Pride and Prejudice: Results of an Empirical Study of Sexual Orientation Fairness in the Courts of England and Wales

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PRIDE AND PREJUDICE: RESULTS OF AN EMPIRICAL STUDY OF SEXUAL ORIENTATION FAIRNESS IN THE COURTS OF ENGLAND AND WALES

BY TODD BROWER

INTRODUCTION

There is a reason why city centres and shopping malls often have a sign with an arrow or dot indicating “You are here.” Without that information, it is difficult to navigate effectively through unfamiliar territory.

That is the dilemma facing decision-makers on issues of lesbian, gay, bisexual and transgendered persons’ rights. Even when there is agreement on policy goals or purposes, decision-makers often lack concrete, factual information on the personal experiences and treatment of LGBT persons. Without knowing

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what the particular problems are, it is difficult to craft effective or appropriate solutions. Legislation in the United Kingdom now exists granting LGBT people employment and other rights. However, although those laws will be interpreted and enforced by courts and tribunals, little empirical evidence exists on the day to day experiences of LGBT individuals in the British courts or legal system.

A December 2003 study of LGBT employees of the Department for Constitutional Affairs and some of their non-gay colleagues partially fills that void. The DCA is the government agency responsible for the courts and related justice agencies in England and Wales. The study questioned DCA employees about their own experiences and treatment, and those of LGBT persons whom those employees observed during their work at the Department.

This article relates the results of that study and analyses its findings. It first reviews the literature on the treatment of LGBT persons in the courts of the UK, and then examines the survey design and the characteristics of the survey respondents. Next it discusses the report’s findings on the perceptions, personal experiences and treatment of LGBT employees of the DCA, and follows with commentary on those employees’ observations of other LGBT persons within the courts of England and Wales. Finally, the article concludes with some suggestions for further study.


4 For a discussion of the use of the names, “Department For Constitutional Affairs,” “DCA,” “Lord Chancellor’s Department,” and “LCD” please see note Error! Bookmark not defined.Error! Reference source not found. below.

5 The author of this article created the 2003 DCA survey and report.
SURVEY OF THE LITERATURE

There are very few empirical studies of LGBT individuals and the court system. The first of its kind, *Sexual Orientation Fairness in the California Courts*, appeared in 2001 and found significant examples of unequal treatment of lesbians and gay men in the state courts of California (USA).

In the United Kingdom, some non-legal professions have studied their members to reveal sexual orientation fairness

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This article uses certain words with specific meanings that may differ from common usage. To eliminate miscommunication, the article defines and uses these words as stated below. These definitions also include phrases that the author used in the survey questions. Thus, the article uses them in discussing the survey results and findings.

"Open-ended responses": The survey often asked respondents to describe in their own words an explanation or elaboration of their answers. The article transcribes those open-ended responses exactly as respondents wrote them. The author has left punctuation, spelling, capitalisation, and grammar as is. Where information was unclear, illegible, or would have disclosed respondent's identity, the article employs brackets to supplement or clarify those quotations.

"Out" or "outed": Refers to individual lesbian, gay, bisexual and transgendered persons whose sexual orientation is publicly known in a variety of settings: by family, at work, and/or by friends and colleagues. Normally, being "out" is a voluntary choice, but in some instances, an individual may be "outed" because someone else disclosed his or her sexual orientation without permission.

"Percentages": When percentages are stated for survey responses that refer to other survey questions and follow up on prior questions, these percentages are for the respondents who answered the antecedent questions in an appropriate manner. E.g., "X percent of respondents reported personal discrimination on the basis of sexual orientation at work. Of these, Y percent stated that they spoke to a superior or other appropriate person. Z percent of those respondents reported that nothing positive came from their intervention." Accordingly, the figures for Y percent and Z percent do not refer to the total survey respondent population, but only to those who reported personal sexual orientation discrimination at work. Further, amongst that sub-population, Y percent refers to those who spoke about the discrimination to appropriate personnel, and Z percent to those who spoke to appropriate personnel and also believed no positive action was taken in response.

Moreover, percentages do not always sum to 100 percent because some survey questions permitted respondents to answer more than once to a series of items or choices.

JUDICIAL COUNCIL OF CALIFORNIA, ACCESS AND FAIRNESS COMMITTEE, *Sexual Orientation Fairness in the California Courts* (2003) (hereinafter SOF CA Report). The author of this article was one of the drafters of the SOF CA surveys and a primary co-author of the SOF CA report.
concerns. For example, the Association of University Teachers (UK) conducted a study that revealed that lesbian, gay or bisexual academicians related high perceived levels of discrimination and harassment, and reported salary gaps and glass ceilings in operation in the academic environment. Additionally, a 2001 article in the British Medical Journal reviewed several studies of sexual orientation bias against medical professionals that found documented homophobia amongst doctors and directors of medical schools against LGB physicians. Those studies also showed that LGB doctors experienced verbal harassment from medical colleagues and that many feared job loss if they disclosed their sexual orientation. Stonewall, the LGB advocacy organisation, released a survey of attitudes entitled, Profiles of Prejudice, which found that 17 percent of people in England were prejudiced against lesbians and gay men and 35 percent said that they knew other people who were prejudiced. Additionally, that report also found that persons who held negative beliefs about LGB persons also were likely to hold racist attitudes.

With respect to legal professionals, the British literature is sparser. Both the Law Society (Solicitors) and the Bar Council (Barristers) have enacted protections against sexual orientation discrimination in their membership. Nevertheless, neither organization has ever surveyed its members, either before or after the enactment of the non-discrimination provisions, to explore the extent of the problem in those organizations or in the courts.

8 LESBIAN, GAY AND BISEXUAL PARTICIPATION IN UK UNIVERSITIES (Association of University Teachers, 2001) at 12.
9 B.F. Burke, J.C. White, D. Saunders., Well-being of Gay, Lesbian and Bisexual Doctors, BRIT. MED. J., Feb. 17, 2001. Other studies have found that gay men fear judgmental attitudes or have other reservations about being open about their sexuality with their physicians. Tania Branigan, National Roundup: Health: Gay men reluctant to tell GPs, THE GUARDIAN (LONDON), Aug. 18, 2004, at 10.
10 PROFILES OF PREJUDICE, (Stonewall, 2003) at 18, 21.
11 Id. At 12.
12 CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES, ¶ 204, 305.1 (Bar Council 2004); SOLICITORS ANTI-DISCRIMINATION CODE §7.02 (Law Society 2004); LAW SOCIETY CODE FOR ADVOCACY §2.4 (Law Society, Amended Jan. 13, 2003) (Solicitors Advocates, Registered European Lawyers, and Bodies Corporate recognized as litigators).
13 Author's Interview with Martin Bowley, QC; Author's Interview with Pamela Bhalla, Bar Council. Hodge, Equal and Decent Treatment, 145 NEW L.J. 6685,
Moreover, with reference to the courts of Great Britain, the Lord Chancellor’s Department, Court Service Staff Opinion Surveys in 2000, 2001 and 2002 asked Court Service staff general questions on diversity.

14 Although the current name for this body is the Department for Constitutional Affairs (DCA), the name at the time of the survey was the Lord Chancellor’s Department (LCD). Accordingly, the survey and respondents used the terms, Lord Chancellor’s Department and LCD. For simplicity, the article uses the older, then proper, terms when speaking in historical terms about the body studied in the report and survey, and uses the DCA when speaking of the modern entity. The DCA encompasses the DCA Head Quarters and Associated Offices, the Court Services and the Public Guardianship Office. See, Department for Constitutional Affairs, Constitutional Reform: Reformng the Office of the Lord Chancellor (Sept. 2003), available at http://www.dca.gov.uk/consult/lcoffice/index.htm.


A separate Diversity section of the UK Court Service staff survey first appeared in 2000. The survey’s authors designed the Diversity section to measure progress against the provision of equal opportunities and elimination of unfair discrimination in the workplace. COURT SERVICE STAFF OPINION SURVEY 2000-REPORT SEPT. 2000 (2000), ORC International, at 3 (Executive Summary). The 2000 survey found:

“Overall, just under a third (30%) did not agree that the Court Service offered equal opportunities, but 63% said that it did. When asked whether they had been subjected to unfair discrimination in relation to their sex, age race/ethnic origin, disability, working hours, religion or sexual orientation, between 90-95% said that they did not. Significantly, 11% of staff who are black and 15% of staff who are Asian, felt discriminated against on account of their race/ethnic origin (as opposed to only 1% of staff who are white).”
More specifically, the 2000 survey asked staff whether they had been subjected to unfair discrimination in relation to their sex, race/ethnic origin, age, disability, working hours, religion or sexual orientation. In response, one percent of all employees reported sexual orientation discrimination. Since the survey did not provide the number of non-heterosexual respondents or that subgroup's answers to that question, it reveals little further information.

The 2001 survey slightly expanded the Diversity section to ask about discrimination, harassment and bullying. In the parallel table to the 2000 report, the 2001 survey reported no unfair discrimination based on sexual orientation, down from one percent in 2000. However, as other portions of the report clarify, the report of no sexual orientation discrimination actually meant less than one percent. The 2001 report found significant under-

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17 The response rate for the 2000 survey was 66 percent, consistent with the over 60 percent rate for other government departments. Id. at 33.
19 "Of those who said that they had been subjected to any form of discrimination, 35% reported it and 26% of those who reported it said that it had been dealt with effectively."
20 6% of staff said that they had been subjected to harassment and 8% of staff said that they had been subjected to bullying."
21 "Around half of staff who had been subjected to harassment reported it, and 40% of staff who had been subjected to bullying reported it."
22 19% of those who reported harassment felt that it had been dealt with effectively, 12% of those who reported bullying felt it had been dealt with effectively." Id. at 32.
23 Id at 32. Table 7 (Unfair Discrimination by Court Service Staff).
24 Id.(underreporting) and at Table 7 (number of respondents). .004%, assuming 27 cases reported and R=7277, and each case reported occurred to a different individual.
reporting of sexual orientation cases and the survey responses underestimated the number of negative experiences.\textsuperscript{22}

The report asked two new questions about fairness and equal opportunities. In the first, 81 percent of staff agreed with the statement, \textit{I am treated fairly and with respect},\textsuperscript{23} but that figure decreased for minority groups, those with disabilities, and those respondents experiencing discrimination or harassment. A similar pattern of responses was reported for the second statement: \textit{The Court Service offers equal opportunities to all its staff}.	extsuperscript{24} The survey did not break down answers to either question by respondents’ diverse sexual orientations or by those who may have experienced sexual orientation discrimination. Accordingly, we cannot know if responses differed along those criteria.

Finally, the report questioned respondents on harassment suffered over the previous year.\textsuperscript{25} “6% of staff said that they had been subjected to harassment. This was less for those in higher spans and higher for those in ethnic minority groups, disabled staff, gay men and those who said they had experienced unfair discrimination.”\textsuperscript{26} The report gave no figures for those subgroups, so we do not know how those figures compare to the subgroups’ perceptions of fairness.

\textsuperscript{22} The Report noted the following on the reporting of discrimination: “Of those who said that they had been subjected to any form of discrimination, 35% reported it and 58% did not report it. That would suggest that Court Service records of discrimination would severely underestimate how much discrimination occurs. Of the staff that reported unfair discrimination, 26% said that it had been dealt with effectively, and 70% said that it had not been dealt with effectively. These two findings would suggest that the small amount of discrimination that does take place is not being dealt with or reported as fully as it could be. The Court Service may need to look at ways in which people feel able to report these things.”

“The form of discrimination most likely to be reported was that relating to disability (43% of cases reported). \textit{The form least likely to be reported was that relating to sexual orientation (75% of the 27 cases not reported).}” \textit{Id.} (emphasis added)

\textsuperscript{23} \textit{Id.} at 29-30.
\textsuperscript{24} \textit{Id.} at 30.
\textsuperscript{25} The survey apparently defined harassment, but that definition is not available in the text of the report.
\textsuperscript{26} “52% of staff who said that they had been subjected to harassment reported it, and 36% of those who reported it said that it had been dealt with effectively.” \textit{Id.} at 33.
The 2002 report contained results similar to those in prior years. One percent of respondents in the 2002 survey reported that they were subjected to unfair discrimination based on sexual orientation by Court Service staff in the past year. Of those, 37% reported it, and 30% believed that it was dealt with effectively. The report also asked about harassment and bullying, 6% of bisexuals, 9% of lesbians, 7% of gay men, and 5% of heterosexuals reported being subject to harassment during the survey period, whilst 10% of bisexuals, 12% of lesbians, 5% of gay men, and 7% of heterosexuals reported being subject to bullying.

These questions, although a useful start to looking at treatment in the Court System of England and Wales, tended to be too generalised in their approach and unspecific in the types of information they sought. Accordingly, a need remained for a more systematic and thorough exploration of sexual orientation fairness and equal treatment in the DCA.

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27 That report appeared in January 2003 and is the most recent staff survey for which data are available. That report found: "The majority of staff (82%) agree that they are treated fairly and with respect, which is above the Central Government average of 73%. This is in line with the result achieved in 2001 (81%)."

"71% of staff feel the Court Service offers equal opportunities to all its staff, compared to the Central Government average of 67%. This has increased 2 percentage points from 2001." COURT SERVICE STAFF OPINION SURVEY 2002-REPORT JAN. 2003, ORC International, at 28.

28 Id. at 30. The 2002 survey had a response rate of 72%, 8,028 respondents, (Id. at 9, sec. 4.1 Overall response rates), 97% of staff reported that they are heterosexual. Id. at 8. For non-heterosexual respondents, the 2002 Report gave no information as to the number or percentage of lesbian, gay, bisexual or transgendered persons surveyed.

29 Id. at 30.

30 Id. at 32.

31 Id. at 33.
OBJECTIVES AND METHODOLOGY

SUMMARY OF SURVEY OBJECTIVES AND METHODOLOGY

As the DCA recognised, the multicultural society of the future will include significant communities of LGBT individuals. Accordingly, its policies defined diversity to include sexual orientation and it created the Rainbow Network to serve employees’ needs across the spectrum of sexual orientation.

One of the first priorities of this study was to determine the extent, if any, actual or perceived sexual orientation bias exists in the courts of England and Wales. To accomplish this, the author developed a survey instrument for the DCA staff, specifically focusing on lesbian, gay, bisexual, transgendered employees and other interested parties, regardless of sexual orientation. The author designed the survey to meet the following objectives: focus on the DCA and the court system of England and Wales; obtain data from every part of those entities; and emphasize the direct experiences, observations of LGBT staff and their supporters in addition to the perceptions of these groups.

Thus, the survey emphasizes what actually happened to respondents in addition to what they perceive happened to them or others. It asked respondents to report on their experiences and observations in the year preceding the survey, and more generally on their experiences and perceptions during their employment with the DCA. The survey requested information on both positive and negative experiences and observations in order not to skew responses towards the negative.

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33 Brochure from the Rainbow Network.
35 Id. at 5, 14.
36 Id. at 14.
37 Id.
Respondents were allowed anonymity so they could answer freely. The survey contained no names or other identifying marks to enable matching of specific responses with particular individuals; pre-addressed envelopes were provided to avoid handwriting or other distinguishing information. Anonymity was particularly important given the sensitivity of the research subject: sexual orientation fairness.

The nature of the target group makes research into the treatment and experiences of LGBT individuals more difficult. Those persons constitute a significantly large group in society with a 'hidden identity'; that an individual is lesbian, gay, bisexual or transgendered is not always immediately apparent from any outward, physical appearance or surname. Many LGBT individuals choose not to expose their sexual orientation publicly.

Accordingly, with the assistance of Mr. Chris Park, Coordinator of the DCA Rainbow Network, Department for Constitutional Affairs, and Chair of the Civil Service Rainbow Alliance, the author designed the survey instrument and sent it to all DCA employees who were full members or friends of the DCA Rainbow Network. Full members of the Network are self-identified LGBT individuals; Friends of the Network are interested

38 Id.
40 ASSOCIATION OF UNIVERSITY TEACHERS, LESBIAN, GAY AND BISEXUAL PARTICIPATION IN UK UNIVERSITIES, at 6, 10-11 (November 2001); Brower, 38 SAN DIEGO L. REV. at 570 n. 26.

The common metaphor of "coming out of the closet" is a misnomer. We literally step out of a closet into a room all at one time. One is either in one place or another, in the closet or out. Unlike that literal decision to leave a physical closet, publicly acknowledging one's identity as a LGBT person is a series of continuing choices as to how and how much to disclose, and when and to whom. For more on LGBT public self identity issues, see Brower, 38 SAN DIEGO L. REV. at 568-570
41 Brower, DCA Report, supra note 33, at 14.
self-identified heterosexual staff. Figure 1, below, at 31, shows the breakdown of survey respondents by Rainbow Network status. Amongst those included were court clerks, ushers, administrators, and other professionals.

Of the 144 surveys sent to all the then-current Rainbow Network full members and friends, 97 completed and returned it, for a total response rate of 67.4 percent. The survey was distributed in the spring of 2003; respondents returned the survey questionnaires through early summer 2003.

Of survey respondents, 70 identified themselves as lesbians, gay males or bisexuals, 25 as heterosexual and 2 as other. Despite the smaller sample of heterosexual and transgendered employee survey respondents, the responses are still statistically significant. Additionally, many of the survey questions asked for employees' direct observations of the experiences of LGBT persons in the English and Welsh courts, which are questions that all employees were qualified to answer.

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42 For convenience, this article uses the term “members” to denote both full members and friends, unless specific reference to one group is required. Id. at 14-15.
43 Figures are compiled from the tables and other data. Tables referenced in the Report are those made from the raw survey data. The author's private files contain those data and tables.
44 Brower, DCA Report, supra note 33, at 15.
45 Id. According to social scientists, being able to identify lesbian, gay, bisexual or transgendered individuals and having a 67.4 percent response rate is excellent. See SOF CA Report, supra note 6, at 13. The response rate compares favorably with that of the LCD, Court Service employee surveys (See nn, 17, 21, 28, above) and also with other surveys of minority employee networks in the DCA. See, e.g., Survey of PROUD Members (Summary of Preliminary Findings) at 1 (2003) (response rate, 63% -- racial and ethnic employee network).
46 The author presented his preliminary results of the survey to the Rainbow Network membership at its Annual Meeting, July 25, 2003, in London. This presentation permitted Rainbow Network members to correct any errors in data interpretation that may have stemmed from the author's unfamiliarity with the DCA or British workplace culture, as well as discuss the implications of the data analysis. In December 2003, the author presented the final survey report to Lord Filkin, Parliamentary Under-Secretary of the DCA, to the DCA Diversity Steering Group (senior managers, network heads and Diversity Champions), and to the DCA Rainbow Network.) Brower, DCA Report, supra note 33, at 15.
47 Id.
regardless of their sexual orientation. The survey instrument was designed to determine: (1) whether employees experienced positive or negative actions or heard positive or negative comments directed toward them based on their actual or perceived sexual orientation; (2) whether employees experienced discrimination based on their sexual orientation; (3) whether employees observed negative behaviours toward LGBT individuals in open court or other work settings; and (4) whether employees believed that LGBT persons are shown equal treatment and respect in the courts and the LCD. The survey primarily asked LCD employees to base their responses on experiences over the past year.

**STUDY LIMITATIONS**

As in any empirical research, the author must acknowledge limitations in the data. Although the Rainbow Network membership is representative of DCA employees (except for sexual orientation), it is a self-selecting group of LGBT persons and their heterosexual colleagues. As such, one cannot know how well their responses correspond to those that the larger group of DCA employees might have given. If similar studies of court employees in California provide guidance, the general court employee group would have been less conscious of sexual orientation issues or discrimination and more likely to see the courts and the DCA as fair. They would, however, still confirm the presence of biased treatment because of sexual orientation, even if their own personal observations as heterosexuals differ from their non-heterosexual co-workers’ experiences.

Second, the self-identified group of Rainbow Network members may under-represent closeted LGBT individuals who may be reluctant to join a gay or lesbian organisation. The ability of less visible LGBT persons to associate with the network as ‘Friends’ may ameliorate that issue. To some degree, those

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50 See, SOF CA Report, at 68-72.
51 See, Open-ended Comments, Q10, at n. Error! Bookmark not defined. Error! Reference source not found., below, Q. 11.7, at n Error! Bookmark not defined. Error! Reference source not found., below. The
issues are common to all empirical research on LGBT persons, a group that is difficult to identify and sample appropriately. The author made several attempts to encourage closeted individuals to participate. Survey respondents were given anonymity; the author sent surveys without DCA funds, stationery, or supplies, and respondents returned the completed questionnaires to the author and not to DCA employees or Rainbow Network members. Rainbow Network members were encouraged to give copies of the survey to persons they personally knew to be LGBT, but who were not members of the organisation. Nevertheless, some potential respondents may not have wished to participate, even with these safeguards.

Third, the survey asked specific questions about personal treatment, experiences and observations as well as perceptions of those events. Moreover, questions asked about both positive and negative experiences so as not to skew the answers negatively. However, the responses were self-reported; the researcher made no attempt to observe directly employees’ daily work lives or court users’ experiences.

Finally, the author acknowledges that he is an American researching UK employees and workplaces. Although he had been living in London for 18 months at the time the survey was developed, he is not a native member of the culture. Accordingly, a group of British citizens and LCD employees vetted the survey before dissemination to ensure that language, cultural and workplace references were appropriate to the survey group. Moreover, the researcher presented the preliminary data to the Rainbow Network to avoid cross-cultural or workplace-specific misunderstandings in data interpretation. Additionally, the data are generally consistent with other studies of the DCA and surveys of LGBT fairness in the United States court system.

open-ended comments in the study demonstrate that at least one closeted LGBT person joined as a “Friend” to hide his sexual orientation.

COURT SERVICE STAFF SURVEYS 2000 – 2002, see n. 16 - 31, and 2003 PROUD Network Survey, Preliminary Report (Ethnos Consultancy, September 2003) (the PROUD Network is the DCA employee group for members of racial and ethnic minorities and those issues).

See generally, Todd Brower, Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts, AM. U J. OF GENDER, SOC. POL’Y & LAW (2003); Todd Brower, “A Stranger to Its Laws:”
CHARACTERISTICS OF DCA EMPLOYEE - RAINBOW NETWORK SURVEY RESPONDENTS

Respondents were 64.6 percent men, 34.4 percent women, and 1 percent transgendered individuals. Figure 2, below, at 32. Two-thirds [66.6 percent] self-identified as gay or lesbian, one-fifth [20.0 percent] as heterosexual, 5.2 percent as bisexual, and 2.1 percent as other. Examples of 'other' included, "I consider myself lesbian, although I currently have a male partner," "Unsure," "Undecided." Figure 3, below, at 32. They were predominantly White, with the remainder divided amongst Black-Caribbean, Chinese origin, or other. The racial demographic figures are generally consistent with other empirical data on the DCA; the gender data differs.

Respondents' ages ranged between 22 and 57 years, with an average age of 39.2. By relationship status, 19.1 percent were married, 6.4 percent lived with a partner of the opposite sex, 40.4 percent lived with a partner of the same sex, and 33.0 percent were single, not living with a partner or spouse. Educationally, 27.1 percent of respondents had a GCSE or O-level, 27.5 percent an A-level, 22.9 reached the degree level, and 12.5 percent attained higher than degree level.

Respondents worked at the LCD from 2 months to 40 years, with the average being 12.3 years. They were employed in their current job for an average of 3.5 years. At the time of the survey, nearly half were employed at LCD Headquarters, with the


54 Brower, DCA Report, supra note 33, at 15.

55 Id.

56 Brower, DCA Report, supra note 33, at 15-16; Author's data set. Open-Ended Comments Q34.4 (Comments referenced in the Report are those made from the raw survey data. The author's private files contain those data.)

57 White 94.8%. See Tables Q33, Q34, Q35. Brower, DCA Report, supra note 33, at 16.

58 The 2002 LCD Court Service Employee Survey showed 90% White, 4% Asian or Asian British, 4% Black or Black British, 1% Chinese, 1% mixed ethnicity. One third of staff were male, 67% were female. 2002 LCD COURT SERVICE EMPLOYEE SURVEY, at 8 (Jan. 2003).


60 Id. See Table Q38.
balance employed in other courts and associated offices. Figure 4, below, at 32. Consistent with their workplace, over one half were in the South Eastern Circuit – London, with the remainder in other circuits of England and Wales. Figure 5, below, at 32.

At work, 55.4 percent of respondents described themselves as totally out, 22.8 percent as selectively out, and 9.8 percent as not out. Figure 6, below, at 32. Approximately the same percentage of respondents reported they were out to their family. Finally, 71.1 percent of respondents stated that they were totally out to friends, with only 15.5 percent describing themselves as selectively out or 1.1 percent as not out to their friends.

Figure 1
Respondents by Rainbow Network Status

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61 LDC Head Quarters, 49.4 percent, 8.6 percent at County Court, 11.8 percent at Crown Court, 3.2 percent at High Court, 3.2 percent at Tribunals, 5.3 percent at a Circuit or Group Office, 9.6 percent at the Public Guardianship or other Associated Office, and 8.6 percent employed in an office identified as Other. See Tables Q43, Q40, Q41. Brower, DCA Report, supra note 33, at 16.

62 52.1 percent were in the South Eastern Circuit – London, 9.8 percent in the South Eastern Circuit outside of London, 9.7 percent in the Midland Circuit, 1.0 percent in the North Eastern Circuit, 9.7 percent in the Northern Circuit, 3.2 percent in the Wales and Chester Circuit, and 8.7 percent in the Western Circuit. Id. See Tables Q43, Q40, Q41.

63 56.6 percent= totally out, 21.1 percent= selectively out, 10.0 percent not out. Id. See Table 44b

64 Id. See Tables Q44a, Q44b, Q44c.
Figure 2
Respondents by Sexual Orientation

- Lesbian or gay: 26.6%
- Bisexual: 5.2%
- Heterosexual: 66.6%
- Other: 2.1%

Figure 3
Respondents by Workplace

- County Court: 32.1%
- Crown Court: 11.8%
- High Court: 8.6%
- Tribunal: 8.6%
- Headquarters: 7.3%
- Circuit or Group Office: 5.3%
- Associated/Public Guardianship Office: 3.2%
- Other: 2.2%

Figure
Respondents by Location

- Midland: 9
- Eastern: 8
- Probate: 3
- Eastern Circuit: 2
- Eastern Circuit (Outside District): 1
- Western: 1
- Other: 1
- Not applicable: 52
The author's interpretations and analysis of the survey results follow. The findings draw reasonable inferences from the data. The article does not include all the reasonable inferences that may be drawn from the responses, but represents those findings that the author found most significant.

Interpreting perceptions of sexual orientation bias and actual biased conduct is difficult. LGBT persons as a group are less visible than other minority groups, such as Blacks and Asians, or women. For the most part, unless LGBT people choose to disclose their sexual orientation or unless they are outed, any
sexual orientation bias or prejudice against him or her held by others is virtually impossible to measure. Moreover, only some LGBT employees are open about their sexual orientation and not to all persons or in all settings. Thus, one must consider the survey results and findings in that overall context.

**THE DCA REPORT: DATA AND ANALYSIS**

**Observations/Perceptions of Fairness and Equal Treatment**

Most Rainbow Network members believed that lesbian and gay people were treated the same as any other employee; however, a significant number did not. See Figure 8, below, at 36. Additionally, over seventy-six percent of respondents believed that the LCD personnel policies are fair to lesbian and gay people. Nearly seventy-two percent thought that their co-workers were sensitive to diversity issues, but a lesser number concluded that when people talked about diversity at work, they included sexual orientation. Despite these generally positive findings, several patterns emerged from the data that demonstrate that large numbers of survey respondents in a variety of contexts had much less favourable experiences and perceptions of fairness in the LCD.

The predominant pattern concerns the degradation in LGBT persons' perceptions of fairness when they are asked about their specific observations, their day-to-day experiences and the application of workplace policies. For example, 55.2 percent stated that people made jokes or comments about LGBT people behind their backs and 20.8 percent of respondents reported that prejudice against LGBT people was widespread at work. Additionally, 41.7 percent believe that it is unsafe for lesbians and

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65 59.6 percent of respondents agreed or strongly agreed with the statement “Lesbian and gay employees are treated the same as any other employee.” However, 37.5 percent disagreed or strongly disagreed with that statement. See Table 29a. Brower, DCA Report, supra note 33, at 26.

66 See Figure 8. 76.8 percent of respondents agreed that their written workplace policies were fair to lesbian and gay men and that their co-workers were sensitive to diversity issues [71.9 percent], although only 61.7 percent concluded that when people spoke about diversity they included sexual orientation issues. See Tables 29c, 29d, 29e. Brower, DCA Report, supra note 33, at 27, 30.
gay men to be open about their sexual orientation at work, whilst 26.1 percent think that it is better for LGBT employees to keep their sexual orientation to themselves whilst at work. Moreover, respondents rated the court system as less fair to LGBT people than to the general population.

When we disaggregate the survey data by respondents' sexual orientation, we see an intriguing configuration. A greater percentage of heterosexuals thought that LGBT persons were able to be open about their sexual orientation at work than did non-heterosexuals — with bisexuals and transgendered persons counselling the most caution about openness. Thus, it may be that even "friends of the Rainbow Network" — a group noted for their interest and sensitivity to sexual orientation issues — may undervalue the risks in disclosing one's sexual orientation at work.

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67 See Tables 29b, 29h, 29k, and 29l. Brower, DCA Report, supra note 33, at 29.
68 On a scale of 1 to 10, with higher scores indicating higher levels of fairness, respondents rated the court system with a mean score of 5.83 on fairness to lesbians and gay men whilst they rated the courts with a mean score of 6.91 for fairness to people in general. See Tables 31a, 31b. Brower, DCA Report, supra note 33, at 34-35.
69 Bisexuals, 80 percent agreed or strongly agreed that it is better for LGBT people to keep their sexuality to themselves at work, transgendered individuals 50 percent, lesbians and gay men 25 percent, heterosexuals 16 percent. See Table Q29.k*34. Brower, DCA Report, supra note 33, at 30.
70 Their membership in the Rainbow Network evidences their interest and sensitivity to sexual orientation issues, despite their majority sexual orientation.
Alternatively, the apparent risks of disclosure may decrease with the size of the group into which one falls. Naturally, heterosexuals are the largest group of LCD employees, with lesbians and gay men perhaps having sufficient numbers to make it relatively relaxed to come out in that setting. Finally, the small numbers of bisexual and transgendered respondents may make their perceptions of risk much higher.71

71 In addition, nearly twice as many men as women agreed or agreed strongly with that statement. Men 30.7 percent, women 15.2 percent. See Table
Additionally, openness about one's sexual orientation appears to correlate with respondents' perceptions of fairness. Respondents who were more open at work believed that it was unnecessary to keep one's sexual orientation quiet in that setting. This same pattern also appeared when they were asked: (1) if an open LGBT person would have a harder time being hired; (2) if people made jokes about LGBT persons behind their backs; and (3) whether prejudice was widespread at work.

This correlation may be an encouraging development in sexual orientation fairness. Treatment and perceptions of treatment may improve as one becomes more visible about sexual orientation. Because the study data reflect correlation and not

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Q29.k*Q33. Brower, DCA Report, supra note 33, at 30. It is unknown why that should be so. It may be that male homosexuals and bisexuals perceive more hostility towards them in the workplace than do female homosexuals and bisexuals. The issue of lesbian invisibility and the stronger negative reactions to male homosexuality may also play a role. On Lesbian invisibility, see Julie Shapiro, Custody and Conduct, How the Law Fails Lesbian and Gay Parents and their Children, 71 IND. L. J. 623, 648 (1996) (discussing the sometimes positive effects of lesbian invisibility). For gender hostility differences between society's views of male and female homosexuals, see Mary Ann C. Case, Disaggregating Gender From Sex and Sexual Orientation, The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, 63-64 (1995); See also, Casenote, 115 HARV. L. REV. 2074, 2080 nn. 49, 52 (2002); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE L.J. 1683, 1776-1777 (1998). Moreover, other studies have shown that men as a group tend to express more prejudice against people from other groups than do women. See e.g., Stonewall, Profiles of Prejudice, supra note 9, at 23 (race), at 25 (Lesbians and gay men), at 27 (other prejudice).

72 Respondents agreed or strongly agreed with the statement, "It is better if LGBT people keep their sexual orientation to themselves whilst at work." as follows: Totally out at work 17.7 percent, selectively out at work 33.3 percent, not out at work 77.7 percent. See Table Q29k*Q44a. Brower, DCA Report, supra note 33, at 30-31.

73 Totally out at work 15.7 percent, selectively out at work 23.8 percent, not out at work 33.3 percent. See Table Q29j*Q44a. Brower, DCA Report, supra note 33, at 31.

74 Totally out at work 49 percent, selectively out at work 61.9 percent, not out at work 77.8 percent. See Table Q29l*Q44a. Brower, DCA Report, supra note 33, at 31.

75 Totally out at work 17.7 percent, selectively out at work 23.8 percent, not out at work 33.3 percent. See Table Q29h*Q44a. Brower, DCA Report, supra note 33, at 31.
causation, however, we may only cautiously assign cause and effect. Conceivably, better perceptions of fair and equal treatment because of sexual orientation may lead to increased openness and visibility of respondents’ sexuality, rather than the other way around. Naturally, cause and effect may also run in both directions at the same time.  

Visibility has effects on fairness, but it is also important to questions of integration into the workplace, into society and to self-worth generally. While it is particularly significant for LGBT persons, it is not exclusive to them. Adherents to non-minority religions and persons with invisible disabilities may also share these concerns.  

Complicating the relationship between visibility and treatment is that if a lesbian or gay man remains silent, other people assume that she or he is not gay. This assumption allows some gay people to hide their identity and avoid the negative consequences of being open. Nevertheless, hiding is not a solution to anti-gay discrimination; forced invisibility is a form of anti-gay inequality. As a short experiment illustrates, denying a

79 See e.g., “I did not tell the truth about having a partner because I was not comfortable being ‘out’ in that setting. I pretended I was single—then ‘passed’ for heterosexual.” Dominic J. Brewer and Maryann Jacobi Gray, Survey Data, Preliminary report Draft 3/31/99, reported in 4/9/99 materials of the Subcommittee on Sexual Orientation Fairness, at 21. (Hereinafter Brewer & Gray, Survey Data). Accord, Los Angeles County Bar Association Committee on Sexual Orientation Bias, Report, 27 (June 1994), (noting that “most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream.”).
part of one’s life is neither easy nor comfortable. This discomfort was reflected in certain survey responses.81

The experiment follows: In normal conversation with a friend or co-worker, relate all your activities over the past fortnight without once giving any indication of your marital or relationship status and without providing any clues as to the sex of the persons with whom you shared these activities. Now imagine doing this with everyone you know, at work, at school, at the shops, at the health club, everyone – and not just describing the past two weeks, but all the time, for every holiday, birthday, date, anniversary, and all the little occasions and non-occasions that make up your daily life.82 This is both difficult and tiring. Neither legal doctrine nor societal pressures coerce non-gay persons into such denial.

Remaining silent causes some lesbians and gay men to feel that they are deceiving others in the court system and elsewhere.83 The significance of visibility or disclosure is important to understanding the survey data. Some respondents took little

81 See, e.g., Open-ended comments, Q10. Brower, DCA Report, supra note 33, at 59-60. “I joined the Rainbow Network on the pretext of being a “friend” whereas I am a full member but not ‘out’. I received widespread negative comments & ridicule from junior staff through to senior managers. I felt very uncomfortable & I was able to see people’s reaction as if is assumed I was totally straight & why was I joining supporting this bunch of ‘weirdos’ “

82 This is part of the restrictions of hidden self-identity, in which lesbians and gay men hide or deny their sexual orientation to others. Nor is this merely an academic exercise, as this quote from a lesbian or gay attorney surveyed in Los Angeles illustrates: “I have to sit anxiously in the office and, at every moment, try to figure out whether and when I can say “we” and risk someone asking who “we” is. . . . [I]f someone asks, “What happened this weekend?” and I slip and [say] “we” instead of “I,” then I go through a kind of turmoil. That really requires energy that . . . prevents you . . . from achieving any peace and assurance.” Response from gay or lesbian attorney surveyed, reported in Report, Los Angeles County Bar Association Committee on Sexual Orientation Bias, at 28 n.181; adopted by the Los Angeles County Bar Association Board of Trustees on June 22, 1994 [hereinafter L.A. Bar Report].

83 See, e.g., Dominic J. Brewer and Maryann Jacobi Gray, Report on Sexual Orientation Fairness in California Courts (1999), at 33 [hereinafter Brewer & Gray, Report] (“The judge asked all prospective jurors to state marital status and what their spouse’s occupation was. I have a long-term domestic partner, so I felt that answering the question honestly required me to reveal my sexual orientation and to state my partner’s occupation even though legally my marital status is single . Stating ‘single’ would have felt like lying.”).
ameliorative action when faced with discrimination because they were afraid they would be forced to disclose their sexuality. Finally others may have wished to be open, but others in the workplace had forced them to stifle their non-majority identity.

In addition to correlating with certain experiences and responses, openness affects other aspects of workplace and legal culture. Silence about one’s self-identity reinforces lesbian and gay marginalization because it requires gay people to deny an essential difference between them and non-gay persons. Some lesbians or gay men do not fit neatly into the standard categories of married or single, an often important distinction for courts and other government agencies or benefits. They cannot share in everyday social interactions at work or generally because they must mask certain aspects of their lives.

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84 See, e.g., Open-Ended Comments, Q15. Brower, DCA Report, supra not 33, at 39 ("I took relatively little action as I was worried & still am that people would guess / find out about my transsexuality as I am not out & may not be ready to be out at work for fear of widespread ridicule & prejudice. I saw & heard the reaction to someone who now presents as a woman in HQ.").

85 See, e.g., Open-Ended Comments Q17. Brower, DCA Report supra note 33 at 37 ("Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited).”).


88 See, e.g., LA Bar Report, supra note 82, at 31-34. “[At social events] gay and lesbian attorneys are most likely to feel and be perceived as ‘different’ – usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious ... not fitting in.” Id. at 33 (quoting response from a gay or lesbian attorney respondent).
Further, open self-identity is more significant for lesbians and gay men than it is for non-gay persons.\textsuperscript{89} The non-gay person may not feel any pressure to voice her sexual orientation explicitly.\textsuperscript{90} She may do so in any of the numerous ways in which this fact is normally communicated, by pictures of a spouse or children at work,\textsuperscript{91} by using the pronoun “we” to describe daily activities,\textsuperscript{92} or simply by allowing people to presume that she is non-gay. In contrast, respondents were sometimes forced to hide their partners in situations where non-gay persons would have been expected to bring theirs.\textsuperscript{93} Further, 41.7 percent of Rainbow Network members believed that it was unsafe for lesbians and gay men to be open at work; 26.1 percent that it was preferable for

\textsuperscript{89} William Eskridge, Jr., A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 YALE L.J. at 2442.

\textsuperscript{90} Non-gay people are open about their sexual orientation in myriad ways without anyone thinking about it. Indeed, the awkwardness of the expression “openly non-gay” to describe the sexual orientation identity of heterosexuals illustrates how little we consider the public nature of heterosexuality.

\textsuperscript{91} Do not underestimate the significance of this distinction. The LA Bar Report found that nearly one half of all respondents, regardless or sexual orientation and sex, believed that simply discussing one’s personal or family life in a manner that revealed the sex of one’s partner – a matter of no consequence for non-gay attorneys – would harm a gay or lesbian attorney’s career. LA Bar Report, supra note 82, at 31.

\textsuperscript{92} See the thought-exercise, supra note 82; see also, John Biewen, Robert Siegel, Gay Teacher Files First Amendment Lawsuit in Utah, ALL THINGS CONSIDERED (NPR, Radio broadcast, Oct. 21, 1997) (discussing lesbian coach and teacher threatened by school district with termination from tenured position if she talked about her sexual orientation or life with students, staff, parents. “BEIWEN: Weaver says in Spanish Fork, a town of 12,000, the order meant she couldn’t have ordinary conversation with most people I or out of school. WEAVER: If I was in a classroom and said something about, oh, Rachel and I went somewhere for the weekend, and – that that could be in violation. I went in and asked them actually that if I was at the ball park, and was talking to somebody, and I didn’t know whether they had a student in the school or not, if that could be part of what this memo was saying, and they said yes.”)

\textsuperscript{93} See, e.g., Open-Ended Comments Q17. Brower DCA Report, supra note 33, at 37. (“Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited).”)
LGBT individuals to keep their sexual orientation private at work.⁹⁴

Further, most lesbians or gay men are not visibly identifiable.⁹⁵ Accordingly, the revelation of gay or lesbian identity usually takes place through speech or communicative conduct⁹⁶ in order to break the assumption of heterosexuality that silence often brings. Indeed, gay people must affirmatively break the assumption of heterosexuality to disclose their sexual orientation publicly. When a non-gay couple kisses in public, it is not viewed as a statement about sexual orientation. Conversely, when gay people engage in those same activities, it is often perceived as flaunting one’s sexual orientation.⁹⁷ The ‘fear of flaunting’ has often justified negative employment or other consequences for LGBT individuals.⁹⁸ For the gay person, each of these situations calls for a conscious decision as to what to say or do, how much to disclose or allow to remain unspoken.⁹⁹ Thus,

⁹⁵ Contrary to many people’s beliefs, non-gay persons are often incapable of identifying lesbians or gay men who do not wish to disclose their sexual orientation. Warren J. Blumenfeld & Diane Raymond, Looking at Gay and Lesbian Life 86 (1993).
⁹⁶ Eskridge, supra note 85, at 2442.
⁹⁷ E.g., Singer v. United States Civ. Serv. Comm’n, 530 F.2d 247, 249 (9th Cir. 1976). Accord, Open-ended Comment Q17. Brower, DCA Report, supra note 33, at 37 (“Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited).”).
⁹⁸ See e.g., Singer, 530 F.2d at 249; Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc). See also, LA Bar Report, supra note 82, at 5-40 (describing the consequences of being an openly lesbian or gay attorney in Los Angeles County).

In the United States, the use of affirmative communication to self-identify as LGBT has often meant that the courts have often jurisprudentially intertwined lesbian or gay identity with doctrine under the First Amendment to the United States Constitution. See Todd Brower, Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts, 38 San Diego L. Rev. 565 (2001) for a discussion of of that interconnexion.

⁹⁹ See, e.g., Dave Cullen, A heartbreaking decision, (June 7, 2000) available at http://www.salonmagazine.com/news/feature/2000/06/07/relationships/index.html. (describing Marine captain who originally created a separate gay life in Denver, Colorado, USA, 70 miles away from the ‘gay-free zone’ of Colorado Springs where he was stationed). (“He loosened those ties [with non-gay friends] by convincing his work friends that he found Colorado
visibility is a continuing set of choices for LGBT persons that must be calibrated according to one's setting, comfort level, and assessment of the consequences. Thus, the findings on openness and visibility are very important to understanding the dynamics and perceptions of fairness. They form an additional dimension in the study LGBT experiences in the courts that is typically not relevant to the treatment of other diverse populations like race or gender.  

If increased visibility leads to better perceptions of fairness, the DCA should be commended for ensuring that it has policies and mechanisms in place to allow LGBT persons to acknowledge their sexuality at work. Employee networks, diversity champions, diversity training and education, and well as sexual orientation-friendly language and policies are all examples of continuing initiatives that help LGBT individuals become more visible in the organisation.

Springs stifling, and shifted all his free time to Denver, routinely spending three to five nights a week up there. But the constant questions of his juggling strategy still dog him -- "What you been up to? What did you do this weekend?" -- requiring an elaborate fictional life. "I have to be careful," Alex says. "I have to be guarded when I come back from a weekend and start talking about where I've been or what I've done." He has spent enough time in Denver's straight clubs to swap them with the gay bars; dates and tricks are converted to feminine counterparts. "I try to keep it as close to the truth as possible, because if I have to retell the story, I'm not going to stumble over things," he says. "If some guy has a broad chest, she's got a rack. A guy named Clay becomes Claire. Everything else pretty much stays the same."; LA Report, supra note 82, at 28 n.181.


Specific Perceptions About Treatment at Work According to Visibility of Sexual Orientation

One must be cautious about this interpretation, however. An alternative reading may be that colleagues simply hide their prejudices when an openly lesbian, gay, bisexual or transgendered person is present. The data that employees who were not visible heard more jokes about LGBT people behind their backs and perceived more widespread prejudice in the workplace than did their more open colleagues may support this hypothesis.102

Some of the open-ended comments reinforce the interpretation that visibility sometimes simply drives prejudice underground. E.g., “I hope they will begin to think about what they are saying, as I confront their behaviour every time. I am worried though, that they will just stop saying things in front of me, which means I can no longer try to change their behaviour and/or attitudes.”103 “I joined the Rainbow Network on the pretext of being a “friend” whereas I am a full member but not ‘out’. I received widespread negative comments & ridicule from junior staff through to senior managers. I felt very uncomfortable & I was able to see people’s reaction as if is assumed I was totally straight & why was I joining supporting this bunch of ‘weirdos’”104

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102 See Tables Q291*Q44a, Q29h*Q44a. Brower, DCA Report, supra note 33, at 31.
Employers should also worry about what this interpretation portends. Bias and prejudice may not be eliminated; they may merely be hidden until co-workers believe it is safe to express them after an openly LGBT person has left the room. The open-ended comments illustrate, however, that LGBT people may be present even when they are not visibly identified. The data also show that a biased workplace environment may affect visible and invisible sexual minorities, as well as heterosexuals. This consequence is particularly grave given the 2003 employment regulations on sexual orientation that make employers and employees responsible for harassment. Harassment includes name-calling, teasing, nicknames or upsetting behaviours, even without malicious intent. Moreover, behaviour is actionable although not targeted at specific individuals if it leads to a general culture that appears to tolerate the telling of homophobic jokes or other similar activities.

Remember also that one may link visibility and perceptions in the opposite direction. Perhaps when respondents had more negative perceptions of sexual orientation fairness, they were less likely to come out to their colleagues and co-workers. Visibility in the workplace may be a function of fairness perceptions, and not vice versa.


106 See, Advisory, Conciliation and Arbitration Service (ACAS), Sexual Orientation in the Workplace – a guide for employers and employees, at 9 (Nov. 2003) (The ACAS is a taxpayer-funded, public body whose interpretation of the 2003 Employment Equality (Sexual Orientation) Regulations was referred to approvingly by the Department of Trade and Industry.) DTI Explanatory Notes, Nos. 47-56, at 11-14 (2003).

107 See, Babbie, supra note 75. The SOF CA Report found evidence that negative treatment affected one’s comfort in disclosing sexual orientation. “One man in particular made gestures and anti-gay comments. Others would nod in agreement it was very scary to come out in that environment. The judge did dismiss this man after a while.” Brower, supra note 52, at 56. At least one court user respondent specifically reported that he or she passed as heterosexual rather than be subjected to mistreatment as gay or lesbian. Id. at 48-49. Accord, LA Bar Report, supra note 81, at 27 ("most gay attorneys attempt to avoid
Additionally, when asked about the concrete application of policies, 32.3 percent of all respondents thought that people used sexual orientation to devalue the credibility of some lesbian or gay employees. Moreover, 27.6 percent believe that openly gay or lesbian employees do not have the same chance of promotion as heterosexual employees, whilst 16.7 percent said it was harder to be hired if people suspect you are a lesbian, gay, bisexual or transgendered person. Finally, a small number [5.2 percent] believed that lesbian, gay; bisexual and transgendered employees receive less favourable work assignments than do their heterosexual peers.\(^{108}\)

Thus, another explanation for the apparent contradiction between some data of fairness and others of sexual orientation bias is that to the extent that one speaks in general terms about diversity and fairness to LGBT people, the workplace and its policies are perceived to be fair. When one explores the specific experiences or concrete observations of lesbian, gay, bisexual or transgendered employees, some Rainbow Network members believed that the policies are applied less fairly. Given these results and the reasonable inferences that can be drawn from them, it appears that a significant current of bias may exist below the surface of workplace interactions, and that LGBT employees are sometimes expected to remain closeted about their sexual orientation or risk suffering discrimination.

Moreover, to the extent that openness about one’s sexual orientation correlates with better perceptions of equal treatment, this interpretation underscores the earlier recommendation to maintain and strengthen DCA policies that support LGBT persons’ visibility at work. One may generalise this advice to other similar employers faced with parallel correlations. On the other hand, if sexual orientation prejudice is merely driven underground when openly LGBT individuals are present, it is incumbent on managers and peers, of all sexual orientations, to ensure that a climate of hostility or discrimination is not tolerated even when such individuals are absent or invisible. This last point sharpens the

\(^{108}\) See Tables 29g, 29f, 29j, 29i. Brower, DCA Report, supra note 33, at 33.
importance of the specific data on respondents’ actual workplace treatment and observations and their intervention after such experiences.

**RESPONDENTS’ EXPERIENCES AND TREATMENT RELATED TO SEXUAL ORIENTATION**

Beyond perceptions of fairness, the study inquired about positive and negative personal treatment and experiences. It asked Rainbow Network members and friends specific questions on what happened to them during the past year, and what they observed during that time period in various work settings.

Nearly one in four respondents heard negative comments about themselves based on sexual orientation; more than one in four were the subject of jokes, ridicule, or sniggering. Between one in six and one in ten Rainbow Network members or friends experienced negative actions, experienced verbal abuse or were called derogatory names or terms based on sexual orientation. Finally, over one in ten reported that their sexual orientation was used to devalue their credibility.

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109 In the past year, 23.4 percent of respondents heard negative comments about themselves based on sexual orientation and 4.4 percent heard such comments more than four times. See Table 16a. Brower, DCA Report, supra note 33, at 37.

110 In the past year, 18.1 percent of respondents experienced negative actions towards themselves based on sexual orientation with 4.4 percent experiencing such actions more than four times. See Table 16c. Brower, DCA Report at 37.

111 9.6 percent of respondents experienced verbal abuse, and 26.4 percent were the subject of jokes, ridicule and sniggering and 15.0 percent were called derogatory names or terms based on sexual orientation. See Tables 16e, 16f, 16i. Brower, DCA Report at 37.

112 12.7 percent stated that their sexual orientation was used to devalue their credibility. See Table 16h. Brower, DCA Report at 37.
Some of respondents’ open-ended responses are instructive. “Another member of staff used offensive words towards me, once he discovered I was gay. Making me feel uncomfortable.”[^113]

“Security personnel seem to think the visual disparity between my appearance and my gender identity is a subject of hilarity.”[^114]

“Because I keep to myself and do not conform to the married with children or clubbing model, people make up their own minds but I have heard the word dyke used. Even though I have not identified myself as being gay at work.”[^115]

“Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited).”[^116]

Figure 13
Responses to Negative Incidents Against Self

- took no action: 46.7%
- confronted perpetrator: 25.6%
- talked with colleague: 22.1%
- talked with someone else: 19.8%
- reported to senior office: 11.7%

Figure 14
Reasons for No Response to Negative Incidents Against Self

- thought nothing constructive would result: 18%
- thought not serious enough to intervene: 25.3%
- feared branding as troublemaker or other negative consequences: 31.8%
- feared reducing chances for promotion: 30.3%
- feared being labelled LGBT: 27%
- not sure how to intervene: 4.6%

Of the respondents who experienced some negative comment or action due to their sexual orientation, 46.7 percent chose to take no action in response, whilst 25.6 percent responded by confronting the person responsible for the negative comment or action. Nearly as many [23.1 percent] discussed the incident with a colleague or co-worker other than the perpetrator, whilst

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20.5 percent talked to someone else. However, only 7.7 percent reported the incident to a senior officer.

As telling as the data that nearly one half of respondents did not reply to their negative treatment or experience is many respondents’ apparently pessimistic attitude. One half believed that their intervention would be futile. A significant number believed that intervention would be affirmatively bad for them or for their careers. Nearly five percent were unsure about how to intervene.

Some examples of negative reactions to intervention are illustrated by the open-ended comments: "If you complain a meeting of the section would be called and all would deny saying anything - it would then turn the attention on to you for making a fuss in the first place." "negative comments / jokes about gay/transsexual people in particular are common at work and you are a troublemaker if you don’t keep your head down or join in with the ‘joke’ - or you are very ‘p.c’ - and as a result not ‘one of the group’" "I took relatively little action as I was worried & still am that people would guess / find out about my transsexuality as I am not out & may not be ready to be out at work for fear of widespread ridicule & prejudice. I saw & heard the reaction to someone who now presents as a woman in HQ.”

It is possible that many Rainbow Network members did not respond because they viewed the experiences as inconsequential. A striking 45.4 percent reported that they believed the incident was

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120 Of the 46.7 percent of respondents who took no action in response to a negative incident based on their sexual orientation, 50.0 percent took no action because they thought that nothing constructive would come from intervening. Brower, DCA Report at 39.
121 Nearly a third [31.8 percent] did not want to be branded a troublemaker or feared some other action would be taken against them. Additionally, 13.6 percent took no action out of fear of reducing their chances of promotion. Just over 9 percent [9.1 percent] did not act out of concern that they would by thought to be gay or lesbian. Brower, DCA Report at 39.
not serious enough to warrant intervention. However, given the high percentage that feared retaliation or some other negative action, it may be that some respondents simply had become inured to this behaviour or expected it as part of their working conditions.

Again, the open-ended comments reflect the hypothesis: "People just seem to take negative or derogatory remarks as par for the course A day to day occurrence." "I am often called a poof at work (in a 'jokey' situation) - but really, it isn't funny, but if I don't go along with the 'joke' I feel even more embarrassed or humiliated [sic]. It's a quieter/easier life to just go along with it." 

Indeed, as the last comment noted, some respondents identified a coping strategy to remain silent rather than deal with the situation. "I did not want to draw attention to myself." "IGNORED IT, AND I TEND TO FIND THIS WORKS, IF I REACT THEN HE WINS." "Sometimes making a comment makes a bigger deal out of something than just letting it go." "Couldn't be bothered explaining why it was offensive."

The data that nearly ten percent did not take any action because they feared identification as gay or lesbian reinforces this thesis. This reaction implies that being associated as homosexual in the workplace often leads to negative treatment - a conclusion with some basis.

"Another member of staff used offensive words towards me, once he discovered I was gay. Making me feel uncomfortable." "Security personnel seem to think the visual disparity between my appearance and my gender identity is a subject of hilarity." "I. Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited). II. Overheard existing staff telling new staff about my S.O. and finding it very

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130 Brower, DCA Report at 40.
amusing."³³⁴ "A manager is very clever with their obvious distaste for my lifestyle and accompanying popularity."³³⁵ "When people became aware of my homosexuality, some people who I had previously called friends stop talking to me! Others talked but refused to acknowledge anything to do with what they had heard. This was quite difficult for me to deal with but was 10 years ago. People get used to it."³³⁶ "My flexible working pattern was challenged, despite it being established, because it was not based on the premise of family responsibilities in the traditional sense."³³⁷ "I have no 'firm' evidence that this has happened - it is simply that the attitude of me particular colleague has changed considerably since he was told that I am gay. The sniggers, whispers, and 'appears' to be anti-gay - again, I can't prove this. [...]"³³⁸

For those employees who responded to a negative work experience based on their sexual orientation, 54.1 percent reported that their intervention or action had no effect, whilst 41.7 percent reported that the negative comments or actions stopped or decreased in frequency. Approximately 4 percent reported the person who made comments or took the actions was reprimanded.

or disciplined; one in five reported some other result. Figure 15, above, at Error! Bookmark not defined.

Respondents’ successful actions included: “It isn’t often expected by people who make such derogatory comments that the ‘victims’ of such comments will challenge them. I find deflecting comments back to the originator works quite well, but you have to be quite confident about yourself to carry this off.” “My own ‘dignified’ response made it unworthy of him to pursue things further PLUS court manager made him aware I was on to him [and] so was she!” “II. [to hearing existing staff tell new staff about his/her sexual orientation and laugh] Just made people aware that I knew problem [and] had overheard - not happened since. III. [to uninvited approach by heterosexual colleagues to ‘try something different’] Discouraged and informed the staff members that I am committed to partner and ‘unavailable for experiment’!” “He made another offensive comment in front of more staff [and] was embarrassed and started to dig himself out of a hole but made it worse so he shut up.” “Made a joke of the comments about me, to deflect any implied criticism about my abilities that might be due to my sexuality” Some examples of “other” responses were: “[talked to my] boyfriend, not a colleague.” “Went to Welfare” “[talked to a] friend”

Finally, at least one respondent admitted reporting the incident inaccurately because of fears of negative consequences.

I did not tell the person I discussed the comment with who had made the ‘joke comment’ about me. They discussed it with the person who made the comment. I had to lie and say the name of someone who had left. I felt ashamed that I had pointed the finger at the person who had left, but I felt I had no

139 See Table 19, 20. Brower, DCA Report at 42.
choice as the incident seemed to be getting out of control, and I didn’t want to be seen a troublemaker.\textsuperscript{148}

A slightly more than 40 percent successful intervention rate may appear somewhat disheartening. However, as stated earlier, only one quarter of those who took some responsive action confronted the perpetrator and considerably fewer than 10 percent spoke to a senior officer. Many respondents spoke with a co-worker or to someone else about their negative treatment. These latter actions, whilst understandable, may not significantly affect negative behaviours. Thus, it is unsurprising that half of the time nothing changed. In light of respondents’ fears of retaliation and despite the relatively few interventions designed to address the problem, the 41.7 percent successful intervention rate may be actually rather encouraging.

Respondents’ experiences with discrimination contain both significant similarities and differences to their experiences with negative comments or actions. One in five lesbian and gay employees and one half of transgendered persons reported experiencing discrimination at their workplace based on their sexual orientation. Only four percent of the heterosexual employees reported being discriminated against based on sexual orientation.

The distinctiveness of lesbian and gay identity in modern Britain helps explain the disparity between the experiences of LGBT persons and their heterosexual colleagues. Although British attitudes about homosexuality are changing,\textsuperscript{149} the spate of articles on how mainstream gay and lesbian identity is actually illustrates the opposite: that the sexual orientation identity of public figures and others is still news.\textsuperscript{150}

\textsuperscript{148} Open-Ended Comments, Q20. Brower, DCA Report at 42.
More specifically, often when we think about sexuality, we think of LGBT individuals as having a sexual orientation, but not heterosexuals.\(^{151}\) We rarely perceive the sexual orientation of non-gay persons because they are viewed as ‘normal’, that is, we measure difference from the heterosexual baseline.\(^{152}\) Accordingly, we do not ordinarily notice the sexuality of non-gay people; they are just ‘people’ and not a group viewed as characterized by their sexual behaviour.\(^{153}\) For example, sexual orientation protections

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\(^{151}\) For example, we ask whether homosexuality is biologically determined, not whether sexual orientation is (including heterosexuality). Scientists and others speak of finding a “gay gene,” and not one for sexual orientation. See, Dean H. Hammer, et al., *A Linkage Between DNA Markers on the X-Chromosome and Male Sexual Orientation*, 261 SCI. 321 (1993). See also, Devon Carbado, *Straight Out of the Closet*, 15 Berkeley Women’s L.J. 76, 109 nn. 205-206 (2000).


\(^{153}\) Some segments of the British, Irish and American gay communities use the term “breeder” to refer to all non-gay persons. E.g., Philip Hensher, *The Gay Mafia Hits Back at Its Enemies; Do We Want to Continue Being Sinister Organisation Exerting Influence Behind the Scenes Or Not?*, THE INDEPENDENT (LONDON), Comment, at 16 (12 Nov. 2002); Rob Morse, *We’re here, we’re having a beer…*, SAN FRANCISCO EXAMINER, at A-2 (29 June, 1997); Rich Kane, *AOHELL, Can A Gay Man Find Love Online?*, OC WEEKLY (ORANGE COUNTY, CALIF.), at 8, First Person (4 Apr., 1997); Michael J. Ybarra, *Odd Man In: Businessman Gavin Newsom Is the Latest Addition to S.F.’s Board of Supervisors. His Biggest Selling Point? The Fact That He’s A Straight White Male – A Relatively Rare Commodity In That City*, LOS ANGELES TIMES, Life-Style, pt E, at 1 View (31 Mar., 1997); Barbara Brotman, *Gay Or Straight, Readers Lust For ‘Savage Love’*, CHICAGO TRIBUNE, Tempo, at 1 (21 Nov., 1996); Edward Porter, *Nine Dead Gay Guys*, TIMES NEWSPAPERS, LTD.(U.K.), Features, at 12 (21 Sept., 2003) (reviewing movie from the perspective of a “boring old Breeder”), accord, Kevin Courtney, *The Straight Talk, There’s never been a better time to be a gay Irishman. I hate to say it, guys, but being straight is sooo last season*. THE IRISH TIMES, (IRELAND), at 61 (24 Nov., 2001) (using the term in Ireland as an ‘affectionate term’ by gay people for non-gays.). The rhetorical impact of that term illustrates the pejorative, misleading, and stigmatizing effect of a view that reduces people to one facet of their assumed sexual activity.
apply to gay and non-gay persons alike, but we usually do not notice that symmetry. Non-gay people appear not to need that protection because they do not appear different enough to provoke a negative reaction. Thus, it is unsurprising that few heterosexual DCA employees suffered negative treatment because of their sexual orientation.

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154 See, e.g., Employment Equality (Sexual Orientation) Regulations (2003/1661) ("Definitions 2. (1).- In these Regulations, "sexual orientation" means, an orientation towards – (a) persons of the same sex; (b) persons of the opposite sex; or (c) persons of the same or of the opposite sex.")

155 United States Supreme Court Justice Antonin Scalia’s dissent in Romer v. Evans, 517 U.S.620 (1996), provides a striking example of this inattention in his description of the law challenged in that case. He stated that the state constitutional amendment at issue (Amendment 2) merely banned special rights for gay people and returned Colorado law to neutrality. Romer, 517 U.S. at 638-39 (Scalia, J., dissenting). On a purely descriptive level, he misstated the effect of the Colorado law. Each of the ordinances affected by the amendment, e.g., Aspen, Boulder, Denver, and the state Executive Order, barred discrimination on the basis of sexual orientation. Id. at 623-24, 626-27 (quoting Evans v. Romer, 854 P.2d 1270, 1284-85 (Colo. 1993)(Evans I). Amendment 2 prohibited anti-discrimination provisions based on homosexual, lesbian, or bisexual orientation only. Colo. Const. Art. II, § 30b; Romer, 517 U.S. at 624. Thus, heterosexuals, as heterosexuals, would have remained protected against discrimination under these ordinances; gay people would not have been.

156 Cf., Romer, 517 U.S. at 631.

157 But see, e.g., Susan Ferriss & Erin McCormick, When a kiss isn’t just a kiss: Castro bar tosses straight smoochers, SAN FRANCISCO EXAMINER, at A-1 (9 Mar., 1997)(gay bar owner ejects man and woman for kissing, SF Human Rights Comm’n orders gay bar to change anti-heterosexual kissing policy to comply with sexual orientation discrimination prohibitions.); Straight Couples Say Ejected From Gay Hotel, CHATTANOOGA TIMES FREE PRESS (TN), at A2 (17 April 2004)(heterosexual couple asked to leave gay guesthouse in Key West, Florida; violates city sexual orientation anti-discrimination law.).
Although it is unremarkable that more lesbian and gay and transgendered employees report sexual orientation discrimination than do their heterosexual counterparts, it should be of serious concern that 20.3 percent of gay and lesbian employees and 50 percent of transgendered employees experience discrimination at their workplace.\textsuperscript{158} Figure 16, above, at 57.

Remember that slightly over one-half of the self-identified LGBT employees are visible as non-heterosexual to their co-workers, and about one fifth more have come out to some but not all of their co-workers. It follows that this visible group would experience a higher percentage of discrimination than do employees who hide their minority orientation or who are heterosexual.\textsuperscript{159}

\textsuperscript{158} See Table Q23*Q34. Brower, DCA Report at 45. Care must be taken with the figures on transgendered individuals as the sample size is small. Nevertheless, the difference in percentages between transgendered persons and others is striking – even given the significant numbers of lesbian and gay persons (20.3%)

\textsuperscript{159} See Table 44. Cf. Brower, \textit{Obstacle Courts}, at 25. This conclusion is borne out by the studies of the treatment of lesbian and gay men in the California courts. The results in the English and Welsh courts are somewhat more equivocal. On some measures, more closeted LGBT persons reported more instances of harassment and negative actions. See above, text accompanying notes 72 - 107.
Moreover, visibility as a lesbian, gay, bisexual or transgendered person appears to correlate with beliefs about fairness and equal treatment, but not in an obvious way. One might expect that this visible group of LGBT individuals would experience more discrimination, and that, accordingly, they would perceive more unfairness and inequality. The data do not always reflect that pattern. On some measures, the more open group had higher perceptions of fairness than did their colleagues who were less visible about their sexual orientation. Thus, treatment and perceptions of treatment do not always coincide.

One might theorise that those measures where higher perceptions of equal treatment correlate with increased visibility as lesbian, gay, bisexual or transgendered illustrate that attitudes may override actual experience. Possibly, the better one feels about oneself and one’s value as a diverse member of the DCA, the better one is able to deal with problems. Respondents’ comments reinforce this theory. “It isn’t often expected by people who make such derogatory comments that the ‘victims’ of such comments will challenge them. I find deflecting comments back to the originator works quite well, but you have to be quite confident about yourself to carry this off.” “My own ‘dignified’ response made it unworthy of him to pursue things further PLUS court manager made him aware I was on to him [and] so was she!”

Thus, some of the open-ended comments by persons who described their intervention strategies may demonstrate that increased confidence as a LGBT person may lead to positive results or at least to the perception of positive results.

This last caveat about perceptions of positive results is important; perception is not reality. The data do not reflect that openly LGBT persons actually experienced different treatment based on sexual orientation than did their less open colleagues. That parity held true for their treatment by others, their assessment of the seriousness of their negative experiences, and their appraisal

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160 See notes 63 - 75, and accompanying text.
of the success or failure of remedial intervention.\textsuperscript{163} Thus, although the data may suggest that perceptions of positive treatment may coincide with increased visibility, actual experiences do not reflect a difference.

As discussed earlier, alternative and less sanguine explanations for the correlation between visibility and treatment may exist.\textsuperscript{164} Attitudes towards sexual minorities are kept undercover in some workplaces. People may avoid expressing negative comments or actions when they perceive others would be hostile to them. Nevertheless, resistance to equal treatment based on sexual orientation may persist. Those negative actions or comments may only surface when LGBT individuals are believed to be absent. For example, one respondent related a telling experience. He is gay but closeted, and thus, is ostensibly heterosexual to his colleagues. "I joined the Rainbow Network on the pretext of being a "friend" whereas I am a full member but not 'out'. I received widespread negative comments & ridicule from junior staff through to senior managers. I felt very uncomfortable [and] I was able to see people's reaction as if is assumed I was totally straight [and] why was I joining supporting this bunch of 'weirdos' "\textsuperscript{165}

With respect to overt and covert bias inside and beyond judicial systems, bias and prejudice remain even where people profess not to have such attitudes.\textsuperscript{166} Moreover, prejudice against one group often correlates to prejudice against other groups.\textsuperscript{167}

\textsuperscript{163} See data sheets reflecting the cross-tabulation of Question 44 (on visibility of sexual orientation) with the other survey questions. (In the author's personal files.)

\textsuperscript{164} See above, text accompanying notes 72 - 107 and accompanying text.


\textsuperscript{166} See, e.g., Stonewall, \textit{Citizenship 21 Project, Profiles of Prejudice}, (July 2003). Key Findings at 14 (there are high levels of prejudice in England against some groups and even higher levels of denial or prejudice against those groups); at 13 (people sometimes relate a smaller incidence of prejudice against certain groups than other measures of the incidence of prejudice actually demonstrate), at 15 (there appear to exist 'socially acceptable' and 'socially unacceptable' prejudices, with people substituting the acceptable for the unacceptable.); see generally, Charles Lawrence III, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 Stan. L. Rev. 317 (1987).

\textsuperscript{167} Stonewall, \textit{Profiles of Prejudice}, at 12 (strong correlation exists between the holding of racist and homophobic views).
Other surveys of courts demonstrate that bias against lesbians and gay men persists on many levels, even in the face of prohibitions against sexual orientation discrimination and diversity training. Further, lesbians and gay men routinely are among the groups to whom American jurors report they cannot be fair—three times more likely for gay litigants than for African-Americans, Asians, Hispanics or Whites. Similarly, anecdotal accounts of prejudice within UK juries also exist. Thus, it should be neither surprising nor aberrant to find that sexual orientation bias exists in the DCA, even where employees perceive relatively high levels of fairness or equality.

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168 See generally, Todd Brower, Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts, 11 Am. U J. of Gender, Soc. Pol'y & Law 39 (2003); Todd Brower, "A Stranger to Its Laws:" Homosexuality, Schemas, and the Lessons and Limits of Reasoning By Analogy, 38 Santa Clara L. Rev. 65 (1997). Accord, "It has always been court staff whom I have witnessed using negative comments or ridiculing LGBT people. These are people who have been on Diversity courses!" Open-Ended Comments Q3. Brower, DCA Report, at 56.

169 Peter Aronson, David Rovella, and Bob Van Voris, Jurors: A Biased Lot, THE NATIONAL LAW JOURNAL, at A1 (2 Nov., 1998)(reporting results of annual National Law Journal-Decision Quest 1998 Juror Outlook Survey)(USA); Ben Schmitt, Poll: Jurors Would Buck Laws to Achieve Justice, FULTON COUNTY (GA) DAILY REPORT (16 Nov., 1998)(USA)(reporting results of 1998 National Law Journal-Decision Quest 1998 Juror Outlook Survey: less than 5% of respondents said they could not be fair to a Black or Hispanic litigant, 17% could not be fair to a lesbian or gay litigant.); Bob Van Voris, Voir Dire Tip: Pick Former Juror, at A1, NATIONAL LAW JOURNAL (1 Nov., 1999)(USA)(1999 Juror Outlook Survey results: 3% of respondents said could not be fair if a litigant were Black, Asian, American Indian or White, 4% for Hispanic litigants, 12% if the party were a lesbian or gay man) The 1999 data show that among respondents over the age of 65, 20.4 percent stated they could not be fair to a lesbian or gay litigant. Press Release from Decision Quest on website: www.nlj.com/1999/juryl101, downloaded 2/8/00 1:18 pm PST.

170 Rachel Vincent, 'I overheard a juror saying his idea of a drug dealer was a big black bloke', THE GUARDIAN (LONDON) (28 Oct., 2003)(discussing racial bias by jurors); Candida Lloyd, "Is that a writ in your pocket?", THE INDEPENDENT (UK), (3 Feb., 2004)(same). However, most traditional British legal doctrine has prevented examination of juror attitudes by empirical means. Id. See also, R. v. Mizra, The House of Lords, THE TIMES (LONDON), (23 Jan. 2004); See generally, Peter Herbert, Racism, Impartiality and Juries, 146 New L.J. no 6706, p 1138 (1995).
In contrast to negative treatment or action directed at respondents because of their sexual orientation, when confronted with actual discrimination, many more respondents tried to ameliorate the situation. Nevertheless, the rate of effective interventions decreased. Although 92.3 percent of employees responded to being discriminated against based on their sexual orientation, 57.1 percent reported that nothing resulted from that action, 33.3 percent thought the discrimination stopped or decreased in frequency or severity; 14.3 percent reported that they were branded a troublemaker or some action was taken against them; and 7.1 percent believed that the discrimination increased in frequency or severity. The Open-Ended responses detail some incidents of discrimination:

\[171\] See Tables 24, 25. Brower, DCA Report at 47.
In short, 15 years ago I was offered the post of Principal Private Secretary of the Lord Chancellor; came out; and the offer was withdrawn. I made little secret of what had happened, and [his/her circumstances were part of an investigation in the cabinet office] which the then cabinet secretary discussed with Permanent Secretaries. That was in a period when attitudes were slowly beginning to change. Since then, my sexual orientation has not been an issue in formal terms (although it has [...] affected some relationships).\(^{172}\)

The incident in question occurred a few years ago. My working relationship with a young, female line Manager broke down when one discovered I was gay. She was a very religious person. She had a very negative view of homosexuality as a result of her beliefs. Having previously worked together harmoniously before she discovered I was gay, she started to pick fault with me once she was aware. LCD personnel were very supportive\(^{173}\)

"I HAVE NO EVIDENCE OF DISCRIMINATION, BUT BELIEVE IT TO BE IN MY MANAGERS' MINDS. I AM TEMPTED TO SAY IT EFFECTS THEIR JUDGEMENTS BUT HAVE NO EVIDENCE. (IT COULD ALL BE IN MY MIND!!)"\(^{174}\) "Not invited to various functions [and] events due to having same-sex partner"\(^{175}\) "Because I was a nice guy helping out a younger male colleague with some [work] it was thought I was after sexual favours."\(^{176}\)

Of those respondents who believed that they were discriminated at work because of their sexual orientation, only 5 percent confronted the person who was the discriminatory actor.\(^{177}\) Respondents' other actions taken in response to perceived sexual

\(^{172}\) Open-Ended Comments Q26. Brower, DCA Report at 47.
\(^{175}\) Open-Ended Comments Q26. Brower, DCA Report at 47.
\(^{176}\) Open-Ended Comments Q26. Brower, DCA Report at 47.
\(^{177}\) See Table 24. Brower, DCA Report at 48.
orientation discrimination varied: 46.1 percent looked for another job, 42.8 percent discussed the incidents with a colleague or a co-worker, 35.7 percent reported the incident[s] to a senior officer, 14.3 percent consulted an employment advisor, 15.4 percent talked to someone else, and 7.7 percent took no action.\textsuperscript{178}

A large number of employees [75 percent], who did not respond to personal discrimination, thought nothing constructive would result from their action.\textsuperscript{179} Some respondents stated: "I felt it would be a waste of time"\textsuperscript{180} "I did not wish to come out, since my personal life is irrelevant and [too] complex to be explained to colleagues. I [...] decided to let the issue pass."\textsuperscript{181}

Of equal significance, 75 percent feared being branded as troublemakers or feared some other negative action would be taken against them, and 25 percent believed that taking some action would reduce their chances for promotion. As an important rebuke to LCD reporting policies, 25 percent were unsure about what to do or did not know how to intervene.\textsuperscript{182}

One can compare the responses to survey questions about discrimination and those relating to negative comments or actions. With discrimination, few respondents directly confronted the perpetrator; a much larger percentage reported the discrimination to a senior officer. Respondents' interventions after negative treatment or hostile behaviours, but not discrimination, followed an opposite pattern.\textsuperscript{183} However, here, too, many more Rainbow Network members chose oblique responses, such as talking to a colleague or others.\textsuperscript{184}

Further, in discrimination experiences, more respondents tried to remove themselves from the workplace than report the discrimination or confront the behaviour. Some open-ended comments reflected these choices: "Left the Court Service."\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{178}See Table 24. Brower, DCA Report at 48.
\item \textsuperscript{179}See Table 27. Brower, DCA Report at 48.
\item \textsuperscript{180}Open-Ended Comments, Q22. Brower, DCA Report at 48.
\item \textsuperscript{181}Open-ended Comments Q21.12. Brower, DCA Report at 48.
\item \textsuperscript{182}See Table 27. Brower, DCA Report at 48.
\item \textsuperscript{183}Compare Table 24 with Table 18. Compare Brower, DCA Report at 48 with 39.
\item \textsuperscript{184}See, e.g., "boyfriend, not a colleague." "Went to Welfare". Open-Ended Comments, Q24.7. Brower, DCA Report at 48.
\item \textsuperscript{185}Accord, Open-Ended Comments, Q24.8. Brower, DCA Report at 48.
\end{itemize}
“Personnel took my complaint seriously and helped me move to another job. However, no action was taken against the individual in question.”

This choice is perhaps explicable because most respondents reported that their intervention was ineffective. Moreover, even with a higher response rate in discrimination experiences, successful interventions decreased and negative consequences increased. Nearly 15 percent stated that they were branded a troublemaker and over 7 percent believed their intervention exacerbated the discrimination by increasing the severity or frequency of the discrimination.\(^{187}\) One might question the effectiveness of the LCD’s policies and procedures with respect to sexual orientation discrimination. Therefore, even more sharply than with the prior recommendation on controlling negative behaviours, the data reflect that, like the DCA, an employer with similar responses ought to clarify its policies on incident reporting and intervention and to monitor and improve the effectiveness of those policies.

Differences between two forms of sexual orientation discrimination may help explain the disparate reactions of respondents to these behaviours. Anti-discrimination law recognises two separate types of actionable conduct, direct discrimination and harassment. The former is treating some persons worse than others in hiring, promotions, job conditions, or other tangible consequences.\(^{188}\) The latter is creating or maintaining a hostile workplace environment based on such things as negative comments, jokes, and other behaviours not related to the grant or denial of tangible job benefits.\(^{189}\)

Some employees may see a hostile workplace environment as something to which they must simply become accustomed. For

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\(^{187}\) See text accompanying notes 170, supra. Brower, DCA Report at 47.
example, “People just seem to take negative or derogatory remarks as par for the course A day to day occurrence.”\textsuperscript{190} “I am often called a poof at work (in a ‘jokey’ situation) - but really, it isn’t funny, but if I don’t go along with the ‘joke’ I feel even more embarrassed or humiliated [sic]. It’s a quieter/easier life to just go along with it.”\textsuperscript{191} One is tempted to attribute this employee reaction to the proverbial British ‘stiff upper lip.’ To the extent that that concept entails imperturbability or stoicism in the face of adversity, it may not be far from the mark.\textsuperscript{192} The open-ended comments, however, suggest a certain resignation to hostility as well.\textsuperscript{193}

A recent anthropological exploration of English behaviour suggests an alternative perspective. In \textit{Watching the English The Hidden Rules of English Behaviour},\textsuperscript{194} Kate Fox states that one distinctive characteristic of ‘Englishness’ is an indirect, ineffectual, moaning about problems. One does not complain to or confront the source of ones discontent; one merely whines to a colleague or other person, without proposing practical solutions.\textsuperscript{195} Fox contrasts this reaction to the more direct, confrontational approach of Americans or other foreigners.\textsuperscript{196}

\textsuperscript{191} Open-Ended Comments, Q17. Brower, DCA Report, at 40.
\textsuperscript{193} \textit{See}, \textit{e.g.}, text accompanying notes 190 - 191.
\textsuperscript{195} KATE FOX, \textit{WATCHING THE ENGLISH}, at 405.
\textsuperscript{196} KATE FOX, \textit{WATCHING THE ENGLISH}, at 303 (discussing the reaction to bad food or service), at 154 (discussing queue jumping).

Although she does not explicitly do so, one may separate her examples into two situations. The first is where the reason for indirectness relates to the
One may examine her discussion of queue jumping for clues as to the indirectness and yet effectiveness of Rainbow Network members' interventions after negative treatment or experiences. Fox suggests that queue jumping is deeply offensive behaviour at odds with an English person's sense of fair play and with a primary social activity, standing in line. Nevertheless, she found that despite its offensiveness, the typical reaction to this anti-social action was oblique and non-confrontational – comments to others and not to the perpetrator. This reaction is intended to police behaviour while still maintaining the normal rule of social interaction 'not to cause a scene,' 'not make a fuss' or 'draw attention to oneself.' Notice that those phrases are echoed in respondents' open-ended comments about their interventions after negative experiences. "If you complain a meeting of the section would be called and all would deny saying anything - it would then turn the attention on to you for making a fuss in the first place." "Sometimes making a comment makes a bigger deal out of something than just letting it go," "IGNORED IT, AND I TEND TO FIND THIS WORKS, IF I REACT THEN HE WINS."

Interestingly, Fox also found that these indirect responses were often successful in preventing or curbing the abuse of queue jumping among those who were attuned to the signals of the native culture. Accordingly, the English ability to police aberrant behaviour through indirect means may help explain the

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English desire not to make a fuss or be confrontational. See, e.g., Fox, *Watching the English*, at 301-304 (poor service at restaurants, etc.); at 154-156 (queue jumping). The second contain examples in which the complaint serves as a ritualized moaning and is an instrument for social bonding and interaction amongst peers. See, e.g., Fox, *Watching the English*, at 31-32 (weather complaints or general weather talk); at 199-200 (workplace moaning). In the latter, oblique complaints are therapeutic and not intended to resolve issues. Fox, *Watching the English*, at 199. It is the first category, the desire not to confront or make a fuss, which may be relevant to understanding Rainbow Network members' experiences and reactions.

197 Fox, *Watching the English*, at 154.
198 Fox, *Watching the English*, at 156.
199 Open-Ended Comments, Q15. Brower, DCA Report at 39
surprisingly high success rate (greater than 40 percent) of Rainbow Network members’ relatively passive interventions.

To the extent that Fox’s work provides insight into respondents’ reactions, it may demonstrate an ingrained trend towards indirectness, avoidance of confrontation, and consequent mix of effective and ineffectual solutions. We may often characterise even the successful responses as oblique. "IGNORED IT, AND I TEND TO FIND THIS WORKS, IF I REACT THEN HE WINS." Rutland, Participant interview. 203 "My own “dignified” response made it unworthy of him to pursue things further PLUS court manager made him aware I was on to him [and] so was she!" 204 "I. [to hearing existing staff tell new staff about his/her sexual orientation and laugh] Just made people aware that I knew problem [and] had overheard - not happened since." 205 Moreover, when there is confrontation, the shock of that response may increase its effectiveness. "It isn’t often expected by people who make such derogatory comments that the ‘victims’ of such comments will challenge them. I find deflecting comments back to the originator works quite well, but you have to be quite confident about yourself to carry this off." 206

In contrast to respondents’ relatively passive responses to lower-level negative experiences, with actual workplace discrimination, more Rainbow Network members reacted actively. 207 Moreover, fewer respondents believed that those occurrences were not serious enough to intervene. 208 Nevertheless, these discriminatory behaviours may be more entrenched in the workplace, harder to eradicate, and demand more dramatic action by management. Thus, there were fewer positive results after respondents’ interventions 209 and the situation sometimes worsened after intervention. 210 These failures are especially troubling because fewer respondents confronted the perpetrator

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207 See text accompanying notes 171 - 176.
208 Table 27. 20% believed that the incidents were not serious enough to intervene.
209 See text accompanying note 183 - 187.
210 See text accompanying note 187.
directly and more went to superiors, all actions recommended by the LCD in these situations. Finally, that some employees left the job or the DCA reinforces the failure of existing mechanisms to deal adequately with these issues.

The 2003 Employment Equality (Sexual Orientation) Regulations bring an opportunity to change old patterns, revise employment practices and improve educational and training efforts. Legislation now buttresses DCA and other UK employers' workplace policies to prohibit hostile environments and direct discrimination and make both employers and employees responsible for this behaviour. This should provide added impetus to train and educate workers and managers to give them tools to handle these situations.

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211 See text accompanying note 183 (respondents' actions). For procedures in case of discriminatory behaviours, see, e.g., LCD, Court Service Employee Handbook, Equality and Diversity Statement, at 16-17 (1 April, 2002) ("If you have a complaint")

212 See text accompanying note 185 -186.

213 Employment Equality Regulations (Sexual Orientation) at 22(1) (employer liability), at 22(1) and 23(2) and 23(5) (employee liability – aiding unlawful acts); ACAS, Sexual Orientation and the Workplace. A guide for employers and employees, at 8 (November 2003); DTI, Explanatory Notes, notes at 40-41 (Notes to Regs. 22 and 23).
OBSERVATIONS OF BEHAVIOURS DIRECTED AT LESBIAN, GAY, BISEXUAL AND TRANSGERENDERED INDIVIDUALS OTHER THAN RESPONDENTS

OBSERVATIONS AND EXPERIENCES

Because the DCA regulates courts and associated agencies in England and Wales, Rainbow Network members observed the treatment of LGBT persons in the legal system. Using DCA employees to assess the treatment of LGBT individuals as court users may appear to be a second-best solution. Of course, one might profitably survey LGBT court users directly to garner their experiences.\(^{214}\) Gaining access to that survey population is difficult, especially since court users are not members of one particular organisation or reachable by any targeted means. Add to that problem the difficulties inherent in any empirical work on LGBT persons and the task is daunting.

However, the one research study that did assess the personal experiences of lesbian and gay court users, the 2001 California Judicial Council Report, found that the court employees' observations confirmed the experiences of that group of court users.\(^{215}\) Accordingly, Rainbow Network Members and Friends not only reported on their own experiences, but also

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\(^{214}\) See, e.g., SOF CA Report; Brower, Obstacle Courts, 11 Am. U. J. of Gender, Soc. Pol'y & the L. 39.

\(^{215}\) See, Brower, Obstacle Courts, 11 Am. U. L. J. Gender, Soc. Pol'y & the L., at 50.
provided data on the treatment of LGBT people in the courts whom they personally observed. Those observations did not depend on Rainbow Network members’ status as heterosexual or non-heterosexual, and answers rarely differed according to respondents’ sexual orientation.\textsuperscript{216}

The data on the treatment of others is significant for what it says about the experiences of LGBT individuals in the courts, and also because others’ treatment influences one’s own experiences in the workplace. This section is divided into observations made in non-court settings and those made in open court.

In workplaces other than open court (e.g., judge’s chambers, meetings, offices, etc), respondents observed the following incidents involving LGBT individuals other than themselves. Nearly two-thirds of Rainbow Network members heard negative comments, ridicule, snickering, or jokes about gay men or lesbians.\textsuperscript{217} A significant number of respondents had such experiences from four to twelve times in the past year and some more than twelve times.\textsuperscript{218}

In that setting, two out of five respondents heard disparaging terms or comments about LGBT individuals. Over one out of every five respondents viewed negative actions taken against that group and saw disparaging gestures towards them, whilst over one out of ten respondents reported that sexual orientation was used to devalue the credibility of a participant in a case.\textsuperscript{219}

\textsuperscript{216} See, Brower, DCA Report.

\textsuperscript{217} 61.8 percent of respondents observed negative comments about LGBT individuals one to three times over the past year, with 20.8 percent observing such negative comments over 4 times. 60.1 percent of respondents reported ridicule, sniggering or jokes about LGBT people, with 21.1 percent having four to twelve such observations in the past year, and 7.4 percent having more than twelve such observations. See Tables 9a, 9b, 9i. Brower, DCA Report, at 50. Nearly twice as many women and men heard such negative comments. Women: 81.8 percent to men 49.2 percent. See Table Q9a*Q33. Brower, DCA Report, at 50.

\textsuperscript{218} Brower, DCA Report, supra note 33, at 50.

\textsuperscript{219} Id. Specifically, 40 percent of employees heard derogatory terms or comments about LGBT individuals; 20.2 percent of respondents viewed negative actions against LGBT individuals; 22.3 percent saw disparaging gestures towards LGBT people. 11.0 percent reported that sexual orientation was used to devalue the credibility of a participant in a case. See Tables 9k, 9c,
Some of the open-ended comments are illustrative: “The judiciary have a code when talking about non heterosexuals. The phrase used for LGBT people is usually something like “isn’t he a queer chap”220 “I have heard comments such as he’s a shirt-lifter. Backs to the wall lads,” and “you can tell she’s a dyke, she’s butcher than I am!”221 “Odd limp-wrist gesture”222 “In a court case between two gay women seeking custody of a child - the words ‘it’s not normal’223 “You know what they are, don’t you” were frequently used. One manager was referred to as ‘She’s one of those” (She may not be of course) What people don’t know, they make up.”224

Court employees also heard negative comments about heterosexuals, albeit to a much smaller degree. Respondents heard nearly five times more negative comments about gay men or lesbians than they did about heterosexuals.225 This disparity is not surprising given that most people do not consciously think of heterosexuals as having a sexual orientation, but rather as the norm against which one measures LGBT individuals’ sexual orientation.226 People tend to attribute any negative comments about a heterosexual’s sexual behaviour to that individual and not to the group as a whole.227 Accordingly, one would not expect a large number of negative views expressed about heterosexuals’

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9j, and 9l; and see Figure 19, supra, at 69. In a similar pattern to the negative comments and ridicule, more women than men heard disparaging comments about LGBT individuals and reported that sexual orientation was used to devalue credibility. Disparaging comments: women 44.4 percent, men 37 percent. See Table Q9k*Q33. Devalue credibility: women 69.7 percent, men 54.1 percent. See Table Q9i*Q33. 220 Id at 51. 221 Id. 222 Id. 223 Id. 224 Id. 225 Id. at 50. Only 13.9 percent reported hearing any negative comments about heterosexuals during that same period. See Table 9b. 226 See, e.g., Brower, supra note 52, at 62, discussing how the word “heterosexual” first came into English in contradistinction to “homosexual.”). 227 See, e.g., Carbado, 15 BERKELEY WOMEN’S L.J. 118 (“White heterosexuals do not have to worry about whether a fictional film villain who is heterosexual will reflect negatively on their heterosexuality,” citing to Vito Russo, The Celluloid Closet: Homosexuality in the Movies, (1981) at 207.
sexual orientation, since people do not view their sexuality as distinctive of the group. For example, a comment about the promiscuity of a heterosexual is likely to be phrased (and understood) in terms of that particular individual’s actions (“She sleeps with anyone.”). In contrast, one may state a similar remark about a gay man as a group characteristic (E.g., “No wonder he has AIDS, poofs sleep with anyone.”). The responses to questions about positive comments or actions based on sexual orientation buttress this insight.

In settings other than open court, the percentages of respondents observing positive comments or actions towards LGBT individuals and towards heterosexuals were similar.

228 Accord, id. at 99 ([A man] “can be moody, irritable, or brusque without it being attributed to [his] sex, to biological changes in [his] life, or to menstruating or experiencing “PMS.”). For a striking comment about court staff treatment of all sexual orientation minorities, see generally, Brower, supra note 52, at 61 (“When helping lesbians or gays some of the clerks handle their paperwork touching only the tips or edges of the paper. Yet another court employee stated, ‘You never know what they did or touched.’”)
Slightly over one in four respondents heard positive comments about LGBT people. During the same period and in the same setting, slightly less than one in four heard positive comments about heterosexuals.\textsuperscript{229}

However, respondents generally observed a greater frequency of positive comments or actions towards heterosexuals than towards LGBT individuals. Of respondents hearing positive comments about LGBT people, 30.9 percent heard those comments one to three times, 10.6 percent heard such comments from four to twelve times, and only 1.1 percent over twelve times. In contrast, only 10.6 percent of respondents heard positive comments about heterosexuals one to three times, 13.8 percent between four and twelve times, and 12.8 percent over twelve times.\textsuperscript{230} Finally, more people saw positive actions towards heterosexuals than towards LGBT people.\textsuperscript{231}

In workplaces in and out of open court, respondents heard negative comments about LGBT people approximately one and one half times more often than they heard positive comments.\textsuperscript{232} Thus, even though respondents heard positive comments, the negative comments likely overshadowed the positive. The frequency of negative comments may provide a basis for sexual minorities to perceive bias when participating in the court system as participants or employees.\textsuperscript{233}

In reporting the data on positive comments, the author does not suggest that judges or DCA employees are or should be engaged in favouritism toward LGBT individuals. The survey

\textsuperscript{229} 42.6 percent of respondents heard positive comments about LGBT people in non-court settings; 37.2 percent heard positive comments about heterosexuals. See Tables 9c, 9f, 9g, and 9h. "With regard to positive comments about heterosexual people, there are constant references such as 'good, family man' etc." "I have never heard positive comments about heteros in a context which implies negative assumptions about LGBT people. But all the time you hear positive comments about defendants having the support of their (hetero) partners. No problem with that." Brower, supra note 33, at 53.

\textsuperscript{230} See id. Tables 9c, 9f, 9g, and 9h.

\textsuperscript{231} Positive actions: 32 percent towards heterosexuals compared to 27.6 percent towards LGBT persons. See Tables 9c, 9f, 9g, and 9h. Id.

\textsuperscript{232} Non-court, 61.8 percent to 42.6 percent = 1.45. In open court, 27.7 percent to 17.2 percent = 1.61. Compare Tables 9a, 9e with 2a, 2e. Compare id. with 55.

\textsuperscript{233} See notes 65 - 68 and accompanying text on perceptions.
specifically requested information on positive experiences, comments and observations based on sexual orientation in order not to skew or distort respondents' replies towards the negative. An accurate picture of sexual orientation fairness would include both positive and negative experiences and observations.

Indeed, just as interesting as the number of positive comments are the type of comments about LGBT people that respondents perceived as positive. The open-ended survey responses show that positive comments or actions tended to be those in which people treated sexual orientation minorities with equal respect and fairness. Positive actions or comments included situations where the judge used respondent's preferred gender pronouns, or where neither the judge nor lawyers mentioned sexual orientation in a same-sex assault matter.

The open-ended comments are instructive: "I was the defendant in a civil action. The judge was extremely courteous [and] referred to me [...] as 'Miss [X]' and used my preferred identity (ea. Use of feminine pronouns like "she" [and] "her")". "One case was of indecent assault by one female on another, and no reference was made as to the sexuality of either party". See also this comment, "I counterbalanced the comment by the judge or the barrister by saying positive things about him. She agreed and we then went on to discuss how his approach worked better due to his better reading of the situation - this was all in chambers not in open court itself."

That survey respondents describe equal treatment or respectful comments as positive tends to show Rainbow Network members' low expectations of equal treatment within the DCA.

The other examples of positive treatment tend to be more problematic. Often they involve stereotypes about gay men. Again, the open-ended comments are illustrative. "The positive comment related to my being a gay man [and] my attention to personal hygiene [and] dress sense." "Positive comments along lines of "you're well dressed, handsome [and] kind so you must be

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234 Brower, DCA Report, supra note 33, at 14.
235 Open Ended Comments Q10. Id. at 54.
236 Id.
237 Id.
238 Id.
Positive actions along lines of attempted pick-ups from other (presumably LGBT) members of staff. Was asked to conduct a sensitive interview (with a female colleague) because it was felt the two of us would deal with matter better than the male heterosexual alternatives. Illspoken, but obvious, assumption a gay person would be better - stereotyping?

A colleague [sic] said one time I was more approachable as a man because I was gay! I took that as a positive comment as it was clearly intended as such!

One respondent offered "Regular speculation that LGBT members of staff get promoted because of their sexual orientation! (positive discrimination for a change!)" Thus, whilst correctly labelled as positive, these comments have more than a hint of stereotypical assumptions behind them or beliefs about cliquishness.

As others have recognised, even the use of positive stereotypes has undesirable consequences. First, what appears to be a positive stereotype to one person may not be to another. Second, and more importantly, to assert a positive stereotype may actually reinforce negative ones as well. Saying that gay men have good fashion sense or are more sensitive often comes with the implied codicils that they are superficial and flighty or not tough.

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239 Id.
240 Id.
241 Id.
242 Id.
243 Id.
245 Richard McGregor, Foreigner-friendly Metropolis Has Global Ambitions, FIN. TIMES (London), Oct. 27, 2003 at 6 (discussing the Chinese in Shanghai using stereotype of Jews as being clever with money, which they believe is a positive statement about Jews).
enough in business. Moreover, whether stereotypes are good or bad, they often underline social difference as they countenance a view of people by reference to group features, and not as individuals. Although majority group stereotypes exist, people rarely take them seriously as a shared characteristic, but as something that applies to only some persons.

246 Cf., A. A. Gill, *They’re Winning the Generation Game*, THE TIMES (London), June 1, 2003 at 12 (discussing positive stereotypes of blacks as carrying with them negative ones); *Challenging the Centipede*, THE GUARDIAN (London) Sept. 15, 1992 at 27 (Letters to columnist: “But perhaps the most dangerous aspect of positive stereotypes is that they leave so much room for other stereotypes. Your article provided some good examples. ‘The Welsh... are not good partners... are wonderfully indifferent to the art of administration.’ Not really all that different than saying all regions have an inbuilt sense of rhythm, is it?”)


248 Matt Keating, *The Editor: From the Gay and Lesbian Magazines: Living as a Homosexual by the Muslim Book*, THE GUARDIAN (London), July 28, 2004 at 24 (discussing choices of stereotypes that gay men have shown to them as reality television); Johann Hari, *A Queer Way to Look at Gay People*, THE INDEPENDENT (London), May 28, 2004 at 33. Interestingly, even articles trying to demonstrate that stereotypes of gay people are sometimes inaccurate depend for their punch on the contrast between certain gay people and the assumed majority who conform to the stereotype. See, e.g., Simon Fanshawe, *You Don’t Have to Play it Straight*, THE GUARDIAN (London), August 11, 2004 at 2 (discussing the ‘novelty’ of gay men interested in playing and watching football); but see, S. Thomas, Letters, *We’re Out at the Match Every Weekend*, THE GUARDIAN (London), August 14, 2004 at 21 (letter from reader who states that the previously cited article by Simon Fanshawe is facile and a two-dimensional portrayal of gay men’s attitudes towards football).

249 On majority group stereotypes, see notes and accompanying text. See also, e.g., Cary Darling, *Queer Idea for Dire Straights*, HERALD SUN (Melbourne, Austl.), Sept. 24, 2003 at H11 (discussing ‘Queer Eye for the Straight Guy,’ the American television show shown in the UK, Australia, and Canada, as perpetuating not only stereotypes of gay men as flamboyant fashion mavens, but of straight men as inveterate slobs – which no one really believes is true for all straight men); Sally Morrell, *On TV, Queer is the New Normal*, HERALD SUN (Melbourne, Austl.), Oct. 8, 2003 at 20 (as above, and also while author discusses how stereotypes are not always true, she insists [with laughter] that gay men are all more fashionable than non-gay men, or than women, even as she clearly dismisses the portrayal of non-gay men as having no taste and living in a pig-sty). But see, David, Skinner, *Queer Like Us – What ‘Queer Eye for the
Although the absolute percentages are smaller, the same general pattern of positive and negative experiences holds true for respondents’ observations of open court settings. In open court, over one out of every four respondents heard negative comments, with over one out of every five hearing ridicule, snickering, or jokes about gay men or lesbians. Only a little more than one out of twenty respondents heard negative comments about heterosexuals during that same period. Respondents heard positive comments and saw positive actions towards heterosexuals more often and at a higher frequency than they experienced positive comments or positive action towards LGBT people.

The open-ended responses to in-court experiences reflect some inferences familiar from the out-of-court environment, as well as issues specific to the courtroom. Respondents stated, “Usual in Family Proceedings to put down to sexuality inability to care for children.” "In child cases, any accusation is used and judge dealt with matter in his judgment (custody to gay-
man/father).” 255 “In a court case between two gay women seeking custody of a child - the words ‘it’s not normal’ 256 “You know what they are, don’t you” were frequently used.” 257 One respondent stated, “It has always been court staff whom I have witnessed using negative comments or ridiculing LGBT people. These are people who have been on Diversity courses!” 258

Interestingly, a number of the responses to the open-ended questions about in-court experiences reflect that disparaging remarks and negative comments about sexual orientation minorities are sometimes a tactic used by counsel to win cases. For example, “In a court case between two gay women seeking custody of a child - the words ‘it’s not normal’ 259 “You know what they are, don’t you” were frequently used.” “This was always used in order to ‘fight’ for their client, especially where children were concerned.” 260 “Comments were made by Counsel not Court staff - so it was not my place to make a point! (they do not take well to being spoken to by a court usher!!)!” 261 “In child cases, any accusation is used and judge dealt with matter in his judgment (custody to gay-man/father)” “In the event (and as anticipated) counsel for the other party made his own devastating comments in response.” 262

To the extent that court staff make disparaging remarks about lesbian, gay, bisexual or transgendered people, this situation may reflect a flaw in diversity education and training, or perhaps a lack of will to enforce the culture of tolerance and to take diversity seriously that the DCA professes. The use of sexual orientation bias as a tactic to win cases is a matter beyond the scope of the DCA as an employer. It may fall within the remit of judges’ control over their courtrooms, 263 or of the General Council of the

255 Id.
256 Id.
257 Id.
258 Id. at 56.
259 Id.
260 Id.
261 Id.
262 Id.
263 See, e.g., Judicial Studies Board, Equal Treatment Bench Book, ch. 14 (Sexual Orientation) (1999) (The Judicial Studies Board is the organization that is responsible for training and instruction for all full- and part-time judges).
Bar, and/or the Bar Council, and the Law Society's jurisdiction over their members.\textsuperscript{264}

\textbf{INTERVENTION AFTER WITNESSING NEGATIVE BEHAVIOURS TOWARDS LESBIAN, GAY, BISEXUAL AND TRANSGENDERED PEOPLE}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{responses_to_negative_experiences_or_observations.png}
\caption{Responses to Negative Experiences or Observations}
\end{figure}

\begin{itemize}
\item took no action
\item confronted perpetrator
\item talked with colleague
\item talked with someone else
\item reported to senior officer
\end{itemize}

\begin{itemize}
\item in-court setting
\item non-court setting
\end{itemize}

\begin{itemize}
\item percentage of respondents
\end{itemize}

After witnessing negative behaviours against LGBT persons, Rainbow Network members had to decide whether and how to intervene. Respondents’ interventions in workplace settings after witnessing negative behaviours towards LGBT individuals mirror their interventions after experiencing negative behaviours directed at themselves. A significant percentage took no action. Many believed that nothing would result from intervening, and an important percentage thought that the incidents were not sufficiently serious to intervene. A similar pattern also exists when respondents witnessed behaviours in open court, although a considerably smaller percentage thought the incidents insufficiently important.

Of those respondents who observed negative actions or comments towards LGBT people in work settings other than open

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265 Compare experiences towards themselves (46.7 percent took no action; 50 percent because they believed no effect would result; 45.4 percent believed not serious enough) with witnessed actions against others (50 percent took no action; 47.5 percent because they believed no effect would result; 42.5 percent believed not serious enough). Cf., Brower, DCA Report, supra note 33, at 56-62 with 39-43.

266 Compare experiences in open court (50 percent took no action; 44.4 percent because they believed no effect would result; 28.5 percent believed not serious enough) with witnessed actions against others, 50 percent took no action; 47.5 percent because they believed no effect would result; 42.5 percent believed not serious enough). Cf., id., at 64-67 with 56-62.
court, half took no action. \textsuperscript{267} For those who took no action in response to a negative comment or action, nearly half thought nothing constructive would come from intervention; \textsuperscript{268} 22.5 percent feared being branded a troublemaker, feared reducing their chances of promotion, or feared having some other negative action taken against themselves or others. \textsuperscript{269} Another 7.5 percent believed that they might be thought to be gay or lesbian \textsuperscript{270} and it never occurred to 7.5 percent of respondents to intervene. \textsuperscript{271}

Again, the open-ended comments are illustrative. "A colleague (aware of my sexuality) (gay) said to me 'that jury will never come to a verdict - there are a couple of poofs amongst them' I relayed this comment to a colleague as I was hurt personally by the comment - I took no other action as I did not want to be seen as a trouble-maker." \textsuperscript{272} "Comments were made by Counsel not Court staff - so it was not my place to make a point! (they do not take well to being spoken to by a court usher!!!)" \textsuperscript{273} "I joined the Rainbow Network on the pretext of being a "friend" whereas I am a full member but not 'out'. I received widespread negative comments & ridicule from junior staff through to senior managers. I felt very uncomfortable & I was able to see people's reaction as if is assumed I was totally straight & why was I joining supporting this bunch of 'weirdos' \textsuperscript{274}"

Whilst one half of employees took no action in response to negative actions or behaviours, over a third confronted the person who made the comments or performed the actions. \textsuperscript{275} 17.1 percent discussed the actions with a colleague or co-worker, 10.8 percent talked with someone else, including 1.5 percent consulting a legal or employment advisor, and only 7.8 percent reported the action to a senior officer. \textsuperscript{276}

\textsuperscript{267} 50 percent. \textit{See} Table 11. \textit{Id.} at 59.
\textsuperscript{268} 47.5 percent. \textit{See} Table 13. \textit{Id.}
\textsuperscript{269} \textit{See} tables 14.8, 14.9, 14.4 - 14.10, 14.12.
\textsuperscript{270} \textit{See} table 14.4.
\textsuperscript{271} \textit{See} table 14.11.
\textsuperscript{272} Brower, DCA Report, \textit{supra} note 33, at 54.
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} \textit{See id.} at 52, fig. 21 (figure showing that 35.9% of employees confronted the person who made the comment or performed the actions).
\textsuperscript{276} \textit{Id.} fig. 21.
Some examples of respondents’ interventions and actions follow: “I counterbalanced the comment by the judge or the barrister by saying positive things about him. She agreed and we then went on to discuss how his approach worked better due to his better reading of the situation - this was all in chambers not in open court itself.”

“Have told somebody there I have felt that their attitude/comments totally inappropriate and reminded them about diversity issues.”

“I did try [and] justify the network [and] why it was there [and] did remind some people of the Court Service policy towards diversity I also used my experience of the reaction to a ‘friend’ of the network when introducing Diversity courses albeit under the guise that my orientation was heterosexual.”

“In the [second] case, as in confronting the person I made it clear I was a supporter of the Rainbow network, [and] they know I am not LGBT, they were taken aback. I had challenged their stereotypes. They said that in future they would be more careful what they said, as it was not always clear what peoples’ views might be! I don’t think it will stop their prejudice but I hope they will modify their comments.”

Notice that in the last two examples, respondents appeared to believe that intervention by non-LGBT persons may have a more beneficial effect because it was less expected. This point would seem to evidence two facts about the DCA workplace and about workplaces generally. First, the shock value of heterosexual intervention to LGBT bias reinforces the hypothesis that sexual orientation prejudice may still be acceptable in the DCA and may simply be driven underground in the presence of LGBT persons.

Second, the positive behaviours, support, and interventions of heterosexual co-workers are very important to creating a climate that values diversity and sexual orientation fairness. Naturally, given that the majority of DCA employees are heterosexual, the attitudes and behaviours of that group are crucial to the success of any non-discrimination programme.

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277 Id. at 53.
278 Id. at 54.
279 Id.
280 Id.
281 Id.
However, the numbers alone are not the whole story. People often believe that diversity issues are important primarily to minorities and that minority group members may be hypersensitive or exaggerate the significance or proper meaning of events and behaviours. Thus, having heterosexuals intervene and correct sexual orientation bias reinforces the point that non-discrimination is a legitimate concern deserving attention.

Of those employees who did intervene upon observing negative actions or comments toward lesbians or gay men outside the courtroom, nearly one half reported that their actions had no effect, whilst over a third stated that the negative actions or comments stopped or decreased in frequency. Only a small number stated that the person responsible was reprimanded or disciplined. Disturbingly, a small, but significant, number

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285 Brower, DCA Report, supra note 33, at 57 fig. 23.

286 Id.

287 Id.
reported an increase in the negative behaviours or retaliation against him or herself for intervening.\textsuperscript{288}

Given that only 35.9 percent confronted the person making the comments or actions, it is encouraging that about a third of the interventions ameliorated the situation.\textsuperscript{289} On the other hand, most respondents took no action or took actions not reasonably calculated to change the behaviours they witnessed. Accordingly, one might conclude that a need exists for further education on remedial procedures or on more effective intervention techniques.

Despite the significant amount of active intervention, one half of all persons witnessing negative behaviours decided not to act. That fact suggests passivity or acceptance of negative treatment towards sexual orientation minorities, even amongst members of the Rainbow Network, a group from whom one might have expected a higher level of action. If even this group remained inactive in the face of these negative behaviours, one might expect non-members to be even more inert.

\textsuperscript{288} Id. 5.1 percent stated that the negative actions or comments increased in frequency or severity, and 2.5 percent stated that they were branded a troublemaker or some action was taken against them.

\textsuperscript{289} One cannot assume that because the percentage of confrontations roughly mirrored the success rate, confrontation was the most appropriate or winning strategy. Study questions were not sorted by type of intervention and then matched with consequences.
Alternatively, perhaps Rainbow Network members are in the best position to judge the importance of these incidents for LGBT people. A sizeable number of persons did not act because they believed that the incidents were not sufficiently serious. It can be difficult to assess objectively the nature of the comments or actions that these respondents deemed too inconsequential to warrant intervention.

Some of the open-ended comments about seriousness are instructive. "Mainly I did not think any incidents were serious or meant to be offensive or discriminate."290 "I was with a good friend whom I have known for 20 years - we often exchange jokes." "I was happy for her to tell me the jokes.291 "Just general 'homosexual' jokes. Good look[ing] barrister gay, "what a shame" comments made."292 "to put this into perspective - there have been more jokes about people eg the Irish than aimed at LGBT staff."

Apparently, for some workplaces and with certain people, a certain amount of personal comments and joking about personal characteristics is deemed acceptable or welcome.294 Remember, however, that not all respondents viewed these types of behaviours in the same light. Some were distressed or intimidated into remaining silent for fear of being thought of as a troublemaker or not part of the group.

E.g., "negative comments / jokes about gay/transsexual people in particular are common at work and you are a troublemaker if you don't keep your head down or join in with the 'joke' - or you are very 'p.c' - and as a result not 'one of the

291 Id.
292 Open-Ended Comments Q10. Id. Although the author of this comment obviously believed the remark was trivial, it also reflects how ingrained heteronormitivity or heterosexual privilege is, even amongst LGBT people. Non-gay persons never have to hear the comment, "What a shame that you're straight." Other similar comments are: "It's OK with me if you're gay," "I don't care that you're gay," and "When we look at you, we don't see a gay person." Accord, Carbado, 13 BERKELEY WOMEN'S L.J. 121. For more on heteronormativity, see notes 150-157 and 226-228.
294 See, e.g., Fox, Watching the English, supra note 191 at 179-182 (describing the use of humour in English workplaces and positing that humour is one of its most striking features. She also finds that humour is used to a greater degree than in the United States or most other countries).
group.”295 “If you complain a meeting of the section would be called and all would deny saying anything - it would then turn the attention on to you for making a fuss in the first place.”296 “Did not want to approach person as I work opposite them and felt I could ignore it. The comment was about others not myself. Spoke to another member of staff, a friend, as I was upset but took no further action ‘to keep the peace’.”297

Still others may have developed an increased tolerance for these behaviours. For example, “Discussed with colleague and agreed comments were inappropriate but felt it would cause too much aggravation to deal with it.”298 “Did not want to approach person as I work opposite them and felt I could ignore it. The comment was about others not myself. Spoke to another member of staff, a friend, as I was upset but took no further action ‘to keep the peace’.”299 “You are not going to change peoples minds, opinions.”300 “Couldn’t be bothered explaining why it was offensive.”301

Nevertheless, even if we assume that these comments and actions are benign or somehow acceptable to respondents, we should consider the effects on non-employees who might overhear or be the subject of these remarks. Court users are usually infrequent targets or witnesses of these behaviours. They may not realise the context of workplace humour, and may come away from these experiences with a much less sanguine view of the courts’ fairness towards LGBT individuals.302 As the DCA has recognised, an organisation that is explicitly concerned with justice needs to be a leader in diversity, both for its employees and for the

296 Id.
297 Open-Ended Comments, Q13. Id.
298 Id.
299 Id.
300 Open-Ended Comments Q14.12. Id.
301 Open-Ended Comments Q15. Id.
302 See generally, Brower, supra note 52 at 64-65 (In California, heterosexual court employees had higher perceptions of fairness than did lesbian and gay court employees, and both groups of employees had higher perceptions of fairness than did court users.); see also, LCD, Draft Report of the Corporate Image and Publications Working Group, Image and Diversity, secs. 1-2, at 56-57 (March 1, 2000).
Similarly, even if respondents were used to these behaviours and saw them as inconsequential does not mean that newer employees or more casual observers would agree with that assessment. E.g., “There is a certain amount of ‘joking’ about everybody’s sexuality / lifestyle which goes on in my workplace. I have personally never felt threatened in any way, but I feel it could appear unpleasant to a newcomer.”

In contrast to the out-of-court experiences, a higher percentage of respondents acted when they observed in-court

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304 Open-Ended Comments Q17. Brower, supra note 33, at 62.
behaviours. They viewed the in-court activities more significantly than the non-court ones. Specifically, only 28.5 percent believed the in-court behaviours not serious enough to intervene\textsuperscript{305} compared to 42.5 percent for out of court actions.

As with the out-of-court behaviours, fifty percent of those respondents who observed negative actions or comments towards LGBT people in open court took no action. However, their other responses differed from the out of court experience. In court, twice as many Rainbow Network members discussed the incident with a colleague or co-worker than confronted the perpetrator.\textsuperscript{306} Out of court, the inverse was true.\textsuperscript{307} The reasons for the reversal are unclear. As the following data show, an extraordinarily high proportion of respondents feared unfavourable consequences for any action. Perhaps they also feared negative responses from intervention and sought to minimise the consequences by merely speaking to a co-worker rather than interceding more meaningfully.

Fear would appear to govern many of respondents' decisions after the in court experiences. For those that took no action in response to a negative comment or action, a remarkable 72.9 percent feared being branded a troublemaker, feared reducing their chances of promotion, or feared having some other negative action taken against themselves or others. 44.4 percent did not think anything constructive would come of intervening; 11.1 percent believed that people would think they were gay or lesbian. In addition, 28.5 percent did not think the incidents were serious enough to intervene.\textsuperscript{308}

The most noteworthy aspect about these findings is the extraordinarily high number of respondents who feared negative consequences from their intervention. Despite this fear, no respondent reported retaliation in this context.\textsuperscript{309} Accordingly, the issue may be one of perception rather than reality – a nonetheless

\textsuperscript{305} See Table 7.1. Id. at 64-67.
\textsuperscript{306} See Tables 4.4, 4.3. Only 14.2 percent confronted the person who made the comment or performed the action, whilst 35.7 percent discussed the incident with a colleague or co-worker. Id. at 67.
\textsuperscript{307} See Tables 11.4, 11.3. Out of court: confronted perpetrator, 35.9%; talked to colleague, 17.1%. Id. at 64.
\textsuperscript{308} See Tables 7.8, 7.9, 7.10, 7.4, 7.3, 7.1. Id. at 67.
\textsuperscript{309} See Table 5. Id. at 69.
very real challenge, but one that would call for different mechanisms to resolve it.

On the other hand, respondents' intervention was only successful one half of the time. Of those persons who intervened upon observing negative actions or hearing negative comments directed at lesbians or gay men in open court, one half reported that their intervention did not reduce or stop the negative comments, and one half reported that the negative comments stopped or decreased in frequency or severity. None reported any other reaction to their intervention.

One might posit that respondents' negative experiences with intervention in other contexts might have led to these fears here. Moreover, as the open-ended responses illustrate, some respondents may have believed that their intervention would be particularly poorly received in court.

For example: “Comments were made by Counsel not Court staff - so it was not my place to make a point! (they do not take well to being spoken to by a court usher!!)”, “remarks made by counsel appearing before the Court of Appeal (Civil Division).”, “Maker of remarks was someone with Judicial capacity [and] grade 2 status in the LCD.” The last comment on the high rank of the perpetrator reflects a certain intimidation on the part of the respondent, as well as showing that sexual orientation bias may reach to the upper levels of the judicial system.

Finally, respondents' fears of negative reactions may be consonant with findings in other DCA staff survey analyses. Other surveys of the DCA have reported that some employees have been sceptical about various departments' commitment to diversity.
Accordingly, respondents’ fears of negative consequences, although not always borne out by their experiences in this context, may have been shaped by other observations or events.

Because the number of valid responses for this series of questions is relatively small, one must exercise caution in interpreting the responses. However, there is a clear pattern showing that intervention after in-court experiences was as often ineffective as it was effective. Nevertheless, the amount of amelioration appears high in comparison to the percentage of interventions that would seem calculated to be productive. Most employees who acted chose to discuss the incident with a co-worker, where the possibility of corrective action would be quite low. Moreover, of those who observed a negative action or comment, no one reported the incident to a superior. A possible explanation for this may be that if offending party were a solicitor, barrister, or judge, employees may perceive that their superior does not have the authority to address and rectify the conduct. Thus, in

also, Smedley, supra note 302 at 9-10 (finding a growing sense of cynicism and scepticism by staff at all levels about the commitment of the DCA to diversity goals); cf. Ethnos, Survey of PROUD Members, Summary of Preliminary Findings, (2003) at 1-2 (noting that PROUD members had little confidence in DCA grievance procedures and that only 47% of ethnic minority members of PROUD agreed that the DCA valued diversity, whilst 79% of white members of PROUD agreed that the DCA did so).
half of the cases, the employee intervention did not remedy the situation.

Nevertheless, that 50 percent of respondents reported an improvement in behaviour suggests that something positive is happening, although it is difficult to know exactly what. People may perceive in court behaviours to be more serious and deserving of correction. That theory is corroborated by the data that significantly fewer respondents stated these incidents were not sufficiently serious to intervene as opposed to when those behaviours occurred in non-open court settings.317

RECOMMENDATIONS FOR FUTURE RESEARCH AND CONCLUSION

This initial study of the treatment of LGBT persons in the courts of England and Wales shows both encouraging and discouraging experiences and perceptions of sexual orientation fairness by Rainbow Network members. Although it is difficult to generalise about such wide-ranging and detailed empirical data, a few comments are in order.

First, even though it is useful to pose general or non-specific questions about sexual orientation fairness, these inquiries tend to underreport the frequency, severity, and commonality of these experiences or perceptions. A more accurate picture of complex issues such as sexual orientation fairness requires more concrete, detailed and particularised questions directed at those individuals most sensitive to these issues, LGBT people and their supporters.

Additionally, a richer and more accurate picture of sexual orientation fairness in the DCA would also include further studies on the topic. Research might fruitfully gather data from an equivalent group of employees in other United Kingdom courts and associated organisations, such as in Scotland or Northern Ireland,318 or from other departments within the Civil Service.

317 Compare 28.5 percent with 42.5 percent. Compare Table 7.1 with 14.1.
318 Anti-LGBT bias is present to a significant degree in both Scotland and Northern Ireland. One would expect that the courts in those locales would also suffer from that prejudice. See e.g., Paul Gallgher, Over 25% of Scots Accept Prejudice, ABERDEEN PRESS AND JOURNAL (Scotland), October 1, 2003 at 10 (discussing survey on behalf of the Scottish Executive by the Equal Opportunities Commission, The Disability Rights Commission, the Commission
These surveys would enable researchers to assess how the DCA is progressing in comparison to other entities. Further, researchers might give this same survey to all DCA personnel to see how Rainbow Network members' and friends' experiences and perceptions of sexual orientation fairness differ from their colleagues.

Moreover, this article can only serve as a snapshot of respondents' experiences and perceptions at a given point in time. It would be very useful to repeat the survey with the relevant group on a periodic basis to view how, if at all, experiences and perceptions change over time. Hopefully, as new legal protections and rights are given to LGBT persons in the UK and as British society continues to change on sexual orientation issues, one could see progress in the DCA on sexual orientation diversity and fairness concerns.

Finally, as the DCA learns from the results of this and other reports on diversity issues and continues its emphasis on training, education, and more effective intervention processes, longitudinal studies could help assess the progress of diversity goals and fairness initiatives.

More generally, despite the difficulties inherent in empirical study of LGBT people and their interactions with governmental and other organisations, that information is crucial to appropriate policy making. As a society we are wrestling with questions of LGBT rights and their integration into social

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for Racial Equality and Stonewall, the LGBT right organization); see also Suzanne Breen, 82% of Gays and Lesbians Suffer Harassment in the North, Says Study, THE IRISH TIMES (Ireland), July 30, 2003 at 6 (discussing study, “An Acceptable Prejudice?-Homophobic Violence and Harassment in Northern Ireland”); and see Fionnuala O’Connor, North is No Place to be ‘Different’, THE IRISH TIMES (Ireland), September 5, 2003 at 16 (discrimination against LGBT persons generally).


See supra note 149.
structures on several fronts today – from debates on marriage and partnership responsibilities, to child custody and other familial arrangements, to battles over the incorporation of gay people into religious and governmental hierarchies.


To engage in policy discussions without adequate factual inquiries or study of LGBT persons’ experiences in society is like looking at a map and figuring routes without knowing one’s starting point. One may eventually reach the destination, but through luck and intuition, rather than data or planning.

The need for empirical analysis is especially acute in the courts and the judicial system: the mechanism by which persons access their legal rights. If that system treats its LGBT citizens

Gina Kim, Protesters Denied Eucharist; 10 Supporting Gay Rights Get Only Blessing in Holy Name, CHICAGO TRIBUNE, May 31, 2004 at 1 of Chicagoland Final Edition, Metro section; Charlotte Allen, For Catholic Politicians, a Hard Line, THE WASHINGTON POST, April 11, 2004 at B01, final edition, Outlook section; Elaine Jarvik, Marriage Debate Splits Congregations, DESERET MORNING NEWS (Salt Lake City, Utah), July 10, 2004; Daniel Burke, Both Sides Prepare for Gay Marriage Showdown in Senate, RELIGION NEWS SERVICE (USA), July 8, 2004 (describing the various debates in religious sects on gay marriage); Larry B. Stammer, ‘A New Day’ for Two Congregations; Two Parishes That Have Separated From the Episcopal Church Will Mark Fresh Starts by Rewriting Their Articles of Incorporation, _LOS ANGELES TIMES_, August 23, 2004 at B1 (split of churches from the US Episcopal Church because of gay rights issues).


Jean Eaglesham, Howard’s Setback on Homosexual Rights, FINANCIAL TIMES (London), June 25, 2004 at 5 (Tory House of Lords members defeat civil partnership bill spurring showdown with modernizing and traditionalist wings of Tory party); Daniel Crary, Openly Gay Politicians Still Relatively Scarce, SAN MATEO COUNTY TIMES, October 21, 2002 at 1.
unfairly, one can hardly expect equality from legal doctrine or principles – despite the actual requirements of that doctrine.\textsuperscript{325} Accordingly, the 2003 DCA study should serve as an important first step in a continuing exploration of the experiences of LGBT individuals in the courts and in the legal system.
