are unable to provide from a place of deprivation of liberty, particularly because of the measures of separation and invisibilisation taken by the authorities against them (testimonies attesting to their gender expression, for example).

Transgender persons deprived of their liberty who wish to make a legal transition* should be accompanied within the institutions by properly trained staff. They should have access to the contact details of associations working for the rights of LGBTI+ persons whose interventions should be encouraged. A telephone hotline for LGBTI+ people should also be available to them free of charge at all times.

In order to facilitate the legal transition and therefore the respect of the right to self-determination and privacy of transgender persons, the CGLPL recalls the framework decision No. 2020-136 of 18 June 2020 of the Defender of Rights, which recommends that such steps may be taken by means of a simple declaration on honour. In the meantime, the administrative and judicial authorities examining applications for a change of first name and gender in civil status from persons deprived of their liberty must be informed of the restrictions imposed on them on a daily basis and take into account the resulting difficulties in proving their transidentity.

The competent services and actors in places of deprivation of liberty must accompany transgender persons of foreign nationality who wish to initiate a legal transition with the authorities of their country of origin. If they have fled their country of origin because of their transidentity and are in France illegally, they should be informed of the possibility of seeking protection from the French Office for the Protection of Refugees and Stateless Persons (OFPRA) and be accompanied in doing so.

4. Ensuring appropriate health care for transgender people and enabling a medical transition

4.1. Ensuring access to appropriate care for transgender people

Access to care and the quality of health care in places of deprivation of liberty must be equivalent to that outside. However, the binary organisation of assignments and the frequent use of

isolation for transgender people deprived of their liberty hinder their effective access to care: limited[30] psychotherapeutic follow-up because the practitioners cannot receive the person in their office as they usually do and must travel to the isolation ward; refusal of assignment to a regional medico-psychological service because of the impossibility of organising isolated management there; reduced access to necessary specialised consultations, for example gynaecological consultations from a "men's" ward for transgender men* who have not undergone phalloplasty or for transgender women who have undergone vaginoplasty, etc.

In addition, many health care personnel working in places of deprivation of liberty claim that they do not provide special care for transgender people on the grounds that care should be seen as that of an individual and not a group. This approach is based on the desire to guarantee identical care to all patients. However, such equal treatment is only effective if it is accompanied by a detailed knowledge of the medical data and needs of transgender[31] people. Despite the lack of training, carers are often aware of the overexposure of transgender people to sexually transmittedinfections[32]. On the other hand, they are unaware, for example, that some patients have given up care in favour of self-medication, including hormonal medication, due to the lack of consideration for their gender identity by the medical profession outside the hospital. Moreover, the majority of doctors interviewed by the CGLPL spoke of the transgender people they were treating by referring to their civil status gender and not their self-identified gender, thus using the masculine form to refer to female patients. Such a misgendering questions the knowledge and positioning of these doctors regarding the needs of their transgender patients.

Transgender persons deprived of their liberty must have effective and consistent access to care that is appropriate to their needs. To this end, health care providers must provide a safe environment, which includes recognising and respecting the gender identity of their patients.

Prevention and screening for diseases to which transgender people are likely to have been exposed as a result of their life course or medical transition (infectious diseases, cancers, etc.) should be encouraged. Psychological support should also be offered and, if necessary, special attention should be paid to the effects of daily confrontation with transphobia.

4.2. Enabling continuity and commitment to medical transition

Just as treatment breaks are often experienced by people arriving in a place of deprivation of liberty, transgender people often do not benefit immediately from the continuation of their hormone treatment or post-operative follow-up. From a few hours in police custody to several weeks in administrative detention centres and prisons, these delays are cumulative as people move from one place of detention to another.

This is particularly the case if they do not carry their medication or a prescription in French. When the deprivation of liberty is to last, some doctors agree to continue the hormone therapy or try

[30] Although transidentity does not obviously calls for psychotherapeutic treatment in itself, confinement can be a source of psychological suffering, particularly when it is accompanied by segregation measures. The CGLPL is particularly attentive to the issue of access to psychotherapeutic care for isolated persons in general.

[31] "When discussing health inequalities for transgender people, health care providers often refer to the idea of "treating all patients the same". In reality, this approach is problematic because it ignores the uniqueness of the person, overlooks the importance of individual factors and characteristics on outcomes, and contradicts the person-centred view of care. Clinically, this affects the patient-provider relationship, with consequences for treatment adherence, and can lead to failure to detect certain diseases such as cancer. It is not surprising in these circumstances that less than 40% of transgender people report that their doctor knows their gender identity", *Sex, Gender and Health*, Haute autorité de santé, 2020, p. 151.

[32] "The rate of HIV-positive diagnoses was 1.4% for respondents, a rate substantially higher than that of the U.S. population (0.3%)" (CGLPL translation), *The Report of the 2015 U.S. Transgender Survey, op. cit.* , p. 120.

to contact the prescribing doctor outside in order to obtain a copy of the prescription, which is a good practice. Continuation of hormone therapy is sometimes conditional on an initial endocrinology consultation or further tests (MRI, blood tests, etc.), which may take several weeks or months.

However, an abrupt and prolonged interruption of hormonal treatment is likely to have detrimental somatic effects on the organism and to induce the reappearance of physical signs linked to the gender assigned at birth (pilosity, vocal moult, etc.), which may lead to psychological suffering.

Medical visits should be arranged on arrival in places of deprivation of liberty and transgender persons should be asked about any needs related to their medical transition. If post-operative treatment or care was underway before deprivation of liberty, it should be continued without delay. If a consultation with a specialist is necessary, it should take place as soon as possible.

At present, in long-stay facilities, it is difficult to continue a hormone treatment that has already been started, and almost impossible to initiate and complete a medical transition, partly because of the reluctance of doctors.

Firstly, doctors in health units often have no medical or legal knowledge of medical transitions. Due to a lack of training and sometimes not knowing where to get information, they are unable to inform people who ask them about medical transitions and find it difficult to refer them. In addition, they feel incompetent to prescribe hormone treatments and do not believe they are authorised to do so. However, while some procedures can only be carried out by specialist doctors, others, such as prescribing feminising hormones, can be carried out by general practitioners working in places of detention.

In addition, many doctors working in health units justify their refusal to prescribe hormonal treatment by invoking the medium- and long-term health risks for patients (psychiatric and cardiovascular problems, etc.). However, the *World Professional Association for Transgender Health* warns that "the consequences of interrupting treatment or not starting medically necessary treatment can be very negative, leading to self-castration, depression and suicidal risks"[33], to which can be added the taking of hormones through indirect channels (trafficking, prostitution) and without medical follow-up, and invites to reflect in terms of risk reduction.

Furthermore, most doctors believe that the commitment to a medical transition must necessarily be part of the strict protocol set up by a dozen multidisciplinary hospital teams specialising in transidentity. However, the CGLPL notes that such a protocol, which imposes a two-year psychiatric follow-up prior to any hormonal prescription, is not imposed by national regulations or WHO recommendations. It is contested by many experts from civil society, who advocate free choice of doctor and treatment. In addition, some specialist teams do not cover the full range of disciplines required for certain transitional pathways, for example those involving genital reassignment. It has been observed that prisoners compromise their family ties by requesting to be transferred to facilities close to these hospitals in the hope of receiving care that is not in fact provided there.

Secondly, some health professionals question the transidentity of their patients. Several doctors interviewed in the course of preparing this opinion indicated that the refusal of some transgender people to undergo gender reassignment surgery is a sign that their transidentity is not a given. Others give limited credit to requests from transgender patients incarcerated for sexual offences, believing that they cannot be truly transgender.

Thirdly, some doctors expressed reservations about initiating a transition during incarceration on the grounds that deprivation of liberty would affect the ability of the individuals concerned to make free and informed choices and that institutions would not be suitable places to do this. Others fear

[33] *Standards of Care (SOC) for transgender, transsexual and gender non-conforming health,* The World Professional Association for Transgender Health (WPATH), 7th version, September 2013, p. 76.

that their patients will start a treatment that may not be continued upon release, which would be harmful to their health. However, for some people, detention can be an opportune time to benefit from health and social support, which they sometimes lack on the outside, and to set up long-term monitoring, as one of them told the CGLPL, even though she had been waiting for a medical transition for years.

While in the open enviroment, transgender people facing similar attitudes can turn to other medical teams, transgender people deprived of liberty are *de facto* deprived of this resource. This situation can result in an undue infringement of their fundamental rights, including their rights to self-determination, free disposal of their bodies, access to care and respect for their physical and psychological integrity.

Transgender persons deprived of their liberty who wish to pursue or initiate a medical transition should be informed and accompanied in their efforts by the health care staff of the institutions. They should be given prompt treatment in accordance with their needs and wishes by doctors who are duly trained for this purpose. The appropriateness of prescriptions must be regularly re-evaluated in the light of medical check-ups, adverse effects observed and the requests of the persons concerned. Refusal to prescribe can only be justified by an individualised assessment that transitional care is medically impossible.

The right to free choice of doctor must be respected. To this end, referral to multidisciplinary hospital teams specialising in transidentity can only be offered on the same basis as other care modalities and after people have been informed of the possibilities offered by each system (time limits, accessible care pathways, prerequisites, etc.) and then given the opportunity to freely express their choice. In addition, the involvement of experts from civil society and access to information, particularly through websites dedicated to medical transition, should be encouraged.

Finally, in addition to the reluctance of doctors, there are difficulties arising from the organisation of places of deprivation of liberty, which also hinder access to specialised care for transgender people wishing to start or continue a medical transition. Indeed, many specialised consultations are not available in places of deprivation of liberty and require medical tranfers. However, in a context where delays in obtaining a medical appointment are several months, these transfers are extremely difficult or even impossible to organise from certain establishments, due to the lack of vehicles and escorts available in sufficient numbers. Specialised doctors sometimes refuse to take charge of detained patients because of these difficulties and the constraints inherent in conducting consultations (presence of officers, including during psychiatric interviews).

Furthermore, surgical operations often require extensive post-operative care and regular follow-up, which cannot be provided in detention. Caregivers generally consider it preferable for the persons concerned to wait until they have been released to benefit from them, even if they have been sentenced to several years in detention.

The CGLPL reiterates its general recommendation to substantially improve access to specialised care for persons deprived of their liberty, to respect medical secrecy and to significantly increase the capacity for medical extractions. Organisational difficulties within the administration should not hinder the medical transition of transgender persons.

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Currently, transgender persons deprived of their liberty suffer numerous human rights violations, the accumulation of which may constitute cruel, inhuman or degrading treatment within the meaning of the European Convention on Human Rights.

The recommendations in this opinion aim to ensure full respect for the dignity and rights of transgender people deprived of their liberty, in particular their rights to self-determination, free disposal of their bodies, access to health care, intimacy and privacy. Their application would also make it possible to respond to an essential issue: the preservation of the physical and psychological integrity of these people, understood from the angle of interpersonal violence but also from the angle, often neglected, of the risks of self-harm.

If a transgender person cannot be provided with care that respects their dignity, identity, privacy, intimacy and safety, or if they are prevented from continuing or initiating a desired medical transition, alternatives to deprivation of liberty, temporary release or release from prison should be considered.

GLOSSARY

Gender expression: the set of visible characteristics that can be associated with gender, whether in terms of behaviour or physical appearance (clothing, jewellery, make-up, haircut, etc.).

Transgender woman: a person who has been assigned male at birth due to her anatomical characteristics and whose gender identity is female.

Self-identified gender: a person's perceived gender, which may differ from that associated with their civil status or physical appearance.

Transgender man: a person who was assigned female at birth due to his anatomical characteristics and whose gender identity is male.

Gender identity: the intimate and personal experience of gender by a person, regardless of the sex assigned at birth.

Misgendering: the practice of referring to and using the lexical field of the sex assigned to a person at birth, ignoring the self-identified gender (e.g. saying 'sir' to a transgender woman).

LGBTI+ people: lesbian, gay, bisexual, transgender, intersex and other sexual and gender minorities.

Intersex person: a person who is born with variations in sex development, whether genetic, hormonal or anatomical, and therefore has characteristics considered both male and female.

Non-binary person: a person who does not identify with the gender duality of men and women.

Transgender person: a person whose gender identity does not correspond to the sex assigned to them at birth. A transgender person may or may not have taken steps to change their civil status or undergo physical transformations. The terms "transsexual" and "transsexualism", used by the CGLPL in its 2010 opinion, should be replaced by "transgender" and "transidentity", as they correspond more closely to the reality of the situation and to the vocabulary used by the majority of the people concerned today.

Genital or sexual reassignment: surgery to reconstruct the genitalia to conform to the self-identified gender (vaginoplasty, phalloplasty).

Transidentity: having a gender identity that does not correspond to the sex assigned at birth.

Transition: steps to bring gender identity and expression in line with the deeply held sense of gender. These steps can be social, legal or medical.

Legal transition: a process aimed at obtaining a change in the first name or gender in civil status.

Medical transition: all procedures that aim to modify, in a reversible or definitive way, the physical characteristics in order to acquire those attached to the gender of destination (taking hormones, voice modification thanks to a follow-up by a phoniatrist, surgery: mastectomy, mammoplasty, removal of the Adam's apple, phalloplasty, vaginoplasty, etc.). Recourse to one, several or none of these procedures does not condition transidentity and is a free choice of the person.

Social transition: adopting a gender expression that does not correspond to that associated with the sex assigned at birth.