THE END OF "HE OR SHE"?
A look at gender-neutral legislative drafting in New Zealand and abroad

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In recent years, the gender binary has started to give way to a more accurate understanding of gender as nuanced and multi-faceted. This article examines a small aspect of this shift: gender-neutral language in legislative drafting in New Zealand and overseas. We examine the history of gendered language in New Zealand and assess the status quo, concluding that while gender-neutral language seems to be encouraged, it is not yet mandatory. We outline the challenges faced in achieving full gender-neutrality, review international drafting practices, and canvass several areas in which New Zealand is making desirable steps towards full gender inclusivity in legislation.

I INTRODUCTION

Traditionally, sex and gender have been understood as binary concepts. A person was either female or male; a woman or a man. While this has never been an accurate reflection of sex and gender, it is only relatively recently that non-binary conceptualisations of gender have started to be acknowledged. Recognition of the full spectrum of genders is a desirable step, but is not the ultimate goal. New Zealand must strive toward full gender-neutrality if it is to take a step toward meaningful inclusivity — only neutrality captures a proper understanding of gender.

In order to effect true inclusivity, gender-neutrality must take place across many aspects of life such as birth certificates, anti-discrimination laws, representation in the media, and access to appropriate facilities

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such as public bathrooms. The purpose of this article is to focus on one particular aspect of the neutrality discussion: legislative drafting. Lawyers know all too well how important the language used in legislative drafting is, reflecting and shaping how individuals understand and interact with society and its laws. This article explores current gender-neutral drafting practices in New Zealand and overseas in order to shed light on the issue with a view to promoting full inclusivity in legislative drafting.

Part II begins with a discussion of the meaning of gender-neutrality. The history of gendered language in legislation is canvassed in Part III, alongside the current position in New Zealand. Part IV outlines the perceived challenges surrounding gender-neutral language, with a focus on the still hotly debated use of the singular *they*. Part V offers comparisons with other jurisdictions, and Part VI explores notable developments in New Zealand.

We conclude that, until now, the place of legislative drafting in the broader gender-neutrality discussion has largely been overlooked. Developments in this area are a clear example of how language in the law can reflect a vision of a more inclusive society.

II WHAT IS GENDER-NEUTRALITY?

Western culture, and the law governing it, has historically adopted binary understandings and expressions of sex and gender.[1] The gender binary categorises people as either a woman or a man based on their biological sex. Where a person's sex matches their gender, they can be described as 'cisgender'.[2] However, many people's experiences of sex and gender are more nuanced than that:[3]

> It is estimated that one to two per cent of people "are born with sexual features that vary from the medically defined norm for male and female", and in the year 2011 alone Victorian hospitals reported about 40 cases of infants who were born with "physical or biological conditions that mean [they] cannot be said to be exclusively male or female".

People also may not identify with the gender paired with their biological sex

1 Anne Fausto-Stirling "The Five Sexes: Why Male and Female Are Not Enough" (1993) 33(2) The Sciences 20 at 20 as cited in Theodore Bennett "'No Man's Land': Non-Binary Sex Identification in Australian Law and Policy" (2014) 37(3) UNSWLJ 847 at 847–848.

2 At 849.

3 At 852 (footnotes omitted).

or may not identify with either of 'female' or 'male', and are therefore non-cisgender.[4] By way of example, New York City recognises 31 different genders,[5] and Facebook recognises 50.[6] Alongside cis female and cis male, Facebook lets users select options such as gender-fluid, pangender, transsexual, and agender.

For the purposes of this article, the term 'gender-neutral' is adopted. We use it in a completely non-gendered and all-inclusive sense.

III GENDERED DRAFTING: HISTORICALLY AND TODAY

A Historical Use of Gendered Language

Traditionally, New Zealand society and language were male-centric, as reflected in legislation, which solely referred to "him" and "he". The Shorthand Reporters Act 1900, for example, described all reporters as male, stating that "[i]f any person, not being an authorised reporter … holds himself out to the public as an authorised reporter, he is liable to a penalty".[7] The Law Practitioners Amendment Act 1935 set down punishments for professional misconduct such as "[c]ensure him" and "[o]rder him to pay a penalty".[8] This example is particularly surprising given the Female Law Practitioners Act 1896 was passed almost 40 years earlier, and pioneering women such as Ethel Benjamin were practising as lawyers long before 1935.[9]

It is important to note that while many statutes referred to men only, there was always an express or implied understanding that references to "him" or "he" included women. For a long time, provision has been made in various Interpretation Acts (culminating in the current Interpretation Act 1999)[10] that references to the masculine gender include the feminine.[11] However, the

4 At 852.

5 Peter Hasson "New York City Lets You Choose From 31 Different Gender Identities" (24 May 2016) The Daily Caller <www.dailycaller.com>.

6 Matthew Sparkes "Facebook sex changes: which one of 50 genders are you?" *The Telegraph* (online ed, London, 14 February 2014).

7 Shorthand Reporters Act 1900, s 16.

8 Law Practitioners Amendment Act 1935, ss 3(2)(c)–3(2)(d).

9 Ethel Benjamin was admitted as a Barrister and Solicitor of the Supreme Court of New Zealand on 10 May 1897: Ministry for Culture and Heritage "NZ's first woman barrister and solicitor appointed" (March 2018) New Zealand History <www.nzhistory.govt.nz>.

10 Note that the Interpretation Act 1999 is soon to be integrated into the Legislation Bill 2017 (257–2), pt 2.

11 Interpretation Act 1888, s 4; Acts Interpretation Act 1908, s 5; Acts Interpretation Act 1924, s 4; and Interpretation Act 1999, s 31.

message was clear that women were not regarded as the norm, and were seen by many as second-class citizens not warranting an express mention. Moreover, such references obviously do not accord recognition to non-binary genders, and so are not gender-neutral.

References slowly began to change to the gender-binary *him or her* as the place of women in society shifted.[12] The wording in some statutes began to read, for example, "where the Secretary has stated that *he or she* is satisfied …".[13] By the 1960s and 1970s, a renewed wave of feminism had thrust the issue of gendered language in legislation into the spotlight. Pressure from feminists for laws and policies to be more gender-inclusive led to the actual text of these laws and policies being considered seriously for the first time.[14]

In the 1980s and 1990s, the New Zealand Law Commission produced four reports that changed the landscape of legislative drafting and access.[15] These reports came in response to a push by the then-Minister of Justice Hon Geoffrey Palmer, who took a keen interest in improving the accessibility of legislation to all.[16] One of these reports, entitled *Legislation Manual: Structure and Style*, sought to create a set of guidelines for drafters that focused on plain and accessible language.[17] These guidelines were largely adopted by the Parliamentary Counsel Office (PCO) and form the basis of the plain language techniques that the PCO use today. The report emphasised that:[18]

> There is no mystery to plain language. Plain language is ordinary language, expressed directly and clearly. … In legislation its use is intended to remove the barriers to communication, and in this way make the law more accessible.

To achieve plain language and improve accessibility the *Structure and Style*

12 For a detailed summary of the women's rights movement in New Zealand, see Christine Dann *Up from Under: Women and Liberation in New Zealand 1970–1985* (eBook ed, Bridget Williams Books, 2015) at ch 1.

13 Forests Act 1949, s 67C(1)(f)(iii) (emphasis added).

14 Margaret Wilson, Professor of Law and Public Policy, University of Waikato "Gender-Neutral Law Drafting: The Challenge of Translating Policy into Legislation" (Sir William Dale Annual Memorial Lecture 2011, Institute of Advanced Legal Studies, London, 11 January 2011).

15 Law Commission *Legislation and its Interpretation: Statutory Publications Bill* (NZLC R11, 1989); Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990); Law Commission *The Format of Legislation* (NZLC R27, 1993); and Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996).

16 Wilson, above n 14.

17 Law Commission *Legislation Manual: Structure and Style*, above n 15.

18 At [136].

report suggested drafters should use gender-neutral language and avoid the traditional use of male pronouns ("he") and nouns ("chairman").[19] The report recognised that doing so might be clunky, and that drafters should "[c]hoose the technique that communicates the message as effectively and as elegantly as possible".[20]

In general, there has been a positive step away from singularly-gendered language ("he"), to dual-gendered language ("he or she"), and this binary language is currently the status-quo in most of New Zealand's statutes.[21] Unfortunately however, references to "he or she" fail to achieve gender-neutrality in a non-binary sense, as they pigeonhole gender into two categories and do not recognise that people may identify with a gender other than male or female. It is therefore incorrect for such language to be described as gender-neutral in its full sense, although it is undoubtedly more desirable to recognise at least two genders rather than one, which was the case previously.[22]

B The Current Position in New Zealand

In New Zealand, entirely gender-neutral drafting is strongly encouraged, but not required. Legislative drafting guidelines are provided to Parliamentary Counsel in the PCO Drafting Manual, which has recently undergone significant changes in respect of gender-neutral language.[23] The Manual provides guidance on all aspects of drafting, such as ensuring plain language is used.[24] According to the currently available public version of the PCO Drafting Manual, gender-neutral language (in the form of "they" or "their") has been used in writing since the 14th century.[25] To cater for the need for gender-neutrality in legislation, a range of techniques are listed as permitted, such as:[26]

i) omitting the pronoun altogether;

ii) repeating the noun;

19 At [186] and [188]–[189].

20 At [187].

21 At the time of publication, the phrase "he or she" appeared in more than 470 Acts. See, for example, the Holidays Act 2003, s 23(1)(b); and the Food Act 2014, s 33(2).

22 See the discussion of the Shorthand Reporters Act and the Law Practitioners Amendment Act above.

23 Chapter 3 of the PCO Drafting Manual was updated in 2018.

24 "Principles of clear drafting" Parliamentary Counsel Office <www.pco.govt.nz>.

25 At [3.70A].

26 At [3.70].

iii) using "they" or "their" to describe singular persons;

iv) using masculine and feminine pronouns (for example, "he" or "she");

v) recasting the sentence into the plural;

vi) converting the noun to a verb;

vii) using a relative clause; or

viii) using a passive construction.

The PCO Drafting Manual notes that these techniques will contribute to full gender-neutrality to varying degrees.[27] In particular, while using gendered pronouns such as "he or she" is still an accepted method, the Manual instructs drafters that this technique is only to be used sparingly.[28] The continued use of "he or she" is also intended to be reviewed in 2019.[29] It is important to note that in some cases of amending specific provisions in old legislation, phrases like "he or she" still have to be used in the amendments to ensure consistency with the language used in the old legislation.[30] For example, if an old statute says "he or she" throughout, any amendments to that statute will also need to say "he or she" in order to maintain consistency in the wording used across the statute as a whole. On the whole however, the recent changes to the Drafting Manual express the PCO's commitment to neutralising New Zealand's gendered legislation. The new section on gender-neutral language emphasises that:[31]

> In the past, gender-neutral language was seen merely as language that did not use "masculine language" being blind to women. It is increasingly recognized that this is an overly narrow concept of gender-neutrality, and that language (and law in general) should move beyond binary concepts of gender that undermine its applicability to all persons.

It is clear from a scan of the current legislation that gendered language still exists throughout the statute books.[32] That being said, change is occurring,

27 At [3.70].

28 At [3.70B].

29 At [3.70B].

30 At [3.72].

31 At [3.69A].

32 See, for example, the Summary Offences Act 1981, s 20A(3) which still assumes that the Attorney-General is a "he"; and the Crimes Act 1961, s 8A(5)(a) which states that "he or she may be arrested".

albeit incrementally. New legislation tends to no longer use gender-specific language (unless there is no other option, or it is amending legislation and requires consistency) and old legislation is slowly being re-written or replaced with modern language as it is updated by Parliament. As the calls for gender-neutrality are relatively recent, it is unsurprising that most existing legislation does not comply with fully gender-neutral guidelines; nor is it surprising that the PCO Drafting Manual has not until recently excluded techniques that only achieve partial gender-neutrality. However, now that the issue is gaining traction there is no reason that legislation enacted from this point on should not be completely gender-neutral.

Alongside the PCO Drafting Manual update, further inklings of positive change can be seen in international drafting practices and in particular, in actual New Zealand statutes. The developments are explored in full below, following a discussion of the challenges posed by complete gender-neutrality.

IV THE CHALLENGES OF GENDER-NEUTRAL DRAFTING

Adapting to completely gender-neutral language in legislative drafting does not come without its challenges — the most significant of which is the use of the singular *they*. The problem stems from the lack of an English gender-neutral pronoun, as exists in other languages, such as Finnish and Swedish.[33] Gender-neutral pronouns solve the problem of gendered drafting for obvious reasons,[34] and some English-speaking countries like Canada have started adopting gender-neutral pronouns (such as *ze*) colloquially but not yet in legislation.[35] In New Zealand, the te reo Māori word *ia* has always existed as a gender-neutral pronoun that can mean *he*, *she*, *him*, *her*, *it* and *they*.[36] *Ia* is used regularly throughout Te Ture mō Te Reo Māori 2016/the Māori Language Act 2016,[37] the first (and at this point, only) New Zealand Act to be drafted bilingually. Unfortunately, *ia* is not used in English and so does not appear

33 See the discussion of gender-neutral pronouns in Finland and Sweden below.

34 Gender-neutral pronouns such as *hän* in Finland can be used to refer to any and all genders (that is, the pronoun encompasses *he*, *she*, and *they* all in one) and so are inclusive.

35 Jessica Murphy "Toronto professor Jordan Peterson takes on gender-neutral pronouns" (4 November 2016) BBC <www.bbc.com>.

36 PM Ryan *The Raupō Dictionary of Modern Māori* (4th ed, Penguin Group (NZ), North Shore, 2012) at 79.

37 See, for example, s 9(1).

in any other legislation. However, the word *they* and its variants (*them*, *their*) can be used in place of gendered pronouns. For example " … where a child or young person is removed from *their* family", could be used rather than the current wording " … from *his or her* family".[38]

The common issue with this approach is that using *they* or *their* in a singular sense (to refer to one person or object) is grammatically incorrect.[39] It does, however, provide a straightforward means of neutral drafting. A conflict thus arises between technically correct grammar in the strictest sense, and fully gender-neutral language.

Members of the United Kingdom's upper house of Parliament, the House of Lords, have expressed strong opinions against the singular *they*. In a 2013 Parliamentary Debate, Lord Scott detailed how "absurd" he found attempts at gender-neutral language in legislation to be, stating that:[40]

> Statutes and statutory instruments ought not only to be clear and free of ambiguity, but surely ought also to stand as models for the correct use of the English language. To prostitute the English language in pursuit of some goal of gender equality is, I suggest, unacceptable.
>
> …
>
> [It is] an insult to the lovely English language …

The argument against the singular *they* is not that it should never be used. Rather, opponents claim that it is improper to use *they* in formal writing as it is "colloquial" and "just wrong".[41] The argument that the singular *they* is too colloquial or somehow improper, however, easily fails. Language is organic, and it changes to suit people's needs in light of evolving social norms. Such change is "natural and inevitable",[42] and many words that were once colloquial are now considered acceptable in everyday usage.[43] The continual addition of new words such as "Google" to dictionaries around the world is demonstrative

38 Oranga Tamariki Act 1989, s 13(2)(f) (emphasis added).

39 This argument is discussed below.

40 (12 December 2013) 750 GBPD HL 1006–1007.

41 Mary Norris *Between You & Me: Confessions of a Comma Queen* (Text Publishing, Melbourne, 2015) at 69.

42 Jean Aitchison *Language Change: Progress or Decay?* (4th ed, Cambridge University Press, Cambridge, 2013) at 245.

43 Eric Partridge *Slang: To-Day and Yesterday* (Routledge, New York, 2015) at 11.

of the ever-shifting nature of language.[44] The word *they* has itself been used colloquially since at least the 14th century,[45] with writers like William Shakespeare and Jane Austen both employing it as a singular pronoun in their works.[46]

Another issue that grammarians have with the singular *they* is that "a pronoun … should not have two grammatical senses".[47] *They* can be used in the singular but also in the plural, which can cause confusion about who is being referred to. In the sentence, "if a person hits another person they must report it", for example, it is unclear whether the first, second, or both people are required to report the incident. This is a fair criticism. However, as the PCO Drafting Manual emphasises the importance of avoiding ambiguity when using *they*, it seems that the simple solution is to use one of the alternative gender-neutral methods of drafting where the use of *they* creates ambiguity.[48]

Strong support for the use of *they* in legislation is found in the latest edition of *Thornton's Legislative Drafting*.[49] Widely thought of as the bible of legislative drafting practice, *Thornton's Legislative Drafting* provides guidance to Parliamentary Counsel and drafters around the world. *Thornton's Legislative Drafting* notes that the problem of gender-neutral drafting arises from the fact that there is no gender-free singular pronoun in English.[50]

Thornton's Legislative Drafting lists numerous methods of avoiding gender-specific language (including those listed in the PCO Drafting Manual and set out above), many of which have been adopted and implemented in drafting manuals overseas. *Thornton's Legislative Drafting* goes further than most, however, and specifically chastises the use of "his or her" because it "fails to sideline gender: it still uses gender specific expressions".[51] This point is an

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44 Angus Stevenson and Maurice Waite (eds) *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011) at 613.

45 "Principles of clear drafting", above n 24, at [3.70A].

46 Catherine Helen Palczewski, Victoria Pruin DeFransisco and Danielle Dick McGeough *Gender in Communication: A Critical Introduction* (3rd ed, SAGE Publications, Los Angeles, 2017) at 101.

47 Dieter Kastovsky and Arthur Mettinger (eds) *The History of English in a Social Context: A Contribution to Historical Sociolinguistics* (Mouton de Gruyter, Berlin, 2000) at 269.

48 "Principles of clear drafting", above n 24, at [3.70A].

49 Helen Xanthaki (ed) *Thornton's Legislative Drafting* (5th ed, Bloomsbury Professional, West Sussex, 2013).

50 At [3.67]. See more on this point in the discussions of Finnish and Swedish drafting below.

51 At [3.68].

important one. The view that "his or her" or "he or she" is gender-neutral because it caters for both males and females is outdated and incorrect, as it still adheres to exclusive binary concepts. To combat this, the use of "they", "them" and "their" is recommended to drafters:[52]

> Although this technique has not been fully accepted, it is gaining ground rapidly, mainly because it serves perfectly the purpose of gender neutral language: it draws the users' attention to gender neutrality and can be used with ease in all languages irrespective of how many genders and grammatical forms there are. What seems to annoy most opponents to the technique is the grammatical error in its expressions. … But is grammatical correctness that important? Since grammar is simply a tool, and not a chain, in the hands of drafters, *gender neutrality cannot continue to remain anchored down by the inherent limitations of language*.

As the leading text in the area, *Thornton's Legislative Drafting*'s advocacy for and recommendation of gender-neutral alternatives, even if not traditionally 'grammatical', ought to carry considerable weight. While drafting offices have their own guidelines, the ultimate product largely depends on the style and preference of the drafter, subject to any changes during the legislative process such as by select committees and the views of the instructing departments or agencies. *Thornton's* stance, that gender-neutrality ought to trump what some people consider to be awkward grammar, ought therefore to be adopted if legislative drafting is to be done in a truly inclusive way.

Many linguists seem to agree that the use of gendered language in general is on the way out. Twenty years ago, Emeritus Professor of Linguistics Janet Holmes concluded that "there is good evidence to suggest that [the] pseudo-generic *he* has all but disappeared. Non-sexist norms have demonstrably displaced the grammatically prescribed sexist forms".[53] More recently, it has become clear to linguists that "*they* has increasingly moved towards singular senses … Disturbing though these developments may be to purists, they're irreversible. And nothing that a grammarian says will change them."[54]

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52 At [3.70] (emphasis added).

53 Janet Holmes "Generic pronouns in the Wellington Corpus of Spoken New Zealand English" (1998) 1(1) Kotare 32 at 38 (original emphasis).

54 Bryan A Garner *Garner's Modern English Usage* (4th ed, Oxford University Press, Oxford, 2016) at 736 (original emphasis).

In 2015, the American Dialect Society elected the singular *they* as Word of the Year for its use as a gender-neutral alternative to *he* or *she*.[55] The singular *they* is now (or at least ought to be) accepted in spoken and written English, and colloquial and semi-formal English.[56] Its widespread use in legislation remains a final frontier. In the context of English language broadly, it seems as if "the battle has been won".[57] It is likely only a matter of time before written legislation catches up to these developments and adopts the singular *they* as a gender-neutral alternative.

V GENDER-NEUTRAL DRAFTING AROUND THE WORLD

The following discussion examines a series of other jurisdictions and international bodies to shed light on how the issue of gender-neutral drafting is addressed around the world.

A Australia

Australia's federal Parliamentary Counsel Drafting Manual proclaims that "[f]or many years, OPC has drafted using gender-neutral language."[58] Unfortunately however, such a claim is only correct insofar as providing gender-neutrality for binary genders. In other words, phrases like *he or she* are still used. Australia's additional drafting guidelines further reflect this, encouraging the use of *him or her* (subject to drafter discretion) and seldom mentioning non-binary alternatives (aside from simply using the noun, for example, *a person*).[59]

Like most countries however, Australian attitudes are changing. In the landmark case of *NSW Registrar of Births, Deaths and Marriages v Norrie*, the

55 Jessica Bennett "She? Ze? They? What's In a Gender Pronoun" *The New York Times* (online ed, New York, 30 January 2016).

56 The singular *they* has long been accepted in informal speech — for example, when told "there's someone here who wants to speak to you", it is perfectly normal to reply "who are they?" or "what do they want?" Further, the singular *they* has now become widely accepted by copy editors in semi-formal publications. See Andy Hollandbeck "Associated Press Accepts Singular They" (29 March 2017) Copyediting <www.copyediting.com>.

57 Email from Janet Holmes (Emeritus Professor of Linguistics, Victoria University of Wellington) to Jasper Fawcett regarding the use of *they* and other gender-neutral alternatives in language (9 March 2018).

58 Office of Parliamentary Counsel *OPC Drafting Manual* (edition 3.1, February 2016) at [98].

59 Office of Parliamentary Counsel *Drafting Direction No 2.1: English usage, gender-specific and gender-neutral language, grammar, punctuation and spelling* (1 March 2016) at [15].

High Court of Australia held that the New South Wales Registry of Births, Deaths and Marriages could record the sex of Norrie as "non-specific".[60] Decisions such as this may, we hope, be a precursor to legislative change.

B Canada

Canada's legislative language is arguably the most inclusive of all the countries surveyed in this article. Canadian drafting guidelines recommend the use of the singular "they" to refer to indefinite pronouns and singular nouns, thereby avoiding gendered language entirely.[61] Although, as with most other countries, Canada's ideal approach is to use alternative methods and draft in a way that avoids the need for specific genders, or the use of *they* altogether.[62]

Much of Canada's federal legislation (for example, the Criminal Code,[63] the Divorce Act,[64] and the Canada Labour Code[65]) uses gender-neutral language, including the singular *they*. While "his or her" is still used sporadically,[66] it is heartening to see such an emphasis on gender-neutral language at the federal level. The Canadian Charter of Rights and Freedoms, Canada's main constitutional document, is also entirely gender-neutral and uses "they" to great effect.[67]

At the state level, Canada's drafting guidelines also encourage the use of the singular *they*, and recommend against using gender-specific language by employing alternate techniques. Evidence for this can be found in the drafting guides of British Columbia,[68] Nova Scotia,[69] and Ontario.[70]

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60 *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, (2014) 250 CLR 490.

61 "Legistics: Gender-neutral Language" (7 January 2015) Canadian Department of Justice <canada.justice.gc.ca>.

62 "Legistics: Gender-neutral Language", above n 61.

63 Criminal Code RSC 1985 c C-46, s 34(1).

64 Divorce Act RSC 1985 c 3 (2nd Supp), s 8(1).

65 Canada Labour Code RSC 1985 c L-2, s 196(4).

66 See, for example, Criminal Code, s 515(10)(a).

67 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

68 Office of Legislative Counsel *A Guide to Legislation and Legislative Process in British Columbia: Part 4 — Statute Revisions* (Province of British Columbia Ministry of Justice, August 2013) at 3.

69 Registry of Regulations *Style and Procedures Manual: A Guide to Drafting Regulations in Plain Language* (Nova Scotia Department of Justice, January 2005) at 75.

70 Donald L Revell, Cornelia Schuh and Michael Moisan "'Themself' and nonsexist style in Canadian legislative drafting" (1994) 10(1) English Today 10.

Additionally, the Canadian Parliament has recently voted to re-word their national anthem, 'O Canada', to make it gender-neutral.[71] A small change of just two words was made: a reference to "all thy sons" in the third line was changed to "all of us". While not legal in nature, this change is demonstrative of the strong commitment to equality and gender-neutrality across Canadian English as a whole.

C European Parliament

In 2009, the European Parliament released a document entitled *Gender Neutral Language in the European Parliament* (the Guidelines),[72] which is designed to provide guidance for gender-neutrality in all publications and communications across the European Union. Consistent with what we have seen in other countries, the Guidelines provide that gender-neutral language in its broad non-binary sense should be the norm, not the exception.[73] The European Parliament recommends using the same techniques as listed in the PCO Drafting Manual (like repeating the noun), and specifically suggests that plural forms such as "officials shall carry out their duties" should be used if possible.[74] Much like the PCO Drafting Manual, the European Parliament recommends only using "he or she" sparingly and if no other technique is appropriate.[75]

D Finland

In Finnish, the third-person singular pronoun *hän* is used when speaking and writing about people. There are no gender-specific pronouns like *he* or *she*, as in English. Accordingly, the issue of gender-neutrality does not arise in Finland. Further, unlike some European languages, Finnish does not use genders for its nouns (as we do with words like *actor* and *actress*). There is a suffix, *-mies,* which appears at the end of occupations such as builder, plumber, and public servant, but it has never been considered gender-specific in Finnish society.[76]

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71 Leah Schnurr, Julie Gordon and Peter Cooney "Canadian lawmakers vote to make national anthem gender neutral" (16 June 2016) Reuters <www.reuters.com>.

72 European Parliament *Gender-neutral language in the European Parliament* (February 2009).

73 At 3.

74 At 9.

75 At 9.

76 Email from Karen Khoo (Embassy of Finland, Canberra) to Ruby King and Jasper Fawcett regarding gender-neutral pronouns in Finland (5 November 2016).

The lack of gendered nouns in Finnish makes it much easier to achieve gender-neutrality across the language as a whole.[77] While "his or her" is still frequently used in the English translations of Finnish legislation,[78] this is because English has no comparable gender-neutral pronoun. As these are only translations, they have no legal effect in Finland (just as a Finnish translation of New Zealand legislation would have no legal effect).

With the help of the European Institute for Gender Equality, 'Gender Impact Assessments' have grown in popularity throughout Finland and wider Europe, and have been recommended to senior officials in an attempt to encourage the vetting of legislation and other official publications for gender sensitivity and neutrality.[79] Providing a Gender Impact Assessment of proposed legislation means that the consequences that the legislation will have on different genders can be analysed in advance, thus preventing it from being directly or indirectly discriminatory.[80] While the assessment is designed to prevent discrimination arising from legislation in general, it presumably also examines whether gender-neutral language is used. We note that in New Zealand, all Cabinet papers are also required to include a statement on gender implications that may result from the proposal(s),[81] and that a similar vetting system also exists in Sweden.[82]

E Germany

German legislative drafting guidelines echo those in most other countries. Essentially, they state that gender equality is important, but should not be achieved at the expense of clarity.[83] German linguists have questioned whether language can be changed by amending legislation, with academic Anatol Stefanowitsch saying that it's "hard to transform grammar through legislation,

77 Conversely, it is much more difficult to achieve gender-neutrality in countries (like New Zealand) which use gendered nouns. The removal of gendered nouns from legislation is discussed below in relation to words such as *chairman*.

78 See, for example, the unofficial translation of the Act on Registered Partnerships 2001 (Finland), s 6(2).

79 European Institute for Gender Equality *Gender Impact Assessment: Gender Mainstreaming Toolkit* (Publications Office of the European Union, 2016).

80 See, for example, European Institute for Gender Equality *Gender Training in the European Union: "Gender Impact Assessment" training in the city of Vantaa, Finland*.

81 Cabinet Office "What are the key requirements of a Cabinet paper" (2 March 2018) Department of the Prime Minister and Cabinet <www.dpmc.govt.nz>.

82 The Swedish process of gender equality analysis is discussed below.

83 Federal Ministry of Justice *Manual for Drafting Legislation* (3rd ed, 2008) at [110]–[123].

and even if so, such changes often happen over centuries".[84] In actual fact, the minor and technical nature of any reform required means that legislative change is not difficult to effect.

F Ireland

Ireland's legislation is not gender-neutral in the full sense. The Gender Recognition Act 2015 was recently passed but, despite being an Act entirely about recognising and providing for different genders, the text itself still uses the wording "him or her".[85] The Act is currently being reviewed to expand the ability of young adults to self-declare as belonging to a non-binary gender,[86] with the results planned to be published no later than September 2018.[87] However, the scope of this review seems to focus on the policy of the legislation rather than the actual words used in it. Just as Te Ture mō Te Reo Māori/the Māori Language Act is an Act about te reo that is written in te reo, an Act on gender recognition ought to be written using gender-neutral language. We hope that the increasing focus on gender issues will result in the Parliament of Ireland improving its position in the near future.

G Sweden

Similarly to Finland, Sweden has addressed the issue of gender-neutrality in a unique way. In 2015, the gender-neutral pronoun *hen* was introduced into the official Swedish dictionary.[88] The word can be used in two ways:

i) if the gender is unknown or not relevant, for example, "if anyone needs to smoke, *hen* may do so outside"; and

ii) as a pronoun for inter-gender people, for example, "Kim is neither boy nor girl, *hen* is inter-gender".

The English language grows by an estimated 5,400 words every year (with roughly 1,000 of those deemed relevant enough to print in dictionaries).[89]

84 Philip Oltermann "Germans try to get their tongues around gender-neutral language" *The Guardian* (online ed, London, 24 March 2014).

85 Gender Recognition Act 2015 (Ireland), ss 6(1), 14(2), and 16(4)(a).

86 Marie O'Halloran "Review of Gender Recognition Act will start by September, Varadkar announces" *The Irish Times* (online ed, Dublin, 10 May 2017).

87 The review had not been published at the time this article was written.

88 Svenska Akademien "hen" Svenska Akademiens Ordböcker <www.svenska.se>.

89 Andy Bodle "How new words are born" *The Guardian* (online ed, London, 4 February 2016).

However, the time it takes to introduce a new word (a neologism) to a language's lexicon can vary greatly, often taking generations.[90] While *hen* is in Sweden's dictionary, it does not currently exist in its legislation. It seems unlikely that it will be added until it has become an accepted and widely-used word in everyday language. This is still a positive development, because the introduction of a gender-neutral pronoun entirely solves the problem of gendered language — but it is important to note that even if a word becomes commonplace in everyday language, the addition of that word to legislation would require incremental amendments over a period of many years.

Sweden has also recently established the Swedish Gender Equality Agency, which analyses new government policies and works closely with departments and relevant stakeholders to implement gender-equal policies throughout society.[91] Similarly to vetting processes undertaken in Finland and New Zealand, these analyses focus on gender-neutrality in a general sense. We again presume that part of this general approach will include an examination of the wording used in legislation and policy documents.

H United Kingdom

United Kingdom legislation is not gender-neutral at all, even in the binary sense of the term. Primary statutes such as the Criminal Law Act 1967 (UK) and the Family Law Act 1996 (UK) make regular use of "him".[92] Notably, the United Kingdom's Parliamentary Counsel Guidelines state that it "is government policy that primary legislation should be drafted in a gender-neutral way, so far as it is practicable to do so".[93] However, "gender-neutral" in this context seems to be limited to the gender binary: the Guidelines suggest that "he or she" be used when referring to an individual.[94] In 2016, the United Kingdom's Ministry of Justice said, in reply to a petition:[95]

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90 Yaroslav Levchenko *Neologism in the lexical system of modern English: On the mass media material* (GRIN Verlag, Germany, 2010) at 3–4.

91 "About the Agency" (25 April 2018) The Swedish Gender Equality Agency <www.jamstalldhetsmyndigheten.se>.

92 Criminal Law Act 1967 (UK), s 6(3); and Family Law Act 1996 (UK), s 33(1)(a)(i).

93 Drafting Techniques Group *Drafting Guidance* (Office of the Parliamentary Counsel, July 2018) at [2.1.1].

94 At [2.1.12].

95 "Petition: Allow transgender people to self-define their legal gender" (22 January 2016) Petitions: UK Government and Parliament <www.petition.parliament.uk>.

> Non-binary gender is not recognised in UK law.
>
> …
>
> We recognise that a very small number of people consider themselves to be of neither gender. We are not aware that that results in any specific detriment …

As mentioned above, some members of the United Kingdom Parliament are vehemently opposed to the use of gender-neutral alternatives at the expense of 'proper' English.[96] In essence, there seems to be an attitude among lawmakers in the United Kingdom of prioritising traditional grammar over gender-neutral language. This position sits in stark contrast to the views of *Thornton's Legislative Drafting*,[97] and to comparable overseas jurisdictions such as Canada and New Zealand.[98]

I Conclusions

It is worth noting briefly that in those countries that do take some step towards gender-neutral legislation, neutrality has typically been implemented selectively. In other words, blanket changes are not usually made; incremental amendments as a result of public pressure are more common.[99]

The typically piecemeal nature of this type of legislative change is due in large part to the legislative process, and the fact that legislation is designed to last as long as possible without amendment so as to minimise the use of parliamentary resources. Simply put, legislation is inherently difficult to overhaul and modernise. Despite these barriers, gradual amendments are being made successfully to legislation around the world.

VI CHANGES IN NEW ZEALAND

As discussed, gender-neutral drafting is strongly encouraged in New Zealand. However, it is not mandatory,[100] leaving open the possibility of the continued

96 (12 December 2013) 750 GBPD HL 1007.

97 Xanthaki, above n 49.

98 See the discussions of Canadian and New Zealand drafting practices above.

99 See the sexual violence amendments to the Crimes Act 1961, discussed below under 'Amendments to Selected Pieces of Legislation'.

100 "Principles of clear drafting", above n 24, at [3.69]–[3.74].

use of gendered language in drafting. A selection of areas where there have been notable shifts towards gender-neutrality are canvassed below.

A Amendments to Selected Pieces of Legislation

1 Crimes Act 1961

Certain provisions of the Crimes Act 1961 relating to sexual violation were amended by the Crimes Amendment Bill (No 2) 2005 to make them gender-neutral.[101] This came in response to the case of *JWB v Accident Rehabilitation and Compensation Insurance Corp*, in which an ACC claim failed because there was (at that stage) no offence covering the situation of a woman indecently assaulting her male son.[102] The Act now reads, "Person A rapes person B if person A has sexual connection with person B" so as to avoid gendered language.[103] This is an effective method, though it is worth noting that it can fast become ambiguous if there are more than a few people involved (for example, persons A, B, C, and D).[104]

2 Education Act 1986

The Education Act 1989 has also been amended recently to ensure that several provisions are gender-neutral.[105] This was achieved by using alternative language such as "a person" and "the parent".[106] Despite these amendments however, the Act remains cis gender-biased and still employs the use of "his or her" in many provisions.[107] This is a prime example of the small and incremental changes occurring to New Zealand's legislation, in lieu of a full overhaul.

3 New Zealand Council for Educational Research Act 1972

Amendments to the New Zealand Council for Educational Research Act 1972 were themselves amended before they were passed to ensure that many of the

101 See, for example, Crimes Act, s 128.

102 *JWB v Accident Rehabilitation and Compensation Insurance Corporation* DC Auckland DCA149/99, 23 November 1999.

103 Crimes Act, s 128(2).

104 For an example of the complexity caused by using multiple person labels, see s 83 of the Local Government (Auckland Transitional Provisions) Act 2010.

105 Education (Update) Amendment Act 2017.

106 Education Act 1989, s 24(1).

107 See, for example, s 1A(3)(a).

Act's provisions were gender-neutral.[108] The Act now only references gendered pronouns twice.[109] This purposeful language change by way of Supplementary Order Paper shows a commitment by Parliament to ensuring that legislation is enacted in a gender-neutral way. We hope to see more amendments made to bills passing through the House to bring them in line with neutral drafting standards.

B Inland Revenue Department Drafting Practices

Because of the specialised nature of its work, the Inland Revenue Department (IRD) drafts most of its own legislation.[110] Tax legislation frequently incorporates the use of the singular *they*, among other gender-neutral drafting methods. The Income Tax Act 2007, for example, uses both "they" and "their" as singular pronouns to no detrimental effect on readability, as can be seen in the following passage:[111]

> An amount that a person derives from disposing of personal property is income of the person if *they* acquired the property for the purpose of disposing of it.

Many more examples of this style of gender-neutral drafting can be found across legislation administered by the IRD.[112] That being said, there are still a number of tax statutes that continue to use "his or her" or "his".[113]

C Powers under the Legislation Bill

The Legislation Bill 2017 is intended to combine and replace the Legislation Act 2012 and the Interpretation Act 1999.[114] The Bill currently includes a new cl 16, which states that when it comes to legislative interpretation,

108 Supplementary Order Paper 2016 (176) Education Legislation Bill 2015 (100–1) (explanatory note) at 9.

109 New Zealand Council for Educational Research Act 1972, ss 12 and 30A.

110 See the Legislation Bill, above n 10, cl 67; and the Inland Revenue Department (Drafting) Order 1995.

111 Income Tax Act 2007, s CB 4 (emphasis added).

112 Goods and Services Tax Act 1985, s 16(4); KiwiSaver Act 2006, ss 10, 36, and 59C; Stamp and Cheque Duties Act 1971, s 86KA; and Tax Administration Act 1994, ss 14G, 15D–15E, 15S, 20C, 22, 24H, 25, 28D, 31C, 32G, 32M, and 120KE. Many of these examples also use "a person" and "the person", which may take into account legal personhood, necessary in tax legislation.

113 See the Estate and Gift Duties Act 1968; Student Loan Scheme Act 2011; Taxation Review Authorities Act 1994; and the Unclaimed Money Act 1971.

114 The Legislation Bill was awaiting its second reading at the time of writing, with the Justice Committee's report delivered to the House on 1 June 2018.

"[w]ords denoting a gender include every other gender."[115] While this is only a presumption, which does not apply if the enactment being interpreted or the context expressly provides otherwise,[116] it marks a significant shift from the clause's predecessor, which simply stated that references to the masculine included the feminine.[117] As currently drafted, cl 16 appears to be a catch-all that will apply wherever gender-biased language is mistakenly used, given the underlying preference for drafting to be gender-neutral from the outset.

Under cl 86 of the Bill,[118] the Chief Parliamentary Counsel also has the power to reprint statutes in order to change gender-biased language, like *chairman*, to gender-neutral language, like *chairperson*. Changing *he* to *they*, or another relevant noun, is listed as a specific example. This important, but little-known, power could be used to systematically remove references to gendered language; both masculine (*chairman*) and binary (*he or she*).

The word *chairman* is used in approximately 176 acts in the New Zealand statute book. Some of these references exist in rarely used statutes that are still in force, such as the Akaroa High School Act 1881.[119] Typical provisions where the word is used include phrases like "signed by the Chairman of the Commission",[120] and "chairman means the chairman of the Board".[121] After examining all 176 of these acts, all references to *chairman* are, in the authors' opinion, able to be changed to *chairperson* or *chair* without any problems arising. Many other references to gendered language also exist, with words such as "workman",[122] "fisherman",[123] "foreman",[124] "manpower",[125] "salesman",[126] and "serviceman",[127] all visible in current legislation. Again, we think these could all be changed to gender-neutral alternatives such as *worker*, *fisher*,

115 Clause 16(1).

116 Clause 9(1).

117 Interpretation Act 1999, s 31.

118 Above n 10, cl 86(a).

119 Akaroa High School Act 1881, ss 7, 9–11 and 15.

120 Fair Trading Act 1986, s 47H(1)(b)(ii).

121 New Zealand Stock Exchange Restructuring Act 2002, s 4.

122 Maori Affairs Restructuring Act 1989, s 84(1)(b).

123 Fishing Vessel Ownership Savings Act 1977, s 5(a).

124 High Court Rules 2016, r 10.11(4).

125 Statistics Act 1975, s 4(f).

126 Insurance Law Reform Act 1977, s 10.

127 See, for example, the Government Superannuation Fund Act 1956, s 62(1).

supervisor, *workforce*, *salesperson*, and *serviceperson* without any detrimental or legal effect.

The Legislation Bill also includes the same powers of revision as in the Legislation Act 2012, which allows bills to be re-cast in plain and modern language provided there are no changes to the effect of the law itself.[128] The most recent example of this is the Contract and Commercial Law Act 2017 (CCLA), which combined 12 acts relating to contract and commercial law and rewrote them in plain language so as to be more easily understood by the general public.[129] The revision programme has the potential to be an effective method of removing gendered language from legislation, as gender-neutral wording can be easily introduced without impacting the substantive meaning of provisions. Many regularly used Acts are proposed to be revised in the years to come,[130] including the Summary Offences Act 1981 which contains extensive references to gender-biased language (it still assumes that the Attorney-General is a "he"[131]) and the Accident Compensation Act 2001 which is full of similarly gendered language.[132]

It is worth noting the distinction between these revision powers and the reprint powers discussed above. While reprints can be made at the discretion of the Chief Parliamentary Counsel,[133] revision bills must be scrutinised carefully by the select committee and debated and passed by the House if they are to have effect.[134] Following the successful revision of the CCLA in 2017, we hope that the revision power afforded under the new Legislation Bill will be employed more regularly to overhaul not just gendered language, but out-dated language as a whole.

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128 Above n 10, cls 91–99.

129 See the Contract and Commercial Law Act 2017, sch 3, for a comparative table of the corresponding old and new provisions.

130 Parliamentary Counsel Office "Consultation on revision programme 2018–2020" (29 January 2018) <www.pco.govt.nz>.

131 See, for example, Summary Offences Act, ss 4(4), 11(2) and 20A(3).

132 See, for example, Accident Compensation Act 2001, ss 16(3), 17(1) and 28(1)(a).

133 Legislation Bill, above n 10, cl 85(1).

134 Under the Standing Orders of the House of Representatives 2017, SO 271, revision bills are not debated at first or third reading and there is usually no Committee of the Whole House. They are still referred to the select committee for consideration and debated at second reading. The legislative process for revision bills is streamlined because the contents of the bill should be uncontentious and implement no new policy.

VII CONCLUSION

New Zealand, alongside the rest of the world, is making progress when it comes to legislative drafting that is inclusive of the full gender spectrum. The conversation has well and truly begun. This is not to say, however, that progress will be rapid. It only takes a glance back to New Zealand's drafting history to ascertain that. It is reassuring to see, however, how far New Zealand has come from using only masculine language in legislation, to embracing fully gender-neutral language in the more comprehensive sense. This article has canvassed these changes, and set out New Zealand's current position on gender-neutral drafting. The same can be said for many comparable jurisdictions, with governments beginning to recognise the importance that legislative drafting plays in the inclusion of all people.

While true gender-neutrality and gender equality are goals being fought for across various fora, it is important to ensure that no platform is overlooked — especially not one as significant as legislation. This article offers a springboard for discussion about how true gender-neutrality can efficiently and quickly be achieved in existing and future legislation.