

Chapter 7.1

Sexual orientation

Key points

- Lesbians and gay men continue to go in constant fear of unequal treatment in their daily lives. Discrimination by the justice system, when it happens, comes as no surprise.
- When dealing with 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.
- Sexual orientation is just one of many facets of a person's identity. Homosexuality is sometimes described as being as much an emotional orientation as a sexual one.
- Nearly all homosexuals were brought up in a heterosexual home.
- Objective mainstream research shows that children brought up by lesbian or gay parents do equally well as those brought up by heterosexual parents.
- Most homosexuals feel that their sexual orientation was there from birth and is unalterable – just as most heterosexuals do.
- Some scientific research claims a genetic determinant for sexual orientation, suggesting that sexuality is not chosen.
- Parliament has now recognised that a same-sex couple can, as a matter of law, constitute an enduring family relationship.
- Gay couples are not the same as straight couples. Courts and tribunals should be careful not to judge same-sex relationships according to the principles of heterosexual married life. Families that do not conform to the traditional model are an increasingly common social reality.
- HIV treatment can prevent a person from developing the symptoms of AIDS indefinitely, but the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging. AIDS is becoming an outmoded concept in countries able to afford effective HIV treatments.

- Being lesbian or gay has nothing whatsoever to do with paedophile desire.
- Judges and tribunal members should be alert to spot the obvious case where inequality may arise.

7.1.1 Introduction

The purpose of this chapter is to raise awareness amongst the judiciary of:

- the approximate numbers of people who are not heterosexual;
- why lesbians and gay men think they are victims of prejudice and discrimination;
- how unequal treatment might arise;
- some factors relevant to the experience of those of minority sexuality;
- some differences between heterosexual and same-sex couples;
- the need to avoid stereotypical assumptions, particularly relating to child care;
- some practical issues that may arise in the courtroom.

This is a significant time in the struggle for acceptance of all varieties that make up sexual choice in our society. The depth of prejudice is not to be underestimated, nor its capacity to endure. But although anger and intolerance are alive and well, fortunately it isn't necessary to fight fire with fire. It is very much better to fight it with reasoned argument, and in a spirit of intelligent understanding.

Mr Justice Sedley, 1994.

7.1.2 Homosexuals as a minority group

Most people are heterosexual. People of other sexual orientations nevertheless constitute a significant minority. Their lifestyles, occupations, political beliefs and financial circumstances 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. But for all this diversity, there remains a cohesive sense of identity and community, and there are at least five experiences and values which most gay people share:

1. Nearly all of them were brought up in a heterosexual home.
2. Being gay is not experienced as a choice, but as a given and unalterable fact.
3. At some stage, nearly all gay people have – through fear – hidden their sexual orientation.

4. 'Sexual orientation' is a misnomer. Being gay or lesbian is as much an emotional orientation as it is sexual. It has nothing whatever to do with paedophile desire.
5. Growing up gay involves profound feelings of isolation. The discovery of a gay community means the discovery of a refuge in a hostile world.

It is extremely difficult to calculate the number of lesbians, gay men and bisexuals in England and Wales. More than 50 years ago, the Kinsey Report (*Sexual Behaviour in the Human Male*, Kinsey et al. (1948); *Sexual Behaviour in the Human Female*, Kinsey et al. (1953)) found that 14% of men and 6% of women were exclusively homosexual. Kinsey's methodology has been criticised, but other surveys suggested that an overall figure approaching 8% may not be far out. Janus and Janus (*The Janus Report on Sexual Behaviour* (1993)) in 1993, found that 9% of men and 5% of women reported homosexual orientation, while in 1994, Laumann (*The Social Organisation of Sexuality*, Edward Laumann (1994)) recorded that the figures turned out to be 10.1% of men and 8.6% of women. Currently, it appears that many more people, especially young people, feel increasingly relaxed about 'coming out' as gay.

It should also be noted that some people with a homosexual identity do not actually engage in homosexual activity. In fact, human sexuality might be regarded as a complete spectrum ranging from the exclusively heterosexual, through varieties of bisexuality to the exclusively homosexual. 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, and the total number represents a very significant minority group of something approaching 9% or 10% of the population. In his opinion in *Grant v West Trains*, in the European Court of Justice, Advocate General Elmer estimated that there were 35 million homosexuals within the European Union.

7.1.3 Nature, nurture or choice

Being gay is most often experienced as a destiny from birth. No reputable medical opinion now suggests that homosexuality is a catchable or pathological condition. In *Sutherland v UK* [1998] EHRLR 117, it was noted that the British Medical Association had stated: 'Most researchers now believe that adult sexual orientation is usually established before the age of puberty.' In 1993 the Department of Health and the Medical Research Council commissioned a study (the Sigma Project) which concluded that there was no persuasive evidence that boys or girls can be seduced into homosexuality. The vast majority of young gay men are aware of their sexual orientation before 16 and seek partners of about their own age.

Recent research at the University of California (Dr Eric Vilain (2001)). concluded that sexual orientation is neither a matter of choice nor a formative experience, but is pre-determined by a person's genes. Such research is undoubtedly controversial, but it accords with the experience and opinion of most gay people, and there is no reputable alternative research to suggest that particular types of upbringing, or particular choices, determine sexual orientation.

7.1.4 Perceptions of prejudice

There is an historical background of deep, widespread, entrenched and unchallenged discrimination against homosexuals. Contemporary surveys continue to show persistent patterns of bullying at school and prejudice, bigotry and discrimination (or perceived discrimination) on the streets, at work and in the home. For lesbians and gay men, 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.

Stonewall, the gay rights pressure group, conducted a survey in 1998 which found that: 35% of lesbian and gay respondents had been the victims of violent attack at least once in the previous five years; 16.5% had been hit, punched or kicked; and 4.5% had been attacked with a weapon. Of young gay people, 48% said they had been physically attacked and nearly every 'out' homosexual living in the provinces, whether male or female, said they had been verbally abused at some time in the recent past because of their sexuality.

It is often remarked that young people are much more tolerant and understanding of homosexuality. 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. For example, many young heterosexuals happily frequent gay bars and clubs. But for some gay people, this apparent integration is artificial and dangerous, with hen parties going to gay clubs for a laugh, gay bars losing their identity, and gay venues ceasing to be much-needed safe havens for gay people, and with the added potential for heterosexual men to take offence at being chatted-up in a gay bar.

A 1999 UK survey of employment experiences found that 16% of lesbian and gay respondents thought they had faced discrimination at work because of their sexuality. Almost half had been harassed and of the remainder, 94% concealed their sexuality from their colleagues. It was also found that 4% claimed to have lost their jobs because of their sexuality, and 8% thought they had been refused promotion.

These attitudes ...ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicant's rights, any more than similar negative attitudes towards those of a different race, origin or colour.

Lustig-Prean and Beckett v UK [2000] 29 EHRR 548,
European Court of Human Rights

7.1.5 Same-sex relationships and sexual orientation

Some judicial office-holders may be concerned that to grant more judicial recognition of alternative family forms will undermine the institution of marriage. This, of course, depends on acceptance of the proposition that to promote the rights of one category of citizen necessarily undermines those of another. That argument would seem curious if applied to the rights of women versus men, or to the rights of a racial minority versus the majority. In promoting social stability, the courts are increasingly asked to recognise diversity. The one does not preclude the other.

A commonly held stereotypical misconception is that same-sex relationships lack commitment, stability and fidelity. It is certainly true that, hitherto, same-sex relationships have lacked the sort of state-endorsed support structures that help maintain heterosexual relationships. It is also true that many long-term same-sex relationships existed quietly and began when any overt acknowledgment of sexuality was completely unacceptable. But, in fact, same-sex couples are just as likely as opposite sex couples to stay together for many years and become integrated into and accepted by their local communities. The huge 'demand' from the gay community for state recognition of same-sex relationships, coupled with the ever-increasing rates of divorce amongst heterosexuals, suggests that stereotypical distinctions between heterosexual and same-sex relationships are unhelpful and should be avoided. Parliament recognises that a same-sex couple may, as a matter of fact and law, be regarded as 'an enduring family relationship' (see section 144(4) Adoption and Children Act 2002).

Further, the Civil Partnership Act 2004 now creates a structure for the establishment and formal recognition of 'civil partnerships'. A 'civil partnership' is a relationship between two people of the same sex which is formed when they register as civil partners of each other¹. A civil partnership is created then by a civil registration process². The Act also repeals provisions found in other statutes which define families and couples, for the purpose of imposing burdens or granting benefits, based on a heterosexual relationship or marriage. The effect of the Civil Partnership Act 2004 is that for most purposes same

¹Section 1 or which they are treated under Chapter 2 of Part 5 as having formed (at the time determined under that Chapter) by virtue of having registered an overseas relationship.

²Or by the automatic recognition of certain overseas same sex relationships as civil partnerships.

sex couples are treated as equivalent to opposite sex couples and civil partners are treated as equivalent to married partners. The Civil Partnership Act also provides for the breakdown of a civil partnership in much the same way as marriage; amends laws relating to children, the succession of tenancies, wills and inheritance, social security, child support, taxation and domestic violence³ to provide same sex partners with much the same rights as heterosexual partners.

It should be stressed, however, that not all gay and lesbian people regard same-sex couples as the same as heterosexual couples. Many successful gay relationships reject the heterosexual model as unsuitable to the practical, financial, emotional and sexual needs of two men or two women living as a partnership. In many ways, the homosexual partners start life together with a blank sheet of paper, unguided or constrained by precedent, tradition and heterosexual cultural norms, and are therefore required to make their own mutually agreed rules. This flexibility may help sustain gay relationships even if, for example, the definition of fidelity is focused more on emotional and honest behaviour, than on sexual conduct. Judges should be careful not to judge gay relationships according to the principles of heterosexual married life. They should also be careful not to assume that only a same sex couple who emulate a heterosexual couple in the conduct of their relationship are fit or able to raise healthy happy children.

There are also increasingly non-discrimination rights afforded to gay and lesbian people. In the context of employment, the Employment Equality (Sexual Orientation) Regulations⁴ outlaw discrimination connected to sexual orientation. Further, the Equality Act 2006 gives the Secretary of State power to make regulations outlawing discrimination and harassment connected to sexual orientation more widely and, in particular, in the provision of goods, facilities and services, in housing, in education and in the exercising of public authority functions.⁵ Regulations under the Equality Act 2006 are expected in the spring of 2007.

7.1.6 Family issues

Families that do not strictly conform to the traditional model are an increasingly common social reality. There is no evidence that children are excessively teased because their parents are unmarried or even because their parents are gay. Confidence to deal with the world springs from a loving, supportive and secure home, and most competent families equip their children to deal with animosity and the ups and downs of life.

Extensive psychological research has demonstrated that children brought up by lesbian or gay parents do equally 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.

³For a summary see N Gray and D Brazil, *Blackstone's Guide to the Civil Partnership Act 2004* (2005, Oxford).

⁴SI 1661/2003.

⁵Section 81.

I was, when I started, surprised and dubious about the stability of children living in a family with two parents of the same sex. But over the years research has shown that for some children, that is the best that is available for them. Consequently, it would be quite wrong, when looking at the welfare of the child, not to recognize that different children need different types of parents. We should not close our minds to suitable families who are clearly not within the old fashioned approach.

Dame Elizabeth Butler-Sloss, October 1999

Adoption

In the Adoption and Children Act 2002 there is provision, for the first time, for same-sex couples to adopt. It is not necessary for the couple to have registered their partnership. Unmarried couples however, whether gay or straight, must show that they are living as partners in an enduring family relationship (section 144(4)).

In *Re W (a Minor)* [1997] 3 WLR 768, Mr Justice Singer held that there were no reasons to disallow a child to be brought up by a loving and caring lesbian couple, and he added that:

any other conclusion would be both illogical, arbitrary and inappropriately discriminatory in a context where the court's duty is to give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood.

In *AMT (known as AC) (Petitioners for Authority to Adopt SR)* (1997) Fam Law 225, the Scottish Court of Session made an adoption order in favour of a gay man living in a stable and long-term relationship with his partner. The court noted the absence of evidence that:

- homosexual relationships are less stable or caring than heterosexual relationships;
- children in a homosexual family are more likely to be homosexual (the vast majority of homosexuals are brought up by heterosexuals); or
- such children are likely to be stigmatised in their social relations.

Divorce

It sometimes happens that, after succumbing to social pressure to marry, a man or woman faces up to the fact of their homosexuality, 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.

Residence and contact

Upon divorce, issues of residence and contact may need to be resolved in relation to children of the family. Again, for the reasons given above, 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 suppose that a heterosexual home will generally be regarded by the judiciary as better than a homosexual home. Judges should reject stereotypical notions and clearly focus on the evidence and the interests of the child.

An increasing number of lesbians and gay men, who are open and secure in their sexuality, are recognising both their strong desire to have children and the opportunities that there are to do so. Some lesbians ask gay (or straight) male friends to act as sperm donors, others place advertisements in the gay press. Others still opt for an anonymous donation either through a sperm bank, or informally through friends or some other network. Techniques for artificial insemination are well-known. Only rarely is a doctor involved. This phenomenon may be somewhat unconventional, but it nevertheless has the potential to create new life, provide abiding happiness to parents and, most importantly, give children the love, care and stability that all children need.

If a lesbian and gay man agree to try for a child, there are many types of agreement that they may reach. Some lesbians do not wish for the man to have contact, although most do. Some gay men do not wish to have contact, although most do. Some couples will agree shared responsibility from the start, with the child spending lots of time with both parents. Alternatively, an agreement might be reached for occasional contact only. Some lesbians will be single, others will be in a partnership. As with heterosexual couples, relationships break down and new relationships start, involving the disappearance of familiar faces from a child's life and the arrival of new ones. Agreements will rarely be written out, but most will have resulted from lengthy discussions before the child is conceived. Clearly, the court will not uphold an agreement that runs contrary to the interests of the child, but generally, judges may be reluctant to interfere with, or strike down, a mutually agreed arrangement that was intended to meet the expectations of both parents and promote the interests of the child.

The key point is that gay, lesbian and bisexual parents will present new challenges to family judges. It is important to recognise and respect these new and very diverse arrangements for the bringing up of children (see further Chapter 1.2, section 1.2.3).

7.1.7 Employment

The Employment Equality (Sexual Orientation) Regulations 2003 brought into effect Article 13 of the Amsterdam Treaty and the Council Directive 2000/78/EC barring employment discrimination on the grounds of sexual orientation. But there are exceptions that the employment tribunal and the county court will have to consider. Whether these exceptions are given a wide or narrow interpretation will be a matter of great concern to the gay and lesbian community, who were the last in the queue in terms of securing some legal protection from discrimination and harassment in their employment, profession or vocation. Article 1 of the First Protocol may also have application in the case of those possessing a licence to hold office or do a particular type of work (see below).

7.1.8 The Human Rights Act 1998

This Act raises a number of issues relating to the equal treatment of homosexuals and lesbians. With the statutory acknowledgement that same-sex couples can constitute an enduring family relationship comes the issue of respect for family life under Article 8, and the positive duty of the state to promote and support family life, in all its diverse forms.

Article 12 provides that men and women of marriageable age have an unconditional right to marry and to found a family, according to the national laws governing the exercise of this right. Taken together with the provisions of the Adoption and Children Act 2002, and the proposals in the Civil Partnerships Bill, a contemporary interpretation of this Article may also have some relevance for homosexual men and women.

Article 1 of the First Protocol prevents the state from being party to a person being deprived of property except in particular circumstances. Property has been held to include a licence to hold office or do a particular type of work (see Court of Appeal judgments in *Crompton Haulage v Department of Transport – North Western Area* [2003] EWCA Civ 64). Thus the state should not permit the holder of a licence to hold office or do a particular type of work to be deprived of it, unless it is in the public interest and either in accordance with any laws necessary to control the use of property, or to secure the payment of taxes or other contributions or penalties. It is therefore not permissible to deprive someone of a licence to hold office or do a particular type of work on the grounds of sexual orientation.

Further, all Articles of the Convention are to be read in conjunction with Article 14 on discrimination. It should be noted that the list contained in Article 14 is not exhaustive and that, in any event, the word 'sex' has been held to include sexual orientation. For example, in the *Sutherland* case (see section 7.1.3 above), it was found that an unequal age of consent amounted to a violation of Article 8, taken in conjunction with Article 14 (see further Chapter 1.6).

7.1.9 Homosexuality and crime

There is no evidence that being gay implies a propensity to commit any particular type of crime. A common, and extremely offensive, stereotype links homosexuality with a paedophile orientation. 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.

Homosexuals are often the victims of crime. By virtue of section 146 of the Criminal Justice Act 2003, where the court is considering the seriousness of an offence committed by a person who demonstrated towards the victim 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.

7.1.10 Immigration

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 gay asylum seekers.

Home Office Immigration rules now make provision for permission to be given for a person to enter or remain in the UK on the basis of a same-sex relationship. Paragraphs 295A–295G of HC 395 as amended by HC 538 set out the provisions for leave to enter or remain for persons intending to live together permanently in the UK. ‘Intention to live permanently with the other’ is evidenced by a clear commitment from both parties that they will live together permanently in the UK immediately following the outcome of the application in question, or as soon as circumstances permit thereafter.

The requirements to be met by a person seeking to remain in the UK as the unmarried partner of a person present and settled here are more complex, but essentially involve the couple intending to live together permanently, and having lived together in a committed relationship which has subsisted for two years or more. They must also be able to accommodate and maintain themselves without recourse to public funds.

Just as the rules apply to unmarried heterosexuals, so they apply to gay or lesbian partners who have chosen not to register their civil partnership. When immigration judges look at gay and lesbian relationships they should bear in mind the factors set out at paragraph 7.1.5 above, as well as at issues relating to private and family life (Article 8).

Since the House of Lords decision in the cases of *R v IAT ex parte Shah* [1999] INLR 144 and *Islam v SSHD* [1999] 2 WLR 1015, and the implementation of the European Convention of Human Rights, gay and lesbian asylum seekers have fared much better in asylum and human rights applications and appeals. The focus in these cases has shifted to credibility issues, and to questions of 'persecution' or 'inhuman and degrading treatment' in the asylum seeker's home country. On appeal, some asylum seekers from known homophobic countries such as Iran, Zimbabwe and Jamaica have established a real risk of persecution, or inhuman or degrading treatment (Article 3), if returned to their home countries.

7.1.11 HIV positive people and AIDS

It is wrong to assume that AIDS and HIV positive status are necessarily indicative of homosexual activity. Worldwide, heterosexual activity is responsible for most new HIV infections. Intravenous drug abuse is another very common cause.

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 will develop and, within a short timescale, death becomes extremely likely.

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 homosexual HIV positive person is likely to be unlawful both on grounds of disability and sexual orientation.

HIV infection results in a gradual erosion of the body's immune system, but HIV treatment is not usually necessary until a person's CD4 count has dropped to around 300. This may typically take five to 10 years from infection. Thereafter a range of possible HIV treatments are available, and from time to time a person's HIV doctor may recommend a change of treatments, or a treatment break, depending on the CD4 count and viral load. For most people, AIDS has become an outmoded concept, since the aim of HIV treatment is to prevent the symptoms of AIDS from ever developing or, if symptoms have developed, to deal with those symptoms and, at the same time, increase the CD4 count, and reduce the viral load, to perpetually safe levels. HIV is, therefore, a manageable, though chronic, condition, much like diabetes. With treatment, serious consequences can be kept at bay indefinitely. Without treatment, serious consequences follow.

7.1.12 Practical situations

It is not always easy to identify and avoid stereotypical assumptions. A stereotype is nothing more than a mental short-cut, leading to generalised expectations about character, and predictions about behaviour, without the effort of obtaining and assessing accurate and direct information about the person, people or situation. It is often self-sustaining and rigid; and is resistant to contrary evidence. It can influence judgement and cause injustices. To be stereotyped on the basis of sexuality 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 homosexuality.

Judges and tribunal chairs should be alert to restrain any intrusive questioning of the sexuality of a witness, a litigant or a defendant unless it is strictly relevant to real issues in the case. They should also be willing to use their powers to restrict reporting of such personal details where appropriate.

Use of language is very important. No one has the right to use the court as the forum for abuse. As in other areas of potential discrimination, people involved in the legal process should, as far as possible, be protected from offensive or clumsy labels, and should be allowed to choose their own language for describing their sexual identity and orientation, and the nature of their relationship or domestic arrangements. Perhaps the only exception to this should be where one of the issues in the case concerns the need to prove the existence of a bigoted attitude.

Gay men and lesbians 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 lesbians and gay men 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.