



GENDER-NEUTRAL DRAFTING AND OTHER RELATED MATTERS

Peter Jamadar, LLB, LEC, MDiv, DD, JCCJ

Meeting with the Criminal Justice Unit
OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF LEGAL AFFAIRS

16 MAY 2024

CJU, AGLA

The Criminal Justice Unit ('CJU'), Office of the Attorney General and Ministry of Legal Affairs ('AGLA') was established by Cabinet Note No AGLA (20)70 dated 15 June 2020 and gazetted on 9 September 2020 via Gazette No 158 of 2020. The Unit is focused on promoting the development of Trinidad and Tobago's criminal justice system in order to enhance public safety; prevent and reduce the harmful effects of criminal and delinquent behaviour on victims, individuals, and communities; formulate sanctions against offenders that are fair, just, effective and efficient and introduce mechanisms aimed at rehabilitation and reintegration of offenders in order to avoid recidivism and reduce criminality.

GENDER-NEUTRAL DRAFTING AND OTHER RELATED MATTERS¹

Introduction

History

Herstory

My-story – Their-story – Our-story

The technique of Gender-neutral drafting has been introduced in many jurisdictions that use English language to draft legislation. The overarching practical aim is to appropriately change the use of masculine pronouns in order to achieve substantive equality. The accustomed use of English language can raise some challenges in formulating gender-neutral and non-sexist legislative sentences. However, these challenges are not insurmountable. Also, the policy to use gender-neutral language does not mean that the use of gendered language always results in discrimination along lines of gender. Indeed, there are times when it is necessary to use specifically gendered language to achieve clarity and to convey legislative intent. The use of gender-neutral language is a legislative technique and tool to produce clarity in drafting and understanding and as well to achieve as normative the constitutional standard of equality. The overarching goal is substantive gender equality, resulting ultimately in corresponding transformative social equality.

Methodologically, and for historical socio-legal and cultural reasons, an effective entry point is to ask and be guided by the question: How does male-centric legislative language affect and disadvantage women? A more contemporary approach is to also adopt and add an inclusive and non-binary citizen-centric perspective. The resulting question may therefore take the form: How does male-centric legislative language affect and disadvantage all persons? Laws are intended to be read and understood by all persons, including young persons, and ought to be inclusive of all genders.

¹ Peter Jamadar, LLB, LEC, MDiv, DD, JCCJ; with assistance from Suraj Sakal, LLB, LEC, Judicial Counsel, CCJ; Thursday, 16 May 2024, Criminal Justice Unit ('CJU'), Attorney General and Minister of Legal Affairs ('AGLA'), TT.

A Gendered Story²

Gender bias can have a profound impact on the administration of justice. As explained recently by the Caribbean Court of Justice (‘CCJ’) in *Nicholson v Nicholson*,³ at [55] and in relation to courts:

These biases impact how we assess and process information, and thus influence our perceptions, interpretations, and applications of facts (evidence) and law. They can be shared and perpetuated in both overt and subtle ways, including through public and political discourse and through all forms of media (including social media). Importantly, ‘unconscious bias [can be] a source and means of reproducing and maintaining entire systems of inequality.’⁴ Indeed, it may very well be that ‘courts are an ideological body whose rulings represent the preferences of the men and women who serve on them.’⁵

Consider the case of Mabel Penury French, in *Re French*⁶. In hindsight it may appear quaint, but it is revealing of why the understanding and application of feminist legal methodologies, including the use of gender-neutral or inclusive language, are necessary.

French was born on 4 June 1881 in Portland Parish, New Brunswick, Canada. In 1902 she was admitted as a law student and in 1905 she graduated with a Bachelor of Civil Law degree from King’s College Law School (the first woman in New Brunswick to receive that degree). She requested the Council of the Barristers’ Society of New Brunswick to recommend her for admission as a lawyer. The Council considered her request and passed a resolution recommending her for admission as a lawyer, ‘subject to the opinion of the court as to her sex being under existing laws a bar to her admission ...’⁷

The courts considered the issue of whether a woman was eligible for admission as a lawyer. The contention was the meaning of the word ‘persons’ in the Barristers’ Society Act 1903

² Peter Jamadar, ‘Supporting and Inspiring Women in Justice Through Education, Mentoring and Across the Justice Sector – 2024 and Beyond: A Caribbean Perspective’ (UNODC Women in Justice/for Justice Annual Roundtable Celebrating the International Day of Women Judges, Vienna, 11 March 2024).

³ [2024] CCJ 1 (AJ) BZ at [55] (some citations omitted).

⁴ Kai Inga Liehr Storm and others, ‘Unconscious Bias in the HRM Literature: Towards a Critical-reflexive Approach’ (2023) 33(3) Human Resource Management Review 1, 23 <<https://www.sciencedirect.com/science/article/pii/S1053482223000207>> accessed 18 October 2023.

⁵ Allison P Harris and Maya Sen, ‘Bias and Judging’ (2019) 22 Annu Rev Political Sci 241, 243.

⁶ (1905) 37 NBR 359 (SC). See generally Mary Jane Mossman, ‘“Invisible” Constraints on Lawyering and Leadership: The Case of Women Lawyers’ (1988) 20 Ottawa L Rev 567.

⁷ *Re French* (1905) 37 NBR 359 (SC) at 359.

(NBR)⁸ which regulated admission to the practice of law. Counsel on behalf of French, submitted that the word ‘persons’ should be interpreted broadly so as to permit French to become a lawyer. However, the court unanimously concluded that the legislature’s use of the word ‘persons’, construed in the context of an exclusively male legal profession, could not have been intended to permit women’s admission to the practice of law.

Five male judges heard the arguments and three wrote opinions, and in a unanimous decision, French was refused admission to the Bar. Tuck CJ relied on ‘the advanced thought of the age ...’⁹, to say that women should not compete with men and that they should attend to ‘their own legitimate business.’¹⁰ He concluded that the word ‘persons’ applied only to males since ‘it was never in the contemplation of the legislature that a woman should be admitted an attorney of this court.’¹¹ Hanington J agreed, adding that in most other jurisdictions, the admission of women as lawyers had been accomplished by statutory amendment.¹²

The third judge to write an opinion, Barker J, affirmed the idea of separate spheres for men and women,¹³ ‘founded in the divine ordinance as well as in the nature of things’¹⁴. Barker J resolved that there was no right at common law for women to practise as attorneys. He further asserted that the use of the gender-neutral word ‘persons’ could not signify the admissibility of women to the legal profession because when the statute was first enacted in 1846, no women were lawyers and therefore the word ‘persons’ meant only men. In his view, the statute had never been intended to make ‘the radical change’ suggested by the applicant, and ‘by every rule of construction applicable to such a case this court [was] bound to hold that no such change [had] been made.’¹⁵

In *Nicholson*,¹⁶ the CCJ commented on *Re French*, at [62], as follows:

⁸ Subsection [sic] 13(1) authorised the Society to make rules for ‘the admission of persons to the study of the law and the periods and conditions of study’.

⁹ *French* (n 7) at 361.

¹⁰ *ibid* at 362.

¹¹ *ibid*.

¹² *ibid* at 363. In fact, women were not allowed to practice law in England until the Sex Disqualification (Removal) Act 1919 was passed. In 1921, Ivy Williams was the first woman to be called to the English bar.

¹³ Citing with approval two American cases, *Bradwell v State of Illinois* 83 US (16 Wall) 130 (1872) and *Robinson's Case* 131 Mass 376 (1889).

¹⁴ *French* (n 7) at 365-366.

¹⁵ *ibid* at 371.

¹⁶ *Nicholson* (n 3).

With the passage of time and the benefit of hindsight, it is quite easy and convenient to see the patriarchal mindset and unconscious gender bias at work in the approaches and justifications in denying Mabel French's petition to become a lawyer. Gender-neutral language was used, yet an interpretation that was male-exclusive and informed by patriarchal values and assumptions was applied. It is not therefore surprising that such occurrences would engender the following opinion: 'It has been a strength of patriarchy in all its historic forms to assimilate itself so perfectly to socioeconomic, political, and cultural structures as to be virtually invisible.'¹⁷

To assess our progress in Caribbean spaces, let us consider a more recent case that came before the CCJ in 2023, the domestic violence case of *OO v BK*.¹⁸ A woman was involved in an intimate partner relationship with a man for three years. During that time, they lived together for 21 months and had a son. After a violent incident involving the man, the woman sought a protection order in the Magistrates' Court. At the time of the incident the parties were not residing together and were not involved in an intimate relationship.

The female Magistrate held that the woman was not a 'spouse', 'former spouse', or person in a domestic, cohabitational, or visiting relationship and had no standing to seek a protection order. This was despite the legislation stating that a 'spouse' included 'a party to a marriage or cohabitational relationship' and affording protection to a 'former spouse'. The application for a protection order was dismissed. On appeal, the Court of Appeal, by majority, held that the Magistrate was entitled to decline jurisdiction. Further, two male judges in the Court of Appeal found it difficult to comprehend how a former intimate partner could be eligible to apply for a protection order.

The CCJ, overturning both the Magistrate and Court of Appeal, held that the woman fell within the term 'former spouse' and was entitled to seek a protection order. The CCJ explained that imposing a time limit on an applicant's capacity or status to make an application for a protection order after the breakdown of a cohabitational relationship ran contrary to purpose of the domestic violence legislation, which had to be interpreted in light of Barbados' fundamental human rights and constitutional values, as well as its international treaty obligations.

¹⁷ Joan Kelly, 'The Doubled Vision of Feminist Theory: A Postscript to the "Women and Power" Conference' in *Women, History and Theory: The Essays of Joan Kelly* (University of Chicago Press, 1984) ch 3, 51, quoted in, Mary Jane Mossman, "'Invisible" Constraints on Lawyering and Leadership: The Case of Women Lawyers' (1988) 20 *Ottawa L Rev* 567.

¹⁸ [2023] CCJ 10 (AJ) BB, [2024] 1 LRC 169.

The CCJ would quite poignantly point out the absurdity in the approaches taken in the local courts, spotlighting what can be interpreted as maybe unconscious gender insensitive adjudication:

... the amended [Domestic Violence] Act cannot sensibly be interpreted to mean that, unlike married spouses, an unmarried person who is or was in an abusive domestic relationship should be forced to stay in or resume that relationship to be eligible to apply for a protection order. Or that, to put it another way, if a traumatised unmarried woman or man ends a violent domestic relationship (irrespective of the length of the union) and tries to move on, they thereby automatically ‘withdraw themselves’ from the category of persons who may seek the protection of the amended Act, even if the threat of violence from their former partner persists.¹⁹

According to Professor Robinson²⁰ :

Not only does the gender system disempower women as a class ... The justice system is not removed from these inequalities. Both laws and the administration of justice can be implicated in maintaining gender inequality. However, the justice system can be an engine for both ‘reproducing *and destabilizing* inequality’.

Our discussions are about whether we, as lawyers and legal officers, want to continue to ‘reproduce’ gender inequality, or do we want to ‘destabilize’ it and move in directions of gender equality? Of particular relevance to today’s discussions, is whether the language of the law, including legislative language, can make a difference. In *Re French* gender-neutral language was used, yet the prevailing ‘gender system’ operated to ‘disempower women as a class’.²¹ In *OO v BK*, an analogous analysis may explain the scuttling of a purposive interpretation by the first and second tier courts.

Why language matters ...

[L]anguage does not merely reflect the way we think: it also shapes our thinking. If words and expressions that imply that women are inferior to men are constantly used, that assumption of inferiority tends to become

¹⁹ *Nicholson* (n 3) at [71] (Saunders P). See also *Nicholson* (n 3) at [70] ‘What seemed clear to the judges of the CCJ ..., was apparently opaque to the Magistrate and the majority of the Court of Appeal. The reading into the legislation of seemingly arbitrary time, dependency, and/or closeness considerations as prerequisites for legal standing for a former spouse to seek a domestic violence protection order, had no statutory warrant.’

²⁰ Tracy Robinson, ‘Gender Equality and Judging in the OECS and Wider Commonwealth Caribbean’ (Report prepared for UN Women and the Judicial Education Institute of the Eastern Caribbean Supreme Court, 12 July 2011) 3 (emphasis on original).

²¹ *ibid.* Adopting Professor Robinson’s insights.

part of our mindset. Hence the need to adjust our language when our ideas evolve. Language is a powerful tool...²²

Modern scholarship confirms this UNESCO insight and exhortation specifically in the contexts of legal drafting. Constanza Toro, in a 2018 article,²³ makes the point:

Since the second wave of feminism, there has been an increasing focus on the relationship between gender and language, acknowledging that language itself can be an instrument of oppression, by silencing women.²⁴ This can also be applied to the specific context of legal language, if we consider that ‘legal discourse systematically excludes, devalues, trivializes and ignore women’.²⁵ Hence, the importance of analysing the language in which the law is expressed, and more specifically the type of language in which we should draft legislation.

The relationship between language and gender has been deeply explored by Sherryl Kleinman, who argues that ‘when any group is made invisible by another, it becomes easier for the more powerful group to do what they want with the less powerful one’.²⁶

Thus, the use of masculine generic language can make women both be seen and experienced, and therefore treated, as less in society than men. For example, when women are called ‘chairman’ it makes women less in society than men, as the term creates a presumptive ‘maleness’ to the office. This perpetuates the invisibility of women *qua* women, which in turn facilitates marginalisation and exploitation. It begs the question: Why not use, say, ‘chairperson’?

Another example, is the normative use of masculine generic language to represent humans, like: ‘All men are created equal.’ This expression is male-biased. By using the masculine term ‘men’ to refer to both men and women and all other genders, it renders women and all who do not identify as men relatively invisible. This also begs the question: Why not use, say, ‘persons’ or ‘humans’? These pervasive, and some may say seemingly trivial and innocuous, male-centric uses of language cumulatively create societal and cultural mindsets that discriminate

²² Annie Desprez-Bouanchaud, Janet Doolaege and Lydia Ruprecht, ‘Guidelines on Gender-Neutral Language’ (UNESCO, 1999) 4 <<https://unesdoc.unesco.org/ark:/48223/pf0000377299>> accessed 10 May 2024.

²³ Constanza Toro, ‘Gender Neutral Drafting: Gender Equality or an Unnecessary Burden?’ (2018) 5(1) IALS Student Law Review 34, 34.

²⁴ Jennifer Hornsby, ‘Feminism in Philosophy of Language: Communicative Speech Acts’ in M Fricker and J Hornsby (eds), *The Cambridge Companion to Feminism in Philosophy* (Cambridge University Press 2000) 87.

²⁵ Karen Busby, ‘The Maleness of Legal Language’ (1989) 18 Manitoba Law Journal 210.

²⁶ Sherryl Kleinman, ‘Essay: Why Sexist Language Matters’ (2002) 25 Qualitative Sociology 299.

on the basis of both sex and gender, mindsets that can and do influence the interpretation and application of the law.

If equality and the language of the law are to be truly liberated from all bias, then the distinctions between sex and gender need to be addressed, and an inclusive non-binary use of language adopted.²⁷

Some historical context; it wasn't always this way ...

In an article, 'Thirty Years with Section 15 of the Charter: A Report on Legislative Terminology in Canada'²⁸, that presents research results of an audit of all Canadian legislation that analyses, among other usage of discriminatory language, the frequency and categories of the use of gender-based language, the authors explain:

It might surprise many to know that early Anglo-Saxon legislation, when it first appeared in English, rather than Latin or French, often used both male and female pronouns.²⁹ This changed in the 1800s, when interpretation legislation was invented to help streamline and reduce the massive amounts of text found in the statute books. Lord Brougham's Act of 1850, the title of which was 'An Act for shortening the Language used in Acts of Parliament'³⁰ introduced the idea of using 'he' to include other genders: 'in all Acts, words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided.' The 'masculine rule', as it has been called, existed for many years in English-language legislative texts.³¹

In terms of reform, they also explain:

However, the practice came under scrutiny in the twentieth century; critics began demanding repeal, or at least amendment, of gendered language provisions.

²⁷ See 'Justice Through a Gender Lens: Gender Equality Protocol for Judicial Officers' (Judicial Education Institute Trinidad and Tobago 2018) 1-8 <<https://www.ttlawcourts.org/jeibooks/bookdetails.php?20>> accessed 14 May 2024.

²⁸ Richard Haigh, 'Thirty Years with Section 15 of the Charter: A Report on Legislative Terminology in Canada' 38(1) Nat'l J Const L 7.

²⁹ See Sandra Petersson, 'Gender Neutral Drafting: Historical Perspective' (1998) 19 Statute L Rev 93, 96-98.

³⁰ Interpretation Act 1850 (13 & 14 Vict c 21-23).

³¹ The term is used most frequently by Sandra Petersson in a series of papers on gender neutrality: see 'Locating Inequality — The Evolving Discourse on Sexist Language' (1989) UBC L Rev 32, 55, 56; 'Gender Neutral Drafting: Historical Perspective' (1998) 19 Statute L Rev 93 ('Historical Perspective'); and 'Gender-Neutral Drafting: Recent Commonwealth Developments' (1999) 20 Statute L Rev 35 ('Recent Developments'). Petersson argues that the masculine rule, attributable to Jeremy Bentham, replaced more gender-neutral drafting practices that had existed for 300 years prior to the early 1800s (see 'Historical Perspective' at 102.)

Most Commonwealth jurisdictions have instituted amendments. The two main approaches, described by Petersson, are the two-way rule and the all-gender rule.

The masculine rule: the imperative for reform

In Trinidad and Tobago ('TT'), as in much of the Anglo-Caribbean, the masculine rule prevails. In this, TT is like Canada and uses the two-way rule.³² The intended effect is that either masculine or feminine words may be used to include the other sex.

Section 33 of the current Canadian federal *Interpretation Act* is a good example of how a two-way rule operates:

33 (1) Words importing female persons include male persons and corporations and words importing male persons include female persons and corporations.

The Interpretation Act, Chap 3:01 (TT) provides:

16. (1) Words in a written law importing, whether in relation to an offence or not, persons or male persons include male and female persons, corporations, whether aggregate or sole, and unincorporated bodies of persons.

Its commencement date is 19 July 1962. Section 2 provides that it 'applies to every written law passed or made before or after the commencement of this Act, unless a contrary intention appears in this Act or the written law.'

In the UK the two-way rule also exists. Section 6 of its Interpretation Act 1978 states:

In any Act, unless the contrary intention appears,—
(a) Words importing the masculine gender include the feminine;
(b) Words importing the feminine gender include the masculine;

There are however well accepted criticisms of the 'two-way' rule. Some are pragmatic and others ideological. Haigh explains:³³

The problem with the two-way rule is that it does not discourage the use of male terms to include women, nor does it encourage the use of female terms to include men. It is a provision that appears neutral, but given

³² Interpretation Act, RSC 1985, c I-21, s 33(1). In fact, according to Petersson, Canada invented the two-way rule, adopting it sometime between 1837 and 1840 in the Interpretation Act, SC 1849, c 10, s 5(7).

³³ Haigh (n 28).

history, context, drafting practices, and other factors, allows masculine forms to retain primacy.

Solely female terms are rarely, if ever, used to include males. As Petersson notes, ‘the feminine rule is therefore easily cut away, leaving the masculine rule intact as the primary rule.’³⁴ And drafting techniques have consequences. Masculine drafting practices, at least in the English language, can perpetuate stereotypes of women as inferior. Interpretation provisions creating presumptions of two-way gender balance do little to alleviate this concern.

True gender-neutral drafting, on the other hand, can help promote equality. Thus, most English-speaking countries have revised drafting practices to reflect concerns with these interpretation rules, adopting neutral words such as ‘person’ or androgynous plural pronouns, or inserting both male and female pronouns such as ‘he or she’ into legislation.³⁵

These are all legitimate considerations from a lawyer’s perspective. And it is worth noting Haigh’s prescriptive equality standard of ‘androgynous pronouns’ (presumably such as ‘they, them, theirs’, as for example - ‘X ate *their* food because *they* were hungry’).³⁶ But what additional insights could a citizen-centric consideration yield? In these contemporary times, laws are intended to be read and understood by all persons – not just legally trained professionals. Laws must make sense for everyone, including young persons. How will young women and girls, young men and boys, and all young persons across the entire gender spectrum be enculturated in a legislative context of male-centric language?

Constitutional bases for reform

The 1976 Republican Constitution, Chap 1:01 (TT), which contains a supremacy clause and in which the fundamental rights provisions are patterned on the Canadian model, has equality and protection of the law provisions. There is therefore a constitutional imperative to equality of treatment and to ensure that there is no indirect discrimination based on, among other things, sex (male and female, and one may also say, applying a purposive and generous interpretation, gender).

Section 4 of the 1976 Constitution, Chap 1:01 (TT) provides:

³⁴ ‘Gender-Neutral Drafting: Recent Commonwealth Developments’ (1999) 20 Statute L Rev 35, 43.

³⁵ See, for example, Christopher Williams, ‘The End of the “Masculine Rule”? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland’ (2008) 29(3) Statute L Rev 139, 140-141.

³⁶ Using the gender-neutral pronoun in its singular form.

4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law.

Thus, a legitimate issue for legislators in TT is whether there is an imperative to reform all laws to ensure that there is no direct or indirect discrimination based on sex or gender. Indeed, this is what Canada has undertaken and felt obliged to do under s 15 of their *Canadian Charter of Rights and Freedoms*, which provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Language, especially legal language, matters

Haigh points out:³⁷

Humans have a special relationship with language. Language is a key determinant of reality for us; it makes us what we are.³⁸

Many critiques of so-called ‘legal neutrality’ - created by interpretation statutes that developed the masculine rule - exist; as discussed above, these attempts can render women invisible.³⁹ Even ‘neutral’ terminology that comes out of reforms such as the two-way rule are little better.⁴⁰

Psychological studies confirm the problems with male bias in language: a ‘pseudogeneric he’ is pervasive in English language, and male referents need to be curtailed if true equality is to be reached.⁴¹ As Sandra

³⁷ Haigh (n 28).

³⁸ Busby (n 25). See also Deborah Cameron, *Feminism and Linguistic Theory* (MacMillan Press Ltd 1985).

³⁹ Katherine de Jong, ‘On Equality and Language’ (1985) 1(1) *Can J Women & L* 119; Vanessa McClean, ‘Is Gender-Neutral Drafting an Effective Tool Against Gender Inequality within the Legal System’ (2013) 39(3) *Comm L B* 443; Mary Dawson, ‘Sex and Gender in Legislative Drafting and Sexist Language in Legislation’ (Uniform Law Conference of Canada: Proceedings of the Sixty-Eighth Annual Meeting, Manitoba, August 1986) <<https://www.ulcc-chlc.ca/ULCC/media/Proceedings-2006-1994/1986-Winnipeg-Proceedings.pdf>> accessed 10 May 2024; Mary Ellen Griffith, ‘Sexism, Language and the Law’ (1988) 91 *W VA L Rev* 125.

⁴⁰ See Katherine de Jong, ‘On Equality and Language’ (1985) 1(1) *Can J Women & L* 119; Marguerite E Ritchie, ‘Alice Through the Statutes’ (1975) 21 *McGill LJ* 685.

⁴¹ See Debora Schweikart, ‘The Gender Neutral Pronoun Redefined’ (1998) 20(1) *Women's Rts L Rep* 1.

Petersson notes, ‘the inequality that flows from male terms is not isolated in the past but is also located in the present text of the law.’⁴²

There is therefore a broad range of research and opinion that supports the use of gender-neutral language where relevant, if one is to meet the constitutional standards of equality and to undo the historical discrimination that male-centric and patriarchal language has introduced and perpetuated.

Other reasons for reform

There are two principal and two secondary justifications for the use of gender-neutral language in legislation.⁴³ First, a substantive reason. As already explained, this is grounded in the principle of equality, and based on the premise that inclusive gender-neutral language is required to overcome the invisibility created by the use of the generic masculine, and in recognition of the pragmatic discrimination created and perpetuated by the masculine ‘two-way’ rule policy. Second, a methodological argument. As Professor Helen Xanthaki has clearly stated, ‘one of the tools serving clarity, precision and unambiguity, and ultimately effectiveness of legislation is gender-neutral drafting’.⁴⁴ Toro explains:⁴⁵

The logic is that if masculine gender is used as a generic, it is not clear whether a particular provision is addressed only for men or for men and women also. In this context, gender-neutral drafting is a basic way to ensure accuracy in legal writing.

Third, a cultural reason. Legal language shapes culture: ‘while language is certainly not the only social factor shaping reality – society’s social institutions such as the family, education, economy, media, etc. all play their part – it is an extremely important one’.⁴⁶ And it is sufficiently important in the context of existing asymmetrical power differentials that the law has created along gender lines.

⁴² Sandra Petersson, ‘Locating Inequality – The Evolving Discourse on Sexist Language’ (1998) 32 UBC L Rev 55, 56.

⁴³ Toro (n 23) 34.

⁴⁴ Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing 2014) 103. See also Kadija Kabba, ‘Gender-Neutral Language: An Essential Language Tool to Serve Precision, Clarity and Unambiguity’ (2011) 37(3) Comm L B 427. Both cited in Toro (n 23).

⁴⁵ Toro (n 23) 37, citing Mary Jane Mossman, ‘Use of Non-Discriminatory Language in Law’ (1995) 20(1) International Legal Practitioner 8.

⁴⁶ Ekawestri Prajwalita Widiati and Dwi Rahayu Kristianti, ‘Legislative Drafting in Genderless Language: Is Gender-neutral Drafting Relevant?’ (International Law Conference: Law, Technology and the Imperative of Change in the 21st Century, Malaysia, 4 September 2018), 146-150, citing Tracy E Ore, *The Social Construction of Difference and Inequality: Race, Class, Gender and Sexuality* (2nd edn, Mc-Graw Hill 2003).

Fourth, compliance with international undertakings. Trinidad and Tobago signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 27 June 1985 and ratified it without reservation on 12 January 1990. By ratifying the Convention, States commit themselves to undertake a series of measures to end discrimination against women.

Gender equality ought to be implemented beyond formal and normative measures, and also operate in a socially transformative manner (the social goal of gender equality). Thus, substantive equality must also realise transformative equality by transforming the structural dimensions of discrimination – breathing ‘life into equality and equality into life’.⁴⁷ One such structural transformation is achieved through the language of legislation.

Sandra Fredman makes the point:⁴⁸

... structural change, goes beyond the assumption that inequality is caused by individual acts of prejudice. Instead, inequality and discrimination are inherent in the structures and institutions of society, which are patterned on the dominant norm and sustained by dominant powers.

The Law is exactly such a structure and institution that has historically been created to sustain the dominant norms and powers of the privileged in society, from colonial times and continuing into the present in the mindset of coloniality.

Indeed, and in the justice sector, as Toro points out in advocating for gender-neutral legislation:

The studies documenting how the judges have been deciding on women rights and obligations based on generic male based provisions are strong empirical evidence in favour of this argument. As these studies have shown, judges not always interpret those provisions in the same way, confirming therefore that gender biased drafting is ambiguous.⁴⁹

In this context and in deciding whether, and if so what steps to take, we should constantly ask the ‘woman question’: How does legislative language affect and disadvantage women?

⁴⁷ See Rebecca Cook (ed), *Frontiers of Gender Equality: Transnational Legal Perspectives* (University of Pennsylvania Press 2023) 10, 15.

⁴⁸ *ibid* 42.

⁴⁹ Toro (n 23) 37.

This question assumes that that ‘some features of the law may be not only nonneutral in a general sense, but also “male” in a specific sense.’⁵⁰ Methodologically, ‘this question encourages examination of the assumptions that we made about a law or practice’.⁵¹ Moreover, in 2024, the ‘woman question’ needs to be expanded into an inclusive and non-binary pure ‘gender question’: How does male-centric legislative language affect and disadvantage all persons? It is difficult to conceive that an honest experiential answer to these questions, will yield anything other than justifications for legislative reform along lines that use gender-neutral language.

The Curious Case of *Alleyne*⁵²: Culture influencing interpretation

Stephen Alleyne (‘Alleyne’) was charged with the offence of Rape contrary to the Sexual Offences Act, Barbados⁵³. Before the start of the evidence in his trial he was discharged by the Magistrate, who determined that the crime of rape did not extend to anal intercourse between men. On appeal and by majority, the Court of Appeal agreed with the Magistrate’s decision.

The CCJ decided that on a correct interpretation of s 3(1) of the Sexual Offences Act, a man can be charged with the rape of another man. The Act uses gender-neutral language and extends the definition of rape to include anal penetration. Considering the literal meaning of the words used in the Act, their context, and comparable legislation, any person, male or female, can be the offender or victim of rape.

What makes the case curious, is that s 3(1) on the face of it uses explicit gender-neutral language (highlighted below), and therefore the legislative intent seems very obvious:

3.(1) *Any person* who has sexual intercourse with *another person* without the consent of the *other person* and who knows that the *other person* does not consent to the intercourse or is reckless as to whether the *other person* consents to the intercourse is guilty of the offence of rape and is liable on conviction on indictment to imprisonment for life. (emphasis added)

⁵⁰ Katharine Bartlett, ‘Feminist Legal Methods’ (1989-1990) 103 Harv L Rev 829, 837, cited in Cook (n 47) 9.

⁵¹ Cook (n 47) 9.

⁵² [2022] CCJ 2 (AJ) BB, BB 2022 CCJ 1 (CARILAW).

⁵³ Cap 154, s 3(1).

Yet, s 3(1) was interpreted in a gender-biased way by the first and second tier courts so as to exclude men from the charge of rape by reason of anal penetration. In these circumstances, I had cause to opine:⁵⁴

In this case the following principles are therefore engaged in interpreting s 3(1). Constitutionally, the right to protection of the law regardless of sex, and the prohibition against discriminatory laws (ss 11 (c) and 23 of the Constitution). And based on international law commitments, equality before the law regardless of gender and the enjoyment of fundamental rights and freedoms without restrictions based on sex. These values, principles, and commitments all support a gender-neutral reading, interpretation, and application of the provisions of s 3(1).

The point is, that using gender-neutral language in legislation is only a beginning of what is necessary to transform social, cultural, and legal mindsets, and to achieve tangible social equality and transformation. Cast our minds back to *Re French* and the use of gender-neutral language in 1905. As in *Alleyne's case* in the 2020s, culture, including legal culture, can be resistant to change – even in the face of gender-neutral language. This creates an even greater imperative for reform in the use of gender-neutral language in legislation. The language of the law shapes society, even if it takes time to do so. Now women can be lawyers! And men can be charged for rape!

Justifiable differentiation, not all legislative language needs to be gender-neutral

Generally, if one gender is used to represent all genders this is on the face of it discriminatory - called 'singling out'. Also, if one gender is used based on false, partial, or historically outdated views of gender in society, this is also on the face of it discriminatory – called 'stereotyping'. Finally, a single gender may be used but the specificity could cause under-inclusiveness – called 'suspect specificity'.⁵⁵ What is important to always bear in mind are the relationships between legal language and power, and how in this context gender-neutral language gives recognition and voice and therefore empowers women and all others.

Haigh explains and illustrates as follows:⁵⁶

For example, a property statute that uses exclusively male gender (to represent ownership of property held in the male name) may represent a

⁵⁴ *Alleyne* (n 52) at [26].

⁵⁵ Haigh (n 28).

⁵⁶ *ibid.*

combination of all three: male gender is singled out but is intended to represent all property holders; male property ownership represents an outdated view that the male was typically the owner of property; or, it may be directed to male property holders specifically without recognizing female property holders may have similar needs.

However, there are times when gender specific language is both appropriate and desirable. These are situations where gendered language is contextually warranted. This could include situations where women or other persons are singled out because of special characteristics, say, the fact that they are the only sex that are able to bear children, or are in need of special protection because of historical injustices.

The Married Persons Act (TT)⁵⁷, is an example of the latter. It's intent and purpose is to right historical laws and common law principles that discriminated against married women's property rights.⁵⁸

The short title states:

An Act to consolidate and amend the law relating to the capacity, property and liabilities of married women, the liabilities of husbands, and matters connected therewith.

Section 3 states:

Subject to this Act, a married woman shall -
(a) be capable of acquiring, holding, and disposing of any property;
(b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation;
(c) be capable of suing and being sued, either in tort or in contract or otherwise; and
(d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders,
in all respects as if she were a *feme sole*.

And Section 5 states:

'A husband and wife shall, for all purposes of acquisition of any interest on or after 1st January 1937, be treated as two persons.'

⁵⁷ Chap 45:50, ss 3, 5.

⁵⁸ See *Nicholson* (n 3) at [30-37].

Since the common law also allowed a husband to sue on behalf of a tort done to his wife, where he himself suffered no damages, the legislation has sought to change this. Section 16 therefore states:

Subject to this Act, the husband of a married woman shall not, by reason only of his being her husband, be liable -
(a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or
(b) to be sued, or made a party to any legal proceedings brought, in respect of any such tort, contract, debt, or obligation.

Examples of male-centric legislative language

As we consider these examples, let us ask ourselves: How will young women and girls, and young men and boys, be enculturated in a legislative context of male-centric language? What social and cultural mindsets are we creating and perpetuating? In this regard we need to also be very aware of social context, for example, that in TT and in the wider Caribbean, violence against women and girls is prevalent and almost endemic. The focus on young persons is because they are the future, and laws have a perpetuating effect.

1. Gendered Job Titles

1976 Republican Constitution: Chapter 6, DPP & Ombudsman

Section 90(3) The *Director of Public Prosecutions* shall have power in any case in which *he* considers it proper to do so ...

Section 91(1) There shall be an *Ombudsman* for Trinidad and Tobago ... who shall not hold any other office of emolument whether in the public service or otherwise nor engage in any occupation for reward other than the duties of *his* office.

Does this language reflect the reality in TT? Could gender-neutral language be used?

2. Assumed Male Office Holders and Officials

Related to the use of non-neutral job titles is the fact that statutory language regarding more senior positions may suggest that these positions are held by men. What cultural and societal mindsets can this create?

1976 Republican Constitution: Chapter 3, The President

Section 23(1) A person is qualified to be nominated for election as President if, and is not so qualified unless, *he* is a citizen of Trinidad and Tobago of the age of thirty-five years or upwards who at the date of *his* nomination has been ordinarily resident in Trinidad and Tobago for ten years immediately preceding his nomination.

Section 74(1) The executive authority of Trinidad and Tobago shall be vested in the President and, subject to this Constitution, may be exercised by *him* either directly or through officers subordinate to *him*.

1976 Republican Constitution: Chapter 4, Parliament

Section 41 ... a person shall be qualified to be appointed as a *Senator* if, and shall not be qualified to be so appointed unless, *he* is a citizen of Trinidad and Tobago of the age of twenty-five years or upwards.

Section 46(3) Where any person who is not a member of the House of Representatives is elected to be *Speaker* of the House *he* shall ...

Section 47 ... a person shall be qualified to be elected as a member of the *House of Representatives* if, and shall not be qualified to be so elected unless, *he* ...

1976 Republican Constitution: Chapter 7, Judicature

Section 103 Where the office of Chief Justice is vacant or where the *Chief Justice* is for any reason unable to perform the functions of *his* office ...

It is noteworthy that the legislative language assumes that senior official positions are male, given the status of the statute – in this instance the Constitution of the Republic of TT. It begs the question: *Why?*

Do you think that all these examples are unimportant and trivial because the Interpretation Act (TT) clearly permits male pronouns to include females?

And what of the ‘woman question’: How has/does legislative language, taken as a corpus of law and factoring in historical, socio-economic, power-relations and other considerations (such as intersectionality), affect and disadvantage women? What societal and cultural mindsets are created and reinforced by the use of male-centric legislative language? And what about the broader gender issue?

3. Mixed and Ambiguous Messaging

Consider s 4 of the 1976 Constitution which deals with fundamental rights. Notice the interplay between the gender-neutral use of ‘individual’ and ‘person’, and the male pronoun ‘his’. In some circumstances, it is difficult to explain why neutral language is mixed with non-neutral language. Is the mixed use of male-centric language necessary? Can it create ambiguity? If clarity and certainty is the goal, what is most desirable?

4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law; Protection of rights and freedoms.
- (c) the right of the individual to respect for *his* (cf *their*) private and family life;
- (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;
- (e) the right to join political parties and to express political views; (f) the right of a parent or guardian to provide a school of *his* (cf *their*) own choice for the education of *his* (cf *their*) child or ward;
- (g) freedom of movement;
- (h) freedom of conscience and religious belief and observance;
- (i) freedom of thought and expression;
- (j) freedom of association and assembly; and
- (k) freedom of the press.

What are the advantages, disadvantages, opportunities, and threats if one were to use gender-neutral language throughout s 4 of the 1976 Constitution?

Techniques and Tools

We will only consider a few examples as there are many resources that give detailed options for achieving gender-neutral drafting (see below). In any event, for legislative drafters these techniques and tools are already well known.

One of the most common approaches is to rely on the third person singular style, typically by using the pronouns ‘he or she’. A creative use of third person singular technique is to mix up or reverse the order of pronouns, and use ‘she or he’. These are intended to ameliorate

the male-centric use of pronouns and the pragmatic ineffectiveness of the two-way rule (*via* an interpretation statute or section), that have preserved male dominance. But note the binary limitation that equates sex and gender. Consider as preferable ‘androgynous pronouns’ such as ‘they, them, theirs’ which can be used in both singular and plural forms.

Thus, for example, third person plural form ‘they’ is frequently used.

Another drafting technique for avoiding potential discrimination traps is to repeat the noun or drop the (usually) male pronoun altogether. For example, instead of ‘The Minister may grant the permit if *he* is satisfied’, a drafter could say ‘The Minister may grant the permit if *the Minister* is satisfied’ or ‘The Minister may grant the permit if satisfied.’⁵⁹

One thing to try and avoid is internal and external inconsistencies within and between statutes. Internal inconsistencies within statutes occur where gender-neutral language in some sections is mixed with male-only pronouns in other sections. External inconsistencies occur where, say, a root statute may have updated language to remove problems, but terminology in other statutes remains outdated by reference to previous male-centric language.

Helen Xanthaki refers to the possibility of avoiding gender specific terminology and making use of neutral terms instead, repeating the noun, omitting the pronoun, converting the noun to a verb form, use of the passive voice, use of a relative clause, replacing the noun by a letter, or using the plural or singular noun plus ‘they’.⁶⁰ A similar generic solution is proffered by the British Columbia Law Institute in using the plural forms of pronouns and gives several examples:⁶¹

(iv) Self-referential “ himself”

Section 12(11) of the Bankruptcy Act allows the trustee, with the permission of the inspectors, to divest **himself** of an interest in the real property of the bankrupt.

Section 12(11) of the Bankruptcy Act allows trustees, with the permission of the inspectors, to divest **themselves** of an interest in the real property of the bankrupt.

⁵⁹ See ‘Gender-Free Legal Writing Managing the Personal Pronouns’ (British Columbia Law Institute 1999) ISBN 1-894278-01-1 page 11.

⁶⁰ Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing 2014) 106, cited in Toro (n 23) 38.

⁶¹ ‘Gender-Free Legal Writing Managing the Personal Pronouns’ n(59) pages 9-11.

Finally, a useful and well-illustrated guide is the United Kingdom’s 2019 ‘Guide to Gender-Neutral Drafting’.⁶² The publication explains its origins: ‘This publication has been drafted by the Office of the Parliamentary Counsel and the Government Legal Department, distilling years of work by both organisations to promote gender-neutral drafting in a wide range of UK government legal documents.’ It also gives its rationale:

When servicing our clients and supporting the members of our organisations, it is important to reflect them in an inclusive manner that provides equal respect to all. Gender-neutral drafting in legal documentation has multiple benefits for equality and inclusion, including promoting gender equality and equality across the gender-identity spectrum. Furthermore, a significant percentage of the next generation of the workforce no longer sees gender as binary and expects to see a new and better approach to gender identity and expression in documentation.

And it suggests the following (and gives clear and detailed examples of their application):

WHAT IS GENDER-NEUTRAL DRAFTING?

In its broadest sense gender-neutral drafting involves:

- avoiding gender-specific pronouns and adjectives (such as “she/her/hers” or “he/him/his”);
- avoiding nouns that might appear to assume that a person of a particular gender will do a particular job or perform a particular role (e.g., “chairman”).

AVOIDING GENDER-SPECIFIC PRONOUNS

A range of techniques are available for avoiding gender-specific pronouns. Which of them works best will depend on each specific context. The techniques available fall into three main categories:

- (1) Repeat the noun;
- (2) Change the pronoun;
- (3) Rephrase to avoid the need for a noun or pronoun.

To summarise and give a flavour of what is possible, using a few simple examples:

First, *repeating the noun* rather than using a pronoun. E.g. ‘... earnings, in relation to *a person*, means sums payable to *the person* in connection with *the person’s* employment ...’.

⁶² ‘Guide to Gender-Neutral Drafting: Based on Guidance Produced by the Office of the Parliamentary Counsel in Drafting Legislation’ (InterLaw Diversity Forum, 2019) < <https://7a21077a.flowpaper.com/GuidetoGenderNeutralDrafting/#page=1> > accessed 14 May 2024.

Second, *change the pronoun*. ‘They’ can be used as both a singular and plural pronoun to refer to a person regardless of gender. E.g. (as a singular pronoun) ‘It is a defence for a *person* charged with an offence under this section to prove that *they* had a reasonable excuse for their action.’ And (as a plural) ‘*Participants* may only carry on [particular activities] ... if *they* hold a permit ...’.

Third, *rephrase* to avoid the need for a noun or a pronoun. E.g. (i) - *use of the passive* - ‘... explaining why the regulations have not been laid ...’ (rather than explaining why he has not laid the regulations); (ii) - *use of ‘who’ instead of ‘if he’* - ‘A person who ... commits an offence ...’ (rather than ‘A person commits an offence if he’); (iii) - *substitute ‘the’ or ‘that’ for ‘his/her’* - ‘... the reasonableness or otherwise of that belief ...’ (rather than ‘his belief’); (iv) – *omit the phrase with the pronoun* – ‘... the Minister may ... (rather than “the Minister may, if he thinks fit”).’

Finally, *avoid using gender specific nouns* and substitute gender-neutral and inclusive terms. E.g. Consider ‘Ombudsperson’ or ‘Ombud’ instead of ‘Ombudsman’. And, ‘Chairperson’ or ‘Chair’ instead of ‘Chairman’.

The Way Forward

As early as 2003, the United Nations Development Programme in Drafting Gender-Aware Legislation,⁶³ recommended that in moving toward good practice, each country must adopt its own approach to ensuring gender equality and indicated that legislation, policy strategy, institutional strategies as well as education and awareness raising should be prioritized.⁶⁴

The UNDP further recommended that in developing and transforming good laws into good practice requires attention to the stages of the process:⁶⁵

- 1) Review
- 2) Drafting
- 3) Passing
- 4) Implementing

⁶³ Drafting Gender-Aware Legislation: How to promote Promote and protect Protect Ggender Eequality in Central and Eastern Europe and in the Commonwealth of Independent States’ (UNDP RBEC 2003.)

⁶⁴ *Ibid* 26-28.

⁶⁵ *Ibid* 29-32.

- 5) Monitoring
- 6) Evaluating

Gender neutral legislation/ Gender sensitive legislation, has and continues to be an important objective and integral part of the international development agenda.⁶⁶ Parliaments are instrumental in forwarding the objective of gender equality and promote gender mainstreaming.

In achieving this objective, there ought to be inclusive participation of diverse groups including women, LGBTQI+ individuals and other marginalized communities in the legislative process. This ensures that the legislation considers the perspectives and needs of all segments of society leading to more comprehensive and effective laws.

From an educational standpoint, the development of capacity building programs, for legislators and policymakers on gender sensitive legislation will equip stakeholders with the necessary skills and knowledge that fosters the very creation and implementation of effective gender-sensitive laws. Public awareness campaigns to educate society on the importance of gender equality and gender sensitive legislation may aid in garnering support and promoting social change.

Regard may also be had to inter-agency collaboration between government agencies, non-governmental organizations and international bodies to share best practices and resources. This collaboration would enhance gender-sensitive initiatives by leveraging diverse expertise and resources.

Accountability mechanisms to monitor and evaluate the implementation of gender-sensitive legislation can ensure that laws are not only implemented but reviewed and improved based on feedback and outcomes. This may be further facilitated through a continuous feedback loop by the creation of a platform for the feedback of the public and stakeholders on the effectiveness of gender-sensitive legislation.

⁶⁶ 'Making Laws Work for women and men: A practical guide to gender-sensitive legislation' (OSCE Office for Democratic Institutions and Human Rights 2017) ISBN 978-92-9234-948-6.

A government and the laws that govern a people must reflect its society and its changing dynamics. The path toward gender equality is both a challenge and a necessity. By adopting a holistic and inclusive approach to legislation, policy, and societal education, we can ensure that the laws of our nations reflect the diversity and evolving nature of our societies. Inclusive participation, capacity building, public awareness, collaboration, and accountability are not just strategies but imperatives for achieving meaningful and lasting gender equality. As we move forward, let us commit to these principles with unwavering dedication, knowing that the true measure of progress lies in our ability to create a just and equitable world for all.

“The measure of any society is how it treats its most vulnerable members.”

- *Mahatma Gandhi*

Resources

1. 'Gender-inclusive Language' (Canada Department of Justice, 27 February 2024) <<http://canada.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/logistics/p1p15.html>>accessed 14 May 2024.
2. 'Policy Relating to Gender-Neutral Expression' (New South Wales Parliamentary Counsel's Office, May 2000) <http://www.pco.nsw.gov.au/corporate/Gender%20Neutral%20Language%20Policy_May%202000.pdf>accessed 14 May 2024.
3. 'Drafting Direction No 2.1: English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling'(Australian Government Office of the Parliamentary Counsel, March 2016)<<https://www.opc.gov.au/sites/default/files/2023-01/dd2.1.pdf>>accessed 14 May 2024.
4. 'Guide to Gender-Neutral Drafting: Based on Guidance Produced by the Office of the Parliamentary Counsel in Drafting Legislation' (InterLaw Diversity Forum, 2019) <[https://7a21077a.flowpaper.com /GuidetoGenderNeutralDrafting/#page=1](https://7a21077a.flowpaper.com/GuidetoGenderNeutralDrafting/#page=1) >accessed 14 May 2024.
5. 'Handbook on Combatting Gender Stereotypes' (Supreme Court of India, August 2023) <https://main.sci.gov.in/pdf/LU/04092023_070741.pdf>accessed 14 May 2024.
6. 'Gender Inclusivity in the Courts: How to Treat Everyone with Fairness, Dignity, and Impartiality' (National Center for State Courts). <https://www.ncsc.org/_data/assets/pdf_file/0028/84916/Gender-Inclusivity-in-the-Courts.pdf>accessed 14 May 2024.
7. *Drafting Gender-Aware Legislation: How to Promote and Protect Gender Equality in Central and Eastern Europe and in the Commonwealth of Independent States* (UNDP RBEC 2003).

8. *Gender-Free Legal Writing: Managing the Personal Pronouns* (British Columbia Law Institute 1998).
9. Annie Desprez-Bouanchaud and others, *Guidelines on Gender-Neutral Language* (3rd edn, UNESCO 1999).
10. *Making Laws Work for Women and Men: a Practical Guide to Gender-Sensitive Legislation* (OSCE Office for Democratic Institutions and Human Rights 2017).