

# Ins



Sasha Borissenko

**In 1986** the New Zealand Homosexual Law Reform Act legalised consensual sex between men aged 16 and older. The campaign to reform the law moved beyond the gay community to wider issues of human rights and discrimination. In December last year the Chief Justice Dame Sian Elias swore in the first openly gay man to sit on New Zealand's High Court, Justice Matthew Muir.

"I should say that those of us who have lived through momentous social change sometimes forget how recent it all was. And how bad things were. There has been a revolution in our lifetimes in the position of those who are different because of gender, or race, or sexual orientation. I do not suggest that all the barriers are down. But we have come a long way," Dame Sian said.

But how far have we come – inside and outside the legal profession?

**Sasha Borissenko** investigates.

# Inside & Outside

## SEXUAL & GENDER DIVERSITY AND THE LEGAL PROFESSION

**M**adeleine (not her real name) identifies as a lesbian and has worked as a lawyer in both the private and public sector for under five years.

“I found working in the private sector quite hard. I don’t know how much of that was self-inflicted. While there is definitely an internal pressure, nothing exists in a vacuum.

“There’s a culture where I was terrified that my sexual orientation would come out. Perhaps it was the fear of derogatory comments, being treated differently or the fear that my work or career would be affected.”

Eventually Madeleine let her sexual orientation be known and it was okay, for the large part. While her orientation didn’t raise issues in a direct way, she still didn’t feel completely comfortable, she says.

There’s a heteronormative “old boys’ club” stereotype of law school and the legal profession generally, she says.

### Pressure

“Private sector law firms have certain types of females – there’s the pretty, straight construct, meanwhile boys tend to be “jokey” in the traditional sense of the word, equally straight. If you’re gay, you don’t fit into that. There’s quite a lot of pressure to fit into that mould and on reflection I didn’t know a single other person who identified as LGBTIQ within that firm.”

Years later, Madeleine decided to take up a job working as an in-house lawyer for the public sector.

“I’ve found it more inclusive – probably because there’s much more diversity in the sector as a whole. I didn’t feel that same pressure that I wouldn’t fit in because there’s not a clear ‘mould’ of person.

“Perhaps I didn’t take to corporate culture but I’ve definitely felt a lot more comfortable being myself in this environment.”

### Apprehensive

Although she was apprehensive at first, when she referred to her partner as a woman, nothing was made of it, she says.

Even so, there was an instance where a colleague indirectly told Madeleine that her orientation had been discussed during the recruitment process and was considered perhaps a problem for the older generation in the workplace.

“I was really shocked. Up until that point I felt absolutely fine and comfortable in the workplace. It was hugely disappointing. It’s 2015. I don’t see how this is still an issue. If have a same-sex partner it should not be a consideration.

“I can see there’s an old guard who are having to catch up to the changing landscape. But I still find it off.”

Madeleine chose a career in law because she had a strong interest in her teenage years in “human rights”, a love of debating and a passion for LGBTIQ issues. She also chose law because it’s a profession that deals directly with the rights and equality of all people and thus should be held to a higher regard than other professions, she says.

**S**impson Grierson human resources director Jo Copeland says diversity within the profession is hugely important to Simpson Grierson, which can be illustrated by their long list of accolades, including the YWCA Equal Pay Awards 2014, the IFLR Best Firm in Australasia for diversity and Most Innovative Law Firm, the Gold Award for gender equality and the Silver Award for employer of choice.

The firm's policies around supporting LGBTIQ stemmed from a case where "we hired an awesome summer clerk who did really well at university. He was so fabulous we hired him back as a law graduate. Let's call him 'Brent'".

Brent's work performance declined dramatically over a period of six months. When human resources approached him he said he was "gay, would go home every night after work and cry himself to sleep and that he felt suicidal".

"When we asked him what was causing it, he said that he had been told by his friends and family that the law was a very conservative profession and that it would ruin his career if anyone found out that he was gay.

### Clear message

"The very clear message he had been given was that the law was not an environment that would support somebody who was gay and it would be career suicide if anyone found out.

"We figured that it is hard enough for kids coming out of law school into their first real job without having to hide who they are. We thought that if we could publicly make it okay to be gay here, we could remove that source of tension and hopefully prevent it as a cause of depression and suicide.

"So we decided to embrace rainbow diversity as a firm, create an environment to actively support our LGBTIQ staff, take a leadership position in the industry and be very public about our commitment in the hope that it changed perceptions of law firms generally.

"The partners jumped on board to support this initiative without any hesitation, which to me says an awful lot about how progressive they are and how the perception out there is very different from the reality."

### Rainbow tick

In the last two years Simpson Grierson has set up an internal Pride network, obtained the Rainbow Tick – the first organisation in New Zealand to do so – teamed up with the Auckland Law school to help them launch their LGBTIQ network, developed a gender transition policy, and launched sexual orientation and gender inclusivity training and videos in each of their offices. They host events for the LGBTIQ community within their key clients and they fly the Rainbow Flag in their staffroom.

Simpson Grierson also conducted a diversity and inclusion survey to get some benchmarks around all

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aspects of diversity, Jo says.

"We figured that if we were serious about sexual diversity, we needed to be bold enough to ask the questions that mattered and to hear the answers. So we asked people (anonymously of course) if they identified as part of the LGBTIQ community and, if so, whether they were 'out' at work. We also asked if they had ever felt disadvantaged as a result of their sexual orientation and asked for suggestions on what the firm could do to be more inclusive for our LGBTIQ staff."

### Encouraging

As a result of the policy changes, Jo's noticed an increased number of people being open about their orientation at the job application and recruitment levels, which has been really encouraging, she says.

Additionally, the rhetoric used within the firm has changed following specific training around appropriate language within the workplace.

"For example, people here now ask if someone 'has a partner' rather than a girlfriend and we train people in the appropriate use of non-offensive language when talking to or about transgender people.

"We also provide training on the impact of subtle signposts and how they can be interpreted such that people don't use the word gay when they mean lame or don't make jokes about pink shirts etc."

## LGBTIQ

Is an acronym. It stands for:

- » Lesbian;
- » Gay;
- » Bisexual;
- » Transgender;
- » Intersex; and
- » Questioning.

This is sourced from The Free Dictionary, at <http://acronyms.thefreedictionary.com/LGBTIQ>.

Some other sources list: lesbian, gay, bisexual, transgender, intersex and queer, or questioning; while others list it as: lesbian, gay, bisexual, transgender, intersex and queer.

**M**eanwhile, Chapman Tripp human resources director Sarah Coleman says the firm has a diversity policy that sets out its commitment to an inclusive work environment and ensures that everyone has an equal opportunity to achieve their potential, regardless of gender, age, ethnicity, sexual orientation or marital status.

“However, having a policy on its own doesn’t mean people of different backgrounds feel welcome in a law firm. That comes down to the culture and leadership of the firm.”

Chapman Tripp has focused on changing its culture in recent years, starting with the launch of their inclusive leadership programme in 2012.

All partners, senior lawyers and senior management in the firm have attended training to help them recognise and address any unconscious biases that may have an impact on their decisions about people, Sarah says.

“While we can’t comment on the culture within the legal industry as a whole, we know that any perception of a ‘homogeneous hetero normative/old boys’ club culture’ is far removed from the reality of our workplace.

“Chapman Tripp has never placed weight on where someone went to school, or who their parents are or whether they play rugby. As a result, we have developed a culture where people can truly be themselves at work.”

**V**ictoria University School of Social and Cultural Studies Dr Carol Harrington says fostering and promoting diversity within a workplace can be difficult.

A company or organisation might have the best of intentions but what’s important is creating meaningful policies, she says.

Pink washing is the idea that companies might be really happy to fly the rainbow flag in a superficial sense, but when it comes to the recruitment process or internal policies homophobia still exists.

There’s been a great shift in recent years however, where individual workplaces and leadership processes have made great strides to promote diversity.

The best way forward is through education and training at a management level where it’s established what is and what is not acceptable – not allowing homophobic slurs even in a joking manner, for example.

Asking those who identify as LGBTIQ is problematic too, she says.

No one should be compelled to advocate or be defined by their sexual orientation. There is sometimes an unfair pressure afforded to minorities to speak on behalf of or for the majority, she says.

“You don’t ask heterosexual people to declare their orientation, I would ask why are they being asked. [Organisations/companies have an interest to target minorities] to declare and promote their diversity numbers.”

Other than on occasions where one’s personal and private lives overlap, awards ceremonies where partners are invited for example, sexual orientation shouldn’t be a consideration in the workplace, she says.

**N**orthland-based Kelly Ellis has practised as a barrister for over 20 years and specialises in criminal law. She identifies as transgender, works with a number of LGBTIQ organisations, has trained and worked as a phone counsellor and completes pro bono legal work for the trans community.

“When one looks at the makeup of the legal profession, there’s no doubt that we have some distance to go in terms of supporting diversity. Notwithstanding that, there is more diversity within this profession than many others. There are many odd and prickly customers within our ranks and, I guess, that makes me feel right at home.

“There’s still a patriarchy in many ways but other than the odd comment I’ve had no difficulty and I’ve received universal respect from the bench.

“While a gay, lesbian or bi person probably doesn’t express that aspect of their identity a great deal in the workplace, for trans people, there’s often no hiding, particularly for someone like me who sees being openly trans in this profession as a powerful statement for our community.

### Visibility

“Visibility is, I believe, the key to trans inclusion. Perhaps when enough of us are seen, we’ll be afforded inclusion in the Human Rights Act.

“Changes to the policy housing transgender prisoners over a year ago is another example where the fact of being an openly trans advocate has helped advance our cause and standing within the profession.

“Obviously as a criminal lawyer, transgender clients come through my door. I see transgender women being disproportionately imprisoned, and it’s in their best interests in terms of safety not to be put in a men’s prison – it’s a subject close to my heart. It must be a terrifying experience.”

Kelly recalls a situation where she was representing a client in the court house while another of her trans clients was being raped two floors below in the cells.

“I stared long and hard into my whisky glass that evening.”

### Sympathetic

The transgender community has come to know Kelly as a trans-sympathetic lawyer. “I think there’s no doubt that I’m in a better position than most to be sympathetic because I’m part of that community”.

Kelly was the first to argue, via the Cooper case (*R v Glen Laurance Cooper* DC Whangarei CRI-2012-088-000223), that it was a cruel and unusual punishment for inmates to be deprived of medication such as subsidised mainstream-allocated testosterone blockers and oestrogen, for example.

“It’s difficult as it is for transgender people to receive adequate healthcare in the big bad world let alone inside prison. It’s hard to think I’m advocating for full access to a service that doesn’t exist. These people are the most vulnerable people in society and who are at the absolute mercy of the state.”

**R**ainbowYOUTH communications manager Toni Duder says there are no concrete figures relating to the number of LGBTIQ people in New Zealand. While Statistics New Zealand is looking into whether or not to change its approach, it does record same-sex relationships, but not identities. At the 2013 Census, there were a recorded 16,660 people living in a same-sex couple relationships in New Zealand – 7,340 male and 9,310 female.

“We at RainbowYOUTH believe that marriage equality, while a huge and important step, is not nearly the end for gaining identity affirming rights for LGBTIQ people.

“Especially in the gender diverse community, often people’s identities are trampled by systems and processes, which need to be refined and diversified. A few examples are name changes, medical care systems, the school system – there’s a lot of ground to cover.”

**C**ommunity lawyer Kate Scarlet of Community Law Wellington and Hutt Valley says the centre is tasked with providing access to justice, particularly with regard to minority groups. A lot of people who identify as LGBTIQ come to the centre asking for advice relating to employment and discrimination issues, she says.

“Often there’s a lot of discrimination in getting a job, but most of the time it is insidious and not overt.”

Whether it is drivers’ licenses, birth certificates or passports, many organisations refuse to or don’t have the infrastructure to take down the use of pronouns in their databases.

If a letter is sent to a person’s flat or address and the wrong honorific is placed, it can put people in potentially dangerous circumstances, she says. This may happen, for example, because it discloses a person’s birth gender to another person who may then seek to harm them.

Anti-Money Laundering and Countering Financing of Terrorism Act 2009 amendments, for example, require a greater level of identification documents, which can be difficult and costly to change. While New Zealand is good with regard to changing gender on passports and drivers’ licences, where it is both simple and cheap, it’s changing birth certificates that’s the real problem, she says.

Unlike the statutory declaratory route, people are required to go through the Family Court and meet what a medical specialist deems necessary, pursuant to s 28 of the Births, Deaths, Marriages and Relationships Registration Act 1995.

“People don’t like the required medical standard as in many cases transgender people prefer to self-identify rather than be held to a physical standard that society sets.”

Furthermore, there's the issue of having to navigate the Family Court process, which can be costly, stressful and time consuming.

There's also the issue that non-binary people, those who don't identify as either male or female, are not recognised and thus not protected in law, namely the Human Rights Act 1993.

As far as representing LGBTIQ clients, a lawyer can always take better steps to support their clients by asking directly for pronouns, collecting data or instead having an option that doesn't require a specific pronoun and not assuming the gender of partners.

"It's important to know that if you are dealing with a transgender person, they mightn't identify themselves as that. Giving people options is important."

**J**ustice Minister **Amy Adams** says discriminating against people on the basis they are transgender is already accommodated in the Human Rights Act.

"The government agrees with Crown Law's advice that 'sex' includes gender identity and as such does not consider it necessary to make any amendments to the law.

"It's important to note the Human Rights Commission has interpreted sex to include gender and gender identity, and accepts complaints of unlawful discrimination from gender minorities (trans or intersex people) under the ground of sex."

**M**eanwhile **Labour MP Louisa**

Wall says Parliament still has a long way to go to recognise LGBTIQ rights in Aotearoa. "It is a human rights issue at the end of the day and is about free-

dom to be who you are and equality before the law. We are making inroads on the latter but still have a long way to go for people to be free to be who they are."

Issues around bullying, suicide and health are still in their early stages and there is a lot more work to be done to ensure a public system that is responsive to specific needs and supportive of LGBTIQ New Zealanders, she says.

The Marriage (Definition of Marriage) Amendment Act 2013 removed one barrier that the State had in place – namely the right to obtain a marriage licence if that was

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your choice to recognise your commitment to your partner, regardless of sex, sexual orientation or gender identity.

“That is an inclusive step that hopefully allows people to feel a part of society when otherwise they felt excluded from the institution of marriage. The state should not discriminate against any citizen in modern, democratic societies.”

In her last term in Parliament, Louisa Wall attempted to include an amendment to s 21 of the Human Rights Act 1993 in a Statutes Amendment Bill to include gender identity as part of sex discrimination.

While some may argue that gender identity and gender expression should stand alone as a ground of unlawful discrimination, the reason for including it was that successive governments have stated that gender identity is included within sex discrimination, she says.

There has been concern expressed by the Human Rights Commission and by a number of members of the transgender community that there is no guarantee that a court would interpret the law in the same way, she says.

“My purpose was to make it clear and to do it through a technical amendment process that merely reflected what the government said. However the former Minister of Justice [Judith Collins] refused to support the amendment because she considered it was controversial, which begs the question of whether gender identity is properly covered within sex discrimination. I intend to continue to advocate for this legislative amendment.”

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**N**ew Zealand Human Rights Commission senior media specialist Christine Amunson says their dispute resolution process works

to deal with unlawful discrimination complaints from affected individuals.

“Within our communities, workers face unique and difficult challenges in the workplace and dismissals or resignations because of sexual orientation or gender identity occur far too frequently. Four out of five submissions to the Transgender Inquiry 2008 described experiences of discrimination.

Employment discrimination was a common experience for trans people, with access to employment and job retention being key issues, she says.

“Workers will frequently choose to leave their employment rather than take a case of discrimination because of the requirement to go public about their sexual orientation or gender identity.”

Though discrimination on the basis of sexual orientation is unlawful under the Human Rights Act 1993 and under s 105 of the Employment Relations Act 2000, this does not alter the fact that it occurs, she says.

Gender identity is not explicitly protected as a ground of discrimination in the Human Rights Act. However, such complaints are taken under the ground of sex discrimination.

In 2010, legal academics and the Human Rights Commission recommended that gender identity should be explicitly protected under the Act as a prohibited ground of discrimination. ■