

GENDER-SILENT LEGISLATIVE DRAFTING IN A NON-BINARY WORLD

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I. INTRODUCTION

Gender and sexual identity, as issues in law, have been with us for centuries. The rights of women to hold property, to vote, and even to serve in the legislature were once in doubt (and remain so in a handful of jurisdictions). Women's rights to govern their own bodies have been circumscribed by abortion laws and by laws against birth control. The right to work and to equal pay for work of equal value are recent developments in North America, as are statutory protections against sexual harassment and discrimination based on sex. These new protections and a dawning awareness do not mean that harassment of and discrimination against women have disappeared.¹ But the last 100 years have seen much progress.

What almost all women confronted in terms of overt discrimination, bias, harassment, and violence in the past (and present), members of the LGBTQIA+² community face now. Same-sex relationships are still a crime

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¹ See, e.g., *Me Too Movement*, WIKIPEDIA, https://en.wikipedia.org/wiki/Me_Too_movement [https://perma.cc/PV5M-GBP6] (last visited Jan. 10, 2020).

² Michael Gold, *The ABCs of L.G.B.T.Q.I.A. +*, N.Y. TIMES (June 21, 2018, updated June 7, 2019), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html> [https://perma.cc/9HU3-DDVQ]. In this article, we use LGBTQIA+ to mean a person who is lesbian, gay, bisexual, transgender, questioning (or queer), or intersex, or who is an ally (or asexual). The plus sign refers to anyone else not included in the LGBTQIA formula.

in many countries, punishable by significant prison time or even death.³ LGBTQIA+ persons continue to face both legal and societal discrimination throughout the world, and even their ability to migrate to safety is restricted.⁴

Language is only a small part of discrimination, yet its effects are pervasive. Although many jurisdictions have taken steps to change legal language to place women on an equal footing, gender bias in language persists. This may derive from traditional views concerning legal personality, or it may stem from fixed ideas about legislation and legislative drafting: among the arguments against gender-neutral language are that it creates legal uncertainty; does not serve precision or clarity; fosters ambiguity; distracts readers; is indirect; is not specific; is not eloquent; and increases the length and thereby the cost of legislation.⁵

Other barriers may arise from the structure of the language itself. In some languages, for example, masculine plural nouns are used to refer to groups containing both genders.⁶ In the English language, “she” has been a “he” for purposes of statutory interpretation until recent decades.⁷

³ Nicole Chavez, *Same-Sex Relationships are Still a Crime in 69 Countries*, CNN HEALTH (Sept. 7, 2018), <https://www.cnn.com/2018/09/07/health/same-sex-relationships-worldwide-list-trnd/index.html> [https://perma.cc/Z55H-BEC3].

⁴ *Protecting and Assisting LGBT Refugees*, U.S. DEP’T ST. (“[I]n countries where they seek safety, LGBT refugees often risk being harassed, hurt, or even killed. They may be targeted by other refugees, host communities, or government officials and police, who may threaten to arrest and detain them.”), <https://2009-2017.state.gov/j/prm/policyissues/issues/c62979.htm> [https://perma.cc/AH48-BPVF] (last visited Feb. 6, 2020).

⁵ ENHANCING LEGISLATIVE DRAFTING IN THE COMMONWEALTH 55 (Helen Xanthaki, ed., 2016); *but see id.* at 55–56 (convincingly dispatching these arguments). *Cf.* Martin Patriquin, *Canadiens and Canadiennes in Uproar as Student Paper Takes Stand on Gender*, GUARDIAN (May 8, 2019) (the decision of a Québec university newspaper to use both the masculine and feminine “eats up more column inches”), https://www.theguardian.com/world/2019/may/08/canadiens-and-canadiennes-in-uproar-as-student-paper-takes-stand-on-gender?CMP=Share_iOSApp_Other [https://perma.cc/BR2D-7FFY].

⁶ MARK EVAN SEGAL, LEGISLATIVE DRAFTING: PRINCIPLES AND MATERIALS 102 (July 2011), <https://marksegaldotnet.files.wordpress.com/2011/07/legislativedrafting-marksegal.pdf> [https://perma.cc/T5SS-VQK6].

⁷ Interpretation Act (Ontario), R.S.O. 1990, c. I.11, s. 28(j) (Can) provided that: “In every Act . . . unless the contrary intention appears, words importing . . . the masculine gender only include . . . females as well as males and the converse . . .” <https://www.ontario.ca/laws/statute/90i11?search=interpretation+act> [https://perma.cc/D4G2-KPUE]. This was repealed on July 25, 2007, when the Legislation Act came into force. Section 68 stated:

Nonetheless, despite resistance and doubt, significant changes have occurred in legal language; what was once controversial (e.g., calling a female person who acts an “actor” rather than an “actress”) is now, in many cases, routine.

We believe that the trajectory of recent language changes to account for women’s rights should guide and inspire the next wave of language transformation to take account of LGBTQIA+ rights. Just as drafting conventions shifted over time in North America and elsewhere to reflect women’s changing legal status, we believe that legislative drafting should now change to reflect and support the legal status of transgender persons and the legal recognition of non-binary genders. These changes are essential because in addition to the traditional binary classifications of gender and sexual identity, there are now recognized persons with a third gender or no gender. Many jurisdictions in North America and elsewhere have begun making changes in the law related to gender and sexual identity to reflect growing LGBTQIA+ rights, having recognized that a change in language can be one small step in advancing equality. Much more can be done to recognize the rights of members of the LGBTQIA+ community in legal language to account for non-binary genders.

This article explores the implications for English-language legislative drafting (and potentially other legal drafting) of a growing recognition that gender and sexual identities exist along a continuum.⁸ The article first analyzes what we mean by gender-neutral drafting, then examines how such drafting has evolved in the English-speaking world and elsewhere. Drawing on our research and a survey we undertook with English-language drafters in the United States and throughout the Commonwealth of Nations and elsewhere, we offer a snapshot of how current drafters are taking account (or

“Gender-specific terms include both sexes and include corporations. S.O. 2006, c. 21 (Can.), <https://www.ontario.ca/laws/statute/s06021?search=legislation+act> [<https://perma.cc/LMW5-TGA8>]. This in turn was replaced in 2016 when the All Families Are Equal Act enacted a new section 68 of the Legislation Act, which reads: “Gender-specific terms refer to *any gender* and include corporations.” See S.O. 2016, c. 23, s. 56 (emphasis added), https://www.ontario.ca/laws/statute/s16023?search=gender-specific&use_exact=on [<https://perma.cc/S5GE-Y8HR>].

⁸ See *Gender Identity*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gender_identity [<https://perma.cc/2TMU-PEPZ>] (last visited Feb. 6, 2020); see also *Understanding Gender*, GENDER SPECTRUM, <https://www.genderspectrum.org/quick-links/understanding-gender/> [<https://perma.cc/C7MY-GNC2>] (last visited Feb. 6, 2020). For an example of this growing recognition, see Richard Pérez-Peña, *English Freemasons Open Door to Transgender Members*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/world/europe/uk-freemasons-transgender.html> [<https://perma.cc/PT58-EDPA>].

failing to take account) of gender issues. We argue that drafters should explicitly account for language issues arising from the increasing recognition of the rights of members of the LGBTQIA+ community and certain members' desire to be identified in non-binary terms in legislation and legal documents such as passports, birth certificates, marriage licenses, and driver's licenses. We review how some jurisdictions are already taking account of LGBTQIA+ rights, including in government forms.

To account for non-binary genders, we propose an all-inclusive legislative drafting style that we call "gender-silent legislative drafting," and we discuss its definitional, drafting, policy, and political implications. We conclude by proposing approaches to implement this drafting style in a manner that accords with the principles of plain language drafting. Our goal is to air the considerations surrounding gender in legislative and other legal drafting in light of LGBTQIA+ rights and non-binary genders and to provide practical guidance for policy makers, legislative drafters, and others who work with legal documents.⁹

II. WHAT IS GENDER-NEUTRAL LEGISLATIVE DRAFTING?

"Gender-neutral drafting" is a method of drafting that began gaining currency in the 1970s and 1980s with the objective of ensuring that legal language takes account of men and women equally.¹⁰ In 1986, a paper presented to the Drafting Section of the Uniform Law Conference of Canada set out five basic principles for gender-neutral drafting, which we paraphrase here:

1. Drafters have an obligation to use plain language.
2. Legislation should address all users equally.
3. The language of the law should not offend any of its readers.
4. Legislation should be drafted with language that is accurate and up to date without being either faddish or stodgy.
5. Drafters should use a style that is consistent with political reality.¹¹

⁹ We exclude from the scope of this article pronoun choice for non-binary persons, despite it being a current topic of discussion and policy making in workplaces and on campuses. We exclude it because the terminology deals with personal terms of address, which are not needed in legislative drafting.

¹⁰ See, e.g., *Legistics: Gender-Neutral Language*, CANADA DEPT. OF JUSTICE (last modified Jan. 7, 2015) [hereinafter *Legistics*], <https://canada.justice.gc.ca/eng/rp-pr/csi-sic/legis-redact/legistics/p1p15.html> [https://perma.cc/TJE4-S6L2].

¹¹ Donald L. Revell, Cornelia Schuh & Michel Moisan, *Sex and Gender in Legislative Drafting*, UNIFORM L. CONF. CAN. 68TH MTG. 91–92 (1986), <https://www.ulcc.ca/images/>

Most jurisdictions in the United States and Canada employ a gender-neutral legislative drafting style.¹² When that style was adopted, words such as “chairman” became “chair” or “chairperson,”¹³ “fireman” became “firefighter,”¹⁴ and “policeman” became “police officer.”¹⁵ Female job titles were adjusted (e.g., “stewardess” became “flight attendant”),¹⁶ and the personal pronoun “he” was often replaced by “he or she.”¹⁷ This gender-neutral style does not include those who identify as neither male nor female. The only way to employ the style in an inclusive manner is to use word strings such as “he, she, or it” or to rely on an interpretation act to say that, “in the laws of this jurisdiction, ‘he’ or ‘she’ and similar pronouns include entities that are neither male nor female.” But because both of these options violate key principles of legislative drafting, namely, to use plain language and to use as few words as possible, we find that the first-generation gender-neutral style falls short.

This gender-neutral drafting style was developed before the growing recognition of LGBTQIA+ rights including the right to fair and equal

[stories/Past_Proceedings_PDF/1986ULCC0068.pdf](https://perma.cc/K4GZ-JZKP) [https://perma.cc/K4GZ-JZKP]. This paper was subsequently published as Donald L. Revell, Cornelia Schuh & Michel Moisan, *Themselves and Non-Sexist Style in Canada*, 10 ENG. TODAY 10 (1994) [hereinafter English Today], <https://www.cambridge.org/core/journals/english-today/article/themselves-and-nonsexist-style-in-canadian-legislative-drafting/5DA66A5A26819AE32AFE69EC1A1D5686> [https://perma.cc/7YZM-VDDL].

¹² We base this assertion on the results of our survey, *see infra* Section IV, and a supplemental review of American federal and state laws and Canadian federal and provincial law.

¹³ 1990 STATUTE REVISION DESK BOOK, PROVINCE OF ONTARIO, Tab 21, *Gender-Neutral Terminology* (Aug. 31, 1990) (unpublished) [hereinafter DESK BOOK]. The Desk Book was prepared by staff of the Ontario Office of Legislative Counsel to provide legal and stylistic advice to those members of staff who were preparing the revised regulations and statutes of Ontario in 1990. It was not circulated outside the office. A copy of the Desk Book is on file with the Public Archives of Ontario.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Barbara Bean-Mellinger, *What Is the Difference Between a Stewardess & a Flight Attendant?* HOUS. CHRON., <https://work.chron.com/difference-between-stewardess-flight-attendant-5409.html> [https://perma.cc/34CG-4M8L] (last updated June 29, 2018) (“The terms ‘stewardess’ and ‘flight attendant’ describe the same basic job of tending to airplane passengers’ needs and safety. ‘Stewardess,’ however, is an outdated term that has been replaced by ‘flight attendant’ on all airlines.”).

¹⁷ DESK BOOK, *supra* note 13.

treatment under the law. We believe that the initial gender-neutral style works well as applied to persons who define themselves as female or male but does not work as applied to transsexual or transgender people, or to those who see themselves as neither male nor female. Before we address potential solutions, we review a bit of history.

III. EVOLUTION OF GENDER-NEUTRAL DRAFTING

Early in modern North American and British history, women had few, if any, independent legal rights. In 1765, William Blackstone wrote the following about the legal position of married women:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a feme-covert, foemina viro co-operta¹⁸

This state of affairs would continue in some jurisdictions well into the twentieth century with respect to the property rights of married women.¹⁹ Nor was a woman's right to vote recognized until early in the twentieth century.²⁰ In the United States, universal suffrage was not enshrined in a constitutional amendment until 1920,²¹ while equal suffrage for men and women at age twenty-one only came to England in 1928.²² Between 1916 and 1922, women in all Canadian provinces, except Quebec, secured the right to vote in provincial elections, and white women received the right to

¹⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, 441 (emphasis removed) (footnote omitted).

¹⁹ Rosalie Silberman Abella, *Family Law in Ontario: Changing Assumptions*, 13 OTTAWA L. REV. 1, 9–10 (1981), <https://rdo-olr.org/en/1981/family-law-in-ontario-changing-assumptions/> [https://perma.cc/ML3B-AZRZ]; see also *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, 425 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5346/index.do> [https://perma.cc/ZXH4-8TN5].

²⁰ *Universal Suffrage*, WIKIPEDIA, https://en.wikipedia.org/wiki/Universal_suffrage [https://perma.cc/B362-RAR8] (last visited Feb. 6, 2020).

²¹ *Id.*

²² *Suffrage*, WIKIPEDIA, https://en.wikipedia.org/wiki/Suffrage#United_Kingdom [https://perma.cc/VKD9-MJAZ] (last visited Feb. 6, 2020).

vote in federal elections in 1919.²³ Minorities (other than indigenous peoples) received the right to vote in Canada in 1948; indigenous peoples were given the right to vote in 1960.²⁴ Other countries lagged even further.²⁵ Equally, the role of women in the work force was restricted in the nineteenth century and well into the twentieth: although factories employed some women, they were primarily relegated to low-paying domestic tasks.²⁶ Legislatures, too, were not just male-dominated; they were exclusively male.²⁷ This state of affairs was inevitably reflected in legislation.

“Sexist language, based on the premise that the norm of humanity is male, had been used for over 150 years in English-language legislative texts.”²⁸ The first statement of the “masculine rule” that we found was in 1827, when a British criminal statute referred to “Words importing . . . the Masculine Gender only, yet the Statute shall be understood to include . . . Females as well as Males”²⁹

²³ *Women’s Suffrage in Canada*, Wikipedia, https://en.wikipedia.org/wiki/Women%27s_suffrage_in_Canada [https://perma.cc/P45U-LFEP] (last visited Feb. 7, 2020). According to this article, women in Quebec did not receive full suffrage until 1940. It also notes that women in Newfoundland received the right to vote in 1925. Newfoundland was not a part of Canada at that time.

²⁴ *Id.*

²⁵ *Universal Suffrage*, WIKIPEDIA, https://en.wikipedia.org/wiki/Universal_suffrage [https://perma.cc/B362-RAR8] (last visited Feb. 6, 2020).

²⁶ *Women in the Workforce*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/history-of-work-organization-648000/Women-in-the-workforce> [https://perma.cc/UW8E-T4T9] (last visited Apr. 6, 2020).

²⁷ The first woman was elected to the British Parliament in 1918. See *Women and the Vote*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/transforming-society/elections/voting/womenvote/overview/womenincommons/> [https://perma.cc/FP37-GZLA] (last visited Feb. 6, 2020). The first woman was elected to the U.S. House of Representatives in 1916. See *Jeannette Rankin*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jeannette_Rankin [https://perma.cc/468C-YSXT].

²⁸ Christopher Williams, *The End of the ‘Masculine Rule’? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland*, 29 STATUTE L. REV. 139, 139 (2008).

²⁹ Sandra Petersson, *Gender Neutral Drafting: Historical Perspective*, 19 STATUTE L. REV. 93, 103 (1998) (quoting An Act for further improving the administration of justice in criminal cases in England 1827, 7 & 8 Geo. 4, c. 28, § 14 (Eng.)).

We believe that this likely emanated from the rule of coverture,³⁰ which tied a woman's legal standing to her husband. Important court interpretations bolstering the masculine rule include *In re Lockwood*, where the U.S. Supreme Court deferred to the Supreme Court of Virginia to determine whether a "person" meant only a man with respect to Bar admissions,³¹ and *Bradwell v. Illinois*, where three Supreme Court Justices joined a concurrence stating that women's "natural and proper timidity and delicacy" make them "unfit[] . . . for many of the occupations of civil life" and their "paramount destiny and mission . . . are to fulfill the noble and benign offices of wife and mother."³²

Not until the 1980s did progress towards gender-neutral language gain real traction. Numerous reports examining the adverse treatment of women in the legal system recommended the use of gender-neutral language in statutes, legal opinions, and other forms of legal writing.³³ Some U.S. states even began adopting gender-neutral language in their constitutions,³⁴ and sections on gender-neutral writing began appearing in legal textbooks.³⁵ A similar trend took place in Canada.³⁶

The goal of gender-neutral language is to avoid gender biases that have traditionally marginalized women.³⁷ Whether it reflects a changed society or actually helps to change society, gender-neutral language seeks to eliminate bias and treat all those affected by laws and other government

³⁰ See generally Jone Johnson Lewis, *Sex Discrimination and the US Constitution*, THOUGHTCO. (July 2, 2019), <https://www.thoughtco.com/constitution-sex-discrimination-3529459> [https://perma.cc/99P5-3DY8].

³¹ 154 U.S. 116, 118 (1894).

³² 83 U.S. 130, 141 (1873).

³³ See Petersson, *supra* note 29.

³⁴ The Associated Press, *Some States Are Going Gender Neutral*, N.Y. TIMES (May 22, 2003), <https://www.nytimes.com/2003/05/22/us/some-state-constitutions-are-going-gender-neutral.html> [https://perma.cc/P83E-UP59].

³⁵ Judith D. Fischer, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, 43 U.S.F. L. REV. 473, 486 (2009) (footnote omitted).

³⁶ For an excellent summary of the situation in Canada up to the mid-1970s, see Marguerite E. Ritchie, *Alice Through the Statutes*, 21 MCGILL L.J. 685 (1975).

³⁷ EUROPEAN PARLIAMENT, GENDER-NEUTRAL LANGUAGE IN THE EUROPEAN PARLIAMENT 3 (2018) [hereinafter EP 2018] http://www.europarl.europa.eu/cmsdata/151780/GNL_Guide_lines_EN.pdf [https://perma.cc/PPW6-BE7E] ("The purpose of gender-neutral language is to avoid word choices which may be interpreted as biased, discriminatory or demeaning by implying that one sex or social gender is the norm.").

actions equally. Although many examples of gender bias find expression in laws and other legal language, we will look at only three:

- An invention of language that we call the “universal he”;
- Interpretation legislation that welded the “universal he” firmly into the law; and
- “Man words,” including exclusionary job titles.

A. *The “Universal He”*

The “universal he” is a conceit of the English language and not just legal language. It is based on the idea that in ordinary English, “he,” depending on context, impliedly includes “she.”³⁸ The “universal he” was endorsed by any number of experts. For example, in a published comment in 1976, after deriding the use of pronoun strings such as “he or she” and “he, she, or it,” Elmer Driedger, a former chief parliamentary counsel for Canada, used the following biblical example to make the point that “he” includes women: “He that hath ears to heare, let him heare”³⁹ Driedger argued that in this example, “he” was being used in the sense of gender rather than sex and that it was grammatically correct.⁴⁰ Driedger was supported in this view by Reed Dickerson, a former professor of legal drafting at Indiana University Bloomington.⁴¹ Similarly, in *The Elements of Style*, Strunk and White stated, without equivocation:

The use of *he* as a pronoun for nouns embracing both genders is a simple practical convention rooted in the beginnings of the English language. *He* has lost all suggestion of maleness. . . . [Using *he* instead of *he or she*] has no pejorative connotation; it is never incorrect.⁴²

³⁸ *He (pronoun)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/He_\(pronoun\)](https://en.wikipedia.org/wiki/He_(pronoun)) [https://perma.cc/JX8G-P7HU] (last visited Feb. 6, 2020).

³⁹ E.A. Driedger, *Are Statutes Written for Men Only?* 22 MCGILL L.J. 666, 667 (1976) (quoting *Mark* 4:9 (King James)). The anecdote comes from OTTO JESPERSEN, *ESSENTIALS OF ENGLISH GRAMMAR* 193 (Routledge 1933). Driedger also relies on HENRY WATSON FOWLER & ERNEST GOWERS, *A DICTIONARY OF MODERN ENGLISH USAGE* (Ernest Gowers, ed., 2d ed. 1965) to support his argument in favor of the “universal he.” Driedger, *supra*, at 668.

⁴⁰ Driedger, *supra* note 39, at 667.

⁴¹ REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 229 (2d ed. 1986).

⁴² WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 60 (3d ed. 1979).

Apologists for the “universal he” failed to see that its result was to exclude women from much of what people read and heard, and recent research has confirmed the deleterious effects.⁴³ Nonetheless, the “universal he” became firmly rooted in the legal lexicon, appearing in all forms of legal writing from judicial decisions to law review articles to contracts to statutory instruments.

B. Interpretation Acts

The “universal he” had a special relationship with the law, thanks to interpretation acts. An interpretation act is a law that sets out how to interpret all other acts in a particular jurisdiction. Interpretation acts have been around for at least 170 years,⁴⁴ and until recently they usually had a clause enshrining the “universal he.” According to an unpublished address by Australian Parliamentary Counsel, Geoff Lawn, the first interpretation ordinance enacted in 1843 in South Australia provided that “unless there was something in the subject or context repugnant to it, words importing the masculine gender . . . were to be construed to include the feminine . . . and vice versa, and bodies politic and corporate as well as individuals.”⁴⁵ Lord Brougham’s Act (the UK Interpretation Act) of 1850 contained a similar provision.⁴⁶ This formulation, with some variation in wording alone (but not

⁴³ Astghik Mavisakalyan & Clas Weber, *Linguistic Structures and Economic Outcomes*, 32 J. ECON. SURVEYS 916, 921 (2017) (citing evidence that gendered language reinforces discriminatory attitudes). Reviewing many other studies, the authors cite research demonstrating an astonishing number of negative impacts of gendered language, including on women’s participation in employment, the division of labor in households, and even women’s health. *Id.* at 924. One such study shows that “speakers of gendered languages are more likely to express support for giving men preferential access to jobs,” *id.* (citing Yehonatan Givati & Ugo Troiano, *Law, Economics, and Culture: Theory of Mandated Benefits and Evidence from Maternity Leave Policies*, 55 J.L. & ECON. 339 (2012); Astghik Mavisakalyan, *Gender in Language and Gender in Employment*, 43 OXFORD DEV. STUD. 403 (2015)), and are less likely to support “policies to combat gender imbalances . . .” *Id.* (citing Efrén O. Pérez & Margit Tavits, *Language Influences Public Attitudes Toward Gender Equality*, 81 J. POL. 81 (2019)).

⁴⁴ For example, the first British interpretation act, known as *Lord Brougham’s Act*, was enacted in 1850. Interpretation Act 1850, 13 & 14 Vict. c. 21 (Eng.).

⁴⁵ GEOFF LAWN, GEORGE TANNER MEMORIAL ADDRESS: INTERPRETATION ACTS AND CLEAR DRAFTING 11 (2014) (presented in 2014 at an Australasian Drafting Conference organized by the Australasian Parliamentary Counsel’s Committee).

⁴⁶ Interpretation Act 1850, 13 & 14 Vict. c. 21 (Eng.).

in intent and impact), appeared in interpretation acts well into the present century.⁴⁷

Even if the relevant provisions in an interpretation act are context-based (allowing a court to find that in a particular context the masculine does not include the feminine),⁴⁸ this does not solve the problem. Our view is that as a simple matter of fairness and equality, all persons covered by a law should see themselves in that law—or at least should be able to imagine themselves in it. Using justifications such as convenience or expedience to deem the masculine as including the feminine is not a sufficient argument for the status quo. All discrimination takes some effort to undo. The “universal he” and the effects of interpretation acts can be overcome with the stroke of a pen: “He that hath ears to heare, let him heare” can easily be changed to “Those that have ears to hear, let them hear,” to beneficial effect. We recommend that interpretation acts be rewritten to be truly gender-silent, with no reference to gender.

C. *The “Man Words”*

The “universal he” is only one example of exclusionary language. Other issues arise from what one might call “man words,” where “man” is either a prefix or a suffix or otherwise implies gender.⁴⁹ The following table contains a list of gendered words that were acceptable before the adoption of gender-neutral drafting standards at the federal level in Canada and that have now been replaced by the words in the right-hand column:

⁴⁷ For example, Ontario (then called Upper Canada) enacted An Act respecting the Statutes in 1858. The Interpretation Act (Ontario), R.S.O. 1990, c. I.11, s. 28(j) (Can.). For subsequent developments, *see supra* note 7.

⁴⁸ *See, e.g.*, Public Prosecutor v. BAB, SGCA 2 (Singapore) (2017), <http://commonlii.org/sg/cases/SGCA/2017/2.pdf> [https://perma.cc/E9T2-AXJH] (reversing the acquittal of a woman on one of several sex abuse crimes, rejecting the lower court’s holding that even the one subsection that did not refer to “a man” was intended only to cover men and not women). *See also In re Lockwood*, 154 U.S. 116 (1894); *Bradwell v. Illinois*, 83 U.S. 130 (1873).

⁴⁹ There are also “woman words” that imply gender, such as “seamstress,” but these have largely been phased out at the same time that male words were being de-gendered, as discussed in this section.

Avoid	Use
businessman	business executive, entrepreneur, businessperson
cameraman	camera operator
chairman	chairperson
fireman	firefighter
fisherman	fisher
foreman	supervisor
mailman	letter carrier
policeman	police officer
workman	worker ⁵⁰

Each of these gendered nouns is by its nature exclusionary. The fixes, as can be seen from the right-hand column, are simple.

Verbs such as “manning” and prefixes in nouns such as “mankind” suffer from the same exclusionary effect and, like the suffixes, can easily be fixed (e.g., “mankind” can become “humankind” and “manning” can become “working,” “staffing,” or “running”).⁵¹ In the 1970s and 1980s, battles raged over these issues.⁵² As we shall see, the “man word” controversies were put to rest in most if not all jurisdictions in the ensuing years.

⁵⁰ *Legistics*, *supra* note 10. While “chairperson” is preferred in federal statutes in Canada, “chair” is preferred in Ontario. *DESK BOOK*, *supra* note 13.

⁵¹ CASEY MILLER & KATE SWIFT, *WORDS AND WOMEN* 20–24 (1977).

⁵² *Id.* at 3–34; DICKERSON, *supra* note 41, at 224–28.

D. Other Gendered Language in Law

Interpretation acts, the “universal he,” and the “man words” all had the effect of making women virtually invisible in the law. Rectifying this was relatively simple, and fixes sometimes took place in the legislative drafter’s office without any actual legislative change. Interpretation acts do not mandate that legislative drafters use the “universal he” or the “man words”; they merely provide for the interpretation of such terms if they are used. Thus many drafting offices, as a matter of office policy, were free to and did adopt a gender-neutral drafting style.⁵³ Pronoun strings such as “he or she” and “he, she, or it” replaced the “universal he,” while “their” replaced “his” or “he,” so that “the policeman should always carry his badge” became “police officers should always carry their badges.” The “man words,” as noted above, were replaced by synonyms.

All of these simple fixes had immense social implications, and yet many took place at the level of the legislative drafter’s office. In such an office, the legislative drafters analyze policy instructions and then convert those instructions into workable legislation. The drafter drafts legislation that will give legal effect to the policy choices of the instructing client, bearing in mind the state of the existing laws in the area as well as constitutional and other rights. The drafter cannot change existing laws, whether found in the common law as determined by the courts or in the statute book: such changes can only be effected by new legislation or further court decisions.

To highlight this distinction—between the types of gender bias in law that can be corrected by legislative drafters and the type that must wait for judges’ or legislators’ action—we next look closely at two Canadian cases. They show how gender-based discrimination can first become embedded in the law by the courts and then can only be remedied by courts or the legislature.

⁵³ Grace E. Hart, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 *YALE L.J.* 438, 463–64 & n. 153 (2016) (“Thirty-four manuals from thirty-three states instruct bill drafters on the use of gender-neutral language . . .”), <https://digitalcommons.law.yale.edu/ylj/vol126/iss2/3> [https://perma.cc/8CLY-6C2P]. Readers may wonder why Hart’s Note comes up with a total of 33 states when our results showed 42. *See infra* text at note 81. This is because Hart’s analysis focuses on legislative drafting manuals only, with no mention of unofficial or official policies of particular legislative drafting offices that may also influence or mandate the office’s legislative drafting style.

The first case is *Murdoch v. Murdoch*.⁵⁴ Irene Murdoch married James Murdoch in 1943 in Alberta.⁵⁵ The two initially worked on a series of ranches.⁵⁶ Using his own money, James got a stake in one ranch, which was later sold at a profit.⁵⁷ By 1958, James had acquired a larger ranch.⁵⁸ Irene contributed to these ventures through her labor on these ranches.⁵⁹ The marriage broke down in 1964, and Irene sued for support and an undivided one-half interest in the land and in James's other assets, arguing that her labor had created a trust in her favor.⁶⁰ Although Irene got \$200 in monthly support, her claim to an interest in the land and other assets was denied at trial and on appeal to the Alberta Court of Appeal.⁶¹ At the Supreme Court of Canada, she lost again.⁶² The majority of the court found that there could be no resulting trust in favor of the appellant because, based on the findings at trial, her work "was the work done by any ranch wife."⁶³

Essentially, *Murdoch* confirmed that in Canadian property law, the man and the woman are one, and that one is the man.⁶⁴ Seventeenth century law lived on: Blackstone would have been quite comfortable with the court's decision. Justice Laskin, in dissent, took a close look at the appellant's role as ranch wife and found that she contributed "considerable physical labour to the building up of the assets claimed by the husband as his own and had also made a modest financial contribution to their acquisition."⁶⁵ Based on these financial and labor contributions, Justice Laskin found that a constructive trust had arisen, and he would have allowed the appeal.⁶⁶

The courts got a second look at this problem in *Rathwell v. Rathwell*.⁶⁷ Helen Rathwell was also a ranch wife, and her situation was remarkably

⁵⁴ [1975] 1 S.C.R. 423, 423 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5346/index.do> [https://perma.cc/ZXH4-8TN5].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 424.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 430.

⁶³ *Id.* at 436.

⁶⁴ *Id.* at 429–30; *id.* at 457 (Laskin, J., dissenting).

⁶⁵ *Id.* at 446 (Laskin, J., dissenting).

⁶⁶ *Id.* at 457.

⁶⁷ [1978] 2 S.C.R. 436 (Can.).

similar to Irene Murdoch's.⁶⁸ In Mrs. Rathwell's divorce case, the court of first instance found against her but the Saskatchewan Court of Appeal found in her favor.⁶⁹ That decision, affirmed by the Canadian Supreme Court, adopted the dissent in *Murdoch*, finding that a constructive trust arises where a wife contributes her money's worth to a marriage.⁷⁰

The *Rathwell* case affirmed the constructive trust remedy⁷¹ but left the widespread gender bias in matrimonial law untouched. This is because courts decide issues on a case-by-case basis and only the issues before them. This is where legislatures have a role to play as they have the power to enact laws of general application. And they did so, across Canada, after *Rathwell*. As Rosalie Abella noted:

Within two months of [the *Rathwell*] judgment Ontario passed the Family Law Reform Act. There was thus a simultaneous recognition by judiciary and legislature that the *status quo* had reached an intolerable state. Both the legislation and the *Rathwell* judgment reflected a dramatic shift in attitudes, or perhaps a dramatic shift in the willingness to recognize that attitudes had changed.⁷²

The Family Law Act⁷³ clarified the rules for family property, matrimonial homes, and support and mandated “that marriage be seen as a social and economic partnership of equals”⁷⁴ The Act ensured that both spouses' contributions to the marriage would thenceforth be considered of equal worth.

Ontario's Family Law Act covered many more policy issues than were raised in *Murdoch* or *Rathwell*.⁷⁵ This is the type of wholesale change that only a legislature can make. Although the drafter would have had an

⁶⁸ See *id.* at 436.

⁶⁹ *Id.* at 437.

⁷⁰ See *id.* at 443.

⁷¹ *Id.* at 464–65.

⁷² Abella, *supra* note 19, at 11–12. One of the co-authors of this paper was a legislative counsel at the time of the *Rathwell* decision. They can safely say it was the plight of Mrs. Murdoch that led to the drafting of the Family Law Reform Act. (Note our use of the singular “they” – see *infra* text at nn. 186–189.)

⁷³ R.S.O. 1990, c. F.3. (Can.).

⁷⁴ Abella, *supra* note 19, at 12.

⁷⁵ See R.S.O. 1990, c. F.3 (Can.). The Act covers not just spousal rights but also dependent rights and addresses issues relating to property, support, inheritance, separation, and prenuptial agreements, among others.

important role in this process, the drafter would not have determined the policy. This contrasts with the power to make style choices—even choices correcting gender bias—that are well within the purview of the legislative drafter.⁷⁶

IV. CURRENT STATE OF GENDER-NEUTRAL DRAFTING IN ENGLISH-LANGUAGE JURISDICTIONS

We contacted approximately 200 legislative drafting offices to determine the current state of gender-neutral drafting in jurisdictions that draft in English. We sent a survey⁷⁷ to all U.S. states and to all jurisdictions on the mailing list of the Commonwealth Association of Legislative Counsel, and we received and analyzed a total of forty-seven replies,⁷⁸ as follows:

- 16 U.S. states,
- 11 Canadian provinces and territories,
- 7 Australian states and territories,
- 3 from the United Kingdom,
- 9 other countries, and
- 1 non-governmental organization.⁷⁹

⁷⁶ Cf. David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437, 2449 (1996) (“The decision [to use a gender-neutral drafting style]—political either way—is one capable of being made unilaterally within the unreviewable discretion of the drafter.”); see also Ruby King & Jasper Fawcett, *The End of “He or She”? A Look at Gender-Neutral Legislative Drafting in New Zealand and Abroad*, 2 N.Z. WOMEN’S L.J. 107, 116 (2018) (“While drafting offices have their own guidelines, the ultimate product largely depends on the style and preference of the drafter . . .”).

⁷⁷ See Annex 1 for the text of the survey.

⁷⁸ Donald L. Revell & Jessica Vapnek, Summary of Responses to Gender-Neutral Drafting Questionnaire (Jan 15, 2019) (unpublished data) (on file with authors). This was not a scientific survey, and some responses were not wholly clear. The weaknesses were due entirely to our design of the survey, which is in part why we supplemented it with additional research.

⁷⁹ The Church of England is a non-governmental organization with its own laws, and it employs its own legislative drafter. See *Legislation*, CHURCH OF ENGLAND, <http://churchofengland.org/about/leadership-and-governance/legal-services/legislation> [<https://perma.cc/CSK9-7S5A>] (last visited Feb. 6, 2020).

We supplemented the survey with our own research on Australia, Canada, and the United States, so that we could comment on all states, provinces, and territories—even those that did not respond. We believe the results of the survey and our additional research give a good snapshot of the current state of gender-neutral drafting in these jurisdictions. Our analysis is set out below.

A. *The United States*⁸⁰

Based on our survey and additional research, 42 of the 50 U.S. states officially use a gender-neutral style when drafting bills,⁸¹ and two more unofficially encourage gender-neutral language.⁸² Nine states still adhere to a policy in which the masculine “he” includes all other genders,⁸³ although seven of these states either officially or unofficially require the use of other gender-neutral drafting methods.⁸⁴

The federal government and most states have used the “he/she” style, but not all federal or state laws use this style consistently. This inconsistent approach can cause problems, as we saw in the Singapore case of *Public Prosecutor v. BAB*.⁸⁵

Thirty-three states avoid the use of the singular pronoun by repeating the nouns.⁸⁶ Five states recommend drafting in the plural,⁸⁷ while three states avoid plurals or draft in the singular to the greatest extent possible.⁸⁸ One state explicitly requires using the plural to avoid gender identification,⁸⁹ and another state requires that gender-specific terms relating to marital or familial relationships be construed as gender-neutral for all purposes.⁹⁰

⁸⁰ Throughout this section, we rely on our survey results as well as a review of state drafting manuals and recent state legislation to determine the legislative drafting styles used.

⁸¹ All states but Georgia, Idaho, Louisiana, Nevada, New York, Oklahoma, South Carolina, and Wyoming. *See* Revell & Vapnek, *supra* note 78, at 9–11.

⁸² *Id.* (Idaho, Nevada).

⁸³ *Id.* (Arkansas, Arizona, Georgia, Idaho, Kentucky, Louisiana, New Hampshire, Nevada, Michigan, North Carolina).

⁸⁴ *Id.* (Arkansas, Arizona, Idaho, Kentucky, New Hampshire, Nevada, Michigan, North Carolina).

⁸⁵ *See supra* note 48 and accompanying text.

⁸⁶ Revell & Vapnek, *supra* note 78, at 9–11.

⁸⁷ *Id.* at 10 (Maine); *id.* (Alabama, Massachusetts, Minnesota, North Carolina).

⁸⁸ *Id.* at 10 (Pennsylvania), 11 (South Dakota, Vermont).

⁸⁹ *Id.* (Montana).

⁹⁰ *Id.* (New Hampshire).

Eight states offer the choice of repeating the noun, using the plural form, using passive voice, or writing “he or she,” leaving the ultimate selection to the drafter’s discretion based on whichever is the least awkward.⁹¹ Fourteen states explicitly require the use of substitute gender-neutral nouns for nouns that denote masculine or feminine, such as “chair” for “chairperson,”⁹² unless the neologism is contrary to basic language rules.⁹³ Another state specified its preference for the term “person.”⁹⁴ Seven others indicate that the drafter should use whatever format reads best or is least awkward,⁹⁵ while one more instructs drafters to use whichever style furthers the general goals of ensuring clarity and avoiding ambiguity.⁹⁶ Two other states instruct drafters to restructure the sentence entirely to avoid the need for any pronoun.⁹⁷

⁹¹ *Id.* (Alabama, Arizona, Connecticut, Florida, Maryland, Michigan, Minnesota, Nebraska).

⁹² *Id.* at 9 (Alaska); *id.* (Arkansas, Georgia, Illinois, Kansas, Kentucky, Massachusetts, New York, North Carolina, Oregon, Texas, Utah, Washington, Wisconsin).

⁹³ Colorado, North Carolina, Utah: DRAFTING MANUAL: C.1 FOUNDATIONAL DRAFTING PRINCIPLES (2014), <https://le.utah.gov/documents/LDM/draftingmanual.html> [https://perma.cc/MK6N-V7LE] (“Do not create gender-specific nouns that are not commonly understood in the English language. For example, use ‘manhole,’ not ‘personhole.’” (Utah Drafting Manual section 2(e)(ii)). *But see* CALIFORNIA CITY COUNCIL REPORT, REFERRAL RESPONSE: BERKELEY MUNICIPAL CODE REVISION RELATED TO THE USE OF GENDER NEUTRAL LANGUAGE [hereinafter BERKELEY CITY COUNCIL REPORT] 8 (2019), <https://www.berkeleyside.com/wp-content/uploads/2019/07/2019-07-16-Item-01-Referral-Response-Berkeley-Municipal.pdf> [https://perma.cc/7HQX-TUNE] (“manhole” to become “maintenance hole” under new Berkeley, California, ordinance).

⁹⁴ *Id.* (Rhode Island).

⁹⁵ *Id.* (Alabama, Arizona, Connecticut, Idaho, Illinois, Massachusetts, Minnesota).

⁹⁶ North Carolina.

⁹⁷ Revell & Vapnek, *supra* note 78 (North Carolina, Tennessee). Also, Washington, D.C., prefers repeating a noun rather than using a pronoun, but using a pronoun is acceptable if the sentence structure is so complex or lengthy that a pronoun seems necessary to shorten the sentence. Alternatively, to simplify the wording of the sentence, Washington, D.C., suggests that the drafter should consider redrafting the sentence rather than using a pronoun. COUNCIL OF THE DISTRICT OF COLUMBIA, LEGISLATIVE DRAFTING MANUAL (Feb. 8, 2019), <https://dccouncil.us/office-general-counsel-2/legislative-drafting-manual-2019-edition-final/> [https://perma.cc/8F9E-QL2V].

Of the 39 states for which we had information on when and why they changed their drafting styles, most changes were made in the 1970s and 1980s (18 states), with increasing adherence in the 1990s (5 states), 2000s (5 states), and 2010s (9 states). Extraordinarily, one adopted the style in 1889.⁹⁸ The impetus for the various changes came variously from a statutory mandate (19 states), office directive (4 states), state code commission (1 state), or drafting manual (2 states). Other cited reasons included general policies (12 states), such as promoting clarity, aiding interpretation, decreasing discrimination, reflecting the equal status before the law of men and women, decreasing confusion, eliminating sex bias, and eliminating conflict.⁹⁹ In another instance, the adoption of a gender-neutral style dated back to the first female in the legislature, who was able to promote and successfully convince the legislature to adopt a gender-neutral style.¹⁰⁰

B. Canada¹⁰¹

The “universal he” and the use of “man words” were standard practice in Canada and its provinces and territories until the 1980s.¹⁰² But in 1985, the province of Ontario adopted a policy of drafting all official documents in a gender-neutral style.¹⁰³ This policy was adopted by the Uniform Law Conference of Canada in 1986¹⁰⁴ and became the norm for all Canadian jurisdictions. However, our survey showed that different jurisdictions adopted different approaches to implementing the policy. For example, Ontario adopted the “he, she, or it” style for personal pronouns, although the province also used more repetition of nouns than it had in the past,¹⁰⁵ while Nova Scotia has adopted “he or she” when the actor is an individual but prefers to repeat nouns or use plurals otherwise.¹⁰⁶

⁹⁸ Revell & Vapnek, *supra* note 78, at 10 (North Dakota).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (Montana).

¹⁰¹ For the three Canadian jurisdictions that did not respond to our survey, we researched their statutes to determine how they have been dealing with gender-neutral drafting. In the case of the Government of Canada, we also relied on its Legistics website. See *Legistics*, *supra* note 10.

¹⁰² A review of legislation from Canadian jurisdictions shows that all were still using the “universal he” in 1980.

¹⁰³ English Today, *supra* note 11, at 90.

¹⁰⁴ *Id.* at 91–92.

¹⁰⁵ Revell & Vapnek, *supra* note 78, at 8.

¹⁰⁶ *Id.* at 6–7 (Nova Scotia).

Of the eleven provincial and territorial responses to our survey from Canada, nine jurisdictions stated that they have a gender-neutral drafting style.¹⁰⁷ Two said “no,”¹⁰⁸ but one of those added that, although the jurisdiction has no formal policy, it does use the “he or she” formulation.¹⁰⁹ Our research shows that one more jurisdiction uses “he or she,”¹¹⁰ while another has used “he, she, or it.”¹¹¹ The Government of Canada used “he or she” until recently, but since 2018 has been using a non-binary style.

Twelve jurisdictions responded to the question whether the drafters use the “he/she/it” formulation. Three said yes.¹¹² Three said they use or have used “he or she” but not “it.”¹¹³ Ten responded that, in new legislation, they avoid the use of the singular pronouns by repeating nouns.¹¹⁴ One territory noted that it rarely drafts in the plural but does use the singular “they.”¹¹⁵ Canadian jurisdictions gave a variety of responses to the question of when they moved to a gender-neutral style, including “the 1980s,” “the 1990s,” “over 20 years ago,” and “many years ago.”¹¹⁶

¹⁰⁷ *Id.* at 6 (Alberta, British Columbia, Newfoundland and Labrador), 6–7 (Nova Scotia), 8 (Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon).

¹⁰⁸ *Id.* at 6 (New Brunswick, Northwest Territories).

¹⁰⁹ *Id.* (Northwest Territories).

¹¹⁰ Québec. *See, e.g.*, Workers’ Compensation Act, S.Q. 2002, c. A-3, s. 36(2) (Can.) <http://www.legisquebec.gouv.qc.ca/en/ShowDoc/cs/A-3> [https://perma.cc/4DFG-YWRN] (last visited Feb. 7, 2020).

¹¹¹ Manitoba. *See, e.g.*, Engineering and Geoscientific Professions Act, S.M. 1998, c. E120, s. 47(1)(e) (Can.) <https://web2.gov.mb.ca/laws/statutes/ccsm/e120e.php>. [https://perma.cc/8E4V-G9K9].

¹¹² Revell & Vapnek, *supra* note 78, at 6 (Newfoundland and Labrador), 8 (Ontario, Saskatchewan).

¹¹³ *Id.* at 6–7 (Northwest Territories, Nova Scotia), 8 (Prince Edward Island).

¹¹⁴ *Id.* at 6 (Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories), 6–7 (Nova Scotia), 8 (Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon).

¹¹⁵ *Id.* at 8 (Yukon).

¹¹⁶ *Id.* at 6 (Ontario’s response, “the 1980s;” Prince Edward Island’s response “sometime in the 90s;” Saskatchewan’s response, “over 20 years ago;” and Yukon’s response, “many years ago”). The vagueness may be because many jurisdictions indeed implemented these changes in the 1980s and 1990s but with staff turnover in the intervening years, the institutional memory regarding these changes has been lost.

Thus, of the fourteen Canadian jurisdictions, thirteen have adopted a gender-neutral style. Of these, six have adopted, formally or informally, a gender-silent style,¹¹⁷ and one is experimenting with it.¹¹⁸

C. Australia

As noted above, South Australia, in 1843, was perhaps the first jurisdiction in the British Empire to enshrine the “universal he” in an interpretation act,¹¹⁹ and other Australian jurisdictions followed suit. Since the 1980s, all Australian jurisdictions have actively moved away from the use of gendered language in their legislation and have adopted interpretation legislation that includes all genders.¹²⁰

From our survey, Australian jurisdictions used the “universal he” and other gendered terminology into the 1980s. In 1983, New South Wales was the first to adopt a gender-neutral style, and all Australian jurisdictions were using “he or she” by the early 2000s. By 2018, all Australian jurisdictions had either already moved or were moving away from the use of personal pronouns and toward a gender-silent style. Our respondents from the states of Queensland, Victoria, and Western Australia noted that their move followed the decision in *NSW Registrar of Births, Deaths and Marriages v. Norrie*, in which the High Court of Australia recognized that not all people identify as male or female and that a person’s sex could be recorded in the birth register as “non-specific.”¹²¹

D. The United Kingdom

The masculine rule first appeared in British legislation in 1827.¹²² Although British legal texts began switching to a relatively consistent gender-neutral drafting in the 1980s,¹²³ we found that full incorporation is

¹¹⁷ *Id.* at 6 (Alberta, British Columbia), 8 (Nunavut, Saskatchewan, Yukon); *Legistics*, *supra* note 10; *see infra* Section V.A.

¹¹⁸ *Id.* at 8 (Ontario).

¹¹⁹ LAWN, *supra* note 45, at 11.

¹²⁰ Revell & Vapnek, *supra* note 78, at 2–5.

¹²¹ [2014] HCA 11, 21 (Austl.), <http://eresources.hcourt.gov.au/downloadPdf/2014/HCA/11> [https://perma.cc/7KC3-XQMG].

¹²² Petersson, *supra* note 29, at 93.

¹²³ Constanza Toro, *Gender Neutral Drafting: Gender Equality or an Unnecessary Burden?* 5 IALS STUDENT L. REV. 34, 35 (2018). *Contra* King & Fawcett, *supra* note 76, at 122 (“United Kingdom legislation is not gender-neutral at all . . .”). Although we are in accord with most of King and Fawcett’s article on gender-neutral drafting, we disagree with their characterization of UK legislation.

far from complete. Indeed, traces of the masculine rule continued to appear in legislative texts as recently as 2007.¹²⁴ The current Drafting Guidance from the Office of the Parliamentary Counsel states explicitly: “It is government policy that primary legislation should be drafted in a gender-neutral way, so far as it is practical to do so.”¹²⁵

The United Kingdom, Northern Ireland, and Scotland still construct some laws according to the masculine rule, possibly due to the vast body of existing laws that require amendment.¹²⁶ The British Office of Parliamentary Counsel has, however, provided specific guidance in this regard, stating that gender neutrality applies not only to drafting new legislation but also “when inserting text into older Acts which are not gender-neutral.”¹²⁷ The Office goes on to state that exceptions may be made “in very limited circumstances” where using gender-neutral language might be confusing.¹²⁸ The responses to our survey from Northern Ireland, Scotland, and the United Kingdom show that all three have a gender-neutral style, and they all try to avoid the use of singular personal pronouns. They repeat nouns, change the pronoun, rephrase to avoid the need for a pronoun or noun, or use other techniques.¹²⁹

E. Other Countries

In addition to the jurisdictions already mentioned, we received responses from Bermuda, Grenada, Hong Kong, Ireland, Isle of Man, Jamaica, New Zealand, Nigeria, Singapore, and Zambia. We also received a reply from the Church of England. The responses show that, of these eleven jurisdictions, only Bermuda has not adopted a gender-neutral drafting style of any kind, while Jamaica is transitioning to one. Nigeria’s Interpretation Act still reflects the masculine rule, providing that in an enactment, “words importing the masculine gender include females.”¹³⁰ At least one recent article advocates for gender-neutral drafting to be officially implemented in

¹²⁴ Williams, *supra* note 28, at 144–45.

¹²⁵ Office of the Parliamentary Counsel, Drafting Guidance 7 (2018) [hereinafter OPC], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727629/drafting_guidance_July_2018.2..pdf [https://perma.cc/99JL-CRC6].

¹²⁶ Williams, *supra* note 28, at 152.

¹²⁷ OPC, *supra* note 125, at 7.

¹²⁸ *Id.*

¹²⁹ *Id.* at 7–11 (setting out several techniques for avoiding gendered language).

¹³⁰ Interpretation Act (2000) Cap. 192, § 14(a) (Nigeria), <http://www.nigeria-law.org/Interpretation%20Act.htm> [https://perma.cc/D6G2-EHMX].

Nigeria,¹³¹ and as will be seen below, some drafting is already gender neutral.

The first of the jurisdictions discussed in this section to adopt gender-neutral drafting appears to have been New Zealand in the 1980s. Others adopted the style in the 1990s,¹³² 2000s,¹³³ or within the last 20 years.¹³⁴

Several jurisdictions use “he or she” or “he, she, or it.”¹³⁵ All of the jurisdictions, except Bermuda and Nigeria, apparently strive to eliminate or reduce the use of “he or she” and “he, she, or it” by, among other techniques, repeating nouns, recasting provisions to avoid using pronouns, using the plural, or using the singular “they.”

Our research showed that in 2015, Ireland passed the Gender Recognition Act, which aimed to recognize and provide for different genders. While the goal of this legislation was to include all members of society, the text of the act, with perhaps unselfconscious irony, uses “he or she” and “him or her” to refer to the Minister and to applicants for gender recognition certificates.¹³⁶ In September of 2017, the Minister for Social Protection announced that the government would review this act to improve the language and include people who are non-binary.¹³⁷ An online search of the act shows that changes were not yet enacted as of April 1, 2020.

F. General Observations

From our survey and other research, we found that most of these jurisdictions employ a gender-neutral style recognizing, at a minimum, that the law should be specifically inclusive of females and that the “universal he” should no longer be the default for legislation. We found that many of

¹³¹ TONYE CLINTON JAJA, BARRISTER MEZIE & BARRISTER CHUKWUDI NWEKE, GENDER-NEUTRAL DRAFTING: A PERSPECTIVE FROM NIGERIAN LEGISLATION 95–97 (Institute for Legislative Studies, University of Abuja, & Association of Legislative Drafters and Advocacy Practitioners of Nigeria 2018) (typescript copy) (on file with authors).

¹³² Revell & Vapnek, *supra* note 78, at 14 (Ireland), 18 (Zambia).

¹³³ *Id.* at 12 (Church of England, Grenada), 13 (Hong Kong), 14 (Isle of Man).

¹³⁴ *Id.* at 14 (Ireland), 17 (Singapore).

¹³⁵ *Id.* at 12 (Church of England, Grenada), 13 (Hong Kong), 14 (Ireland, Isle of Man).

¹³⁶ See, e.g., Gender Recognition Act 2015 (Act No. 25/2015) (Ir.) §§ 6(1), 8(1), 9(2), 14(2), 16(4)(a), <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/pdf> [https://perma.cc/2KQF-N7VW].

¹³⁷ Marie O’Halloran, *Review of Gender Recognition Act Will Start by September, Varadkar Announces*, IRISH TIMES (May 10, 2017), <https://www.irishtimes.com/news/politics/oireachtas/review-of-gender-recognition-act-will-start-by-september-varadkar-announces-1.3078764> [https://perma.cc/WT5B-Z8PQ].

these jurisdictions use “he or she” or “he, she, or it.” We also found that many jurisdictions try to reduce or eliminate the use of third person singular pronouns through a variety of techniques, such as repeating nouns, drafting in the plural, and using the singular “they.” These changes seem to have been adopted without controversy.¹³⁸

V. GENDER-SILENT IS THE NEW GENDER-NEUTRAL

The gender-neutral drafting style that evolved in the 1980s included both males and females. But it did not account for persons who identify as neither male nor female. For many in the LGBTQIA+ community, “he/she” binary terminology is just as incorrect and offensive as the “universal he” is to most women. From our survey and research, we found several jurisdictions that have moved, or are considering moving, beyond male-female gender neutrality to implement an all-inclusive drafting style, that we call “gender-silent.” In the following pages, we detail best practices for the use of this style and propose its wholesale adoption.

Gender-silent legislative drafting is not without its controversies. Just as some formulations set off alarms in the 1980s, some of the latest solutions to gendered drafting have alarmed linguists, grammarians, and members of Facebook groups like *I judge you when you use poor grammar*.¹³⁹ For example, a 2018 article by John McWhorter in the Atlantic, entitled *Call Them What They Wants*, examined what the author considered to be the most challenging language change faced in the author’s lifetime, namely, the

¹³⁸ To the extent that there was controversy, it seems to have come before the actual adoption of gender-neutral drafting and to have originated with male academics such as Driedger, *supra* note 39, and Dickerson, *supra* note 41. One co-author of this paper remembers that when Ontario adopted non-sexist writing, the biggest concerns revolved around small issues such as what to do about “chairman” and “manhole cover.” In the case of “chairman,” the issue was not whether to change but whether to use “chair” or “chairperson.” Some argued that a chair was a piece of furniture and not a presiding officer. Others said “chairperson” was unwieldy. Then-Chief Legislative Counsel, Arthur Stone, came down on the side of “chair,” declaring that the word was shorter and had been used to denote the Speaker of the Ontario Legislature for decades, as in the Speaker’s instruction to members to “address their remarks to the chair.” A search on February 8, 2020, showed that there are nine Ontario regulations, all drafted after Ontario adopted its gender-neutral style, that use “manhole.” See O. Reg. 40/15, 311/17, 503/09, 191/14, 350/06, 332/12, 88/19, 337/13, 509/18. Cf. *supra* note 93.

¹³⁹ *I judge you when you use poor grammar*, FACEBOOK, <https://www.facebook.com/groups/IJudgeGrammar/> [https://perma.cc/EU4N-NL97] (last visited Jan. 14, 2020).

rejection of the gender binary.¹⁴⁰ The author discussed why there is discomfort with sentences like “Ariella isn’t wearing the green one. They think it’s time to wear their other one.”¹⁴¹ As McWhorter explained, “pronouns . . . are a very deeply seated feature of language, generated from way down deep in our minds, linked to something as fundamental to human conception as selfhood in relation to the other and others.”¹⁴² On the other hand, we believe that changing times call for changes in the language we use and how we use it.¹⁴³

Legislative drafters must walk a tightrope between being faddish and being rigidly conservative. One need only read the letters-to-the-editor of any major newspaper to see how upset people get when others breach what the letter writer considers to be inviolate rules of grammar. It is our view that these concerns pale in comparison with the harms done by non-inclusive language. The research into the adverse effects on women of gendered language is staggering;¹⁴⁴ there is no reason to think that the deleterious effects on non-binary readers are any less harmful. In fact, it may be more harmful, given that women are half of the population and so at least visible, whereas non-binary members are a minority group—and in our view even more in need of seeing themselves reflected in (or at least not excluded from) legislative language.

Language is intrinsically a vehicle of representation in a society; it can blur lines between genders or accentuate their differences. In a study published in 2012, researchers found a correlation between gender equality and language. That is, countries where citizens speak a gender-neutral (e.g.,

¹⁴⁰ John McWhorter, *Call Them What They Wants*, ATLANTIC (Sept. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/the-new-they/568993/> [https://perma.cc/95PY-EXQS].

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ In this connection, we note that the American Dialect Society chose the singular “they” as the word of the decade, “recognising the growing use of third-person plural pronouns as a singular form to refer to people who identify their gender as neither entirely male nor entirely female.” *Singular ‘They’ Voted Word of the Decade by US Linguists*, GUARDIAN (Jan. 3, 2020), https://www.theguardian.com/world/2020/jan/04/singular-they-voted-word-of-the-decade-by-us-linguists?CMP=Share_iOSApp_Other [https://perma.cc/2FK8-NJ2L].

¹⁴⁴ See Mavisakalyan & Weber, *supra* note 43, at 922, 924; but see Venessa Mclean, *Is Gender-Neutral Drafting an Effective Tool Against Gender Inequality Within the Legal System?* 39 COMMONWEALTH L. BULL. 443 (2013) (questioning whether gender-neutral drafting can affect deep-seated gender inequality in society).

Swedish, Icelandic and Norwegian) or genderless (e.g., Finnish) language rank higher in gender equality than countries in which citizens speak gendered languages.¹⁴⁵

Language not only reflects a system of hierarchy; it also reinforces it. The authors of the 2012 study argue that grammatical gender in language might affect social perceptions of gender and consequently the lives of those assigned to a gender.¹⁴⁶ In this respect, English-language jurisdictions may have an advantage; gender is not baked into our language, as it is in many others. But that also means that we can decide to take the additional step of embracing a truly gender-silent style.

A. Current State of Gender-Silent Legislative Drafting in English-Language Jurisdictions

We now explore the current state of what we call gender-silent legislative drafting in the United States, Canada, Australia, and the United Kingdom.

1. United States

As an indication of how recently and rapidly things are changing, we learned that California's Office of Legislative Counsel in 2018 adopted new drafting rules to ensure that statutory and constitutional provisions are gender inclusive.¹⁴⁷ On the narrower question of whether the changes were made to shift to a non-binary style, only two other states indicated that specific changes were made for this purpose—Indiana to remove references to gender and Vermont to make modest changes such as “chair” instead of

¹⁴⁵ Jennifer L. Prewitt-Freilino, T. Andrew Caswell & Emmi K. Laakso, *The Gendering of Language: A Comparison of Gender Equality in Countries with Gendered, Natural Gender, and Genderless Languages*, 66 *SEX ROLES* 268, 268–75 (2012), https://www.researchgate.net/publication/257663669_The_Gendering_of_Language_A_Comparison_of_Gender_Equality_in_Countries_with_Gendered_Natural_Gender_and_Genderless_Languages [https://perma.cc/T8F8-FD3N].

¹⁴⁶ *Id.* at 269.

¹⁴⁷ See, e.g., Assemb. Con. Res. 260, c. 190 (Cal. 2018) (“Resolved by the Assembly of the State of California, the Senate thereof concurring, That the legislature should engage in a coordinated effort to revise existing statutes and introduce new legislation with inclusive language by using gender-neutral pronouns or reusing nouns to avoid the use of gendered pronouns”); *id.* (“[S]tate agencies should engage in similar efforts to use gender-neutral pronouns and avoid the use of gendered pronouns when drafting policies, regulations, and other guidance”).

“chairman.”¹⁴⁸ In December 2019, Illinois approved legislation allowing driver’s license applicants to select X as their gender,¹⁴⁹ following adoption of the practice in fifteen other states and the District of Columbia.¹⁵⁰

Related initiatives in other states include a bill in New Hampshire introduced in 2019 that provides a procedure for an individual to obtain a new birth certificate based on a change of gender identity,¹⁵¹ as well as a bill in Utah that offers non-binary options for birth certificates and driver’s licenses.¹⁵² Similarly, after a bill was rejected in 2018, New York re-introduced legislation in 2019 that would allow people to change their names to conform with their gender identity.¹⁵³ In Oregon, a House bill recognizes non-binary as a gender,¹⁵⁴ and several other states have followed suit.¹⁵⁵ Finally, although there has been no formal legislation introduced in Michigan, the state bar journal has published an article discussing the importance of recognizing non-binary gender.¹⁵⁶

Cities, too, can embrace a gender-silent legislative drafting style. Following the California legislature’s directive (mentioned at the beginning of this section), the City of Berkeley, California, recently adopted an

¹⁴⁸ Revell & Vapnek, *supra* note 78, at 10 (Indiana), 11 (Vermont).

¹⁴⁹ Governor Pritzker Signs Law Allowing for Gender-Neutral Markers on Driver’s Licenses, ID Cards, WSPY NEWS (Dec. 28, 2019), http://www.wspynews.com/news/local/governor-pritzker-signs-law-allowing-for-gender-neutral-markers-on/article_a12c9e7c-298e-11ea-9a48-bb35df6a2de8.html [https://perma.cc/AE2H-CXCL].

¹⁵⁰ *Legal Recognition of Non-Binary Gender*, WIKIPEDIA, https://en.wikipedia.org/wiki/Legal_recognition_of_non-binary_gender [https://perma.cc/K4FB-22KS] (last visited Apr. 16, 2020).

¹⁵¹ H.R. 446, 2019 Gen. Ct., 2019 Sess. (N.H. 2019).

¹⁵² Taylor Stevens, *Utahn Becomes One of the First in the State to Receive Nonbinary ‘X’ Markers on Birth Certificate and Driver License*, SALT LAKE TRIB. (Oct. 8, 2018), <https://www.sltrib.com/news/politics/2018/10/08/male-female-x-utahn/> [https://perma.cc/JZ4E-BZGH].

¹⁵³ H.R. 3457-B, 2019–20 Reg. Sess. (N.Y. 2019).

¹⁵⁴ H.R. 2412, 80th Leg. Assemb., Reg. Sess. (Or. 2019); *see also* H.R. 2856, 79th Leg. Assemb., Reg. Sess. (Or. 2017).

¹⁵⁵ Jessica A. Clarke, *They, Them, and Theirs*, HARV. L. REV. 894, 897 (2019), https://harvardlawreview.org/wp-content/uploads/2019/01/894-991_Online.pdf [https://perma.cc/T86N-9XZV].

¹⁵⁶ *See* Angie Martell, *Legal Issues Facing Transgender and Gender-Expansive Youth*, 96 MICH. BAR J. 30 (2017), <http://www.michbar.org/file/barjournal/article/documents/pdf4article3272.pdf> [https://perma.cc/NHA9-URTM].

ordinance to de-gender city legislation.¹⁵⁷ Although the bulk of the changes concern a shift away from “man” words and away from the “universal he”, the accompanying memo underlines that the purpose of the changes is to reflect a non-binary world: “In recent years, broadening societal awareness of transgender and gender nonconforming identities has brought to light the importance of non-binary gender inclusivity.”¹⁵⁸ Toward this end, the ordinance goes beyond simply making Berkeley’s legislation gender neutral; it fully embraces the gender-silent style. In particular, the ordinance provides that “‘They/them’ shall indicate a singular individual, unless the context indicates the contrary.”¹⁵⁹ For the same reasons, the ordinance requires the use of a job title instead of a gendered pronoun, for example “the Director’s office,” rather than “her office.”¹⁶⁰

2. Canada

In Canada, as noted above, the federal government is using a non-binary style, and of the eleven provincial and territorial respondents to our survey, five jurisdictions have formally or informally adopted a non-binary style.¹⁶¹ Six said they have no policy on this issue,¹⁶² but of these, three are considering adopting a gender-silent style.¹⁶³ Ten stated that they try to avoid the use of personal pronouns in favor of repeating nouns.¹⁶⁴ In our view, all jurisdictions that avoid the use of third-person pronouns are well on the road to a non-binary gender-silent style, especially if they also avoid gendered nouns and verbs.

¹⁵⁷ Kayla Epstein, *Berkeley Plans to Remove Gendered Pronouns From its Municipal Code*, WASH. POST (July 18, 2019), https://www.washingtonpost.com/dc-md-va/2019/07/18/berkeley-plans-remove-gendered-pronouns-its-municipal-code/?utm_term=.b1b6092fc68b [https://perma.cc/ZLD7-TQ66].

¹⁵⁸ BERKELEY CITY COUNCIL REPORT, *supra* note 93, at 2.

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 5.

¹⁶¹ Revell & Vapnek, *supra* note 78, at 6 (Alberta, British Columbia), 8 (Nunavut, Saskatchewan, Yukon).

¹⁶² *Id.* at 6 (New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia), 8 (Ontario, Prince Edward Island).

¹⁶³ *Id.* at 6 (Newfoundland and Labrador, Northwest Territories), 8 (Ontario).

¹⁶⁴ *Id.* at 6 (Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nova Scotia), 8 (Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon).

One jurisdiction has not formally moved away from using “he, she, or it” but is evolving a style that does not rely on singular personal pronouns.¹⁶⁵ Similarly, although another state has in the past used “he, she, or it,” recent statutes do not use singular pronouns.¹⁶⁶ For example, its *Safe and Responsible Retailing of Cannabis Act (Liquor and Gaming Control Act and Manitoba Liquor and Lotteries Corporation Act Amended)*¹⁶⁷ repeats nouns and avoids gendered nouns.

3. *Australia*

In Australia, the Commonwealth of Australia and five of its states and territories have a formal policy on gender-silent legislative drafting.¹⁶⁸ Another, despite expecting a formal policy change at any time, appears to have already moved in that direction.¹⁶⁹ One has no formal policy, but it too appears to have already moved in that direction, as it avoids the use of singular pronouns and uses plural nouns and other techniques to avoid gendered language.¹⁷⁰ Several jurisdictions use personal pronouns where it is unavoidable,¹⁷¹ for example, when amending older legislation. It is our opinion that Australia is the most heavily invested and advanced of all countries in gender-silent legislative drafting.

4. *New Zealand*

According to a recent article, gender-neutral drafting in New Zealand is strongly encouraged, but not required.¹⁷² The Parliamentary Counsel’s Drafting Manual lists several techniques that can be used to further gender neutrality.¹⁷³ The manual allows the use of “he or she,” but suggests limiting its use.¹⁷⁴ The trend is clearly toward what we call gender-silent legislative drafting, since the gender-neutral drafting section of the manual explicitly

¹⁶⁵ *Id.* at 8 (Ontario).

¹⁶⁶ *See* *Safe and Responsible Retailing of Cannabis Act*, 3rd Sess., 41st Leg. (Manitoba 2018).

¹⁶⁷ *See id.*

¹⁶⁸ Revell & Vapnek, *supra* note 78, at 2 (Australian Capital Territory), 3 (Queensland), 4 (South Australia, Victoria), 5 (Western Australia).

¹⁶⁹ *Id.* at 3 (Northern Territory).

¹⁷⁰ *Id.* (New South Wales).

¹⁷¹ *Id.* (New South Wales, Queensland).

¹⁷² King & Fawcett, *supra* note 76, at 107.

¹⁷³ *Id.* at 111–12.

¹⁷⁴ *Id.* at 112.

states that “language (and law in general) should move beyond binary concepts of gender that undermine its applicability to all persons.”¹⁷⁵

5. *United Kingdom*

In December 2018, Scotland’s Parliamentary Counsel Office updated its internal guidance to provide specifically that drafters should avoid gender-specific pronouns and should “[b]ear in mind that some people who identify as non-binary do not use either of those gender-specific pronouns for themselves so this may have particular relevance for them.”¹⁷⁶ The respondent to our survey indicated that the policy will likely not require any changes in drafting style.

The U.K. drafting office adopted a gender-neutral drafting policy in 2007, which was amended in 2018 to remove a restriction on the use of the singular “they.”¹⁷⁷ The current guidance reads as follows:

2.1.16 They (singular). In common parlance, “they” is often used in relation to a singular antecedent which could refer to a person of either sex.

2.1.17 Whether this popular usage is correct or not is perhaps a matter of dispute. OED (2nd ed, 1989) records the usage without comment; SOED (5th ed, 2002) notes “considered erron[eous] by some”. It is certainly well-precedented in respectable literature over several centuries.

¹⁷⁵ *Id.* (citing *Principles of clear drafting*, N.Z. PARLIAMENTARY COUNS. OFF. 3.69A, <http://www.pco.govt.nz/clear-drafting/> [https://perma.cc/BQ4K-HVLK] (last visited Feb. 6, 2020)).

¹⁷⁶ *Drafting Matters!: Guidance on the Drafting of Primary Legislation*, SCOTTISH GOV’T (Dec. 6, 2018), <https://www.gov.scot/publications/drafting-matters/pages/6/> [https://perma.cc/FX6N-L6D2].

¹⁷⁷ For further reference on the use of the singular “they” in the UK, see GENDER-NEUTRAL LANGUAGE, 750 Parl Deb HL (5th ser.) (2013) (UK), <https://hansard.parliament.uk/Lords/2013-12-12/debates/13121276000394/LegislationGender-NeutralLanguage> [https://perma.cc/F85T-LUPT]; see also DRAFTING GUIDANCE, OFF. PARLIAMENTARY COUNS. 9 (Oct. 2, 2010, last updated July 17, 2018), <https://www.gov.uk/government/publications/drafting-bills-for-parliament> [https://perma.cc/PPF4-WQ8A]; GENDERED PRONOUNS, 792 Parl Deb HL (5th ser.) (2018) (UK), <https://hansard.parliament.uk/Lords/2018-06-25/debates/A1C1FAD6-81A9-405D-B451-20890306A6F1/LegislationGenderedPronouns> [https://perma.cc/H4DG-T8CK].

2.1.18 It may be that “they” as a singular pronoun seems more natural in some contexts (for example, where the antecedent is “any person” or “a person”) than in others.¹⁷⁸

Northern Ireland adopted its gender-neutral policy within the last ten years but has not explicitly adopted a gender-silent policy. Drafters occasionally use “he or she” but try to avoid the use of personal pronouns. The issue of gender silence has arisen on at least one occasion; our respondent gave the following example:

The question of persons who do not identify as male or female was raised recently at the drafting stage of some provisions. The drafter had at first adopted the “he or she” formulation in a handful of places where, in the drafter’s view, it was the most natural gender-neutral option. On the point being raised by the instructing Department, the provisions were re-drafted using “that person” and “the deceased”, with (at most) only a minor departure from the most natural phrasing.¹⁷⁹

B. New Principles for Gender-Silent Legislative Drafting

In Part II, we set out the five principles that were adopted by the Uniform Law Conference of Canada in 1986 to eliminate sexism in Canadian legal language—i.e., to implement a gender-neutral style.¹⁸⁰ We now introduce our proposed revisions to take account of non-binary genders—i.e., to implement a gender-silent style.

1. Drafters have an obligation to use plain language.

Plain language means that laws should be written in a style as close to ordinary language as is consistent with the accuracy requirements of the law. Updated and informed by a modern sensibility and sensitivity to non-binary concerns, this plain language principle means that a law should not use a sex-specific form when a correct user of the language would use a neutral form.

We believe that gender-silent legislative drafting is plain language at its finest for at least three reasons. First, it allows readers of any gender identity to imagine themselves as being included rather than excluded from the laws of the land. Second, the elimination of gendered pronouns and the repetition

¹⁷⁸ DRAFTING GUIDANCE, *supra* note 177, at 8–9.

¹⁷⁹ Revell & Vapnek, *supra* note 78, at 16 (Northern Ireland).

¹⁸⁰ See *supra* text at note 11.

of nouns eliminate the problem of incorrect pronominal reference. Third, the inclusion of LGBTQIA+ community members in all legislation reflects values of equality set out in some constitutions,¹⁸¹ domestic human rights codes,¹⁸² and international declarations. Recent scholarship also posits that plain language advances the goal of increasing access to justice.¹⁸³

2. *Legislation should address all users equally.*

No one should have to adjust their thinking to envision anyone other than a man being addressed or empowered by a particular statute. The use of “he or she” or “he, she, or it” and the embrace of words like “firefighter” and “worker” cure this issue for women but not for those members of the LGBTQIA+ community who do not identify as male or female.

3. *The language of the law should not offend.*

Women and members of the LGBTQIA+ community are often the butt of insensitive sexist or non-inclusive language which they rightly find offensive.¹⁸⁴ In our opinion, the “universal he” and other non-inclusive language is offensive as it excludes women. Many modern but now outmoded drafting practices leave the LGBTQIA+ community in the same situation. Gendered language that only accounts for two genders excludes all other members of the community. This appears to be a perfect illustration of the old Latin legal maxim *inclusio unius est exclusio alterius* (to include one is to exclude another).

4. *Drafted legislation should reflect the community.*

The legislative drafter is required to be aware of current developments in the language, and to use that language—but also to be aware of what is going on in the world beyond the drafting office. Drafters should avoid faddish language—language that, while current, has not gained general acceptance, such as slang—as it may cause difficulties for readers who are not up to date on the latest terminology or it may cause difficulties in the

¹⁸¹ See, e.g., U.S. CONST. amend. XIV; Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c 11, s. 15 (UK).

¹⁸² See Province of Ontario Human Rights Code, R.S.O. 1990, c. H.9, s. 1–3, 5, 7. (Can.).

¹⁸³ Yaniv Roznai & Nadiv Mordechay, *Access to Justice 2.0: Access to Legislation and Beyond*, No. 16-12 HEBREW UNIV. JERUSALEM LEGAL STUD. RES. PAPER SERIES 1, 22, 34 (2015).

¹⁸⁴ Christopher John Hunt, ‘It’s Just a Joke;’ *The Subtle Effects of Offensive Language*, CONVERSATION (July 13, 2016), <https://theconversation.com/its-just-a-joke-the-subtle-effects-of-offensive-language-62440> [https://perma.cc/DLS8-32NA].

future if the word disappears. Drafters should also avoid language that is excessively conservative or reflects another era.

Using language that reflects the world outside the drafting office means drafters should strive to use language that reflects the community. Resisting change means clinging to language that no longer reflects the persons and groups affected by the law. Gender-silent legislative drafting is not a fad. As we showed in the review of our survey and supplementary research, many jurisdictions are already using this form of drafting, and more are expressing interest every year. Moreover, the historical experience of gender-neutral drafting, which was met with hand-wringing and worse by the likes of Driedger, Dickerson, and others, confirms that what initially shocks the grammarian's sensibilities eventually becomes common, accepted, expected, and routine.

5. Drafters should facilitate the legislative process.

One need only look at the news to see that legislators in many jurisdictions are becoming more conscious of the rights and interests of the LGBTQIA+ community and are working to reflect those rights and interests. Given this widespread awareness, we are confident that many of those legislators (and their staff) will examine any proposed legislation arriving at their offices to ensure that its language is gender inclusive. They may then file a last-minute motion to amend these bills.

Many jurisdictions afford little time between the introduction of legislators' motions and the vote.¹⁸⁵ As a result, there may be little time to ensure that the motion (to amend to update the language to make it gender-silent) is consistent with the rest of the bill or to ascertain whether other complementary amendments are required. The last-minute changes may be hurried or awkward, and may spoil an otherwise well-drafted bill. It is for this reason that we advocate that bills be made gender-silent at the drafting stage, so as to avoid any issues arising unexpectedly and late in the legislative process.

C. Techniques for Gender-Silent Legislative Drafting

Our survey and searches of legislative databases confirm that many jurisdictions have already implemented drafting policies that will remove most if not all gendered terminology. Society is changing. In our view, now

¹⁸⁵ See *Parliamentary Proceedings for Meetings*, NOAA, U.S. DEP'T COM., https://www.afsc.noaa.gov/Education/Activities/PDFs/SBSS_Lesson6_roberts_rules_of_or_der.pdf [<https://perma.cc/8UXX-C8BG>] (suggesting, at least at some levels of the legislature, motions are introduced and voted on during the same meeting).

is the time to complete the move to a truly gender-silent legislative drafting style. The following list of techniques, which we have adapted from the responses to our survey and from the Government of Canada's Legistics website,¹⁸⁶ should assist in accomplishing that goal. As with any such list, drafters must use their professional judgment in determining which, if any, of these solutions works best in any particular situation.

1. Use the singular "they"

Drafters may use the singular "they" and its other grammatical forms ("them," "themselves," and "their") to refer to indefinite pronouns and singular nouns. Canada, the Australian Capital Territory, Hong Kong, and the United Kingdom, among others, have already adopted this technique.¹⁸⁷ It is controversial, as described above.¹⁸⁸ But it is also simple. The following example of the use of singular "they" is taken from the Legistics website, which suggests replacing "Every taxpayer shall file his tax return no later than April 30 of the year following the year in which he earned the income on which he is paying tax" with "Every taxpayer shall file their tax return no later than April 30 of the year following the year in which they earned the income on which they are paying taxes."¹⁸⁹

The singular "they" may be a stumbling block for those who see it as a serious grammatical fault. Concerns about the grammar may get in the way of understanding the message and embracing the values underlying the change. We believe the singular "they" is an acceptable device despite the grammar fears (and we note that one of the leading texts on legislative drafting has embraced it),¹⁹⁰ but we suggest that it be used with caution.

2. Replace a possessive pronoun with a definite article

A definite article can often replace a possessive pronoun with no loss of meaning. For example, "The investigator must give a copy of *his or her*

¹⁸⁶ Legistics, *supra* note 10.

¹⁸⁷ Revell & Vapnek, *supra* note 78, at 2 (Australia Capital Territory), 6 (Canada), 13 (Hong Kong), 18 (UK).

¹⁸⁸ McWhorter, *supra* note 140; *see also* King & Fawcett, *supra* note 76, at 113–17 (discussing in detail the use of the singular "they" and its cousins).

¹⁸⁹ Legistics, *supra* note 10.

¹⁹⁰ King & Fawcett, *supra* note 76, at 116 (citing THORNTON'S LEGISLATIVE DRAFTING (Helen Xanthaki ed., 5th ed., Bloomsbury Professional 2013)) ("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.").

report to the supervisor” can be changed to “The investigator must give a copy of *the* report to the supervisor.”

3. *Replace gendered language with gender-silent language*

Gendered language can be replaced with gender-silent language, for both nouns and verbs: “If the occupational nurse is absent, the *foreman* must assign a *workman* who is a qualified first aid responder to *man* the safety office” can be changed to “If the occupational nurse is absent, the *supervisor* must assign a *worker* who is a qualified first aid responder to *staff* the safety office.” This technique applies equally to masculine and feminine gendered language. For example, as we saw earlier, “stewardess,” “actress,” and “waitress” have now been replaced by “flight attendant,” “actor,” and “waiter or “table server” in many jurisdictions.

4. *Repeat the gender-silent noun*

Some people find repeating gender-silent nouns instead of using personal pronouns awkward, but it has the virtue of eliminating exclusionary pronominal references. For example, “The commissioner must write a report setting out *his or her* findings regarding *his or her* refusal to grant a permit, and *he or she* must give a copy to *him or her*” could be changed to “The commissioner must write a report setting out the *commissioner’s* findings in respect of the refusal to grant a permit and ~~*he or she*~~ must give a copy to the applicant.” Note that this example repeats nouns and eliminates unnecessary pronouns.

5. *Recast the provision*

Sometimes it may be best to recast a provision to avoid any reference to gender. For example, “A person may be fined up to \$100 if he or she contravenes subsection (1)” could be changed to “A person who contravenes subsection (1) may be fined up to \$100.” Similarly, “The chief building official may issue a building permit and he or she may register it if he or she considers that the applicant has met the requirements of the building code” could be changed to “The chief building official may issue and register a building permit if satisfied that the applicant has met the requirements of the building code.”

6. *Draft in the plural*

Drafting in the plural can be quite effective but may sometimes introduce ambiguity, particularly in criminal or quasi-criminal laws. Replacing “A director shall be paid his or her reasonable expenses” with “The directors shall be paid their reasonable expenses” is easy. By contrast, “The directors are guilty of an offence if they contravene section 1” raises

the question whether this means a contravention by one is a contravention by all or whether there must be multiple directors colluding or conspiring in the contravention. Using the plural is an option, but we suggest using it with care.

7. *Eliminate the pronoun*

Not all pronouns are necessary. For example, “The director must give *his or her* opinion” can be replaced by “The director must give *an* opinion.”

8. *Use the passive voice*

Drafters rightly prefer using the active voice because the passive voice can create ambiguity or vagueness as to who must perform a duty or who receives a benefit or privilege.¹⁹¹ However, these issues do not always arise and the passive voice is perfectly acceptable, especially where it can eliminate gender references.¹⁹² For example, “The applicant must include *his or her* mailing address in *his or her* application” can become “The applicant’s address must be included in the application.” It does not matter who inserts the address in the application, so long as it is included.

9. *Use a verb in place of a noun*

Using a verb in place of a noun can eliminate some verbiage and sometimes provide a simple solution to the pronoun problem. For example, “An inspector may not enter any residence unless the occupant has given his or her consent” can become “An inspector may not enter any residence unless the occupant has consented.”

10. *Summary*

All of these techniques have been deployed by at least one jurisdiction, and most have been used by several. They all respect the principles of plain language and (with the exception of the singular “they”) are unlikely to cause discomfort to those troubled by changes in language. Carefully used, these solutions are often invisible to the reader. More importantly, they advance the goals of treating equally all those who are affected by the law.

¹⁹¹ RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 27–31 (3d ed. 1994); *see also* ROBERT C. DICK, *LEGAL DRAFTING* 87, 91–92 (3d ed. 1995).

¹⁹² For a detailed explanation of the passive voice and when it should be used, *see* George D. Gopen, *Why the Passive Voice Should be Used and Appreciated – Not Avoided*, 40 *LITIG.* 16 (2014), https://www.georgegopen.com/uploads/1/0/9/0/109073507/litigation_10_why_the_passive_should_be_used.pdf [<https://perma.cc/A9NF-GJJZ>].

D. Government Forms

This section deals with an area of gendered drafting that we feel is worthy of separate consideration—government forms. Since time immemorial, governments have sought information on the people they govern, and government information gathering requires forms. Forms are one of the most common points of contact between the residents of a jurisdiction and the various levels of government.

Types of forms include applications for licenses and certificates; registration forms for births, deaths, marriages, and land titles; and tax filings. Governments also require forms for other official documents such as passports. In some cases, the forms are prescribed by statute, in others, by subordinate legislation or by administrative order. Some forms are developed informally by an administrative body. Most application forms require applicants or registrants to indicate their sex as male or female, and every resulting official document forever thereafter (such as a license, passport, or death certificate) sets out the selected sex.

Until recently, official forms did not recognize the possibility of non-binary alternatives. Some forms are now changing in many jurisdictions that recognize LGBTQIA+ rights. For example, Canada's Supreme Court outlawed discrimination based on sexual orientation in 1995.¹⁹³ Although the ban was effective immediately, it took some time for it to have an impact on government forms; only by the mid-2010s were changes occurring. For example, beginning May 1, 2017, the Government of Ontario adopted the following policy on gender identity in forms:

- sex will only be collected and used when it is required to deliver, monitor or improve the product or service
- Ontario government ministries must tell you why they are collecting the information and how it will be used
- when gender identity information is displayed on an ID, customers will have the option to choose
 - male 'M'
 - female 'F', or
 - 'X' which includes trans, non-binary, two-spirit, and binary people and people who do not want to disclose their gender identity.¹⁹⁴

¹⁹³ *Egan v. Canada* [1995], 2 S.C.R. 513, 522 (Can.).

¹⁹⁴ *Gender and Sex Information on Government IDs and Forms*, ONT. MINISTRY GOV'T & CONSUMER SERVS. (Aug. 8, 2016, last updated March 25, 2019), <https://>

The policy goes on to state that its objective “is to reduce the risk of trans and non-binary people facing harassment or discrimination because their ID is not consistent with their gender identity.”¹⁹⁵ Since the enactment of this policy, government ministries have been consulting with various stakeholder groups and reviewing any changes that may need to be made to forms and IDs.¹⁹⁶ Most other Canadian jurisdictions have adopted or are in the process of adopting similar policies.¹⁹⁷

The decision to allow persons to choose an ‘X’ is not without problems. In a Canadian news report, a non-binary transgender resident of Prince Edward Island commented:

As someone with a job that requires me to travel constantly (sometimes internationally), . . . I can’t help but wonder: If I had an ‘X’ on my passport, what would this mean if I show it to a border guard? Would I be safe? Too often trans and non-binary folks are forced to make the trade-off between validation and potentially becoming a walking target.¹⁹⁸

Incorporating language that accounts for the complete gender spectrum of individual identities is not easy, and it cannot prevent discrimination occurring once people see that someone has chosen a non-binary designation, but it is essential to ensure that neither gender stereotypes nor

www.ontario.ca/page/consultation-gender-and-sex-information-government-ids-and-forms

[<https://perma.cc/MM7C-BDQY>].

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ On November 4, 2019, an adjudicator ordered the Government of Manitoba to offer the option of using an X to indicate sexual identity on birth certificates. See Kayla Rosen, *Manitoba Government Ordered to Offer Non-Binary Sex Designation on Birth Certificates*, CTV NEWS WINNIPEG (Nov. 6, 2019), <https://winnipeg.ctvnews.ca/manitoba-government-ordered-to-offer-non-binary-sex-designation-on-birth-certificates-1.4672466>

[<https://perma.cc/A8TK-PJAM>]. The policy with respect to other forms was still under review as of November 2019. See DEPARTMENT OF FAMILIES, REPORT ON THE COLLECTION AND USE OF GENDER AND SEX DATA (2019), https://manitoba.ca/asset_library/en/proactive/2019_2020/fam_report_gender_based_data_nov2019.pdf [<https://perma.cc/58XX-NHFN>].

¹⁹⁸ Sara Fraser, *P.E.I. Government ‘Open to Exploring More Changes’ for Gender ID on Paperwork*, CBC NEWS (Sept. 22, 2018), <https://www.cbc.ca/news/canada/prince-edward-island/pei-gender-sex-x-other-trans-birth-certificate-1.4832853> [<https://perma.cc/4XZC-XEHD>].

gender identification denies equal treatment and representation for persons covered by the law.

Although advances in technology often attract criticism, they have an advantage in diminishing reliance on gender identity. As individuals increasingly can be identified through fingerprints and iris scans (such as the airport fast-pass system called CLEAR),¹⁹⁹ the less necessary it will be to track them by sex or to note it on official documents. Starting from birth, governments could use DNA, iris scans, footprint, or fingerprint identification. Privacy concerns aside, in the age of facial recognition software and perhaps DNA scans, using sex and gender on official documents may become obsolete.

Indications are that society is moving in this direction. In 2016, the State of Oregon eliminated the requirement that courts publish citizens' gender changes²⁰⁰ and also authorized driver's licenses to use "X" as an alternative to "M" or "F".²⁰¹ Sixteen other states and the District of Columbia have followed suit in allowing "non-binary" as an option on official documents.²⁰²

VI. ALIGNMENT WITH OTHER JURISDICTIONS

The treatment of sex and gender is not only an issue in the jurisdictions that we surveyed; changes are being considered in many others. Here is a brief overview of three other jurisdictions that are exploring how to account for non-binary gender.

¹⁹⁹ CLEARME, <https://www.clearme.com/> [https://perma.cc/QM75-9EKD] (last visited Feb. 6, 2020).

²⁰⁰ Shelby Hanssen, Note, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 297 (2017), <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/22999/Hanssen.pdf?sequence=1&isAllowed=y> [https://perma.cc/94M6-PJX5].

²⁰¹ *Id.*

²⁰² See WIKIPEDIA, *supra* note 150.

A. Germany

To inform the work of its Interministerial Working Group on Inter- and Transsexuality, the federal government of Germany undertook a comprehensive review of how its legislation treated sex and gender.²⁰³ The review was in part to take stock of policy results of the Civil Status Law of 2013 that allowed parents to leave the “gender” box blank on birth certificates.²⁰⁴ The report recommended introduction of a non-binary category to give effect to fundamental and human rights²⁰⁵ in line with other steps taken at the federal level to move toward a gender-inclusive legal system, such as abandoning gender-specific terms with respect to parenthood, marriage, and other family relationships.²⁰⁶

B. Sweden

Sweden has been proactive in addressing the issue of gender in its legislative drafting. In 2015, the pronoun “hen” was formally introduced into the Swedish dictionary.²⁰⁷ This new word is used to refer to a person who is transgender; whose gender is unknown or irrelevant; who wishes not to be identified with a gender; or whose gender the writer deems superfluous information.²⁰⁸ This is a positive trend toward equal treatment of all genders in language.

²⁰³ Nina Althoff, Greta Schabram & Petra Follmar-Otto, *Gender Diversity in Law: The Status Quo and the Development of Regulatory Models for Recognizing and Protecting Gender Diversity*, GERMAN INST. FOR HUMAN RTS. 4 (2017), <https://www.bmfsfj.de/blob/116952/2f2af83b324af52cbb1d0efbfda212e2/geschlechtervielfalt-im-recht--band-8---englisch---gender-diversity-in-law-data.pdf> [https://perma.cc/7TSD-YGUH].

²⁰⁴ *Id.* at 5.

²⁰⁵ *Id.* at 17.

²⁰⁶ *Id.* at 18.

²⁰⁷ AFP, *Sweden Adds Gender-Neutral Pronoun to Dictionary*, GUARDIAN (Mar. 24, 2015), <https://www.theguardian.com/world/2015/mar/24/sweden-adds-gender-neutral-pronoun-to-dictionary> [https://perma.cc/9323-BWUU].

²⁰⁸ *Id.*

C. European Parliament

In 2008, the European Parliament published a set of guidelines for gender-neutral language,²⁰⁹ and these were substantially updated in 2018.²¹⁰ The 2018 document states that “the aim of these guidelines is to ensure that, as far as possible, non-sexist and gender-inclusive language is used . . . in the Parliament’s documents and communications in all official languages.”²¹¹ The document sets out a number of recommendations for English-language documents, such as using plural forms of a noun (as in “officials shall carry out their duties”), omitting pronouns, and using the imperative.²¹² The guidelines state that it may not always be possible to avoid the occasional use of “he” or “his,” but strenuous efforts should be made to reduce such use to a minimum.²¹³

The 2018 document, which was developed jointly by linguists and policy officials,²¹⁴ recommends the following policies for three groups of European languages.

1. Neutral gender languages (Danish, English, Swedish)

Drafters in these languages, which use personal nouns and pronouns specific to each gender, should consider using words that are gender neutral (e.g., chairperson, spokesperson, director, principal, etc.).²¹⁵

2. Grammatical gender languages (German, Romance languages, Slavic languages)

These languages, which assign grammatical gender for every noun and where the personal pronoun gender matches the reference noun, should consider feminization, particularly in the context of professional nouns and job titles.²¹⁶

Countries like France (and others) have formally introduced new words into their language to create a feminine version for almost all titles of

²⁰⁹ EP 2018, *supra* note 37, at 2.

²¹⁰ *Id.*

²¹¹ *Id.* at 4.

²¹² *Id.* at 10.

²¹³ *Id.*

²¹⁴ *Id.* at 2.

²¹⁵ *Id.* at 5.

²¹⁶ *Id.*

masculine gender (e.g., *autrice* for *auteur*, *députée* for *député*).²¹⁷ In explaining the language changes, the Académie française noted that this is a “natural evolution” of French, “aim[ed] at recognising in language the place of women in today’s society” (although it goes on to warn that the changes should not “contravene the elementary and fundamental rules of language”).²¹⁸

In these languages, the use of the generic masculine noun is no longer the norm, even in legislation. For instance, the translation of the Treaty of Lisbon into German reads as “Unionsbürgerinnen und Unionsbürger” to indicate the word “citizens” in both masculine and feminine.²¹⁹

3. Genderless languages (Finnish, Hungarian, Estonian)

Languages that have no grammatical gender and no pronominal gender do not need a specific strategy to be gender inclusive.²²⁰ The European Parliament recognizes that there are significant differences between languages of member states and recommends appropriate solutions “in each specific context, taking into account the relevant linguistic and cultural parameters.”²²¹

D. Other Jurisdictions

Gender-silent legislative drafting has been adopted in Zambia.²²² It is under consideration by the Church of England, whose respondent to our survey indicated that they tend to avoid personal pronouns and repeat nouns. Gender-silent legislative drafting is also under close consideration in New Zealand, while gendered language is avoided in Isle of Man. As these and the previous examples show, many jurisdictions are already moving ahead with embracing gender-silent legislative drafting, and we urge more to do the same.

VII. CONCLUSION

The age of the “universal he” in legislation lasted several hundred years. We are currently less than forty years from the time most jurisdictions

²¹⁷ *Feminine Job Titles Get Go-Ahead in France*, BBC (Mar. 1, 2019), <https://www.bbc.com/news/world-europe-47414140> [https://perma.cc/FDD9-Y4NS].

²¹⁸ *Id.*

²¹⁹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 art. 8B.

²²⁰ EP 2018, *supra* note 37, at 6.

²²¹ *Id.* at 9.

²²² Revell & Vapnek, *supra* note 78, at 18 (Zambia).

accepted a binary view of gender-neutral drafting. Using “he or she” and “he, she, or it” is neutral as between male and female but does not reflect the growing recognition that many people do not self-identify as either male or female. Recently, many jurisdictions have moved to what we call a gender-silent style, and many more are transitioning to or considering moving to it. It is not a fad: it reflects the fact that society is changing.

Different jurisdictions are at different points on a path from the continuing use of the “universal he” to the full adoption of gender-silent legislative drafting. There may be lingering questions about how to handle gendered language in old legislation, but this focus on the artefacts of an earlier era should not hinder the transition to a gender-silent legislative drafting style.

To those who object that it takes extra effort to alter language to be more inclusive, the response is the same as it was in the 1970s when society was changing language to take account of women: the extra effort is important to ensure that those affected by a law do not feel excluded from it and that all members of society feel like full members. This is not to say that changing how we speak and write is easy: it is not. But as one Columbia University linguistics professor (and author of the *Atlantic* article we discussed earlier) recently pointed out, it also takes effort to learn grammatical constructions such as “John and I went to the store” and not “Me and John went to the store.”²²³ We absorb these grammar rules as children; we can and should make a greater effort as adults when people’s human rights and access to justice are at stake.²²⁴

In our view, the drafting office is the key to change. In the past, drafters (and others) tended to cling to comfortable, well-settled ways of writing legislation and to defend tradition vigorously.²²⁵ This is no longer the case. We believe that our survey and other research show that drafting offices are

²²³ McWhorter, *supra* note 140.

²²⁴ Heidi K. Brown, *We Can Honor Good Grammar and Societal Change Together*, A.B.A. J. (Apr. 1, 2018) (“The concept of inclusive legal writing is an opportunity for lawyers to be at the forefront of balancing grammatical correctness and cultivation of gender inclusiveness.”), http://www.abajournal.com/magazine/article/inclusive_legal_writing [https://perma.cc/K636-A9AW]; see also King & Fawcett, *supra* note 76, at 116 (“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.”).

²²⁵ See generally, e.g., Driedger, *supra* note 39; see also DICKERSON, *supra* note 41, at 228–29.

acting proactively and, commendably, taking a leading role in linguistic reform.

Language is an instrument that can be used as a tool to oppress, discriminate, and exclude—or it can equally well be used to advance equality. We cherish the values of inclusion, equal treatment, and non-discrimination, and we believe written laws should reflect these norms. The time has come for all jurisdictions to embrace gender-silent legislative drafting as an honorable way to treat one another in a non-binary world.

Annex 1**Survey of Heads of Legislative Drafting Offices****August 2018**

1. Does your jurisdiction use a gender-neutral drafting style in drafting English-language laws?
2. If yes to question 1,
 - a. Do you use *he/she/it* and their cousins *him/her/it*, *his/her/its*?
 - b. Do you try to avoid the singular personal pronouns by repeating nouns or drafting in the plural?
 - c. When did you adopt the style?If a. or b. do not apply, please describe what gender-neutral drafting style you use.
3. Has your drafting style changed to reflect an all-inclusive (non-binary) gender-neutral style, i.e. a style that recognizes that many people identify as neither male nor female?
 - a. If so, when did you adopt this style and can you give examples or provide us with a copy of any manuals or directives that you have on this style?
 - b. What, if any, problems or resistance did you receive in implementing the change?
 - c. What support did you receive?
4. If you haven't changed style in your jurisdiction, is such a change being considered?
 - a. Who do you see as supporting the move?
 - b. What obstacles to you see?
5. What is the name of your jurisdiction?
6. Do you have any other comments or suggestions that may help us developing our paper

