

12. Sexual orientation

Key points

- Sexual orientation is just one of many facets of a person's identity and lesbian, gay and bisexual (LGB) people are as diverse as the community as a whole.
- The definition of 'lesbian', 'gay', 'bisexuality' and 'heterosexuality' is better expressed as 'sexual orientation towards people', rather than 'sexual attraction to'. This reflects the fact that people build committed, stable relationships and does not focus purely on sexual activity.
- Most LGB people feel that their sexual orientation is unalterable – just as most heterosexuals do.
- 'Gay' is increasingly used as a generic term to describe LGB people in preference to 'homosexual'.
- Same-sex relationships are not necessarily the same as heterosexual ones. Courts and tribunals should be careful not to judge same-sex relationships according to the principles of heterosexual married life. In any case, families, whether heterosexual or gay, that do not conform to the traditional model are an increasingly common social reality. Same-sex couples can enter into civil partnerships and can, as a matter of law, constitute an enduring family relationship.
- Objective mainstream research shows that children brought up by LGB parents do equally as well as those brought up by heterosexual parents.
- Some people wrongly assume that being lesbian or gay is related to paedophile desire. It is not.
- Lesbian, gay and bisexual people continue to go in constant fear of unequal treatment in their daily lives. Discrimination by the justice system, when it happens, confirms the expectations of many LGB people.
- When dealing with any apparent lack of candour, courts and tribunals should remember that being gay or lesbian is an individual experience that may have led to fear and concealment; many gay people fear to engage with the justice system as they may be 'outed' in open court with serious consequences for their family life and their relationships in the community, not to mention their safety.
- There is no one "gay community" but growing up gay involves profound feelings of isolation and the discovery of a gay community means the discovery of a refuge in a hostile world. Research has shown that bisexual people suffer particular problems in being excluded from both heterosexual and gay communities.
- No reputable medical opinion now suggests that 'homosexuality' is a catchable or pathological condition or that boys or girls can be seduced into being gay.
- Stonewall which works to achieve equality and justice for LGB people has a website containing a great deal of useful information: www.stonewall.org.uk

Lesbian, gay and bisexual people – introduction and language

1. The lifestyles, occupations, political beliefs and financial circumstances of LGB people will be as diverse and unpredictable as those of their heterosexual counterparts. Their sexual orientation is but one facet of their identities and their lives.
2. It is extremely difficult to calculate the number of lesbians, gay men and bisexuals in England and Wales. The government and Stonewall agree that a reasonable estimate is that 5–7% of the population is gay. In his opinion in *Grant v South-West Trains (Case C249/96)*, in the European Court of Justice, Advocate General Elmer estimated that there were 35 million LGB people within the European Union.
3. It should also be noted that human sexuality is a complete spectrum ranging from the exclusively heterosexual, through varieties of bisexuality to the exclusively gay. Additionally, some people resist labelling, and decline to be identified as being of any particular or fixed sexuality. All this makes an estimate of numbers extremely difficult although there is little doubt that, with more tolerant public attitudes, the number of people willing to be identified as gay, lesbian or bisexual, is increasing.
4. To be stereotyped on the basis of sexual orientation is just as offensive as to be stereotyped on the basis of colour. Consequently, judicial decision-makers need to be aware of the harm done to people, and to the reputation of the judicial system, by stereotypical assumptions and homespun theories around the issue of being lesbian, gay or bisexual.
5. Judges should be alert to restrain any intrusive questioning of the sexuality of a witness, a litigant, an applicant or a defendant unless it is strictly relevant to real issues in the case. In fact it is rarely necessary to ask what a litigant's sexual orientation is, and if it becomes necessary they should be asked to self-define.
6. Different people prefer different terms but in general it is acceptable to use the following:
 - lesbian, gay and bisexual people (for short, 'LGB people'; sometimes the term 'LGBT' is used meaning lesbian, gay, bisexual and transgender people)
 - a woman who is lesbian/a lesbian/a gay woman
 - a gay man
 - a bisexual person
7. Terms that are not acceptable are:
 - a homosexual
 - a gay
 - some lesbians do not like to be called 'gay' because they have a distinct identity from gay men although many are very happy with that
 - dyke/queer, etc. – some of these derogatory terms may be used with irony by gay people themselves but should not be used by judges or (generally) by heterosexual people.

8. Lesbian, gay and bisexual people face a daily dilemma – whether to be open as to their sexual orientation, and risk bigotry, prejudice, discrimination and the adverse judgements of others, or keep the issue hidden and face accusations of cover-up, dishonesty and a lack of candour. Many are deeply fearful of the consequences of ‘coming out’. For many, the fear is of potential personal rejection by family, friends and colleagues. Employment can be lost, families devastated and relationships damaged by unnecessary and prurient court reporting. Courts and tribunals should be aware that these factors may place additional burdens on gay and lesbian witnesses and victims, and should consider what measures might be available to counteract them.
9. It is sometimes asked “Why do they have to say they are gay, why not keep this a private personal matter?” Amongst the answers are that:
 - heterosexual people are constantly outing themselves to colleagues referring to “my husband/ wife” etc, all LGB people want is to do the same;
 - many say that coming out is a liberating experience which removes stress and allows full participation in the workplace etc.

Perceptions of prejudice

10. There is an historical background of deep, widespread, entrenched and unchallenged discrimination against LGB people and male homosexuality was only decriminalised in Northern Ireland in 1980. Polling by Stonewall in 2012-13 shows that 800,000 people in the British work force have witnessed physical homophobic bullying at work in the past five years; 98% of secondary school pupils who identify as gay regularly hear homophobic language; and there are 20,000 homophobic crimes still being committed in this country every year.
11. For LGB people, therefore, unequal treatment in their daily lives is an ever-present expectation. Discrimination by the justice system, when it happens, comes as no surprise and reinforces a belief that nothing will ever change. Further, parties, jurors and witnesses may assume that their lifestyle and sexuality will be judged adversely.
12. It is often remarked that young people are much more tolerant and understanding of LGB people. But the reported experience of gay people is that this tolerance or understanding does not manifest itself in schools and – unless informed by education and intelligent thought – such apparent tolerance on the part of the over-18s can be somewhat superficial (see *The Teachers’ Report*, Stonewall, 2009).

The legal recognition of same-sex relationships

13. A ‘civil partnership’ is a relationship between two people of the same sex which is formed when they register as civil partners of each other. The Civil Partnership Act 2004 also broadened the definition of families so that for almost all purposes same-sex couples are treated as equivalent to opposite-sex couples and civil partners are treated as equivalent to married partners. It provides for ‘divorce’ (known as ‘dissolution’) in much the same ways as for marriage; amends laws relating to children, the succession of tenancies, wills and inheritance, pensions, social security, child support, taxation and domestic violence to provide the same-sex partners with much the same rights as heterosexual partners.

14. The Marriage (Same Sex Couples) Act received Royal Assent in July 2013 allowing the first same-sex marriages to be performed in the summer of 2014. When s.9 of that Act comes into force it will grant anyone who is registered in a civil partnership the ability to convert that partnership into a marriage.
15. At the committee stage in February 2013 Ben Summerskill, CEO of Stonewall, was asked about the importance of the Bill to gay people given that the civil partnership legislation has conferred pretty much the same rights as marriage already. He said:
“First, we are alive to the fact that there are now an increasing number of lesbian and gay people, particularly younger ones, who want their family structures to be described in exactly the same way as everyone else’s. For those who have children, that is particularly important. Secondly, many people rather hoped when civil partnerships were introduced that they would lead to lesbian, gay and bisexual people being treated in the public space in exactly the same way as others.....We have come to the view that until people are treated in exactly the same way legislatively, there is a risk that distinctions will continue to be made. some of the language we have heard in the public space in recent weeks and months comparing gay people in long-term relationships to abortionists, to bestialists and to paedophiles has rather galvanised the view of a lot of gay people that it is time that this distinction was eroded.”
16. The wording of the civil partnership contract and the civil marriage contract are pretty much the same. The legislation will enable same sex marriages on religious premises but will not require this. Civil partners will be entitled to convert their partnership to a marriage.

Family issues

17. Extensive psychological research has demonstrated that children brought up by lesbian or gay parents do equally as well as those brought up by heterosexual parents in terms of emotional well-being, sexual responsibility, academic achievement and avoidance of crime. There is no body of respectable research which points convincingly to any other conclusion.

Children born to same-sex couples through donor insemination

18. The Human Fertilisation and Embryology Act 2008 applies to both same-sex and heterosexual couples who conceive using donor sperm or embryos. The Act brought civil partners into line with married couples, and same-sex couples not in a civil partnership in line with unmarried couples. Same-sex couples, including civil partners, are legally recognised as parents of children conceived during their relationship from the moment of conception without the need for either to apply to adopt the child, giving same-sex couples the same rights to parenthood as heterosexual couples when registering their child's birth.
19. Fertility clinics are no longer required to consider the 'need for a father' before granting treatment; now clinics are only required to consider the need for 'supportive parenting'.

Adoption

20. In the Adoption and Children Act 2002 there is provision for same-sex couples to adopt. It is not necessary for the couple to have registered their partnership. Unmarried couples, however, whether gay or heterosexual, must show that they are living as partners in an enduring family relationship (section 144(4)).
21. In *McClintock v Department of Constitutional Affairs UKEAT/0223/07*, Mr McClintock, a Justice of the Peace, resigned from membership of the Family Panel because the Department of Constitutional Affairs refused to relieve him of the duty to officiate in cases in which he might have to place children for adoption, fostering or care with civil partners or same-sex partners. The EAT upheld a tribunal's decision that Mr McClintock had not suffered direct or indirect discrimination or harassment on grounds of his religion or belief (the Employment Equality (Religion or Belief) Regulations 2003).
22. The basis on which Mr McClintock had asked to be excused was that children were being treated as part of an unacceptable social experiment. He had not made it clear that his objection was founded on any conscientious or religious convictions. In any event, the EAT upheld the tribunal's finding that the requirement for Mr McClintock to uphold the judicial oath to apply the law 'without fear or favour' was justified.

Residence and contact

23. One of the central legal concepts in lesbian and gay parenting is parental responsibility. In England and Wales it is defined in the Children Act 1989 as 'all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his property'. It is the starting point for recognition as a parent under the law. Some gay men can obtain parental responsibility by agreement with the mother but many gay parents have to go to court to obtain an order (see www.stonewall.org.uk/at_home/parenting and www.rightsofwomen.org.uk for further information).

Divorce

24. It sometimes happens that, after succumbing to social pressure to marry, a man or woman faces up to the fact that they are gay, and the marriage breaks down. For the reasons given above in relation to adoption it would be wrong for a judge to make any value judgements based on the sexuality of the parties. The heterosexual party may feel superior, or that the fault or blame lies with the gay or lesbian party by virtue of their sexuality, but such notions are misplaced.

Employment

25. The Equality Act 2010 outlaws employment discrimination on the grounds of sexual orientation. Discrimination can be direct, indirect victimisation or harassment. There is no need for person suffering discrimination to be gay or perceived as gay and indeed no need for the judge to ask what the victim's sexual orientation is. The test is whether that person has suffered a disadvantage on grounds of sexual orientation.

26. Sir Stephen Sedley in the Court of Appeal stated:

“Sexual orientation is not an either/or affair. Some people are bisexual; some are asexual; some, including heterosexuals, have unusual interests and proclivities. All of these may desire to keep their orientation to themselves but still be vulnerable to harassment by people who know or sense what their orientation is.”

English v Thomas Sanderson Blinds Ltd [2009] IRLR 206, CA

27. There is sometimes a perceived conflict between the protection afforded by the Equality Act to those with the protected characteristics of religion or belief and sexual orientation. In *Ladele v London Borough of Islington* [2009] the Court of Appeal rejected an appeal by a registrar who had refused to perform civil partnership ceremonies against a finding that she had not been discriminated against on grounds of her Christian religion. Lord Neuberger held:

“...Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.”

Mrs Ladele's application to the ECHR failed in January 2013.

28. In 2011 the Court of Appeal considered a discrimination claim brought by a gay man partly on the grounds that a colleague had “outed” him; she was found to have believed that he was openly gay. LJ Elias said that it would:

“[make] a mockery of discrimination law to impose liability in these circumstances. A defendant would be liable for discrimination for doing something which the claimant had reasonably led him or her to believe would not cause the claimant concern....” *Grant v HM Land Registry* [2011]

Such situations are fact specific but judges should not assume that an innocent allusion to a colleague's sexual orientation in neutral language is unlawful.

29. Rights to time off work to care for children, for example paternity, parental and adoption leave and the right to time off for dependants are available to gay people.
30. See the Stonewall website (<http://www.stonewall.org.uk/workplace>) for resources, research and guides, including an employer handbook and an employee toolkit. There is also information on www.gov.uk

Facilities and services

31. The Equality Act 2010 outlaws discrimination and harassment in the provision of all goods, facilities and services This includes healthcare (GPs cannot turn you away for being gay or refuse lesbian, gay or bisexual people treatments they would offer to anyone else) housing (in the past some councils have refused to recognise homophobic bullying as a

good reason to re-house a person or evict their neighbours), in education (if a school fails to take anti-gay bullying seriously or refuses a place to someone because they might be gay) and the exercising of public authority functions. Hotels and B&Bs cannot refuse double rooms to same-sex couples (see *Black & Morgan v Wilkinson* [2013] EWCA 820 where the Court of Appeal refused an appeal by a Christian bed and breakfast owner who had refused a bed to a gay couple, but granted her leave to apply to the Supreme Court). Restaurants should not ask gay couples to leave simply for holding hands.

Lesbian, gay and bisexual people and crime

32. From 1967 in England and Wales homosexual acts between adults with no other persons present became legal (1980 in Scotland and 1982 in Northern Ireland). Under the Sexual Offences Act 2003 there is an offence applicable to all persons regardless of their sexual orientation of 'sexual activity in a public lavatory'; this is all that remains of the 1967 reference to 'other persons present'. From 2000 the age of consent for gay men has been 16. Lesbians have never subject to the criminal law. Consensual homosexual act between adults remain illegal in about 36% of the countries of the world.
33. There is no evidence that being gay implies a propensity to commit any particular type of crime. A common and extremely offensive stereotype links being gay with paedophilia. Most sexual abuse of children happens in the home, is committed by someone the child knows well, and is not gender specific. There is absolutely no evidence that gay men are more likely to abuse children than heterosexual men.
34. Lesbian, gay and bisexual people are often the victims of crime. Stonewall's 2008 survey found that:
 - One in five lesbian and gay people had experienced a homophobic hate crime or incident in the last three years, one in eight had been a victim in the last year; three in four of those experiencing hate crimes or incidents did not report them to the police. Seven in ten did not report hate crimes or incidents to anyone.
 - One in six experiencing homophobic hate incidents in the last three years experienced a physical assault.
 - Eight per cent of all black and minority ethnic lesbian and gay people have experienced a physical assault as a homophobic hate incident, compared to 4% of all lesbian and gay people. One in six lesbian and gay people have been insulted and harassed in the last three years because they are gay.
35. By virtue of s.146 of the Criminal Justice Act 2003, where the court is considering the seriousness of an offence committed by a person who demonstrated hostility based on sexual orientation (or presumed sexual orientation), or where the offence is motivated (wholly or partly) by hostility towards persons who are of a particular sexual orientation, then the court must treat such hostility as an aggravating factor, and it is immaterial whether or not the offender's hostility was also based, to any extent, on any other factor.
36. However, there is no free-standing offence of homophobic hate crime so perpetrators cannot be charged with a specific offence of homophobically motivated harassment, unlike perpetrators of racially and religiously motivated hate crimes who can be charged with racially or religiously aggravated harassment or assault.

Immigration

37. Issues around sexual orientation arise in two broad areas, namely same-sex relationships, where one party is an overseas national seeking permission to enter or remain in the UK with a view to settlement, and lesbian, gay, transgender and transvestite asylum seekers.
38. Those entering the UK for the purpose of entering into a civil partnership or with the intention “to live permanently with the other” are treated exactly the same as heterosexual people entering to marry or cohabit. Home Office approval may be required.
39. Those who claim to be refugees with a well-founded fear of being persecuted under Article 1A2 of the 1951 United Nations Convention relating to the status of refugees (The Refugee Convention) by reason of their sexual orientation or who fear gender-related harm may put their case on the basis that they are ‘members of a particular social group’, Paragraphs 295A–295G of HC 395 as amended by HC 538. They may also argue that they have a well-founded fear by reason of their political opinion, or for any of the other reasons set out in Article 1A2 of the Refugee Convention.
40. There is very little information on which countries condone human rights abuses based on sexual orientation (see Amnesty International’s *Crimes of hate, conspiracy of silence: torture and ill-treatment based on sexual identity* (2001)). Another problem is that in some countries deemed safe by the Home Office, LGB and transgender people may still suffer persecution.
41. An applicant may also have difficulty in proving their sexual orientation. In its report *Fit for purpose yet?* published in 2008, the Independent Asylum Commission discussed particular credibility problems faced by LGB and transgender people, for example (a) they may have led an apparently heterosexual family life in their home country or (b) they may have delayed coming out to immigration officials and interpreters until late in the day, the fear of disclosure being mistaken for ‘changing their story’.

HIV positive people and AIDS

42. It is wrong to assume that AIDS and HIV positive status are indicative of ‘homosexual activity’. Worldwide, heterosexual activity is responsible for most new HIV infections. Intravenous drug abuse is another very common cause. The Terrence Higgins Trust (tht.org.uk) reports that there are now nearly as many African people living in the UK diagnosed with HIV as there are gay men, though the majority of new infections continue to be amongst gay men.
43. HIV treatment can prevent a person developing the symptoms of AIDS indefinitely. Such treatment is available in the UK to all HIV positive people. Without such treatment the symptoms of AIDS are likely to develop.
44. The pace of medical progress has dramatically changed and lengthened the lives of HIV positive people in those countries able to afford the cost of treatment. This means that old ideas need to be re-thought in the light of new medical facts. Unfortunately, the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging to HIV positive people. Discrimination towards, or harassment of, a gay HIV positive person is likely to be unlawful both on grounds of disability and sexual orientation.