

# Officially recorded gender

Ethical considerations on the management of the recording of gender  
in the civil register

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# Foreword

The Swiss civil register recognises only two genders – female and male. Intersex individuals, those with non-binary gender identity and many trans individuals do not have the option of having a gender recorded with which they can identify. They are thus denied recognition of their gender identity. Both in Switzerland and abroad, alternative arrangements are being discussed which would make it possible for the official recording of gender to acknowledge the diversity of existing gender identities. The possible solutions under discussion range from the option of (temporarily) not having gender recorded, or the introduction of a third category, all the way to complete abolition of the official recording of gender. In Switzerland, all these options are the subject of an ongoing political debate, to which this Opinion – prepared by the Swiss National Advisory Commission on Biomedical Ethics in response to a request from the Federal Office of Justice – is designed to contribute.

The debate is shaped by a variety of conceptions of identity, attitudes and cultural notions. It includes the question of how important the category of “gender” actually is both for individuals and for the structure of society as a whole. There is also a broad spectrum of views regarding the role that the existing gender binary – i.e. the potent distinction between “female” and “male” – plays for individuals. With this topic, traditional norms are fundamentally called into question, confronting each of us with our own self-conception in what is, for many, a deeply personal area. The Commission hopes that its reflections, and its recommendations for a step-by-step procedure to expand the available options, will help to promote a nuanced social and political examination of this highly complex topic.

**Andrea Büchler**

NCE Chair

# 1. Introduction

In recent years, the ethical debate as to whether, at what time and in what form the official recording of gender is appropriate has been conducted particularly in connection with the topic of intersexuality (cf., for example, in detail German Ethics Council 2012). This topic was also addressed by the Swiss National Advisory Commission on Biomedical Ethics (NCE) in its Opinion no. 20/2012 “On the management of differences of sex development – ethical issues relating to ‘intersexuality’”. To date, the debate has focused, firstly, on the issue of treatment, counselling and support for individuals with differences of sex development (DSD) and, secondly, on the question of the ethically advisable development of civil status legislation. It should be emphasised that the issue of the recording of gender does not only concern a restricted group of people; rather, it always involves the basic question of the normative function of gender categories. The regulations to be established should thus also be considered in terms of their possible impact on fundamental structures within society, as well as their potential to make gender relations more equitable in the long term.

In its Opinion no. 20/2012, the Commission took the view that the two existing gender categories should be maintained for the time being, as they are deeply embedded socioculturally, and people with DSD often also wish to find their place in society as a man or woman. The Commission also considered that the introduction of new gender categories could lead to further stigmatisation of those concerned (NCE 2012). The Commission’s recommendations were included and taken into account in the Federal Council’s Dispatch on the Revision of the Swiss Civil Code (Amendment of gender recorded in the civil register), which is currently undergoing parliamentary deliberation.<sup>1</sup> In its response to the consultation on the preliminary draft

revision, the NCE on 20 September 2018 called for prompt continuation of the work to develop one or more additional categories. It argued that the possibility of further positive options would be most likely to respect the rights of those concerned, thus acknowledging the developments that have taken place since its 2012 Opinion.

In the context of the current public debate on the possible introduction of a third option, the Federal Office of Justice (FOJ), represented by Michael Schöll, Deputy Director of the Private Law Division, asked the Commission, in a letter dated 5 November 2019, to comment on the following questions regarding various alternative arrangements for the official recording of gender:

## 1. Choosing not to have gender officially recorded at birth:

- *Is it appropriate to allow the person with parental responsibility to choose not to have the gender of a newborn child recorded? If so, is it appropriate to attach certain conditions to this option? If so, what should those conditions be (e.g. medical certificate on a difference of sex development, length of time for which recording of gender may be deferred, etc.)?*
- *Should the lack of a recorded gender be rectified, if necessary, ex officio, e.g. at the time when the child’s sex could be medically ascertained, if the person concerned or the person(s) with parental responsibility have not spontaneously made such a request?*

## 2. Choosing not to have gender officially recorded after birth:

- *Is it appropriate to allow a person, after the event, to request that their recorded gender be deleted,*

<sup>1</sup> Cf. item of business 19.081 (CC. Amendment of gender recorded in the civil register), <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20190081> [2020.10.05].

*so that the gender is no longer mentioned in the civil register (i.e. left blank)?*

*3. Abolition of official recording of gender:*

- Is it appropriate, in the Commission's view, for the recording of gender in the civil register to be abolished altogether?*
- If so, how soon should this happen and under what conditions?*

*4. Creation of new gender categories:*

- Is it appropriate to introduce a third gender category alongside "female" and "male"?*
- Is it advisable to introduce additional gender categories?*
- Should these categories be used in addition to the option of leaving the gender entry blank (cf. questions 1 and 2 above)? If so, please indicate the designations to be used for these categories ("diverse," "other," etc.).*

*5. The consequences of abolishing the binary gender system for legislation.<sup>2</sup>*

The introduction of a third category, or the abolition of the recording of gender in the civil register, are the subject of the three postulates Arslan (17.4121), Ruiz (17.4185) and Flach (18.3690), which request the Federal Council to prepare a report examining the adjustments that would be necessary in the electronic civil register to allow for the introduction of a third category. The National Council adopted the first two postulates on 17 September 2018 and rejected the third one on 13 June 2019.

The FOJ's questions and possible arrangements raise a number of fundamental ethical issues, which are the focus of the present considerations. The Commission thus sees the enquiry as an opportunity to review and further develop its reflections from 2012 and 2018 in the light of societal and political developments regarding the visibility and acceptance of the diversity

of gender identities. For this purpose, the Commission consulted Deborah Abate and Alecs Recher at its plenary meeting on 27 January 2020. Alecs Recher is the co-founder of Transgender Network Switzerland (TGNS), ran the organisation until 2012 as its co-president, set up a professional legal aid service for trans people within TGNS (where he continues to provide legal advice), and was a member of the board of Transgender Europe (TGEU). Deborah Abate is an activist and co-founder of InterAction Schweiz (the Swiss association for intersex persons) and is involved in various projects and organisations promoting equal rights for women, sexual minorities, intersex and trans individuals and people with non-binary gender identity.<sup>3</sup>

The official recording of gender represents one aspect of a broad debate about the prevalent binary structures and their consequences. As far as the NCE is concerned, the discussion about the official recording of gender cannot be pursued independently of this broader debate. The Commission sees the state's approach to gender and society's approach as interdependent; there is no doubt that the latter is reflected in the former – which includes the official recording of gender. It can also be assumed that legal provisions have normative effects on society. How a society deals with gender depends in particular on a variety of conceptions of identity, cultural practices, historical contexts, biological experiences and associated attitudes. This Opinion cannot comprehensively address the origins or legitimacy of these, nor will it focus on the question of how the state's management of the recording of gender interacts with the reality of particular lifeworlds. On this point, a broad spectrum of opinions and assessments exist – also among NCE members. This is reflected, for example, in expectations regarding the potential and the risks of abolishing the officially recorded gender, and its effects on how society deals with the issue of gender. While some believe that it offers the prospect of liberation from socially imposed constraints and discrimination, others doubt that such a change would in fact be able

<sup>2</sup> The questions were originally submitted to the NCE in French.

<sup>3</sup> For an explanation of the relevant terminology for this Opinion, cf. Section 2.1.

to reduce, much less overcome, existing disadvantages and discrimination. Rather, they argue, the attempt to abolish officially recorded gender might lead to new forms of discrimination, without ensuring that the disadvantages (cf. Section 2.3) experienced by some people are indeed overcome. Against this background, the discussion of the present question must consider to what extent the state has a legitimate interest in preserving the gender binary, bearing in mind that the current practice – which demands a classification – is considered, by many, not only self-evident but appropriate. Assessments vary not only with regard to the interaction between the state's and society's approach to gender; there are also differing views on the binary order itself. While the social scientific finding that the gender binary is a social construct is widely accepted, this does not, for some people, alter the fact that it is also deeply embedded in actual lifeworlds, as well as providing a sense of identity and security for many people. In contrast, others emphasise that the gender binary is inappropriately normative, has a constricting effect on many people and restricts people's choices as to how they can live their lives. This diversity of viewpoints also exists within the NCE, and it must be taken into account in any future regulations.

## 2. Context

Every person is assigned a gender – at birth at the latest, but often as part of prenatal testing, i.e. even before birth. From that point onwards, this gender becomes a social and legal fact for the person concerned (Hammarberg 2010). This is based on the historically evolved, deeply rooted societal belief – manifested in our thinking and action – that human beings can be classified as male or female, with corresponding expectations as to their roles. People who do not identify as women or men represent a challenge to this binary structure of societal and legal gender recognition.

The idea of a fundamental difference between women and men did not develop in Europe until the 18<sup>th</sup> century. Up to that point, women and men were considered one and the same humankind, even though the man was conceived as “more perfect” than the woman. This, however, in no way implied gender equality. The status and role of the woman, particularly within the home, was defined by her social position, which was attributable to her husband, father and a patriarchal society (Gender-Portal der Universität Duisburg-Essen). The development from a single- to a two-gender model resulted from a complex societal and ideological transformation, associated with an interest in the individual and challenges to theological worldviews and a class-based social order. In the wake of these developments, there were calls for women to be emancipated from their husbands’ and fathers’ control and integrated into civil society on an equal footing. This was seen as a threat to the established order, particularly to the family, and the status and role of women had to be legitimised in a new way. In order to reconcile the desired marital and family relationships with societal and ideological developments, the late 18th century saw the development of “natural endowments”, dividing the human personality into female and male components (Hausen 1976). A rationale for this was provided by the humanities and natural sciences which ascribed different social roles to women and men, primarily attributable to anatomi-

cal-physiological differences (Büchler & Cottier 2012). Even though the construction of this dichotomy was intended to imply equal value, it in effect involved an assignment of social positions and spaces (home vs public sphere) and the restriction of political rights and opportunities for participation (Hausen 1976). This gender dichotomy – combined with the idea of heterosexuality as the norm – continues to be a core structural characteristic, shaping existing law today.

The established view in gender studies is that, in a social context, gender is to be understood not as a biological fact but as a social construct. Gender is thus not a predefined category but a product of social interaction, based on the interplay between gender expression and gender attribution (Heintz & Nadai 1998). Gender differences and “gender” in itself are constructed, reproduced and reinforced on the basis of learned and socially assumed role expectations, as well as individual behaviours. Gender differences, furthermore, are reproduced through existing institutionalised behaviours and structures (Goffman 1994). The law illustrates not only how gender is constructed but also how a society’s conceptions of gender can shape norms that claim to be generally applicable (Baer 2008). Current law thus generally equates a person’s biological sex with their gender identity and assumes not only the gender binary but also the immutability of gender (Büchler & Cottier 2012; Cannoot & Decoster 2020). As an immutable, given entity, deeply rooted in the personality, gender is also crucial to the allocation of entitlements, protections and rights (Venditti 2020). However, the recording of gender also organises collective reality and helps to determine which gender experiences and embodiments are recognised and accepted by society (Braunschweig 2020). There is, therefore, an interaction between the law and societal practice. Given this connection, the question is also raised to what extent the dissolution of the gender binary in the law could contribute to breaking down historically established hierarchical gender notions

(Baer 2008). Against this backdrop, the discussion about the official recording of gender also involves the question of how the law and society are to deal with the realisation that the binary nature of the legal order and, to a large extent, of social practice cannot adequately reflect the diversity of gender identities.

## 2.1 Terminology

For the purposes of recording of gender, the diversity and complexity of gender identities is greatly reduced and put into categories with which most – but by no means all – people can identify.

The term **gender identity** primarily refers to each person's internal and individual experience of gender, which may or may not (completely) correspond with their biological sex. It also includes the personal sense of the body and other expressions of gender, such as dress, speech and mannerisms (The Yogyakarta Principles 2007). Nowadays, gender identity is understood as a spectrum ranging from "female" to "male": a person's gender identity indicates where they situate themselves within or outside this spectrum (Monro 2019; Silberman 2016; Thorne et al. 2019).

If a person does not identify within the gender binary of "female" and "male", i.e. neither (exclusively) as a woman nor (exclusively) as a man, this is referred to as **non-binary gender identity**.<sup>4</sup> "Non-binary gender identity" should be understood as an umbrella term, encompassing a wide range of gender identities (Thorne et al. 2019).<sup>5</sup> People with non-binary gender identity are generally differentiated as follows:

(1) those who perceive themselves as being somewhere between "female" and "male", or outside the gender binary (genderqueer); (2) those who have two or more genders (polygender) or identify more closely with one gender or another at different points in time (gender-fluid); (3) those who (sometimes) do not feel as if they have a gender, or do not wish to identify themselves through gender (agender) (Monro 2019; Thorne et al. 2019). Identification outside the gender binary is shaped by a person's social and lived experiences of gender. Those concerned thus often use the terms with different connotations or use other designations which provide the needed nuance for a precise and often very personal gender identity and experience (Thorne et al. 2019). Particularly intersex and trans individuals<sup>6</sup> may identify as non-binary.<sup>7</sup>

Before or at birth, people are assigned a **biological sex** – "female", "male" or "intersex". Biological sex is determined based on such characteristics as chromosome configuration, primary sex organs, sex hormones and other associated sexual characteristics (Whyte et al. 2018). **Intersex persons** are born with sexual characteristics that cannot be strictly categorised as female or male – or which belong to both categories and are present in varying degrees (FRA 2020<sup>8</sup>; cf. also German Ethics Council 2012 and NCE 2012). Intersex individuals are estimated to constitute roughly 1.7% of the world's population (Blackless et al. 2000; Fausto-Sterling 2000). For Switzerland, this would translate into roughly 140,000 people. They may identify as non-binary or binary. In the FRA survey, 20% of the 1,398 intersex respondents reported their gender identity as non-binary (FRA 2020).

4 Various terms are used to denote the range of non-binary gender identities. Among the terms commonly used in addition to "non-binary gender identity" are "gender diversity", "genderqueer", "gender non-conforming" and "nonbinary, genderqueer (NBGQ)".

5 It must be emphasised that each individual is free to choose, under this umbrella term, the specific designation that feels right for their own identity (Thorne et al. 2019).

6 For explanations of the terminology, see below.

7 Persons whose body conforms to the medical norm of female or male and who identify with their body may also identify as non-binary.

8 In 2020, the European Union Agency for Fundamental Rights (FRA) published a report entitled "EU LGBTI II – A Long Way to Go for LGBTI Equality", which presents results of a 2019 survey among lesbian, gay and bisexual as well as trans and intersex persons 15 years of age or older from 28 EU Member States, North Macedonia and Serbia. 139,799 people participated in the survey, of whom 1,398 were intersex and 19,572 were trans. 20% of intersex individuals and 51% of trans individuals reported their gender identity as non-binary. To this day, the people studied face continued violations of their fundamental rights in the EU, as well as hatred, violence and discrimination. The survey results provide policymakers with the data necessary to develop targeted measures for guaranteeing the fundamental rights of those concerned within the EU. For further data, cf. also <https://fra.europa.eu/en/data-and-maps/2020/lgbti-survey-data-explorer> [2020.07.16].



Lastly, **transgender** is an umbrella term for the gender identities of individuals who do not, or do not fully, identify with the biological sex assigned to them at birth. Trans individuals identify as one of the binary genders and live as women or men, but they may also identify as non-binary (Silbermayr 2016). The number of trans individuals in Switzerland has never been determined (TGNS information). In the FRA survey, 51% of trans individuals reported their gender identity as non-binary (FRA 2020). While many people with a non-binary gender identity identify as transgender, not all of them do so. The term “transgender” may be associated with a “feeling of transition”, thus implying a process leading, at some point, to a fixed and unchangeable gender identity. Those individuals who view their gender identity as dynamic and not fixed at any one time may feel this description to be inaccurate (Conlin et al. 2019).

Estimates of the total number of people who identify as non-binary vary.<sup>9</sup> According to a representative survey, between 2% and 3% of the German population identify within the trans spectrum, which encompasses trans, intersex and other persons with non-binary gender identity; of those 2-3%, 60% identify as neither female nor male (Recher 2018). For Switzerland, this would translate into between 103,000 and 154,000 individuals with non-binary gender identity.<sup>10</sup>

## 2.2 Relevant developments

Only in recent years have people with non-binary gender identity become visible in Swiss society. However, knowledge about differences of sex development (intersexuality) and variant gender identities is by no means new and has long been established in various cultures: the earliest recorded instances are representations of the Greek god Hermaphroditus and of Sumerian gala priests in ancient Mesopotamian

cities. They depict individuals not readily identifiable as women or men. Indigenous North American communities refer to individuals with a female and a male soul as “two-spirit”; in India, the “Hijra” identity is considered neither female nor male and is recognised by law as a “third gender” (Thorne et al. 2019).<sup>11</sup> Europe also used to have regulations for individuals with ambiguous gender classification – one example being the Prussian Civil Code of 1794, which included provisions for what were then known as “Zwitter” (hermaphrodites) (Büchler & Cottier 2005).

Until as recently as the early 21<sup>st</sup> century, the dominant medical-psychological perspective considered the gender binary as natural. Individuals with non-binary gender or transgender identity were thus considered a deviation from this norm and were generally pathologised. In recent years, not least the medical sciences have, to some extent, moved away from this view (Balzer, Suess and Sauer in Hammarberg 2010). This is reflected, for example, in the 11<sup>th</sup> revision of the International Classification of Diseases (ICD-11), adopted by the World Health Organization (WHO) on 25 May 2019, which removed transgender from the chapter on mental, behavioural or neurodevelopmental disorders (Jacke 2019; WHO 2019). This is considered an important step towards the depathologisation of non-binary gender and transgender identities. Nevertheless, even ICD-11 continues to pathologise intersex individuals (OII Europe 2018; WHO 2019).

Legislative steps have also been taken to protect and recognise individuals with non-binary gender identity, as well as intersex and trans people (van den Brink & Dunne 2018). For example, on 17 June 2011, the UN Human Rights Council adopted its “Human rights, sexual orientation and gender identity” Resolution (Human Rights Council 2011), which calls for an end to discrimination by states on the basis of sexual orien-

9 In the FRA survey, 51% of the 19,572 trans respondents reported their gender identity as non-binary (FRA 2020). A review of the literature conducted by Nieder et al. (2018), however, found that only about 20% of trans individuals identify as non-binary.

10 The approximate number of intersex individuals is almost the same as the number of individuals with a non-binary gender identity. However, not all intersex individuals identify as non-binary.

11 However, despite being recognised by society and the law, Hijra often have a low social status, and their role and importance varies with societal structures (Thorne et al. 2019).

tation or gender identity. Also of international importance are the Yogyakarta Principles and the Yogyakarta Principles plus 10<sup>12</sup>, which specify, in 38 principles, the human rights which are relevant to sexual orientation and gender identity. Principles 3 and 31, in particular, address the right of those concerned to recognition before the law (The Yogyakarta Principles 2007; The Yogyakarta Principles plus 10 2017). In its PACE Resolution 2048, the Council of Europe recommends that the inclusion of a third gender option in identity documents be considered (Council of Europe 2015). The International Civil Aviation Organization (ICAO), a specialised agency of the UN, allows for the use of “X” (unspecified sex) in addition to “F” (female) and “M” (male) in international passports; but a gender entry continues to be mandatory (ICAO 2015).<sup>13</sup> Not least, the question of how to deal with the diversity of gender identities has increasingly been discussed by the media and the public in recent years.

This change in attitude can also be observed in Switzerland, both in medical circles and in other areas. Intersex and trans individuals, as well as those with non-binary gender identity, have become increasingly visible, for example in political campaigns such as “Ehe für alle” (marriage equality). But the change in attitude is also manifested in the use of non-binary language by countless public and private actors, such as most public administrations, Swiss universities and institutes of higher education (Tagblatt 2019), private-sector organisations or the Federation of Swiss Protestant Churches (Evangelischer Kirchenbund 2018), which have adopted guidelines for gender-inclusive language. The shift is also expressed in the National Council’s adoption of the Arslan (17.4121) and Ruiz (17.4185) postulates (cf. Section 1).

A legal provision of the Canton of Zurich can also serve as an example: since 2019, individuals have been allowed to change their first name and/or gendered suffixes in surnames or middle names to match their self-determined gender identity; in addition, a gender-neutral or several gendered first names can be chosen. Such an approved name change does not, however, change the officially recorded gender, as the Canton of Zurich expressly states (Gemeindeamt Kanton Zürich 2019).

These changes in Switzerland point to an increasing societal awareness of non-binary gender identities. However, challenges in terms of visibility and recognition remain, and these are relevant for policymaking and the shaping of societal and medical practices, as well as for legal regulations.

## 2.3 Implications for those concerned

Particularly intersex individuals and those with non-binary gender identity have to accept the negative consequences of the official recording of gender within a binary system. However, they are also often faced with negative experiences not related to the official handling of the recording of gender, since society generally continues to tacitly assume identification with one of the binary genders, and binary gender determinations are visually and linguistically ubiquitous. Many of them thus feel invisible, suffering from an inordinate pressure to conform and from discriminatory behaviour (Brubaker 2016; Jones et al. 2019; Shuster & Lamont 2019; Silbermayr 2016).<sup>14</sup> What follows below is a non-exhaustive list of negative consequences. The NCE points out, however, that, given the potential impact on social (power) structures and on the freedom of personal development, any discussion about the possible expansion or abolition of gender categories affects the interests of everyone.

12 The Yogyakarta Principles were developed by a group of human rights experts and are the most influential international document on the rights of sexual minorities, trans and intersex individuals and individuals with non-binary gender identity (Holzer 2020).

13 The ICAO defines international standards and recommended practices for customs and immigration procedures (<https://www.icao.int/about-icao/Pages/default.aspx> [2020.08.28]). Gender is defined as one of four mandatory personal identifiers that must be included in a passport (ICAO 2015).

14 In a 2018 survey by the UK Government Equalities Office, 76% of 7,567 non-binary respondents said they avoided disclosing their gender identity for fear of a negative reaction from others (Government Equalities Office 2018).

### 2.3.1 Everyday life

The fact that there is no legally recognised gender category for intersex individuals and those with non-binary gender identity represents a heavy emotional and moral burden, as it means that their gender or intersex identity is denied recognition by the state and partly by the people around them, which – at least in their subjective perception – means that, for the state, they do not exist or are considered illegitimate (Braunschweig 2020). The prevailing binary norm shapes and characterises the lives of those concerned and impedes alternative ways of life. This is reflected, for example, in the ubiquity of gender-binary bathrooms and uniforms, and the limited use of non-binary language, but also in official and medical registration forms, which generally recognise two genders (Agius 2015; German Ethics Council 2012; Herman 2013; Monro 2019; Scottish Trans Alliance 2015; Taylor et al. 2018). In particular, the mismatch between gender category and gender identity, biological sex and/or gender expression in identity documents is burdensome for trans and intersex individuals; on a daily basis, they are forced to disclose to strangers the details of their gender identity or intersex status, and related aspects of their private lives (Agius 2015; Government Equalities Office 2018; Holzer 2020; Human Rights Watch 2011). The experience of rejection and discrimination, fuelling fears of future harassment, can also cause those concerned to (have to) forgo professional and social opportunities or experience social and emotional isolation (Conlin et al. 2019; German Ethics Council 2012; James et al. 2016). Continual corrections, for example regarding the desired form of address or identity documents, require a lot of energy and can lead to further discrimination or even violence (Taylor et al. 2018). Individuals with non-binary gender identity are often not recognised as such, which can lead to a feeling of invisibility.

It has also been shown that trans individuals and those with non-binary gender identity are often exposed to discrimination, for example in the areas of employment and education. Indeed, in a survey by Transgender Network Switzerland (TGNS 2018), 20% of trans respondents reported being unemployed – an unemployment rate almost five times that for the Swiss population as a whole.<sup>15</sup> In the 2015 US Transgender Survey, 16% of children and adolescents with non-binary gender identity reported having experienced physical violence in school because of their gender identity, and 10% left school because of abuse (James et al. 2016; Liszewski et al. 2018).

### 2.3.2 Pressure to undergo sex reassignment procedures

In individuals with non-binary gender identity or intersex individuals, surgical procedures or hormone treatments to align the body with a particular gender are often not medically indicated. Nor, in many cases, do those concerned desire such interventions. However, they are frequently under significant societal pressure, since the idea of congruence between gender identity and visible sexual characteristics is a culturally potent one (Brubaker 2016; Jacke 2019; Streuli et al. 2013).

The situation of intersex children presents a particular challenge. Genital procedures that are unnecessary and thus violate the principle of non-maleficence are still performed in children who lack capacity – which constitutes a human rights violation.<sup>16</sup> In Germany, a public debate about sex reassignment surgery for intersex children which started in 2005 led, in 2013, to the possibility of leaving the gender entry blank and, in 2018, to the introduction of a “third option” in the Civil Status Act (PStG; cf. Section 3.2) and amendments to medical guidelines. However, there is still no prohibition on surgical procedures, and despite these

<sup>15</sup> In the FRA survey, 35% of 19,572 trans respondents and 32% of 1,398 intersex respondents also reported experiencing discrimination in the workplace or during job search in the year leading up to the survey (FRA 2020; for information on non-binary gender identity, cf. Footnote 8, p. 8).

<sup>16</sup> European Court of Human Rights decisions regarding the prohibition of sterilisation and of procedures that lead to infertility or permanently alter a person's physical appearance make reference to Art. 8 of the ECHR (the right to respect for private and family life).

developments, the number of genital cosmetic procedures in intersex children lacking capacity did not decline between 2005 and 2016 (Hoenes et al. 2019; Klöppel 2016; Oll Deutschland 2013). This is often due to parents' and medical professionals' conviction that intersex children will experience discrimination on account of being different (Klöppel 2016; Streuli et al. 2013). Moreover, parents' decisions are strongly dependent on the information and advice received from medical professionals (Clercq & Streuli 2019; Streuli et al. 2013). Whether the option of a "diverse" gender entry, introduced in Germany in late 2018 (cf. Section 3.2), will have an impact on these figures cannot yet be determined.

### 2.3.3 Violence

There is currently no data on violence committed against individuals with non-binary gender identity because such attacks are not separately recorded in official statistics. Insights into the dimensions of violence are made possible by surveys of trans and intersex people.<sup>17</sup>

Trans and intersex people face pervasive discrimination, including general harassment, sexual assault and physical violence (Conlin et al. 2019). The "Transrespect versus Transphobia Worldwide" (TvT) research project of Transgender Europe (TGEU) records violence motivated by transphobia worldwide.<sup>18</sup> The term "transphobia" refers to the fear people may feel when the familiar gender order is disrupted. Often, this fear turns into aggression (Silbermayr 2016). Between 2009 and 2014, cases of extreme physical violence, such as torture and rape, against trans individuals were documented in 28 countries. 50 countries recorded cases of physical attacks, while cases of psychological violence were reported in 30, and hate

speech in 21 countries. Physical attacks, psychological violence and hate speech were also documented in Switzerland (TvT 2014).<sup>19</sup> Moreover, 1,700 homicides of trans individuals were recorded between 2008 and 2014 (TGEU 2015). Intersex individuals also face sexual and physical attacks and are harassed and threatened (FRA 2020). The number of unrecorded cases is bound to be high, as the victims rarely report these types of attacks (FRA 2020; Government Equalities Office 2018).

### 2.3.4 Health

Lack of recognition and denigration by the social environment, as well as the binary structures in society, can have far-reaching health effects (German Ethics Council 2012; Jones et al. 2019; Silbermayr 2016). Individuals with non-binary gender identity show higher rates of chronic conditions, disabilities, illness and depression than those who identify with their assigned gender (Burgwal et al. 2019). Affected adolescents in particular have higher rates of depression, suicidality, violence and substance abuse (alcohol or drugs) (Newcomb et al. 2020; Rimes et al. 2017).

Moreover, negative experiences in healthcare institutions or the fear of such experiences often lead trans and intersex individuals with non-binary (or binary) gender identity to delay seeking medical care or to avoid early detection measures (Agius 2015; FRA 2020; Houben et al. 2019).<sup>20</sup> They also find it more difficult to access public health services (Agius 2015; FRA 2020; Government Equalities Office 2018). It has been shown, for example, that Swiss trans persons with non-binary gender identity are in significantly worse health and have a lower quality of life<sup>21</sup> than trans persons who identify as binary and persons who identify within the gender binary (Jellestad et

17 For information on trans and intersex individuals with non-binary gender identity, cf. Section 2.1.

18 Available data is from 2014 and covers 116 countries. Apart from homicides, no explicit numbers are given.

19 The FRA survey revealed that 17% of 19,572 trans respondents, and 22% of 1,398 intersex respondents had experienced sexual and physical violence motivated by hate (FRA 2020; for information on non-binary gender identity, cf. Footnote 8, p. 8).

20 In the FRA survey, 59% of 1,398 intersex respondents and 55% of 19,572 trans respondents reported having experienced healthcare-related discrimination (FRA 2020; for information on non-binary gender identity, cf. Footnote 8, p. 8).

21 Quality of life is the assessment of the psychological, physical, relationship and environmental domains in life (Jones et al. 2019).

al. 2018).<sup>22</sup> The difficulties encountered when trying to change their officially recorded gender and the lack of societal support are also associated with a lower quality of life among intersex individuals and those with non-binary gender identity (Jones et al. 2019).

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22 Some studies from the English-speaking world, on the other hand, indicate that the quality of life and mental health of binary-identifying trans individuals are even lower than in individuals who identify as non-binary. One possible explanation is that binary-identifying trans individuals usually suffer from a higher degree of gender incongruence and body dissatisfaction than non-binary-identifying individuals (Jones et al. 2019; Newcomb et al. 2020).

## 3. Legal and political framework

### 3.1 The legal situation in Switzerland

#### 3.1.1 Officially recorded gender

The Federal Constitution (FC) specifies that no person may be discriminated against on grounds of gender (Art. 8 para. 2 FC). However, the officially recorded gender continues to serve as a point of reference in a number of areas, including compulsory military service, social security law and family law. It is also included in the civil register for purposes of identification, along with, for example, marital status, name, place and date of birth (Art. 8 ZStV).

Swiss law currently assumes the validity of the gender binary. Gender is recorded in the civil register (Art. 8 let. d ZStV). The birth of a child must be notified to the competent civil register office within three days, with the notification including the child's gender (Art. 8, 34, 35, 91 ZStV). There is no third category and no option of not having gender recorded. Until very recently, it was also usual for an unambiguous gender to be established not only through registration but also by means of surgical sex reassignment. This medical practice has been and continues to be strongly criticised, not least by the NCE.

An "erroneous" entry at birth can be rectified (Art. 43 CC); otherwise, an entry can be rectified by court order following legal action by the person concerned or their authorised representative (Art. 42 CC). As regards assignment to one of the two genders, the Federal Office of Civil Status (FOCS) has adopted a recommendation made by the NCE and, on 1 February 2014, issued an official notice urging civil register authorities to facilitate rectification of the recorded gender based on a medical certificate (EAW 2014). If the amendment of the gender entry in the civil register follows shortly after the original notification of the

newborn's gender, rectification should be possible in a straightforward way, "based on a rectified birth notification, for which, in turn, medical professionals are responsible" (EAW 2014: 4). It is also pointed out that "relevant medical evaluations [...] may well take a certain amount of time (in isolated cases even several years)" (EAW 2014: 4).

While this eases the burden for those concerned, the regulation assumes that only the two genders "female" and "male" exist, and that the question whether someone belongs to one or other of these is amenable to medical assessment. Non-binary gender identities continue to be disregarded. In addition, Switzerland has no legal definition of gender or recommendations as to how it should be ascertained; rather, its determination is left to the discretion of medical professionals.

If a person's gender identity does not correspond with the gender assigned at birth and recorded in the civil register, rectification of the entry is currently only possible through the courts. For a long time, amendment of the recorded gender required, firstly, sex-altering surgery and, secondly, evidence that reproductive capacity in the original gender had been eliminated. As gender identity is also a fundamental right, this meant that the person concerned had to choose between the exercise of two fundamental rights: they could only achieve their right to gender identity by accepting interference with their physical integrity and reproductive self-determination.

This official practice has been and is still criticised around the world. In 2017, the European Court of Human Rights ruled that it violated Article 8 of the ECHR.<sup>23</sup> Accordingly, Switzerland has seen a shift in jurisprudence over the past decade. For example, the Court of Appeals of the Canton of Zurich ruled for the

23 ECtHR 6 April 2017, nos. 79885/12, 52471/13 and 52596/13.

first time in 2011 that sex reassignment surgery must not be a requirement for amendment of the officially recorded gender.<sup>24</sup> Other courts have shared this view. In recent years, an increasing number of courts of first instance have ruled that neither a surgical procedure nor other evidence of sterility may be required for an amendment of the gender entry. Amendment of the officially recorded gender is to be possible if the individual in question convincingly lives in the desired gender and is also perceived by others as belonging to that gender.<sup>25</sup>

### 3.1.2 Revision of the Swiss Civil Code

In a new draft revision, the Federal Council proposes to make amendment of the gender and first name recorded in the civil register generally less bureaucratic for children and adults who identify as intersex or trans (Schweizerischer Bundesrat 2019). The revision covers all constellations which may lead to amendment of the recorded gender: a declaration made before the registrar is to be sufficient to obtain amendment of a civil register entry. The emphasis is placed on the self-determination of the person concerned: the individual's sincere conviction regarding their gender identity is to be sufficient to obtain amendment of an entry. There are no longer to be any preconditions such as medical interventions or certificates, although, according to the Dispatch on the revision, the civil register office would be required to deny legal effect to declarations constituting an "abuse". By the 2020 autumn session, both the Council of States and the National Council had already approved the draft revision in principle. However, disagreement remains concerning the question whether minors should

require the consent of their parents or legal guardians to amend their recorded gender.

The draft revision does not suggest introducing a "third gender," nor does it allow for the option of choosing not to have gender recorded. Numerous participants in the consultation procedure would, however, support such additional provisions – which already exist in some other countries – for Switzerland as well.

## 3.2 Experiences and situation in other countries

In view of the challenges associated with the gender binary in law, as well as increasing social acceptance of non-binary gender identities, solutions are being sought. In response to a petition launched by several NGOs that promote the rights of sexual minorities and trans and intersex people, Nepal in 2007 became the first country to introduce a third category based on self-declaration.<sup>26</sup> A number of countries have followed Nepal's lead, three of which will be briefly discussed below.<sup>27</sup>

In a ruling dated 10 October 2017, Germany's Federal Constitutional Court held that the option (available since 2013) of deferring the recording of gender for intersex newborns and leaving the birth register entry blank was unconstitutional: the general right to personality, which guarantees protection of gender identity and protection against discrimination on grounds of gender, also applies to people who permanently identify as neither female nor male. If, however, German civil status law obliges someone to record their gender without providing a positive gender category

24 Ruling of the Zurich Court of Appeals of 1 February 2011, NC090012/U, E. 3.6.

25 E.g. Tribunal de première instance du Jura, Décision du 3 Septembre 2012, CIV/1420/2012, <https://www.tgns.ch/wp-content/uploads/2011/09/Zivilgericht-Jura-Urteil-vom-3.9.2012.pdf> [2020.06.11]; Regionalgericht Bern-Mittelland, Entscheid vom 12. September 2012, CIV 12 1217, FamPra.ch 2015, 1, 196 ff.; Zivilgericht des Kantons Basel-Stadt, Entscheid vom 26. Februar 2015 - HEE, FamPra.ch 2015, 3, 671 ff.; [with a detailed and convincing statement of reasons] Bezirksgericht Zürich, Urteil vom 25. Juli 2016, EP160012-L/I, [https://www.tgns.ch/wp-content/uploads/2011/09/PA%cc%88\\_BGZ\\_2016\\_anonym.pdf](https://www.tgns.ch/wp-content/uploads/2011/09/PA%cc%88_BGZ_2016_anonym.pdf) [2020.06.11]; Regionalgericht Oberland Bern, Entscheid vom 22. August 2016, CIV 16 1920 SCN, FamPra.ch 2017, 1, 286 ff.; Regionalgericht Oberland Bern, 23. August 2017, CIV 172249, FamPra.ch 2018, 1, 204 ff.

26 Cf. also Pant vs. Nepal (<https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Others-v.-Nepal-Government-and-Others-Supreme-Court-of-Nepal.pdf> [2020.09.09]) and Bochenek and Knight (2012).

27 For information on options for amending the recorded gender and first name existing in other European countries, cf. Schweizerischer Bundesrat 2019, here 822-830.



in addition to “female” and “male”, this violates the right to personality of non-binary-identifying individuals. Following this ruling, the German Bundestag, on 18 December 2018, adopted the Act Amending the Information to be Entered in the Birth Register, which introduced the new category “diverse”. A requirement for the “diverse” entry is a medical certificate providing evidence of, for example, surgical procedures, therapies or differences of sex development (intersexuality) (Bundesamt für Justiz 2020; Bundesministerium des Innern, für Bau und Heimat 2018).<sup>28</sup> In addition, paragraph 45b of the PStG (added in 2018) allows individuals older than 14 years to have their previously recorded gender and first name rectified or deleted by way of a declaration to the civil register office.<sup>29</sup> The German regulations do not impose any age limit for leaving the gender entry blank; however, the legal status of individuals without a recorded gender with respect to sex-specific laws remains to be specified (Holzer 2020).

In Malta, the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Act) of 1 April 2015 allows citizens to have their gender and/or first name changed in their birth certificate and other official documents to match their gender identity. Minors (under 16) must go through a court. For adults, a declaration before a notary is sufficient. It is also possible to defer the recording of a child’s gender in the birth register until the 18th birthday, and sex reassignment surgery in minors is explicitly prohibited. The civil register classifies those concerned as “U”, which in the case of children stands for “undetermined”, and in the case of adults for “unspecified”. The birth register continues to record the binary gender, so that it can be consulted in the context of gender-specific laws. The GIGESC Act furthermore prohibits any type of discrimination based on gender or gender identity (Maltese Parliament 2015).

The Act is applicable for all citizens, not only for intersex individuals. This new opportunity seems to meet a need: within nine months of the Act coming into force in April 2015, 40 amendments of gender identity had already been registered, compared with 17 cases in the preceding 15 years (queeramnesty 2016). Given the difficulties which may be encountered when attempting to enter certain countries with an “X” in the passport, Malta has, since 2018, offered those concerned the option of applying for one passport with an “X” and another with a binary gender marker (Holzer 2018).

In April 2019, Tasmania became the first territory in Australia to make details of gender on birth certificates optional under the Justice and Related Legislation (Marriage and Gender Amendments) Act 2019.<sup>30</sup> The reform includes an “opt-in” model for the recording of gender in birth certificates: a child’s gender is only indicated on the birth certificate if the parents so desire. Moreover, individuals over the age of 16 have the option of amending the gender recorded on their birth certificate by means of a declaration. In addition to “F” and “M”, the categories which may be chosen are “indeterminate gender”, “non-binary” and “a word, or a phrase, that is used to indicate a person’s perception of the person’s self”. No medical interventions or certificates may be required for an entry or an amendment thereof (Tasmanian Government 2019). In Australian passports and other official documents, a third option (designated “X”) is available – “nonbinary/indeterminate/intersex/unspecified/other”. To amend the gender marker in the passport, a medical or psychological certificate confirming the gender status is required. No amendment of the gender recorded on the birth or citizenship certificate is necessary for a travel document to be issued with a person’s preferred gender (Australian Passport Office 2020).

28 Under certain conditions, evidence of a difference of sex development can be provided by an affidavit (Bundesministerium des Innern, für Bau und Heimat 2018).

29 This was clarified by various court rulings over the past five years, including the Federal Constitutional Court decision of 10 October 2017 (Bundesverfassungsgericht 2017).

30 In Australia, healthcare and the issuance of passports are regulated by the national government, while birth certificates are issued by the individual territories.



## 4. Ethical considerations

The question of how to deal with the recording of an individual's gender identity touches on a number of ethical issues, which are fundamental to the assessment of the options identified. They are discussed below and considered in relation to the possible options under consideration. In each case, the central ethical issues and the associated legal questions are taken into account.

As a result of the questions addressed to the NCE and considered here, what follows will focus on the potential of expanding the current options or abandoning the official recording of gender altogether. However, it should be borne in mind that the binary order which structures our societies today is not based merely on legal requirements and, for many people, provides a means of orientation which they feel to be important for their identity. If the official recording of gender is to be abandoned in the interests of overcoming the binary order, not just legally but also in everyday practice, this will – unlike expansion of the existing gender categories – raise concerns that an important and justified orientation may be lost. Against this backdrop, Section 5.4 will explore the consequences of implementing the various options and discuss how the expanded options relate to the current order.

### 4.1 Guiding principles and weighing of interests

#### 4.1.1 Recognition

From an ethical perspective, significant weight must be given to the principle of *recognition* of the diversity of human forms of appearance, life and existence. The principle of recognition derives, among other things, from the principle of human dignity and, consequently, plays a role in many aspects of the law which safeguard people's ability to live their lives freely or which protect minorities. The concept of recognition has multiple prerequisites and is the subject of extensive

debate in contemporary philosophy, relating to theories of justice and of difference (cf., e.g., Fraser & Honneth 2003; Lash & Featherstone 2002). Recognition is important for communal life, as it not only documents societal developments but also leads to further development of moral and legal norms.

Recognising the fact that gender identities vary and may lie within a non-binary spectrum means, of course, not just accepting this fact, but also seeing it as legitimate and thus recognising the need for it to be taken into account. In this respect, recognition acquires normative force as a fundamental human need (Taylor 1992). People depend on recognition of the qualities that are central for them if they are to live their lives as free moral agents. In this sense, recognition – as a relationship based on reciprocity – is indispensable as an “enabling condition” for a successful life. At the same time, the possibility of showing or withholding recognition, as an individual, is also part of a successful life. Recently, discussions of recognition have focused on the question of which social groups are inadequately recognised or should in fact be conceived as such. In this respect, the struggle for recognition is less a question of distribution of goods, and thus of distributive justice, and more a question of the normative consideration of particular identities.

The recognition aspect is an important part of the issue of how to deal with the diversity of gender identities, since the current official recording of gender, presupposing a binary classification, can be understood as an expression of the refusal of recognition to existentially significant non-binary gender identities. The diversity of gender identities thus appears to be incompatible with a system that forces the people concerned to assign themselves to a group that specifically does not encompass their identity. At the same time, expanded options for recording gender are not in conflict with the equally widespread need to be recognised as a woman or a man. This would remain fully possible.

### 4.1.2 Respect for human dignity

*Respect for human dignity* is of fundamental importance as a basic legal and ethical principle in this context. It underlies the demand that everyone be treated and respected as free and having equal rights. This demand involves giving everyone the possibility to live in accordance with their identity. Regulations on registration that run counter to this general demand should be revised. This principle of respect for human dignity is at the root of the other ethical principles which will be discussed in detail below in relation to the question at hand.

### 4.1.3 Self-determination

The principle of *self-determination* is also crucial in the management of gender identities. It states that individuals essentially have the right to make decisions concerning highly personal interests without being subject to coercion or control by others. This undoubtedly applies to the question of a person's gender identity and possible changes in that identity over time.

Consequently, there is a need to justify any obligation imposed by the state to *have to* undergo official registration and thus accept an unequivocal gender classification. For this obligation means that individuals have to disclose and be confronted with their gender identity. An approach to the gender category based on self-determination could, however, also mean being able to forgo classification and thus choosing not to have to declare a particular identity. The tensions between an autonomy-based approach and mandatory recording of gender (resulting in surrender of control) are further exacerbated if the obligation to record gender requires an unequivocal classification within a binary structure even though the individual cannot (yet) or does not wish to accept either of the available gender identities. For self-determination presupposes the existence of options among which an autonomous choice can be made. But even if a variety of options offer a certain degree of choice, the principle of self-determination requires attention to the modal-

ities whereby such a choice can be exercised. In this respect, the principle of self-determination entails that it should be possible – straightforwardly and without restrictions – to change a gender classification previously undertaken. If, however, obstacles in the form of medical criteria are created – for example, by making a medical certificate of intersexuality a precondition for changing a register entry – this represents a restriction of choice amounting to undue control. Therefore, the only solution satisfying the principle of self-determination is one which enables the individual concerned to decide what entry they wish to make. Essentially, respecting someone's right to self-determination means allowing them to exercise control over their own gender (Venditti 2020).

It should be noted that a legal act such as a gender classification may also be undertaken autonomously by minors above a certain age – i.e. when the minor has capacity. However, the earlier such decisions are required, the more obvious it becomes that they cannot be made by the individuals themselves but must be taken by the persons with parental responsibility. In this case, it is incumbent on the parents to decide, not according to their own preferences, but in accordance with the child's welfare. Here, the principle of self-determination involves a requirement to help parents or guardians recognise that options other than an unequivocal (binary) classification may be compatible with the child's welfare.

Also of relevance to self-determination in children and adolescents is the question of the right to an open future (cf. Feinberg 1980). This right requires that options and the choice of life plans and ways of life be kept open for children and adolescents, so that they can make autonomous decisions. Early determination of gender identity, however, always also involves a substantial determination of role expectations and influences exerted by societal practice. From the perspective of self-determination, therefore, the question of the timing, form and content of the recorded gender must also be considered in the light of the right to an open future.

#### 4.1.4 Equal treatment

Recognition of the diversity of human appearance, ways of life and existence is also reflected in the principle of *non-discrimination*, i.e. the *prohibition of discrimination*, which numerous legal systems have in common. Discrimination is to be understood as the *unjustified unequal treatment* of – and thus morally impermissible lack of respect for – people, based on specific characteristics. Such unequal treatment leads to individuals with the characteristics in question being disadvantaged. In this sense, discrimination may be experienced as a denial of recognition, if individuals with certain characteristics are prevented from exercising certain rights or are denied the opportunity to live in accordance with their identity without having to suffer disadvantages to which others are not exposed.

The discussion about gender identity and the recording of gender brings to light an important aspect of the debate on discrimination – the question of the criteria whereby unjustified unequal treatment is ultimately assessed. Individuals of different genders being treated differently even within a binary order by no means always represents a form of discrimination. For example, the fact that some public spaces are reserved for specific genders is based on their justified claim to protected areas where people can be with others of the same gender. If anything, it would often rather be discriminatory for all genders to be treated exactly the same. This is exemplified in the debate about access to gender-segregated bathrooms in the public sphere.

Naturally, the principle of non-discrimination is universally applicable – it is just as important for individuals with non-binary gender identity as it is for those for whom belonging to a specific gender is of great importance in how they live their lives. They must not be prevented from living as a “woman” or a “man”, just as no-one should be prevented from living in accordance with a non-binary gender identity. Against this backdrop, the current legal situation leads to unequal treatment: individuals with non-binary gender identity do not have the option of expressing their gender identity through the relevant legal vehicles. On the

contrary, they are forced to assign themselves to one gender or the other. The same cannot be said of individuals who identify within the binary order, i.e. as a “woman” or a “man” – and it would not be the case for them even if people with non-binary gender identity were given the option of an alternative category.

Even if it is indisputable that the current practice of officially recording gender involves unequal treatment, it remains to be examined whether this is unjustified and results in discrimination for those concerned. This question can be answered on at least two levels: firstly, in relation to the normative regulation of numerous areas of life that follow the gender binary. As discussed, these areas need to be regulated in such a way that discrimination does not arise even within a binary order. This requirement is all the more urgent if in addition, as is currently the case, gender identities are not even acknowledged due to a lack of legal recognition. Secondly, unjustified unequal treatment may be linked to the fact that gender identity is of constitutive significance for personal identity. While the current system allows those who identify within the binary order to express their identity both socially and legally, this is not possible for individuals with non-binary gender identity.

And finally, it is important to note that neither a binary classification nor the expansion of options can completely avoid discrimination. If, for example, a trans person is denied access to occupational positions or gender-specific spaces on the grounds of external characteristics associated with the biological sex with which they do not identify, this is discriminatory – but it may occur irrespective of how the recording of gender is regulated. This indicates the need to distinguish between legal discrimination – associated with the current restrictions on officially recorded gender – and societal discrimination, which is only indirectly linked to the legal options available. While the former can be reduced through changes to existing regulations, additional efforts will be required to overcome everyday societal discrimination. Here, it is not clear to what extent changes to the official recording of gender can make a contribution.

#### 4.1.5 Protection of privacy

Especially in view of the continuing restrictions and burdens to which the individuals concerned are exposed (cf. Section 2.3), the principle of *protection of privacy* is also of great importance. Gender identity is part of individuals' privacy. However, if gender has to be recorded at a certain time, or if the person concerned wishes to amend the entry, then gender identity has to be disclosed. This is in tension with the principle of protection of privacy. The solution to be adopted must therefore ensure that the disclosure of gender identity can be avoided as far as possible and restricted to situations where confidentiality is assured.

#### 4.1.6 Protection of personal integrity

The failure to recognise the diversity of gender identities may contribute to violations of personal integrity – *protection of personal integrity* is thus a core principle in this context. The protection of personal integrity covers physical, mental and moral aspects; it may be violated through bullying, marginalisation, discrimination or sexual harassment. Employment law in particular attaches great weight to the protection of personal integrity, and appropriate duties are thus specified for businesses.

It is to be assumed that legal recognition of the diversity of gender identities, as expressed in expanded options for the recording of gender, will increase the visibility of structural disadvantages and violations of personal integrity suffered by trans or intersex individuals and those with non-binary gender identity. It is also apparent, however, that merely introducing a third gender category is not sufficient to ensure the protection of personal integrity. In the German state of Hesse, for example, the number of people opting for the new "diverse" category has so far been low.<sup>31</sup>

One explanation is that those concerned fear the negative social consequences which may be associated with its disclosure. In addition to legal recognition of the diversity of gender identities, there is thus also a need for additional efforts in society to combat stigmatisation and marginalisation, so that gender identity can not only be autonomously determined but also actually lived.

### 4.2 Public and societal interests

In order to answer the question of how the recording of gender in the civil register should be regulated, it is necessary to discuss, in addition to the aforementioned ethical aspects, what public or societal interests could justify mandatory registration, or the restriction of officially recorded gender to female and male.

The personal data recorded in the civil register "serve to permit personal identification and as evidence of belonging to a legal community"<sup>32</sup>. A person's civil status thus comprises a variety of information (such as birth, death, marital status), entailing certain legal consequences. The same is also true of gender: certain areas of the law specify different legal consequences depending on a person's gender – hence the interest in this information being recorded under civil status regulations. Here, there is a need to weigh the intrusion on the personality rights of intersex and trans individuals and those with non-binary gender identity represented by a mandatory entry within the binary structure of the civil register against the possible public and societal interests that could justify such an intrusion.<sup>33</sup> Here, a distinction needs to be made between interests that may justify an official recording of gender in general and interests that presuppose a binary recording of gender.

The binary system allows for a certain stability in the organisation of society and enables the continuation

31 Cf., e.g. the 17 November 2019 issue of FAZ, <https://www.faz.net/aktuell/rhein-main/wenige-antraege-auf-eintragung-des-dritten-geschlechts-16489647.html> [2020.06.22].

32 <https://www.bj.admin.ch/bj/de/home/gesellschaft/zivilstand.html> [2020.07.15] [in French, German and Italian only].

33 Cf. also German Ethics Council 2012: 129ff, and also, for a discussion on the relevant areas of interest, Deutsches Institut für Menschenrechte 2017: 30ff.

of a tradition strongly influenced by the gender binary (colours, gender-specific spaces, obligations, gender-specific character of certain occupations, etc.). Thus, the interest in preserving the binary recording of gender relates primarily to rights and obligations which, within this order, are assigned according to gender. A conspicuous example is the current regulation of compulsory military service, which demands an unequivocal binary classification. Another case in point are gender-specific rights and obligations under social security law – for example, a retirement age which depends on gender, as well as other gender-specific pension provisions. Further relevant examples concern access to reproductive medicine or marriage, which is available to opposite-sex couples only, thus making reference to the binary system.

More numerous are the interests linked to the recording of gender in general – for example, with regard to public order and safety. The recording of gender underlies, for instance, the gender-segregated penal system. Gender segregation, generally based on the officially recorded gender, is considered indispensable for the protection of prisoners. However, this type of protection could also be ensured without the binary system. The planning of public spaces can also require officially recorded gender, as this regulates access to gender-specific services and (public) gender-specific spaces which enable and promote the protection and well-being of individuals by allowing them to be among those of the same gender. This may be relevant, for example, in the planning and design of healthcare or educational facilities.

Furthermore, social and sociopolitical interests may also justify the official recording of gender, for example in relation to the state's duty to ensure healthcare for all population groups. It is known that the distribution of medical risks, as well as access to medical treatment and the availability of medical research data, varies according to gender. From a public health perspective, it is thus in the public interest and in each individual's interest to continue pressing for measures to reduce unequal access to treatment and the unequal amounts of research data currently available for the different genders. There is also an interest in making treatments gender-specific and being able to categorise medical risks accordingly.

Promoting gender equality is another public interest that could justify the preservation of officially recorded gender. Gender equality policies rely on knowledge about the particular ways in which the genders are treated differently, and what specific types of protection and support are appropriate. There is, for example, the problem of collecting data on gender-specific violence – data which is indispensable for taking adequate protective measures and combating such violence. The collection of this data is also vital for ensuring that measures can be taken to combat discrimination against individuals with non-binary gender identity as well as trans and intersex individuals with binary gender identity.

## 5. Assessment of the options

Regulations concerning officially recorded gender are currently undergoing major changes, and scant experience with the abolition of official recording of gender is available as yet. Below, the options listed in the request submitted to the Commission are discussed in the light of the above considerations. The question of the solutions to be preferred for changing current registration practice is then addressed. It should be noted at the outset that the NCE believes that all the options to be considered would be preferable to the current regulations, which fail to give adequate recognition to the diversity of gender identities.

### 5.1 Choosing not to have gender officially recorded at birth, or after birth

From an ethical perspective, the two options separately mentioned by the FOJ – choosing not to have gender officially recorded at birth, or after birth – raise the same questions: both options concern a situation where a blank could be left, either for a limited period or permanently. In the first case, this blank would subsequently lead back to a binary structure (everybody must at some point be registered as female or male). In the second case, the possibility of non-binary classification would be granted (individuals may be registered as female or male, or permanently forgo registration). In principle, this approach could be implemented in three ways:

1. Gender is not recorded for any newborns
2. Gender is not recorded for any newborns, but parents or guardians may decide to have gender recorded (opt-in)
3. Gender is recorded for all newborns, but parents or guardians – and later the individuals themselves – may opt for non-registration, i.e. leaving the gender entry blank (opt-out).

The options for implementation thus assume that, after a certain time, an entry must be made in the form of a fixed classification. If this option is taken to mean that the recording of gender cannot be forgone indefinitely, or if no option of recording one or more new gender categories is established, then the restriction to two genders – and thus the binary system – remains in place. Recognising the diversity of gender identities would require an open classification for individuals with non-binary gender identity, which would not be possible in this case.<sup>34</sup> The key question is thus what conditions must be met for it to be possible to have a gender entry left blank – or whether such conditions may even be specified.

The possibility of deferring registration until the individual concerned has capacity and can make a free, fully informed decision as to what (if anything) is to be recorded would help to strengthen self-determination. The more straightforwardly and free from conditions – such as medical certification of intersexuality – an entry can be made or removed, the less the right to self-determination is curtailed. In addition, the requirement that any conditions stipulated for non-registration be kept to a minimum arises from the right to privacy: why, if the option of leaving the gender entry blank is essentially available, should restrictive conditions be stipulated which require the disclosure of highly personal characteristics of the person concerned? Specifically, requiring a medical certificate may also lead to this option being restricted to a particular group of persons, and it would reinforce the pathologisation of intersex and trans individuals. Individuals who do not wish to have any medical interventions or who are not intersex would be excluded under such a system. In addition, under the opt-in and opt-out models, a substantial prolongation of the waiting period would be advisable, to give parents or guardians the chance to adequately inform themselves.

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34 A circumstance which, for example, Germany's Federal Constitutional Court has declared unconstitutional (cf. Section 3.2).

The option of leaving the gender entry blank must also include support measures for the relatives and contacts of the children concerned, so as to counteract discrimination and violations of personal integrity. In the school setting, for example, it would need to be borne in mind that some children may be disoriented by the binary structure of spaces such as changing rooms or bathrooms. As noted above, the management of international identity documents would also need to be adjusted.

With regard to the option of choosing not to have gender recorded after birth, it would also need to be possible for an entry to be deleted at any time at the request of the person(s) with parental responsibility or the individual concerned. This might be necessary if, at the time of registration, the person(s) with parental responsibility did not (or could not) determine that binary classification was inappropriate for the child, or in cases where children or adolescents with capacity arrive at a different view of their gender identity than the person(s) with parental responsibility at the time when they had to decide on the child's behalf.

This option, however, is in tension with the principle of protection of privacy, since the children or adolescents concerned, or adults, are required to actively challenge a binary classification previously undertaken and request its deletion. A request for deletion inevitably entails the disclosure of gender identity – which may not be desired by the individual concerned vis-à-vis the parents or guardian or vis-à-vis the authorities. In addition, individuals who do not wish to have a gender entry or intend to have it deleted are given to understand that they are outside the norm, which generally assumes that people can classify themselves as either female or male. This division into those within and those outside the norm generally creates considerable scope for stigmatisation, violations of personal integrity and, all too often, discrimination based on gender identity.

## 5.2 Abolition of official recording of gender

While the option discussed above represents an improvement over the status quo, it also raises significant ethical problems. The question thus arises whether the official recording of gender is even necessary, or whether this category could be dispensed with. Here, it must be emphasised that the abolition of the legal gender category would not in itself eliminate the gender binary, which is deeply rooted in society. Such a change – should it be considered desirable – would require societal evolutions in many aspects of communal life. It must therefore be asked, not least with regard to the goal of preventing the discriminatory effects of the current binary order, to what extent amendments to legal regulations can actually change mentalities or social practices.

To our knowledge, no country has so far completely abolished the recording of gender. In international debate, however, there are increasingly calls for a review of the recording of gender as part of civil status (e.g. Third International Intersex Forum 2013). This demand is supported by Principle 31 of the Yogyakarta Principles plus 10 (2017). Principle 31 – the right to legal recognition – calls on states to gradually end the registration of gender in identity documents and as part of a person's legal personality. The Netherlands has already examined this option and concluded that there are no norms in international law which would prohibit abolition.<sup>35</sup> Accordingly, from 2024, gender will no longer be specified in Dutch identity cards.<sup>36</sup>

Abolition of the official recording of gender, together with the questioning of the “significance of gender as a characteristic relevant for public policy” (Büchler & Cottier 2005: 125), may address some of the ethical concerns considered here. With regard to recognition, for example, all varieties of gender identity would be assured consideration, and no justification would

<sup>35</sup> Result of a study on the possibility of abolishing registration of gender, conducted under a Dutch parliamentary motion (Van den Brink & Tigchelaar 2014).

<sup>36</sup> Cf., e.g., the 4 July 2020 issue of ZEIT, <https://www.zeit.de/politik/ausland/2020-07/gernder-mainstreaming-niederlande-geschlecht-ausweis-lgbt> [2020.07.23].



be required for a gender identity departing from the binary norm. Making it impossible for those who identify as non-binary to represent their gender identity runs counter to their justified claim to recognition. At the same time, in accordance with the protection of privacy, if this option were implemented, nobody would be required to declare a particular gender identity against their wishes.

From the point of view of protection against discrimination, abolition of the official recording of gender could help to reduce people's exposure to unjustified unequal treatment based on gender. It would need to be borne in mind, however, that to abolish the official recording of gender is not in itself to minimise forms of discrimination embedded in everyday practice. Also significant in this respect is the fact that regulations designed to reduce unequal treatment for some may have discriminatory consequences for others. This could be the case, for example, if, following the abolition of officially recorded gender, the need for gender classification was ignored altogether, and provision was no longer made e.g. for spaces serving as a retreat for people with the same gender identity.

Also to be borne in mind is the fact that gender serves to protect other human rights and as a point of reference for various legal rights (cf. Section 5.4, Braunschweig 2020; Holzer 2020). Accordingly, with regard to this option – and naturally also with regard to the option of a third gender category – it needs to be discussed how documents and IDs which currently include a gender marker could be replaced. It would also need to be established which documents would be affected and within what time frame changes would have to be made. Not least, the complete abolition of officially recorded gender would require access to certain services and spaces to be organised in a different way (Holzer 2018). Furthermore, efforts would need to be made to ensure that non-inclusion of a gender marker in official documents becomes an internationally accepted possibility – if not a universal obligation – in order to prevent adverse consequenc-

es for citizens from countries wishing to adopt this approach.<sup>37</sup>

There are thus also pragmatic factors that militate against the complete and universal abolition of the gender category at this time (cf. also Section 5.4). However, given the above considerations, these grounds are not sufficient from the NCE's perspective to reject this option entirely. It therefore believes it would be appropriate, as well as introducing a third category, to consider in more depth the abolition of official recording of gender and the consequences thereof (cf. Section 6).

### 5.3 Creation of new gender categories

Less radical than the complete abolition of officially recorded gender is the proposal to make additional gender categories available. Various possibilities exist: (1) creation of a single new category, (2) creation of a single new category with one or more addenda, (3) creation of several new categories, (4) creation of a single new category for ID purposes. If only one official non-binary gender category is created, it needs to be discussed whether it should be differentiated by means of an optional addendum. The fourth option would involve the introduction of a third category for certain identity documents, while the binary gender categories would be maintained in the civil register. Here, a binary gender entry would be used to permit the assignment of certain gender-specific rights and obligations (e.g. marriage, healthcare or compulsory military service). A third category would thus be introduced not for all legal purposes, but solely for identification purposes.

The introduction of one or more new categories provides choices for those concerned which go beyond binary classification or no classification at all. In order to recognise the diversity of gender identities, this approach would, of course, need to cover a sufficiently broad spectrum of classifications, which could be dif-

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37 According to Holzer (2018), the ICAO, for example, appears to have already signalled its openness to such proposals.



difficult to achieve. For example, agender or gender-fluid individuals would need to be able to identify with the options available; for with every new category, new conceptions of normality are created – and hence also new exclusions, with certain identities classified as legitimate and others as illegitimate as a result. Even classifications based on self-determination do little to change the conception of gender as an indispensable and non-negotiable characteristic of identity (Holzer 2020).

The availability of a new category with an addendum, or of several new categories, would, however, guarantee the protection of privacy, representing a “normal” case of entries available without any need for justification. But it would not, in itself, ensure the protection of personal integrity or protection against discrimination based on gender. An additional category may grant those concerned access to basic rights, but at the same time it assigns them an identity which may be associated with other legal and/or societal regulations, such as the withholding of legally recognised marriage or parenthood (Braunschweig 2020). In the light of experience in Germany, for example, it cannot be ruled out that the introduction of a third category may increase pressure for the categorisation of all identities while not reducing the sense of a lack of social recognition (Braunschweig 2020; Venditti 2020) and thus, contrary to what was intended, actually promote discrimination. In order to avoid this, additional efforts and legal provisions would be necessary, as is also the case with the other options.

In addition, as regards the situation of intersex newborns and children, there remains the risk that sex reassignment procedures will be performed which are not medically indicated. As these procedures violate human rights, they need to be prevented. As studies in Germany have shown (cf. Section 2.3), a third cate-

gory would not be sufficient to eliminate this practice. For this reason, a ban on non-medically indicated sex reassignment surgery in children who lack capacity – as exists in Malta, for example – would need to be instituted alongside the introduction of a third or several new categories.

Given these limitations, this option cannot be satisfactorily implemented simply by introducing an additional gender category. Merely entering an “X” instead of “female” or “male” does not adequately recognise particular, especially dynamic, non-binary gender identities.<sup>38</sup> The designation “other” also seems deficient in this respect, as an umbrella term of this kind once again emphasises the norm and deviation therefrom. Since the individuals concerned often have a clearly defined self-categorisation, the designation “indeterminate” also seems inappropriate (Ansara et al. 2015). The problem with markers other than “X” is that they are not internationally recognised under the current ICAO guidelines. But the “X” in passports can also lead to problems – for example, with certain airlines’ online check-in systems, with visa applications<sup>39</sup> or when entering certain countries (Holzer 2018). By ascribing an identity to women and men, while individuals for whom the third option applies cannot express their own identity, additional categories may have a discriminatory effect. At the same time, the state continues to define the spectrum of possible recognition (Venditti 2020).

The proposal nevertheless takes up an important element that needs to be considered with regard to this option: from the point of view of recognition and self-determination, what is crucial is not the introduction of a “third gender”, but the creation of a third gender entry. This would essentially make it possible, at the implementation stage, to pursue the German model of an open wording (“diverse”) or to make

38 However, in October/November 2019, Transgender Network Switzerland conducted a non-representative survey on the recording of gender among 197 individuals with non-binary gender identity. 54% of respondents would prefer the omission of a gender entry to having a non-binary gender entry. Of the five markers proposed by TGNS, the respondents preferred “X”, followed in second place by “NB” (non-binary). “The results show a clear need for official recognition of the non-binary gender identity. The two principal options are ‘no gender entry’ and ‘X’ as a third option.” (TGNS 2019: 1)

39 These may arise, firstly, from the policies of the country concerned and, secondly, if documents with options other than “X” cannot be processed by electronic systems. Problems may also arise if a person who has an identity document with a third gender marker other than X checks a binary marker on a visa application, which can lead to inconsistency between the visa and the passport (Holzer 2018).

available several gender markers (in addition to female and male) which reflect the multiplicity of identities. Another positive consequence of the introduction of new categories would be the increased visibility of intersex individuals and individuals with non-binary gender identity, which could lead to acceptance and promote reflection on the binary structure of society.

## 5.4 The consequences of implementing the various options

If the current system for official recording of gender is retained, the fundamental problem inherent in binary classification, i.e. non-recognition of individuals with non-binary gender identity, will remain. Given that Switzerland's legal and social order is profoundly shaped by the gender binary, implementation of the options discussed would have far-reaching consequences for existing social practices and/or legal regulations, as well as raising questions of practical management. These need to be considered in assessing the options, and they are summarised below.

### a. Consequences associated with all options

Gender remains a point of reference for various areas of legal regulation, the shape of which would be affected by the introduction of a third gender category or the abolition of official recording of gender. For all the areas of regulation in question, it needs to be considered what goods are protected or what goal is pursued by the regulations concerned, and to what extent gender is in fact the relevant criterion which has to be invoked by the regulations. For purely in the light of the constitutional prohibition of discrimination, differentiation by gender requires a particular justification. The present Opinion cannot discuss all these areas of regulation in detail; below, some of them will be addressed merely by way of example.

In parentage law, for example, the terms "mother" and "father" clearly have gendered connotations – it is assumed that the two terms correspond to the woman/man dichotomy. However, the "mother" is regarded as the person who bears (or has borne) the child. So here the point of reference is the birth, and a designation of the person's gender is not essential-

ly necessary. A similar example, from social security law, is the widow's pension, which can be traced back to the role of the woman who does not earn her own living and is financially dependent on her husband's income. But here the point of reference is marriage, not the gender of the person entitled to the pension. A regulation focusing on the function of the pension could be based on the division of roles, or the unpaid work performed within the partnership, and thus also define entitlements without reference to gender.

Also affected are all legal provisions concerning the enforcement of compulsory military service: liability is determined on the basis of officially recorded gender. It would therefore be essential to amend the relevant provisions. Another serious challenge, and therefore a question to be dealt with as a matter of urgency, is the penal system. Here, too, however, it would need to be considered whether the possibility of self-declaration might not be sufficient to ensure the protection of prisoners.

With regard to international cooperation, again, measures would be required to adapt to a new legal framework. For example, the universal or optional non-inclusion of gender markers and the introduction of a new category other than "X" are currently limited by the international regulation of passports by the ICAO. After any changes to the regulation of the recording of gender in Switzerland, it would need to be ensured that all concerned continue to be in possession of internationally recognised travel documents. If the situation is to evolve in this area, multilateral agreements with other countries are necessary. It would also be important, however, to provide information for the people concerned on the legal situation and social acceptance of individuals with non-binary gender identity in other countries.

Another example is access to gender-specific medical treatments and the collection of gender-specific research data. Here, in practice, officially recorded gender is of little relevance; rather, what is decisive is the individual's self-classification – and this would remain so if the recording of gender were abolished or a third category were created. Here, it would need

to be ensured that intersex and trans individuals have access to relevant medical measures associated with different genders.

In the NCE's view, none of the options considered would automatically restrict the rights and preferences of those who identify within the binary gender structure and wish to live as a "woman" or a "man". Such effects, however, need to be borne in mind as potential challenges when these options are implemented. This point is important, because a contemporary form of official recording of gender also has to be assessed by whether it allows people previously unable to do so to register their deeply felt and lived gender identity without unjustifiably limiting this possibility for others, who can readily identify within the existing system.

#### b. Leaving the gender entry blank and introducing new gender categories

The options discussed in Sections 5.1 and 5.3, namely leaving the gender entry blank or introducing one or more new categories, may help to increase the visibility of people with non-binary gender identity and intersex individuals, thereby strengthening their acceptance in society. However, it needs to be borne in mind that changes to regulations do not necessarily improve protection against discrimination. There is a risk that those who wish to select a third option or leave the gender entry blank will be given an even greater sense that they do not match the expected social norm. The new options could thus further increase, rather than decreasing, the pressure for gender categorisation and renaturalisation of gender, thereby further marginalising those concerned (Braunschweig 2020). It is therefore likely – given experience in other countries – that a third category would be used only rarely, or not at all. This is partly because only a very broad range of possible entries (i.e. not the creation of a single third category but the availability of a wide-ranging third option) would be able to reflect the diversity of gender identities. In terms of implementation in practice, reflecting such diversity would involve a number of challenges, e.g. when designing public spaces. In addition, the problem would remain that even a wide variety of options cannot satisfy the existing diversity of identities. Also to be addressed,

finally, would be the question whether the frequency of changes to recorded gender should be subject to regulation.

#### c. Abolition of official recording of gender

If mandatory recording of gender were abolished, the pressure for self-justification to which individuals with non-binary gender identity are currently exposed would also be removed. At the same time, the abolition of official recording of gender could help to reduce forms of unequal treatment which currently exist. On the other hand, this option involves particular challenges with regard to the collection of data for medical purposes and for combating discrimination or unequal treatment on grounds of gender. If official recording of gender were abolished, it would need to be defined how the promotion of women in areas where they remain disadvantaged (equal pay, pensions, etc.) could be made possible. However, the collection of data on gender identity does not necessarily require the recording of gender in the civil register, since personal and often statistically relevant information such as religious or ethnic affiliation, gender or sexual orientation is today already collected by means of self-declaration. In addition, individuals and organisations collecting data would be required to consider which genderspecific aspects (gender identity, biological sexual characteristics, gender expression, responsibilities assigned and accepted, etc.) are relevant for the purpose in question. This could contribute to more precise results, but also to the minimisation of data collection and the restriction of data to specific purposes. Also to be taken into account is the symbolic value attaching to public recognition of the diversity of gender identities, as expressed by an official recording system which appropriately reflects this diversity. Such recognition could contribute to social acceptance thereof. Finally, it should be noted that the abolition of gender classification would also raise questions concerning the organisation of genderspecific public spaces and services, and structures for children and adolescents, particularly in educational institutions.

## 6. Summary and recommendations

This Opinion is concerned with the question of the direction in which the requirement for official recording of gender in Switzerland should be developed. Various options are currently under discussion. They range from leaving the gender category blank to creating a third category, or abolishing official recording of gender altogether. In the Commission's view, this discussion needs to be conducted as part of a broader debate about the gender binary, which is deeply embedded in our culture, shaping social structures, everyday communal life and the legal system.

The current obligation to have gender officially recorded as either "female" or "male" in the civil register shortly after birth is an expression of the gender binary, which – as the NCE recalls – though it is to be understood as a social construct, also needs to be taken seriously as something that is rooted in traditional lifeworlds and plays a fundamental role for many parts of society. As the issue of officially recorded gender can thus not be dealt with separately from the debate about the gender binary, it by no means affects only a limited group of people. On the contrary, as discussed above, any new regulations to be introduced must also always be assessed in terms of how they could change existing social structures. The Commission is convinced that the state's approach to gender interacts – albeit in complex and not unequivocal ways – with lived social reality; accordingly, society's views of gender and gender identities are reflected in the legal order, which, however, also influences how society deals with the diversity of gender identities and thus has normative effects. For this reason, the potential associated with, and questions raised by, any new regulation of recorded gender need to be carefully considered.

The NCE takes the view that the current regulation and practice of official recording of gender is unsatisfactory. It does not adequately reflect the diversity of gender identities and disregards fundamental interests of persons with non-binary gender identity and

trans and intersex individuals. For those concerned, this gives rise to serious restrictions affecting their self-determination and freedom to choose how to live their lives, but also protection against discrimination.

The Commission concludes that each of the options discussed would be preferable to the current arrangements: they all express improved recognition of the diversity of gender identities and strengthen the rights of those concerned without unduly restricting the rights of those who identify with the binary gender system. At the same time, each of the options has its own deficiencies and difficulties, which would need to be addressed if new regulations were introduced: creating the option of leaving the gender entry blank – either for a limited period or indefinitely – certainly relieves those concerned of the obligation to have gender recorded, but it also leaves the binary normative framework intact and signals to those who do not identify as binary that they are outside the norm. This creates new scope for stigmatisation, violations of personal integrity and discrimination. That also applies to the introduction of a third category alongside "female" and "male": while this would indicate that additional gender categories are available without any need for justification, as a "normal" case of officially recorded gender – thus eliminating significant official barriers – it also poses the challenge of providing an option that is sufficiently broad to adequately reflect the diversity of gender identities. Nor can the creation of additional official gender categories be expected to resolve the problem of discrimination or the issue of inadequate recognition of the various gender identities. Indeed, without adequate accompanying measures, the additional categorisation associated with a third option could even exacerbate existing stigmatisation and discrimination.

The complete abolition of official recording of gender, signalling the state's rejection of the gender binary, faces the challenge that the binary structure is deeply embedded in our culture and widely accepted, mak-

ing this a highly sensitive issue. The NCE explicitly acknowledges this challenge. Nonetheless, in the Commission's view, the above considerations suggest that the abolition of official recording of gender is the solution to be preferred from an ethical perspective. Such a step would, of course, involve far-reaching – also ethically relevant – consequences, which concern not only the public interests existing in this area and the need for extensive changes to existing legal regulations, but also the social conditions which would be required for such a step to be undertaken. In the Commission's view, these implications remain to be explored in greater depth.

For the above reasons, the Commission recommends a step-by-step procedure. As a first step, the legal foundations should be established for a third official option, providing for several new gender categories or a single new category with an addendum. The solution to be defined should enable the inclusion of as many different gender identities as possible. A restrictive solution, such as the entry "X", for example, should therefore be avoided in favour of an open option, corresponding at least to the "diverse" category introduced in Germany. Even if, in the Commission's view, a third option of this kind represents a substantial improvement over the current situation, its deficiencies – in particular, the unresolved issue of discrimination – can be expected to become rapidly evident. For this reason, the Commission recommends that, at the same time, a process should be initiated with the aim of considering in depth the abolition of official recording of gender. This solution faces challenges which are not primarily legal or political, even though it would involve substantial efforts to amend existing arrangements. It requires adequate societal acceptance, and for this reason an in-depth assessment of the prerequisites for and concrete effects of the abolition of official recording of gender must first be obtained. Taking as its starting point the interaction between legal regulations and societal norms discussed in this Opinion, the assessment should identify the amendments which would be required in detail and how this step would fit into the context of international developments. On this basis, the subsequent political process could then be evaluated.

In order to strengthen self-determination and protection of privacy and personal integrity for all people, the choice of a third category – or, where appropriate, the choice not to have gender recorded – should not, in the Commission's view, be made subject to specific (particularly medical) requirements. Likewise, rapid, straightforward and transparent procedures – not requiring medical certificates – should be established for the amendment of an existing gender entry. Finally, in this context, the Commission wishes to reiterate that sex reassignment procedures which are not medically indicated are to be prohibited in intersex children lacking capacity.

As has been repeatedly noted, regulation of the official recording of gender is just one element in efforts to combat the violations of human dignity and discrimination based on gender identity which remain widespread. Irrespective of the issue of officially recorded gender, therefore, the Commission appeals to all concerned to undertake further efforts and, where necessary, introduce legal measures to combat such discrimination – for example, in the areas of employment or education. This includes, not least, designing public spaces and services in such a way as also to meet the needs of persons with non-binary gender identity and trans and intersex individuals.

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## 8. Abbreviations

CC	Swiss Civil Code
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FC	Federal Constitution of the Swiss Confederation
FOCS	Federal Office of Civil Status
FOJ	Federal Office of Justice (Switzerland)
FRA	European Union Agency for Fundamental Rights
GIGESC Act	Gender Identity, Gender Expression and Sex Characteristics Act (Malta)
ICAO	International Civil Aviation Organization
ICD	International Classification of Diseases
NCE	Swiss National Advisory Commission on Biomedical Ethics
PStG	Civil Status Act (Personenstandsgesetz) (Germany)
TGEU	Transgender Europe
TGNS	Transgender Network Switzerland
TvT	Transrespect versus Transphobia Worldwide (TGEU research project)
WHO	World Health Organization
ZStV	Civil Status Ordinance (Switzerland)

This document was unanimously approved by the Swiss National Advisory Commission on Biomedical Ethics on 5 October 2020.

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This Opinion is available in English, French and German. The German version is the original version.

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