

# Lesbians, gay men and bisexuals

## Contents

8.1	Some statistics . . . . .	8103
8.2	Some information . . . . .	8201
8.2.1	Common misconceptions . . . . .	8201
8.2.2	Explanations and terminology . . . . .	8203
8.2.2.1	Homosexuality and homosexual . . . . .	8203
8.2.2.2	Gay . . . . .	8203
8.2.2.3	Lesbianism and lesbian . . . . .	8203
8.2.2.4	Coming out, out, outed and closeted . . . . .	8203
8.2.2.5	Same sex relationship . . . . .	8204
8.2.2.6	Homophobia and lesbophobia . . . . .	8204
8.2.2.7	Queer and queer-identifying . . . . .	8204
8.2.2.8	Bisexuality and bisexual . . . . .	8204
8.2.2.9	Straight and bent . . . . .	8204
8.2.2.10	Other terms . . . . .	8204
8.3	Legal recognition . . . . .	8301
8.3.1	Age of consent . . . . .	8301
8.3.2	Same sex relationships . . . . .	8301
8.4	The possible impact of a person's lesbianism, homosexuality or bisexuality in court . . . . .	8401

8.5	Practical considerations . . . . .	8501
8.5.1	Appearance and behaviour . . . . .	8501
8.5.2	Language and terminology . . . . .	8501
8.5.3	The impact of a person’s lesbianism, homosexuality or bisexuality on any behaviour relevant to the matter(s) before the court . . . . .	8502
8.5.4	Directions to the jury — points to consider. . . . .	8503
8.5.5	Sentencing, other decisions and judgment or decision writing — points to consider . . . . .	8504
8.6	Further information or help . . . . .	8601
8.7	Further reading . . . . .	8701
8.8	Your comments. . . . .	8801

## 8.1 Some statistics<sup>1</sup>

- **Proportion of the population** — There are few reliable statistics on the number of lesbians, gay men and/or bisexuals resident in NSW. An Australian survey conducted in 2001 interviewed 19,307 respondents between the ages of 16 and 59. 97.4% of men identified as heterosexual, 1.6% as gay and 0.9% as bisexual. 97.7% of women identified as heterosexual, 0.8% as lesbian and 1.4% as bisexual. In addition, 8.6% of men and 15.1% of women reported either feelings of attraction to the same sex or some same sex sexual experience. Half the men and two thirds of the women who had same-sex sexual experience saw themselves as heterosexual rather than homosexual.<sup>2</sup>
- **Views of others** — 35% of respondents to a Roy Morgan Research survey of over 24,000 Australians aged 14 and over regarded homosexuality as immoral. Some of this opposition was based on adherence to the values of a religion, or more usually, an orthodox form of a particular religion. Those who do not practise a religion were the least likely to regard homosexuality as immoral.<sup>3</sup>
- **Discrimination** — Despite the existence of anti-discrimination protection under NSW anti-discrimination law since 1982,<sup>4</sup> there is little doubt that lesbians, gay men and bisexuals are discriminated against more than heterosexuals. For example, nearly 60% report being discriminated against at work because of their sexuality.<sup>5</sup> Some lesbians and gay men feel that it is easier to be bisexual than to be exclusively lesbian or gay, in that it is easier for bisexuals to “pass” as heterosexual. However, a recent study found that bisexuals have significantly

1 Unless otherwise indicated, these statistics are drawn from information on the Gay and Lesbian Rights Lobby’s website, at <[www.girl.org.au](http://www.girl.org.au)>, accessed 8 February 2011, and from information on the Gay and Lesbian Counseling Service’s website, at <[www.glcsnsw.org.au](http://www.glcsnsw.org.au)>, accessed 9 February 2011.

2 *Sex in Australia: The Australian study of health and relationships*, Australian Research Centre in Sex, Health and Society, published as 27(2) *Australian and New Zealand Journal of Public Health*, 2003, at <[www.publish.csiro.au/?act=view\\_file&file\\_id=NB03040.pdf](http://www.publish.csiro.au/?act=view_file&file_id=NB03040.pdf)>, accessed 8 February 2011. In the United Kingdom, between 5–7% of the population is estimated to be exclusively homosexual: Judicial Studies Board (UK), *Equal Treatment Bench Book*, 2009, London, at [7.1.2], at <[www.judiciary.gov.uk/Resources/JCO/Documents/2009\\_etbb\\_7\\_orientation.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/2009_etbb_7_orientation.pdf)>, accessed 8 February 2011.

3 M Flood and C Hamilton, *Mapping homophobia in Australia*, Australia Institute Webpaper, 2005, pp 3 and 13, at <<http://unilife.curtin.edu.au/sexualdiversity/documents/MappingHomophobiaInAustralia.pdf>>, accessed 8 February 2011.

4 *Anti-Discrimination Act 1977* (NSW), Pt 4C, assented 12 December 1982. Note also that there is as yet *no* federal statutory anti-discrimination protection for lesbians, gay men and bisexuals other than the Fair Work Act 2009 (Cth), s 351 which prevents an employer taking “adverse action” (which includes discrimination, injury, dismissal) against an employee because of the employee’s “sexual preference”.

5 Australian Centre for Lesbian and Gay Research, *The pink ceiling is too low — Workplace experiences of lesbians, gay men and transgendered people*, 1999, p 28, available to order from <<http://sydney.edu.au/arts/centres/acigr/publications.html>>, accessed 8 February 2011. For broader information see, for example, the considerable amount of information on the Gay and Lesbian Rights Lobby’s website available, at <<http://girl.org.au>>, accessed 8 February 2011; Anti-Discrimination Board of NSW, *What is lesbian discrimination?*, 1990; Anti-Discrimination Board of NSW, *Skool’s out*, 2002, at <[www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/vwFiles/SkoolsOut.pdf/\\$file/SkoolsOut.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/SkoolsOut.pdf/$file/SkoolsOut.pdf)>, and Annual Reports of the Anti-Discrimination Board of NSW, at <[www.lawlink.nsw.gov.au/adb](http://www.lawlink.nsw.gov.au/adb)>, accessed 8 February 2011.

worse mental health related to a number of risk factors, including experiencing greater adversity in their lives and receiving less social support.<sup>6</sup>

- **Verbal abuse, intimidation and violence** — Lesbians, gay men, and bisexuals experience much greater levels of verbal abuse and violence than heterosexuals. A 2003 survey of 600 lesbians and gay men in NSW found that 85% reported experiencing some form of anti-lesbian/gay abuse, intimidation or violence, 56% having occurred in the previous 12 months.<sup>7</sup> This percentage has not reduced from earlier surveys. Gay bashings and even murders have at times been a form of sport among largely young men in at least the inner parts of Sydney.

Many lesbians, gay men and bisexuals remain reluctant to report verbal abuse or violence for a variety of reasons, including fear of a homophobic response, fear of “outing” themselves, fear of a distressing investigation process, a belief that little can be done, and concerns about privacy and security.<sup>8</sup>

The use of the “homosexual advance defence” and “homosexual panic defence”<sup>9</sup> as a mitigating factor in relation to violent behaviour towards someone who is or was perceived to be homosexual has made gay men less confident about reporting violence and/or receiving equitable treatment in the courts. There has been widespread criticism within gay male and lesbian communities about the way in which these defences have been allowed to operate, with many taking the understandable view that no-one deserves to be assaulted following a “same sex” sexual proposition, and that as with a heterosexual proposition,

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- 6 AF Jorm et al, “Sexual Orientation and Mental health: Results from a community survey of young and middle-aged adults” (2002) 180 *British Journal of Psychiatry* 423 at 426, as cited in the Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Supreme Court of Queensland, p 250, at <[www.courts.qld.gov.au/The\\_Equal\\_Treatment\\_Bench\\_Book/S-ETBB.pdf](http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf)>, accessed 8 February 2011.
- 7 NSW Attorney General’s Department, *You shouldn’t have to hide to be safe — A report on homophobic hostilities and violence against gay men and lesbians in NSW*, 2003, p 2, at <[www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/pages/CPD\\_glb\\_publications](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/CPD_glb_publications)>, accessed 8 February 2011; see also Gay and Lesbian Rights Lobby, *Streetwatch Report*, 1990; Anti-Discrimination Board of NSW, *Final Report of the Streetwatch Implementation Advisory Committee*, 1994; and J Sandroussi and S Thompson, *Out of the Blue: Police Survey of Violence and Harassment against Gay Men and Lesbians*, 1995, New South Wales Police Service.
- 8 NSW Attorney General’s Department, *You shouldn’t have to hide to be safe — A report on homophobic hostilities and violence against gay men and lesbians in NSW*, see n 7, pp xi, 23.
- 9 Although no such defence exists at law, the term “homosexual advance defence” is used to describe those “cases in which criminal defendants have claimed they acted either in self-defence or under provocation when committing acts of violence against homosexual men who had made sexual advances towards them”: J Keane, *Sentenced Homicides in New South Wales, 1994–2001*, Research Monograph 23, 2004, Judicial Commission of NSW, Sydney, p 98. The term “homosexual panic defence” is used to describe the uncontrollably violent response of a person to a homosexual advance and operates as “some form of insanity or diminished capacity defence”: Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party*, 1998, Sydney, para 2.2, at <[www.lawlink.nsw.gov.au/lawlink/clrd/ll\\_clrd.nsf/pages/CLRD\\_had](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_had)>, accessed 8 February 2011. In *Green v The Queen* (1997) 191 CLR 334, the High Court “upheld the view that the defence of provocation may be available to a person who kills in response to a non-violent homosexual advance”: Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 6, p 254 — but see Kirby J’s powerful dissenting view in this case and similar comments by McPherson JA in *R v Irving* [2004] QCA 305. See also I Potas, “Sexuality-related hate crime”, (2004) 16(3) *Judicial Officers’ Bulletin* 18.

unless the proposer is specifically threatening or assaulting the person they are propositioning, it is always open to the person being asked to say “no” or walk away.

- **Family support** — Some have lost touch with their families and/or previous friends after “coming out” as lesbian or gay. Some young lesbians and gay men leave school (see under “education” below) and home because of their feelings of lack of support. Some of these young people end up living on the streets, and/or as prostitutes, and/or abusing alcohol or drugs.
- **Suicide attempts of young people** — Research suggests that 25 to 45% of young lesbians, gay men and bisexuals have made suicide attempts, while up to 85% have felt suicidal and up to 30% of young gay men attempt suicide.<sup>10</sup>
- **“Coming out” as lesbian or gay** — Some people take much longer to “come out” as lesbian or gay than others. Some never fully “come out”. Some have had heterosexual relationships before coming out. Others have never had any heterosexual sexual experience.
- **Self-censorship** — Because of the discrimination that lesbians, gay men and bisexuals experience, many lesbians and gay men are not completely open or “out” about their sexuality. They adopt a practice of self-censorship in at least some part of their everyday life — for example, they may limit discussion of weekend activities and change the pronoun when referring to a partner or lover, or never hold hands in public.<sup>11</sup> This is likely to be even more the case in a formal setting such as a court. Some lesbians and gay men choose not to live with their (sometimes long-term) partner through fear of public exposure, and some live together but do not identify as living in a same sex relationship.<sup>12</sup> However, anecdotal evidence suggests that this is much less the case than it used to be. And note that some choose not to live together simply because they do not want to live together.
- **Education** — Those who started to “come out” at school, or who were recognised by other students as different, may not have been able to reach their full educational potential.<sup>13</sup>

10 J Howard et al (2002) “Same sex attracted youth and suicide” in L Rowling, G Martin, L Walker (eds) *Mental Health Promotion and Young People: Concepts and Practice*, McGraw Hill, Sydney, 2002. See also the literature review in K Quinn, “Rural suicide and same-sex attracted youth: issues, interventions and implications for rural counselors”, (2003) *Rural and Remote Health*, at <[www.opendoors.net.au/wp-content/uploads/2009/10/rural-lgbt-and-suicide.pdf](http://www.opendoors.net.au/wp-content/uploads/2009/10/rural-lgbt-and-suicide.pdf)>, accessed 10 February 2011.

11 A Chapman, “Sexuality and Workplace Oppression” (1995) 20 *Melbourne University Law Review* 311 at 315; Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 6, p 247.

12 There was an Australia-wide increase of 25.9% of same sex couples identifying as such between the 2001 and 2006 Censuses — from 19,596 to 24,681 — representing 0.4% (around 50,000) of all adults: *Couples in Australia, 4102.0 — Australian Social Trends*, March 2009, at <[www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009)>, accessed 8 February 2011.

13 See for example, Anti-Discrimination Board of NSW, *Skool's out*, see n 5.

- **Income level** — Anecdotal evidence within gay and lesbian communities suggests that gay male couples tend to have higher disposable incomes than heterosexual couples, whereas lesbian couples tend to have lower disposable incomes than heterosexual couples. This is likely to be more a reflection of gender disparity in income levels (see Section 7) than anything to do with sexuality.
- **Children** — Lesbians and gay men are less likely to be parents or live with children than heterosexuals. However, an increasing number of gay male and lesbian individuals and couples live with children — these children may be from previous heterosexual relationships, foster children, children born through surrogacy arrangements, co-parenting arrangements, or children born using artificial or self-insemination.<sup>14</sup> Lesbian and gay male couples tend to share childcare activities (and household duties) more equitably than heterosexual couples.<sup>15</sup>

[The next page is 8201]

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14 See for example, J Millbank, *Meet the parents: A review of the research on lesbian and gay families*, Gay and Lesbian Rights Lobby, 2002, at <[http://grrl.org.au/images/stories/meet\\_the\\_parents.pdf](http://grrl.org.au/images/stories/meet_the_parents.pdf)>, accessed 8 February 2010. The *2006 Census* reports that only 1.0% of couples with children are same sex couples, at <[www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article82005?opendocument&tabname=Summary&prodno=1301.0&issue=2005&num=&view=>](http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article82005?opendocument&tabname=Summary&prodno=1301.0&issue=2005&num=&view=>)>, accessed 18 February 2011.

15 R Graycar and J Morgan, *The Hidden Gender of Law*, 2nd edn, 2002, The Federation Press, Leichhardt, NSW, p 89.

- **In all other respects** — Lesbians, gay men and bisexuals are as diverse as heterosexuals in relation to their level of education, employment status, religious affiliation, ethnic or migrant background, whether or not they have a partner or indulge in sexual activity at all, levels of domestic violence, mental and physical health, criminality etc. Their sexuality is simply one (albeit important) facet of their make up.

## 8.2 Some information

### 8.2.1 Common misconceptions

There are many false assumptions made about lesbians, gay men and bisexuals. Some of the most common are:

- **You can tell if someone is lesbian or gay (and possibly if they are bisexual) because they look and/or behave more like people of the opposite sex, or in a “gay” way** — Assumptions should not be made about a person’s sexuality based on their actions, appearance or behaviour. People who are lesbian, gay, bisexual and heterosexual behave in different ways, some of which don’t fit within the stereotypical idea of how a person of that sexuality should act.
- **In lesbian and gay male couples, one is more masculine and takes the traditional male role and the other is more feminine and takes the traditional female role** — The form of lesbian and gay male couple relationships is as varied as the form of heterosexual couple relationships. Some couples have loving, mutually supportive and life-long relationships. Other relationships can be short-term, destructive, and/or domestically violent.<sup>16</sup>
- **Gay men are more likely to sexually abuse children or youths** — Children and young people who are sexually abused are most commonly abused by an adult of the opposite sex. There is no research evidence that homosexual men are any more likely to sexually abuse boys aged under 18 than heterosexual men are likely to sexually abuse girls aged under 18.<sup>17</sup> In addition, men who sexually abuse boys aged under 18 “are not necessarily homosexual. They are sexually attracted to children”.<sup>18</sup>

16 There is limited data on the incidence of domestic violence in same sex relationships but it has been observed that it is a “major issue”: see research collected in C Chan, “Domestic violence in gay and lesbian relationships”, Australian Domestic and Family Violence Clearing House, 2005, at <[www.adfvc.unsw.edu.au/PDF%20files/Gay\\_Lesbian.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/Gay_Lesbian.pdf)>, accessed 10 February 2011. The Inner City Legal Centre now operates the Safe Relationships Project, which is a court assistance scheme for people in same sex relationships, transgender people and intersex people who have experienced domestic violence. Information about same sex domestic violence is also available at “Another Closet”: <<http://ssdv.acon.org.au>> and “Fairs Fair” at <[http://ssdv.acon.org.au/providerinfo/documents/SSDV\\_A4report.pdf](http://ssdv.acon.org.au/providerinfo/documents/SSDV_A4report.pdf)>, accessed 17 February 2011.

17 MR Stevenson, “Public policy, homosexuality and the sexual coercion of children” (2000) 12(4) *Journal of Psychology & Human Sexuality*, 1–19; see also statistics cited and fully referenced in an article on the website of the National Gay and Lesbian Task Force (USA): S Cahill and K Jones, “Child Sexual Abuse and Homosexuality”, (2002) at <[www.pinktherapy.com/downloadables\\_new/youth/Child\\_Sexual\\_Abuse\\_&\\_Homosexuality.pdf](http://www.pinktherapy.com/downloadables_new/youth/Child_Sexual_Abuse_&_Homosexuality.pdf)>, accessed 18 February 2011.

18 B Adair, “Child Sexual Assault” (1996) 8(5) *Judicial Officers’ Bulletin* 33 at 33.

- **Homosexuality breeds homosexuality/lesbianism and gay men make bad parents** — There is absolutely no evidence that gay or lesbian parents produce greater numbers of gay/lesbian children than heterosexual parents. Most gay men, lesbians and bisexuals have heterosexual parents. There is also no discernible difference between the children who live with one or two lesbian or gay male parent(s) and the children who live with one or two heterosexual parent(s) in relation to such things as the children’s level of happiness, social adjustment, satisfaction with life and/or moral or cognitive development. In addition, lesbian mothers are generally “more concerned than heterosexual women that their children should have contact with men and positive male role models”.<sup>19</sup>
- **Lesbians, gay men and bisexuals could choose to be heterosexual** — While it is true that a few make an active decision not to have heterosexual relationships, most feel that their lesbianism, homosexuality or bisexuality was there from birth, and is not something they can change. There is some research evidence that sexuality may be biologically determined.<sup>20</sup>
- **People who call themselves bisexual are really gay or lesbian but do not want or dare to describe themselves as such, or they are really heterosexual but just like the idea of describing themselves as capable of having sexual relationships with anyone** — Bisexuals “live their lives in a diverse range of ways, including remaining single, marrying, and having a same sex partner. They may engage in sexual activity with partners of the same sex, the opposite sex or partners of both sexes”<sup>21</sup> — at the same time or sequentially. They are therefore too diverse to categorise in either of these ways.
- **Same sex relationships do not have the same significance as heterosexual relationships** — Same sex relationships have the same significance to each partner (and any children living with the couple) as heterosexual relationships (and families) do to heterosexuals. To accord them less significance because they are same sex, do not fit the “norm”, or do not match the way heterosexuals arrange their everyday life is unfair and discriminatory. Note also that same sex parents tend to share all parenting activities and parenting decisions in much the same way as heterosexual couples (although, as noted in 8.1 above, they tend to share the actual work more equitably). This happens despite the fact that only one parent is the biological parent — see 8.3.2.

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19 J Millbank, *Meet the parents: A review of the research on lesbian and gay families*, Gay and Lesbian Rights Lobby, 2002, p 7, at <[http://glrl.org.au/images/stories/meet\\_the\\_parents.pdf](http://glrl.org.au/images/stories/meet_the_parents.pdf)>, accessed 9 February 2011.

20 Judicial Studies Board, *Equal Treatment Bench Book*, see n 2, Section 7.1.

21 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 6, p 250.

## 8.2.2 Explanations and terminology

### 8.2.2.1 Homosexuality and homosexual

“**Homosexuality**” is used to describe both lesbian and gay male sexuality — that is, as a term for people who are sexually and emotionally attracted to people of the same sex.

“**Homosexual**” is used as either an adjective or a noun to refer to both a lesbian and a gay man.

However, many lesbians regard both these words as male and exclusive of women. Some gay men prefer to use “gay man”, “gay male”, or “gay” — see 8.2.2.2.

### 8.2.2.2 Gay

“**Gay**” is used to describe both lesbians and gay men. While technically an adjective, it is often used as a noun as well — particularly when used in the plural — “**gays**”.

Again, some lesbians prefer the term lesbian instead.

The term “**gay man**” is the closest match for the term “lesbian”.

### 8.2.2.3 Lesbianism and lesbian

“**Lesbianism**” (as opposed to “homosexuality”) and “**lesbian**” as opposed to “homosexual” or “gay”, are preferred by many women who are sexually and emotionally attracted to women.

### 8.2.2.4 Coming out, out, outed and closeted

“**Coming out**” is used to describe the process of being able to openly describe oneself as lesbian or gay and then live openly, or relatively openly, as lesbian or gay. All forms of the verb are used depending on the tense required.

Someone who has “**come out**” may be described as “**out**”.

Lesbians and gay men who have “come out” are sometimes said to have come “**out of the closet**”.

Those who are not open about their sexuality are described as “**in the closet**” or “**closeted**”.

People who are closeted are sometimes “**outed**” (that is, publicly named as lesbian or gay) — usually by others who wish to embarrass them, shame them or for political purposes.

### 8.2.2.5 Same sex relationship

A lesbian or gay male relationship.

### 8.2.2.6 Homophobia and lesbophobia

“**Homophobia**” (literally fear of homosexuals/homosexuality) describes the inability of others to tolerate lesbians and gays and accept that they should be treated fairly and their different needs allowed for. It embraces discriminatory views and actions.

“**Lesbophobia**” is preferred by some lesbians when describing homophobia towards lesbians.

### 8.2.2.7 Queer and queer-identifying

Some (particularly younger) gay men, lesbians and bisexuals use “**queer**”, and/or “**queer-identifying**”, as both nouns and adjectives, to describe anyone who is not completely heterosexual.

These words are often used as including transgendered people, despite the fact that being transgendered has nothing to do with sexuality — see Section 9.

### 8.2.2.8 Bisexuality and bisexual

“**Bisexuality**” describes the sexuality of people who are sexually and emotionally attracted to members of both sexes.

“**Bisexual**” is used (as a noun and adjectivally) to describe people who are sexually and emotionally attracted to members of both sexes.

### 8.2.2.9 Straight and bent

Lesbians, gay men and bisexuals often use “straight” to describe heterosexuals, and its opposite “bent” to describe themselves. It is generally not appropriate to use “bent” unless you are lesbian, gay, or bisexual, or have been given specific permission to use the particular term.

### 8.2.2.10 Other terms

Other terms used to describe lesbians and gay men, such as “dyke”, “lemon”, “leso”, “poof”, “poofter”, “fag”, “faggot”, “camp”, “fairy”, “butch”, “queen” and “femme” are generally not appropriate to use unless you are lesbian or gay, or have been given specific permission to use the particular term. Indeed, many are considered derogatory when used outside gay male and/or lesbian communities.

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## 8.3 Legal recognition

### 8.3.1 Age of consent

The age of consent in NSW is now the same for everyone, whether heterosexual, bisexual, lesbian or gay — that is, 16.<sup>22</sup>

### 8.3.2 Same sex relationships

The definition of “marriage” in the *Marriage Act* 1961 (Cth) specifically excludes same sex unions. The *Marriage Act* also prohibits the “recognition in Australia of overseas same sex marriages”.<sup>23</sup>

However, under NSW and Commonwealth law in areas of superannuation, social security, taxation and family law, same sex couples who live together enjoy the same rights as heterosexual de facto couples.<sup>24</sup> However:

- Those who live apart generally do not enjoy these rights, despite the fact that it is more common for same sex couples to choose not to live together — sometimes for fear of being recognised as lesbian or gay.
- Same sex couples who are parenting can both be recognised as legal parents in some circumstances. For example, a lesbian couple who plan and conceive a child together can both be recognised as parents on a child’s birth certificate in NSW.<sup>25</sup> The *Family Law Act* (Cth) now recognises same sex couples as parents.<sup>26</sup>

[The next page is 8401]

22 *Crimes Act* 1900 (NSW), s 66C.

23 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 6, p 249; see s 88EA, *Marriage Act* 1961 (Cth).

24 See, for example, the *Property (Relationships) Act* 1984 (NSW).

25 Arising from amendments made by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act* 2008, commenced 22 September 2008.

26 As amended by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act* 2008 (No 144, 2008). This Act amended about 85 Commonwealth laws to take account of same sex relationships and give same sex couples in a de facto relationship or registered relationship the same rights as de facto opposite sex couples.



## 8.4 The possible impact of a person’s lesbianism, homosexuality or bisexuality in court

The discrimination and abuse that many lesbians, gay men and bisexuals have experienced (often many times) may make some of them more likely to name *any* perceived problem, or *any* perceived difference in treatment as being a form of sexuality discrimination, even when it is not. However, if you follow the guidance provided in 8.5, below, this should be less likely to occur.

In addition, unless appropriate account is taken of any needs specific to their sexuality, lesbians, gay men and bisexuals are likely to:

- Feel uncomfortable, resentful or offended by what occurs in court.
- Feel that an injustice has occurred.
- In some cases be treated unfairly and/or unjustly.

These problems are likely to be compounded if the person also happens to be Indigenous, from an ethnic or migrant background, a young person, female, transgender(ed), a person with a disability, or if they practise a particular religion, or are representing themselves — see the relevant other Section(s).

Section 8.5, following, provides additional information and practical guidance about ways of treating lesbians, gay men and bisexuals, so as to reduce the likelihood of these problems occurring.

The boxed areas provide the practical guidance.

[The next page is 8501]



## 8.5 Practical considerations

### 8.5.1 Appearance and behaviour

Lesbians, gay men and bisexuals must be accorded the same dignity and respect as anyone else.

Points to consider:

- ▣ **Be sensitive to the fact that the style of dress (or haircut, make up or lack of make up) of a particular lesbian, gay man or bisexual may or may not accord with the general community’s view of how someone of their gender should dress or look.** No discomfort should be shown with any style that is more common in someone of the opposite sex, or with any style that might be seen as the stereotypical presentation of someone who is lesbian or gay (for example, excessively camp, femme or feminine or excessively butch or masculine).
- ▣ **Be sensitive to the fact that the behaviour traits of a particular lesbian, gay man or bisexual may or may not accord with the general community’s views about how someone of their gender should behave.** Again, no discomfort should be shown with any behaviour that is more common in someone of the opposite sex’s gender, or with any behaviour that might be seen as the stereotypical presentation of someone who is lesbian or gay (for example, excessively camp, femme or feminine or excessively butch or masculine).
- ▣ **Apologise if an initial mistake has been made about the gender of a particular gay man, lesbian or bisexual.**
- ▣ **As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular allegedly sexuality-determined difference in appearance or behaviour.<sup>27</sup>**

### 8.5.2 Language and terminology

Points to consider:

- ▣ **Use sexuality descriptors only when relevant to the matter before the court, and then use only those that are both accurate and acceptable to the particular lesbian, gay man or bisexual.** For example, it is generally best to use “lesbian”, “gay man”, “homosexual” or “homosexual man” as opposed to “gay lady/woman”, or “gay”. But it is always best to check with the particular person first — see also 8.2.2 above.

<sup>27</sup> Note that s 41 of the *Evidence Act* 1995 (NSW) provides that a judicial officer must disallow improper questions (for example, misleading, or unduly annoying, harassing, intimidating, offensive or repetitive) questions and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate” or “has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability)”. Sections 26 and 29(1) of the *Evidence Act* 1995 also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act* 1995 allows you to exclude any evidence that is misleading or confusing.

- Use the word “partner” to describe the person a lesbian, gay man or bisexual is (or was) in a relationship with, or “lover” to describe the person they are (or were) having a short-term affair with.
- Do not use any form of discriminatory or discriminatory-sounding language — for example, do not state or imply, or allow others to state or imply, that all gay men are sexually promiscuous, or all lesbians hate men.<sup>28</sup>
- Treat everyone as an individual, and do not make statements that imply that all those who are lesbian, gay male or bisexual are the same, or likely to act in the same way. Never assume or imply that the way you think the majority of lesbians, gay men or bisexuals behave or think is the standard by which any individual member of that group should be judged.

### 8.5.3 The impact of a person’s lesbianism, homosexuality or bisexuality on any behaviour relevant to the matter(s) before the court

#### Points to consider:

- Be sensitive to the fact that evasiveness about personal life and activities may simply be a reluctance to “come out” in court. You may need to intervene if any such questioning is unnecessary or irrelevant, or consider whether it would be best to close the court.
- Do not let stereotyped views about lesbianism, homosexuality or bisexuality unfairly influence your (or others’ assessment). For example, you may need to:
  - As prescribed by law, intervene if any of the common misconceptions listed in 8.2.1 appear to be unfairly behind any questioning.<sup>29</sup>
  - Be mindful of the fact that lesbians, gay men and bisexuals can be victims of domestic violence, in just the same way that heterosexuals can. Note that “Battered Spouse Syndrome” (see Section 7.3.3.3) “has successfully been relied upon by a gay man who killed his partner of 14 years to reduce a charge of murder to manslaughter, and as a mitigating factor in sentencing”.<sup>30</sup>
  - Be mindful of the widespread criticism within gay male and lesbian communities and general controversy about the use of the “homosexual advance defence” and “homosexual panic defence” — see 8.1 above under “Verbal abuse, intimidation and violence.”

28 *ibid.*

29 *ibid.*

30 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 16, p 253, citing *R v McEwen* (unrep, WASC, 18/3/96) and CJ Simone, “Kill(er) man was a battered wife: The application of battered woman syndrome to homosexual defendants: *The Queen v McEwen*” (1997) 19 *Sydney Law Review* 230 at 235.

- **Assess a same sex relationship appropriately — while many are similar to heterosexual relationships, many are not, and each relationship** (just like those of heterosexual couples), **is different.** For example, many gay male couples allow sexual activity outside the relationship. A same sex couple who live apart might have as strong a relationship as a conventional heterosexual couple. Financial and other such arrangements vary from couple to couple, just as they do with heterosexual couples. But (as indicated in 8.1 above) childcare activities and household duties tend to be more equitably shared than for heterosexual couples.
- **As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular allegedly sexuality-determined difference.**<sup>31</sup>
- **Has the fact that the person is lesbian, gay male or bisexual, together with any difficulties they might have experienced as a result, been an influencing factor in the matter(s) before the court? If so, where possible, you may need to take appropriate account of these influences.** For example, you may need to decide whether the law allows you to take account of any such influences and, then, as necessary and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. And, for example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 8.5.4 and 8.5.5.

#### 8.5.4 Directions to the jury — points to consider

As indicated at various points in 8.5, it is important that you ensure that the jury does not allow any ignorance of lesbianism, homosexuality or bisexuality, or stereotyped or false assumptions about lesbians, gay men or bisexuals to unfairly influence their judgment.

**In your final directions to the jury, you may need to remind them of any points in relation to these aspects that you alerted them to during the proceedings, and/or cover them for the first time now.**

**This should be done in line with the *Criminal Trial Courts Bench Book*<sup>32</sup> or *Local Courts Bench Book*<sup>33</sup> (as appropriate), and you should raise any such points with the parties' legal representatives first.**

31 See n 26.

32 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002, Sydney, at <[www.judcom.nsw.gov.au/publications/benchbks/criminal](http://www.judcom.nsw.gov.au/publications/benchbks/criminal)>, accessed 9 February 2011.

33 Judicial Commission of New South Wales, *Local Courts Bench Book*, 1988, Sydney.

For example, you may need to provide specific guidance as follows:

- **That they must try to avoid making stereotyped or false assumptions** – and what is meant by this. For example, you may need to specifically remind them that while the particular lesbian's, gay man's or bisexual's behaviour and/or sexuality may not accord with behaviour they themselves regard as morally acceptable, they must “remember that this is a court of law and not a court of morals”.<sup>34</sup> And then direct them to the specific questions they must decide. And finally explain that they must decide the matter(s) on the issues without prejudice to anyone.
- **On the other hand, that they may also need to assess the particular person's evidence alongside what they have learned in court about the way in which lesbians, gay men and bisexuals often have to (or feel they have to) live their lives** as opposed to the way in which they themselves might act. In doing this you may also need to provide guidance on any legal limitations that exist in relation to them taking full account of any of these matters. And you may also need to be more specific about the particular sexuality aspects that they need to pay attention to.

### 8.5.5 Sentencing, other decisions and judgment or decision writing — points to consider

Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory to (and preferably be considered to be fair and non-discriminatory by), any lesbian, gay man or bisexual affected by or referred to in your sentencing, decision and/or written judgment or decision.<sup>35</sup>

Points to consider:

- In order to ensure that any lesbian, gay man or bisexual referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision also considers it/them to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) any of the points raised in the rest of 8.5 (including the points made in the box in 8.5.4 immediately above) that are relevant to the particular case.
- Whether to allow a victim impact statement to be read out in court.<sup>36</sup>
- Do not under-value the significance of a same sex relationship, or non-biological parent-to-child connection, in relation to such matters as compensation, property division and inheritance.

[The next page is 8601]

34 The “Court of Morals” Direction, NSW Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party*, 1998, para 6.12, cited in Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 16, p 253.

35 See also Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006, Sydney, at <[www.judcom.nsw.gov.au/publications/benchbks/sentencing](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing)>, and *R v Henry* (1999) 46 NSWLR 346 at [10]–[11].

36 See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the Charter of Victims Rights (which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the prisoner to read, but the prisoner must not be allowed to retain it.

## 8.6 Further information or help

Organisations that can provide information or expertise about lesbianism, homosexuality or bisexuality or related issues, are:

- **Gay & Lesbian Rights Lobby**  
PO Box 304 Glebe NSW 2037  
Telephone: (02) 9571 5501  
Fax: (02) 9571 5509  
[www.glr.org.au](http://www.glr.org.au)  
**Convenors**  
Email: [convenor@glr.org.au](mailto:convenor@glr.org.au)
  
- **Inner City Legal Centre**  
(Includes Gay and Lesbian Advice Service)  
**Street Address:**  
Lower Ground Level  
50-52 Darlinghurst Rd  
Kings Cross NSW 2011  
  
**Postal Address:**  
PO Box 25  
Potts Point NSW 1335  
Phone: 02 9332 1966  
Fax: 02 9360 5941  
Web: [www.iclc.org.au](http://www.iclc.org.au)

[The next page is 8701]



## 8.7 Further reading

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Australian Medical Association, *AMA Position Statement: Sexual Diversity and Gender Identity*, 2002, citing AF Jorm, AE Korten et al “Sexual Orientation and Mental health: Results from a community survey of young and middle-aged adults” (2002) 180 *British Journal of Psychiatry* at 423–427.

S Cahill and K Jones “Child Sexual Abuse and Homosexuality”, at <[www.pinktherapy.com/downloadables\\_new/youth/Child\\_Sexual\\_Abuse\\_&\\_Homosexuality.pdf](http://www.pinktherapy.com/downloadables_new/youth/Child_Sexual_Abuse_&_Homosexuality.pdf)>, accessed 18 February 2011.

A Chapman, “A Sexuality and Workplace Oppression” (1995) 20 *Melbourne University Law Review* 311–349.

M Flood and C Hamilton, *Mapping homophobia in Australia*, Australia Institute Webpaper, 2005, at <[www.tai.org.au](http://www.tai.org.au)>, accessed 16 May 2006, via the hyperlink “Web papers and others”.

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Gay and Lesbian Rights Lobby’s website, at <<http://glrl.org.au>>, accessed 18 February 2011.

Gay and Lesbian Rights Lobby, *Streetwatch Report*, 1990.

R Graycar and J Morgan, *The Hidden Gender of Law*, 2nd ed, 2002, The Federation Press, Leichhardt, NSW.

Inner City Legal Centre, “Talking Turkey: A Legal Guide for Lesbian Mothers, Gay Fathers and Sperm Donors in New South Wales”, 2009, at <[www.iclc.org.au/iclc\\_pubs\\_rt.html](http://www.iclc.org.au/iclc_pubs_rt.html)>, accessed 18 February 2011.

Judicial Studies Board, *Equal Treatment Bench Book*, 2nd edn, 2010, London, Pt 7, “Sexual orientation”, at <[www.judiciary.gov.uk/publications-and-reports/jsb-publications/equal-treatment-bench-book](http://www.judiciary.gov.uk/publications-and-reports/jsb-publications/equal-treatment-bench-book)>, accessed 18 February 2011.

J Millbank, Meet the parents: *A review of the research on lesbian and gay families*, Gay and Lesbian Rights Lobby, 2002, at <[http://glrl.org.au/images/stories/meet\\_the\\_parents.pdf](http://glrl.org.au/images/stories/meet_the_parents.pdf)>, accessed 8 February 2011.

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NSW Attorney General's Department, *Understanding your Legal Rights: A Guide for Lesbians and Gay Men in NSW*, 2009, at <[www.safetypartnership.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/vwFiles/UYLRS.pdf/\\$file/UYLRS.pdf](http://www.safetypartnership.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/UYLRS.pdf/$file/UYLRS.pdf)>, accessed 18 February 2011.

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[The next page is 8801]

## 8.8 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the *Equality before the Law Bench Book*.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

[The next page is 9101]

