



**Rape Crisis Network Ireland (RCNI)**

submission on the issue of

Consultation on the Review of the Equality  
Acts

To the Department of Children, Equality,  
Disability, Integration and Youth

December 2021

### **Rape Crisis Network Ireland (RCNI)**

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

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## Section 1: Introduction

### RCNI areas of consideration in this submission

1. RCNI in setting out this submission would first like to clarify our scope and understanding of our areas of expertise and understanding within this consultation process. We will do so by outlining what the government have set out for us as parameters and our understanding therein of our role and contribution to this consultation in as far as we can.
2. In the announcement of the consultation, the government's call for submissions cites all the Equality Acts (Equal Status Acts 2000-2018 and the Employment Equality Acts 1998-2021) and beyond. This is a broad and open spectrum of law. While sexual violence victimisation, response, prevention and perpetration is experienced in highly unequal terms and we understand sexual violence to be both cause and effect of discrimination, we do not propose to cover all aspects of discrimination. We have attempted to prioritise areas of particular relevance to sexual violence response and prevention, but offer our caution that we will no doubt not manage to be exhaustive even in that narrow focus.

Where we can, we will form recommendations or set out challenges which require further consideration of remedy on legislative changes, recommendations for policy development or recommendations for changes to the practical operation of the redress mechanisms.

3. The first proposal specifically mentioned in the government's call is the addition of a socio-economic ground to the Equal Status Act 2000. RCNI work with our partners across the NGO sector on matters of poverty as we recognise that economic disadvantage is both a risk factor and an outcome of sexual violence. We are indebted to our partners who focus their expertise and advocacy in this area and broadly support the position of our partners in the add the 10th alliance in this matter
4. The second area specifically mentioned in the Government's call is consideration of the amendment of the gender ground of the Equal Status Act 2000. All of the evidence consistently demonstrates that the most important and profound risk factor in sexual violence, is one's sex. Further, it is well established that inequality, based on one's sex, is both one of the most pervasive discriminations and one that manifests itself most acutely in acts of sexual harassment and violence. Therefore, RCNI's focus with regards to sexual violence is necessarily on the gender ground of discrimination. However, the broad scope of law that is required to address gender discrimination (from employment law, maternity rights, pension rights, care responsibility etc) is beyond our scope. It should be taken as



read that RCNI support the broad gamut of equalities legislation that addresses gender inequality however, for this submission we will focus more narrowly

Further, the government's call seeks to examine the 'effectiveness in combatting discrimination and promoting equality. It will also include a review of current definitions...' We will address these matters in relation to our focus in Section 2 below.

5. Thirdly the government seeks to review the use of **Non-Disclosure Agreements**. RCNI would not claim expertise in this area of employment law but understand NDAs to be a pertinent matter in terms of redress, prevention, transparency, accountability and protection. Please see Section 3 below.
6. Fourthly the consultation seeks to understand complainants' experiences of **redress and complaint** under the current legislative framework and what we might recommend regarding change. Please see Section 4 below.
7. Fifthly we will give consideration to whether existing **exemptions** should be removed or modified and whether or not the existing legislation adequately addresses issues of **intersectionality**. The RCNI will address this in section 5 below.

Specifically, the consultation asks us to address these matters with regards:

1. The functioning of the Acts and their effectiveness in combatting discrimination and promoting equality;
2. The degree to which those experiencing discrimination are aware of the legislation and whether there are obstacles which deter them from taking an action;
3. The scope of the current definitions of the nine equality grounds. This will include consideration of the gender ground, the disability ground and whether new grounds should be added, such as the ground of socio-economic discrimination;
4. Whether the legislation adequately addresses intersectionality or the intersection of discrimination across a number of grounds;
5. Whether existing exemptions in the legislation should be modified or removed.



## Section 2: The Gender Amendment

The first challenge we have in considering this matter is that we do not know what 'the gender amendment', proposed in this consultation, is. The gender amendment is cited in the public consultation online page and by the Minister in his public announcements with regards to this consultation but is not defined or any proposal set in front of us. The Programme for Government does provide more detail and it states the intention to: 'amend the gender ground in equality legislation, to ensure that someone discriminated against on the basis of their gender identity is able to avail of this legislation.'

To the best of our knowledge two detailed policy discourses have taken place on this issue, one within the development of the LGBTI+ Youth National Strategy (2018 - 2020) and the other within the Gender Recognition Act review (2015 - 2019).

Upon examining the outputs of these processes our conclusion is that there are broadly two amendments proposed:

- one is to amend the gender ground to encompass gender identity and
- the other is to introduce a third sex, non-binary, to the ground.

These are different propositions with different potential impacts. Our reflections below therefore are contingent in the absence of this clarity on a definition of the problem, what is proposed and therefore how we might assess impact.

### 2 (A): The Gender Ground - Definition and Meaning

Before progressing further, it is necessary to define terms and our usage of those terms in this submission. The Equal Status Act was drafted in 2000 and is now one of a group of related Acts usually referred to as the Equal Status Acts 2000-2018.<sup>1</sup> The words 'sex' and 'gender' have been making a rapid evolution in how they are used and understood in the past 20 years.

A commonly accepted definition is that 'sex' relates to the physical, biological facts of a body that distinguish it as either male or female in humans. Or as the Oxford English Dictionary puts it 'the state of being male or female.'

'Gender' then relates to social and cultural expectations that are assigned to people on the basis of their sex and are social constructions that change over time and cultures, defining what is feminine and masculine and the behaviours and attitudes expected of men and women. Or as the OED defines it - 'the fact of being male or female, especially when considered with reference to social and cultural differences, rather than differences in biology; members of a particular gender as a group.'

<sup>1</sup> The consolidated version of the ESA 2000 can be viewed online at [www.lawreform.ie/revised](http://www.lawreform.ie/revised)



These are commonly held definitions of sex and gender,<sup>2</sup> but in the context of identity and Rights discourse, can appear to become less stable.

The OED adds a caveat to the definition of gender which stipulates: 'The term gender is also used more broadly to mean a range of identities that do not necessarily fit in with the usual division between male and female.'

To sum up therefore:

- Sex is biology
- Gender describes social and cultural differences, based on sex
- Gender may also refer to identity based on social and cultural differences, not based on sex.

It is perhaps important to bear in mind that the two meanings of gender are opposite to each other, with the first being an imposed system of discrimination based on one's sex, the second being a valued and affirmed self-identity regardless of sex. Therefore, the first may be something to be protected from, the second something to protect. The distinction is that in the first definition of gender (based on sex), gender is the source of discrimination, whereas under the second definition of gender (based on identity), gender is the value that is to be protected from discrimination. Combining these two opposite matters in the same ground would appear to be untenable.

The Equal Status Act, written in 2000, at first glance seems to make little distinction between these categories, describing a sex ground but using gender as an umbrella term in its naming. This, we would suggest has led to an unhelpful lack of clarity in the discourse.

The gender amendment we are asked to review is worded as follows:

*'Discrimination (general).*

*Section 3 (2) As between any two persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are:*

*(a) that one is male and the other is female (the "gender ground");'*

2 For example in 2016 the Gay and Lesbian Equality Network (GLEN) in a Dept. of Education publication 'BEING LGBT IN SCHOOL 'A Resource for Post-Primary Schools to Prevent Homophobic and Transphobic Bullying and Support LGBT Students. (2016)' defined the two as follows:

'Gender: A term that is often used to refer to ways that people act, interact or feel about themselves, which are associated with boys/men and girls/women. The term 'gender' is distinct from 'sex', see definition below.'

'Sex: Refers to the biological status accorded at birth as male or female. The designation of a person at birth as male or female is based on their anatomy (genitalia and/or reproductive organs) or biology (chromosomes and/or hormones).'



The Act describes a sex ground that it then names as a gender ground. We note that this treatment of the sex-based ground, by naming it the gender ground, is unique in the list of the existing 9 grounds. The other grounds are named after the trait or characteristic to be protected rather than the system of oppression to be protected from eg the race ground is not called 'the racism ground'

We also understand that there is case law which would seem to suggest that gender as identity, which is not attached to sex, has already been understood to be included under this ground. An analysis of case law as it pertains to this ground involving trans and gender non-conforming people would be useful to have to hand for the purposes of this review.

Sex and gender are not distinguished from each other in the Gender Recognition Act 2015, where registering to a 'preferred gender' is understood to change 'sex' which is given official legal status through the issue of a Gender Recognition Certificate and entry onto the Register of Gender Recognition.

The conclusion of the GRA review (2019), that the Equal Status Act gender ground as is, is not inclusive of trans and non-binary people, would indicate that the conclusion of those LGBT representative organisations and those with statutory responsibility to LGBT+ people's rights and interests, was that the ground is one based on discriminations constructed around sex rather than the affirming gender identity not based on sex. To the contrary however, FLAC in its Guide to this Consultation (24 Nov 2021) stated that 'the definition has been interpreted in a way which includes transgender people.'<sup>3</sup>

The argument for treating all gender matters in one ground is voiced by FLAC, that in effect the social and cultural system of 'gender is the common factor underpinning this discrimination.

*'Advantages of [one inclusive gender ground] include the fact that the causes of many forms of discrimination of both cisgender people, women in particular, and trans and intersex people, may have similar roots (i.e. gender bias, stereotypical thinking on gender roles, etc.). [A single ground] also offers better opportunities to deal with intersectional forms of discrimination on these particular grounds.'*[1]).

*FLAC guide (24 Nov 2021)*

We would beg to differ that a combined ground would necessarily enable a better way of dealing with intersectional matters. In fact, part of our concern is the very opposite, that intersectional matters paradoxically disappear and become hidden when we pool

3 <https://www.flac.ie/publications/flac-guide-the-review-of-the-equality-acts-making/> pg 23



these very distinct concerns under a broad 'gender' heading (see section 2d on data below). We consider, on balance, that having a full range of distinct grounds (where there are distinct matters) allows for each form of discrimination to be visible, counted and responded to. Further we believe the Equalities laws should allow for a combination of intersectional matters. This is only possible if the intersectional matters are treated in a distinct manner in the first instance.

We draw three conclusions from these considerations of definitions and meanings above:

- firstly, that the protection from discriminations concerning sex and gender identity are distinctly different in nature and ought to be treated in a standalone manner. To protect these two different characteristics in the same ground risks having to privilege one over the other in manners that are non-transparent, irreconcilable and conflictual.
- Thus, we believe the Legislature should consider adding a gender expression or identity ground.
- That it may be timely to consider aligning the treatment of the existing 'gender ground' with the format of all other grounds eg that it is named after the trait being protected (sex) rather than the oppression (gender).



## 2(B) Sexual Violence and Discrimination Grounds

The characteristic of sex is the single most significant variable in the prevalence, perpetration and failures in response to sexual violence. The recognition of sex in the equality legislation as a basis for discrimination is pivotal in the legal infrastructure that enables us to understand and redress this inequality broadly and its impacts, principal amongst which for RCNI, is sexual violence. Vitally it not only allows for risk assessment and positive discrimination it is also critical in establishing obligations to record and collate the disaggregated data that makes tracking the effects of sex discrimination possible.

It might be useful to consider the unlikely outcome that we eliminate the existing gender ground altogether – what would we lose and why would it matter in terms of sexual violence?

- Gathering statutory administrative data disaggregated on the grounds of sex might no longer be obligatory. For example, we could move from talking about ‘95% of suspected perpetrators of sexual violence detected by the Garda in 2020 were males and 4.7% females<sup>4</sup>’ to ‘100% of sexual violence crime suspected offenders were people.’
- Government and responsible bodies would not be able to demonstrate the nature of gender inequality or the impacts of initiatives addressing sexual discrimination.
- Without a way to name and describe this fundamental inequality we could not justify uneven resource allocation, exemptions, waivers, risk assessments and positive discrimination based on this inequality.
- Victims subject to discrimination and violence on the basis of their sex would not be able to cite the targeting of them as members of that group, rather the focus would be on their circumstances and behaviours as individuals and thus the burden of responsibility (and its shadow – blame) might be pressed on victims no longer understood to have been subject to a form of violence targeted in very specific ways at their characteristic of sex.

The elimination of the ground is unlikely, so this is illustrative only of how important it is to be able to distinguish the characteristics that are targeted in sexual violence. The single most significant variable in sexual violence is sex. Those born female are more at risk of being subjected to sexual violence than those born male. Those born male are more likely to perpetrate sexual violence than those born female<sup>5</sup>. And by very

4 <https://www.cso.ie/en/releasesandpublications/ep/p-rcd/recordedcrimedetection2020/personsdetectedandsanctiontypes/>

5 [https://repository.rcsi.com/articles/report/The\\_SAVI\\_report\\_sexual\\_abuse\\_and\\_violence\\_in\\_Ireland/10770797/1](https://repository.rcsi.com/articles/report/The_SAVI_report_sexual_abuse_and_violence_in_Ireland/10770797/1)



significant margins. Of the existing grounds Disability is the second most significant variable with others also featuring. We have good evidence on some of those:

- SAVI has demonstrated that sexual violence is a gendered crime that is perpetrated predominantly by boys and men against girls and women. RCNI annual data collection also concurs with this and year on year we see that 90% of survivors coming to RCCs for counselling and support are women and girls, and that approximately 96% of perpetrators of sexual violence are men and boys.<sup>6</sup>

When we examine disability as a key variable, we see that vulnerability of people with disabilities to sexual violence is higher in adulthood than for survivors with no disability.<sup>7</sup>

Lesbian/gay/bisexual survivors utilising RCC services disclosed higher levels of multiple incidents of sexual violence than heterosexual survivors. Gay/bisexual men disclosed almost twice the level of rape disclosed by heterosexual men.<sup>8</sup>

Survivors attending RCCs who are seeking or have been granted international protection are most likely to have been subjected to abuse by groups of perpetrators than the general population of survivors. They also disclose higher levels of physical violence perpetrated along with the sexual violence than the general population.<sup>9</sup>

Gender non-conforming which is a variable of interest, may already be protected in the main under the current gender ground. Gender non conformity is a term encompassing those whose behaviour or expression is deemed by an observer/perpetrator to be outside of acceptable gendered norms. This category may therefore include women who achieve career success, who we know are more likely to experience sexual harassment than women with less senior roles in the workplace<sup>10</sup>, many trans gender or non-binary identifying people or those whose expression or appearance is perceived as non – heterosexual. We know that sexual harassment and violence can usefully be understood as a tool to reassert or control traditional or existing gender roles. Gender non-conformity, however perceived, may be targeted and sexual violence used as a disciplining tool and punishment for a ‘transgression’ against these perceived norms and vested interests. This a risk category for sexual violence that may not be fully captured by either the category of sex or gender identity and may be both and neither<sup>11</sup>.

6 <https://www.rcni.ie/wp-content/uploads/RCNI-Rape-Crisis-Statistics-2020-FINAL.pdf>

7 <https://www.rcni.ie/wp-content/uploads/SexualViolenceAgainstPeopleWithDisabilities2011.pdf>

8 <https://www.rcni.ie/wp-content/uploads/RCNI-Finding-a-Safe-Place-LGBT-Survivors.pdf>

9 <https://www.rcni.ie/wp-content/uploads/RCNI-Rape-Crisis-Statistics-2020-FINAL.pdf>

10 <https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey>

11 This is not intended to be an exhaustive list.



This risk may benefit from a list of subcategories under any gender or gender identity ground.

**Conclusion:** These considerations from a sexual violence perspective would seem to indicate that

- 'the gender ground' must have its own standing and be appropriately named for the characteristic it protects - sex,
- That gender transition, identity and non-binary identity might benefit from their own ground,
- That we might consider if the grounds fully cover all aspects of discrimination on the basis of gender non-conformity and consider further additions if not,
- And that acting on the basis of multiple grounds must be permissible.

## 2(C): The process of defining the problem?

In this section we look at how the problem has been defined and therefore how we might understand the solution being sought.

As noted above this review was primarily instigated in policy discourse by experts and advocates in LGBTI+ rights and interests. The first thing to note is that upon arriving at this point of a change process the conversation has not yet been held more broadly. There is little evidence that sexual violence has been a consideration of any weight in this process to date. There is no evidence that the Domestic Sexual and Gender Based Violence sector or those civil servants charged with upholding the interests of victims of DSGBV were part of the discourse.

For example, in terms of sexual violence the LGBTI+ youth strategy does not specify sexual violence risk and harm but does note victimisation, harassment and bullying generally, the need for mental health support and for gender neutral spaces for intimate and vulnerable settings such as changing and toilets etc. There is one reference to sexual violence and that is in relation to adequate sex education in schools. The strategy identifies the policy landscape for this strategy and provides an overview. While the overview does not claim to be exhaustive, the list does not include the National Strategy on DSGBV or the Women and Girls' strategy.

The Gender Recognition Act 2015 and its review does concern itself more particularly with sexual offences, as it must, and makes specific law around how a GRA certificate recognising preferred gender in law does not override someone's sex in the perpetration



of a sex specific offence, that is, that a trans woman can still be prosecuted for a male sex-specific sexual violence crime they commit.<sup>12</sup>

We note therefore, that this proposition, which was committed to in a Programme of Government, has yet to be explored, tested and impact assessed from the point of view of the wider stakeholders and indeed current principal beneficiaries. This current wide-ranging public consultation is therefore the first step in engaging a significant proportion of those potentially impacted. While the deadline of this consultation has been extended multiple times it is not clear that there has been broad reach and awareness achieved as yet.

While consultations vary, we do think that this Equalities infrastructure is one that might yet benefit from proactive Departmental and Ministerial awareness raising and engagement with the broad intersectional stakeholders.

**Conclusion:** the next steps of this process must incorporate impact assessments, research, stakeholder awareness, engagement and board consultation representing the full intersectionality of the rights beneficiaries in both defining ‘the gender amendment’ and consulting upon such a proposal.

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12 Gender Specific Offences:

23. (1) Where (apart from this sub section) a relevant gender-specific sexual offence could be committed or attempted only if the gender of the person to whom a gender recognition certificate is issued were not the preferred gender, the fact that the person’s gender has become the preferred gender does not prevent the sexual offence being committed or attempted.

(2) An offence is a relevant gender-specific sexual offence if a condition specified in subsection (3) is satisfied.

(3) The following conditions are referred to in subsection (2):

(a) that the offence may only be committed by a person of a particular gender;

(b) that the offence may only be committed against, or in relation to, a person of a particular gender.

(4) A part of the body surgically constructed (in particular through gender assignment surgery) is the same, for the purposes of a sexual offence, as a part of the body not so surgically constructed.

(5) In this section “sexual offence” means an offence specified in the Schedule to the Sex Offenders Act 2001.



## 2(D): Impact on evidence, knowledge, data and transparency

The Equal Status Act sets out for government and civil society the type of information we must pay attention to in understanding the vulnerabilities, harms and underserving of various populations who have been identified as disadvantaged within our society. RCNI believe we risk losing sight of critical inequality metrics if we merge all matters under a generic gender ground. The impacts will range from minor to serious, with its impacts expected to increase over time.

Conflating sex, gender and gender identity risks our capacity to understand and gather evidence and measure impact on a range of equality issues where sex and gender identity are critical variables. The RCNI will confine ourselves to the issue of sexual violence but the impacts are of course broader.

Goal 3 of the LGBTI+ National Youth Strategy is to enhance the quality of LGBTI+ data and commission research to ensure evidence informed policy and service delivery, for example:

*15 (d) Commission a review of international and Irish best practice study on appropriate language and ways to ask about gender identity and sexual orientation to inform the development of best practice instrumentation for inclusion in surveys and/or Census. Participate in piloting of questions with CSO and other research bodies, as relevant.*

A number of thought leaders, academics and statisticians are working on building these categorisations, although often not in a coordinated manner. The government, in the Department of Social Welfare are progressing shared categories and definitions for the Equality budgeting exercise. Enhanced transparency to this process would be of benefit. In practice, however, this objective to gather accurate gender identity data has often been at the cost of sex disaggregated data. This is unnecessary in our opinion and problematic.

The standard set at a European level<sup>13</sup> for census gathering is that sex should be a variable and should always be counted in census data. As the national statistics offices of Europe are understood to be standard setters, one could anticipate that other survey data would follow suit.

Using international and national law and practice RCNI have recently collaborated with interagency partners under a DCEDIY 'What Works' grant to examine definitions

<sup>13</sup> UNECE Conference for European Statisticians recommends that 'the sex (male or female) of every individual should be recorded in the census questionnaire (or taken from the appropriate administrative source for those countries using registers). Sex disaggregation of data is a fundamental requirement for gender statistics' [https://unece.org/DAM/stats/publications/2015/ECECES41\\_EN.pdf](https://unece.org/DAM/stats/publications/2015/ECECES41_EN.pdf)



regarding sexual violence against children.<sup>14</sup> This is the formulation arrived at regarding the questions of sex and gender identity:

### Sex: Proposed shared definition

Proposal to collect 2 indicators here:

A. 'Sex at birth' is recorded at birth, based on external genitalia and noted on birth certificate. 'Sex at birth' cannot be subsequently revised. The correct variables to collect this information are:

- Female
- Male

Indeterminate (recognises that a small number of people do not have a sex of male or female recorded at birth)

B. 'Current sex' for children under 16 is the sex recorded at birth, based on external genitalia, and as recorded on birth certificate. Children who have not reached the age of self-determination (which is 16 in Ireland) cannot change their sex. For people over the age of 16 'current sex' is almost always as recorded on birth certificate, however, it may have been changed by court order and consequent issue of a Gender Recognition Certificate. The official records of 'sex' can only be added to following issue of a Gender Recognition Certificate and an entry into the Register of Gender Recognition, but statistical birth certificate records of sex of person prior to gender-recognition or sex-reassignment cannot be back-dated. The effect of the legal Gender Recognition Certificate is not retrospective. All rights, responsibilities and consequences of actions (including statistics) prior to the date of recognition of preferred gender remain unaffected. The correct variables to collect this information are:

- Female
- Male
- Indeterminate (recognises that a small number of people do not have a sex of male or female recorded at birth)

<sup>14</sup> RCNI publication forthcoming: [Breaking the Silence: Terminology Guidelines for Irish services for Survivors of Sexual Violence against Children, Q1 2022](#)



### Gender identity: Proposed shared definition

'Gender identity' is a concept that describes how roles, expectations, responsibilities and experiences are created by society. Gender identity is also a useful variable in data collection to analyse how social norms can infringe rights to equality, freedom, bodily autonomy, and self-determination and contribute to sexual violence.

Sex and gender are inter-related but separate data collection variables. Gender identity refers to current gender identity which may be different to sex recorded at birth and may be different to legal documents and records. Gender identity should be self-reported and not assumed. The most common current gender identity variables are:

- Girl
- Woman
- Boy
- Man
- Transgender girl
- Transgender woman
- Transgender boy
- Transgender man
- Non-binary
- Other

Gender identity is always self-identified and can change over time.



Below are two case studies on the types of problems that arise when the criterion of sex and gender identity are merged.

### Case Study One: The RCNI database - Counting trans people

RCNI has built a data system for sexual violence survivors and gathers data nationally and has been doing so since, 2004. We record the characteristics and vulnerabilities of those using Rape Crisis Centres in order to accurately tell their stories in the statistics. When those characteristics puts someone in a minority and/or we know that they are particularly targeted and may therefore have different needs, it is vital we can tell the particulars of that story.

At the point of access to a Rape Crisis Centre the gathering of data is not a priority as this is a person centre service. Therefore, only minimal data may be gathered and only if it is offered/apparent. In terms of sex or gender identity, at the entry level the RCNI Database only records a person's presenting or preferred gender offering three options: male, female and other. However, in doing so trans people may disappear into the larger gender categories of woman/man. This is a problem. One of the challenges for trans survivors is that there is so little reliable or robust data either in Ireland or internationally which evidences their particular vulnerability to sexual violence. Like other minorities, it is critical that when we do interact with them, that they are visible in our data in a manner that is accurate, respectful and safe.

We developed a specialist report on LGBT survivors in 2015. As part of this process, we interrogated service access and data categories in this area. Engaging with LGBT partners, including TENI principally on trans data, we arrived at a two-step solution which would maximise respecting the dignity and privacy of trans survivors while also ensuring they could be represented in the data. This would mean collecting gender upon entry and if that client moves to become more long-term service and as it arises, they will be recorded as being born a different sex to the gender they present as. This means in the analysis of the data they are counted and visible as both their preferred gender and as trans people. This is only possible by using two questions on the different characteristics of sex and gender identity. **Combining sex and gender will invariably make trans people invisible.**



### Case Study Two: The Active Consent, Sexual Experiences Survey, 2020 Adding Non-binary gender identity as a third sex

We have a recent case study in the Sexual Experiences Survey (SES) conducted by our partners in the Active Consent Team in NUIG in 2020. In common with much recent research, this survey asked a blended sex/gender question rather than making a distinction between these two characteristics. The answer also offered a range of options in addition to the traditional binary male/female options.<sup>15</sup>

Looking at the findings of this survey we can ask the question what impact does this have on non-binary people in particular when we treat the characteristics of sex and gender identity in this manner?

In rape crisis we know that gender non-conformity<sup>16</sup> and perceptions of same, is one of the risk factors for being targeted for sexual violence and harassment along with other intersectional characteristics. Indeed, we have no doubt that this consultation will include many arguments premised on the particular vulnerability of this cohort. We would expect those who gender identify as non-binary to correlate closely with gender non-conformity and therefore we would expect to see this group having significantly higher rates for victimisation than their male or female counterparts. This is not the case in this survey's findings. Taken at face value the non-binary cohort appear marginally less vulnerable compared with the females in this study.<sup>17 18</sup>

15 In this study on sexual violence experiences amongst college students there were 6,026 self-selecting respondents. 65% identified themselves as female, 33% as male and 2% as non-binary. The 2% were made up of various gender identities other than male or female and amounted to 112 people.

16 We use 'gender non-conformity' as an umbrella term which will correlate highly but not uniformly or exclusively with those who identify as gender non-binary and trans gender (see pg 15 above also)

17 See tables 10-12 looking at instances of sexual violence – with an n value of 87 for non binary participants, (subsequent tables drop to an n value of 25 or much lower). The sexual harassment reported by respondents (n number for non-binary 78) figure 9 also shows the same pattern of non binary people being less vulnerable than females in half of the categories.

18 Some health warnings; This study is self-selecting not representative. There is no way to know if those with certain experiences opted in or out of the survey in significant numbers. Until we have the forthcoming CSO representative sexual violence survey this is an unknown. In addition, the numbers for non-binary people are small. We have confined our commentary here to the tables and statistics where their number stays above 70. Because the demographic question blended sex and gender, we do not know the sex of the gender non-binary people and what balance of sex is distributed in this cohort eg is it 50/50 or 20/80 male/female? Lastly, these margins are narrow but we note them here as we expect this issue to magnify over time.



What sense are we to make of what SES may be telling us about non-binary people's vulnerability to sexual violence? There are two potential answers:

1. That being non-binary means you have a lower risk of sexual violence than if you are female; *or*
2. understanding that this figure includes both males and females combined and given female and male vulnerability (all else being equal) is strikingly unequal, we can expect the non-binary males in the cohort to have the effect of bringing down the non-binary females' averages, making them look safer, when in fact they may not be.

If we decide that non binary is a third sex rather than a gender identity in addition to sex, our conclusion must be answer 1. The policy and resource implications for treating non-binary people as privileged in terms of sexual violence risk are potentially significant, particularly if we are wrong.

If we maintain the distinction between sex and gender identity, with sex being fixed and gender identity being fluid, we can more accurately measure the sexual violence targeting of gender non-conforming people thus enabling us to understand and respond appropriately to their needs.

### Recommendations

- The RCNI is of the view that the category of sex remains of critical importance in understanding sexual violence (and many other aspects of the human condition, both biological and social) and thus must remain defined in the binary of male, female. This should be a requirement in relevant administrative, survey and statistical data.
- The RCNI believes the visibility of gender non-binary, trans and gender non-conforming people is critical to understanding intersectional impacts, vulnerabilities, providing protection and informing responses. The addition of a gender identity ground may the best way to enable same.
- We believe a gender identity question should be a requirement in relevant administrative, survey and statistical data.
- Given gender is affirmative for some and oppressive for others, a form of language should be arrived at in making this enquiry that is value neutral.
- We believe it is important we build norms and trust through distinguishing between two categories of enquiry. The first that requires these two distinct categories of sex and gender identity in the interest of all vulnerable stakeholders, the second concerning the type of data where it is an unnecessary invasion of privacy and an affront to dignity.



## Section 3: Non-Disclosure Agreements

RCNI would like to express its broad support for the changes to the law proposed in the Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 introduced by Senator Lynn Ruane. While we do not have a large number of clients who wish to pursue a claim of sexual harassment to the Workplace Relations Commission, we are aware that for most of these clients, a non-disclosure agreement is not a satisfactory resolution.

Having a non-disclosure clause in a settlement agreement is a way to silence victims of sexual harassment and to minimise the significance of what happened to them. This silence may have implications for other potential victims in the future. The proposal in the Bill is that these clauses are made illegal. In expressing support for the Bill, we are aware that there is at least some risk that if it is enacted and brought into force, one unwelcome result may be that the number of settlements offered is reduced dramatically.

Therefore, we propose that the Bill be amended to include a review clause so that if there is such an effect, the review will pick it up so that solutions may be explored and hopefully, found.

We also propose that the Bill be amended so that it also applies to complaints of sexual harassment made under the Equal Status Acts.



## Section 4: Complainants' experiences of redress and complaint

RCNI does not have a large number of clients seeking support to make a claim of sexual harassment to the Workplace Relations Commission, as outlined in Section 4 above. However, it is our experience that many clients find the process of making a complaint quite daunting, particularly if it comes to an oral hearing where the other side (employer or service provider) may have access to a team of experienced, specialist legal experts, while they do not have access to Legal Aid and therefore must often either pay for representation (which few can afford) or represent themselves, at a hearing where intimate, embarrassing and personal history will be raised and discussed at length. For an often vulnerable client undergoing something so challenging, well-informed, competent and experienced support is essential.

### Recommendation

RCNI recommends therefore that consideration be given to making legal advice and legal representation available free of charge from the Legal Aid Board, for all complainants in sexual harassment cases before the Workplace Relations Commission.



## Section 5: Exemptions and Intersectionality

As outlined above RCNI believe distinct risk characteristics must be treated in a distinct manner. In addition to the considerations outlined above, we believe it is also only by doing so that intersectional considerations are possible. RCNI are supportive of the law enabling intersectional consideration of someone experiencing discrimination on multiple grounds.

For all those whose characteristics are a source of vulnerability the State must do its best to enable their protection with special considerations, exemptions and risk assessments that are reasonable and proportionate. By their nature these types of actions require balancing of rights. Further, no vulnerable person should be subject to punishment under the law for risk assessing their lives in this manner.

Some risk assessments have become normalised and routine in our society. These are based on known vulnerabilities and known risk categories. One of the most salient known risks is the targeting of women and girls for sexual harassment and violence by men and boys. This is one of the principal reasons why there are provisions such as single sex wards in hospitals, single sex spaces where nudity and intimate matters are common such as a changing rooms and other settings where women and girls are deemed to need, or benefit from, separation from men and boys in general. These routine risk-assessed, measures do not require or seek to set out any allegations against any individual but rather treats the categories female and male as proven and evidenced risk factors, the one to the other. Change to these routine risk-assessed measures should follow clear changes in the proven risk. Unfortunately, at present, we see no evidence that the rate of men's violence against women has decreased or radically altered in its pattern.

A person has the right under the Gender Recognition Act to adopt a "preferred gender" with or without physical change to their biological sex characteristics and be registered under that gender and sex on both the GRC and RGR. This means that a transgender woman, in possession of gender recognition certificates regardless of any medical transition, may be placed, or may choose to place themselves, in settings that have been built as female only as part of the routine risk assessed separation of the sexes.

In principle, this is the right of any transgender person. In practice, the exercise of this right may cause difficulty for females in general situations or indeed in a small number of individual cases.

Therefore, the Equality Acts should recognise that the rights of both groups to use services and spaces predominantly used by females – must be balanced against each other, in certain limited situations.



RCNI believes that services and spaces that are accessible to all should be the aim and expectation in the first instance, where transgender women and men and non-binary people's rights to be recognised and treated as belonging to their preferred gender are respected. In most circumstances it is possible for the same space or service to be used by all groups of rights holders without any variation, such as is largely the case in Rape Crisis Centres. Sometimes the service or space is made accessible through the use of simple adjustments or procedures. Those adjustments depend on risk assessments and variation. We believe facilitating the maximum access by all parties, requires the law to allow for exemptions, risk assessment and variance in service provision and access. These variations should be reasonable, evidence based, proportionate and transparent.

Sometimes an undifferentiated outcome, where difference exists, will not be possible. In some kinds of situations, it may be necessary in the process of balancing these competing rights, to introduce specific and limited restrictions on the rights of the transgender group.

RCNI stresses that this position does not rely upon any trans woman ever having abused a female, sexually or otherwise, in these circumstances. The argument rests on the facts of men's violence against women, which are indisputable. As long as it is possible for an abuser to pose as a transgender woman (including in applying for and getting a Gender Recognition Certificate), it cannot be said that there is no risk from the GRC to existing protective measures for females in terms of the sharing of spaces or services and for which we believe exemptions must continue to be available.

Where the risk is assessed as coming from a specific individual, where that person has formally transitioned, the additional factor for consideration is the rights conferred through the GRC. RCNI's view is that the right of females to bodily integrity, that is, to freedom from sexual and other physical attacks should take precedence over preferred gender rights to access those female only spaces. This would only be applicable where a transgender woman, is individually assessed as posing a real risk to the physical and/or sexual safety of a particular female, or group of females, if they are allowed to share a particular service or space.

Therefore, in certain limited situations, where there is a particular risk to the safety of females from a particular individual, the right of that individual to be in that space or use that service aligned with their GRC sex must be balanced against the rights of females to use that space or service without being subjected to additional risk to their safety from that individual.

These realities should be reflected in the Equality Acts, perhaps by providing exemptions from their application in the sharing of space and/or services between transgender women, others and females where those specific services or spaces exist as single sex, at least in part, as a protective measure in response to sex discrimination risks and where those risks remain evident.



## Conclusion

We thank you for the opportunity to consider these important matters. We are at your disposal should we be able to be of further assistance and would welcome further engagement as you consider the next steps.

Rape Crisis Network Ireland  
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