Sir William Dale Annual Memorial Lecture

Gender-Neutral Law Drafting: The Challenge of Translating Policy into Legislation

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Abstract

For legislation to be inclusive it must be expressed in a way that is gender-neutral. Gender-neutral drafting became a policy issue in New Zealand in the 1980s and since that time gender-neutral drafting has become an accepted drafting practice. The issue has been to ensure previous legislation is gender-neutral. The Legislation Bill that is before the Parliament provides for legislation already enacted to be reviewed to remove gendered language. The main lesson to be learnt from the New Zealand experience is the need for political and bureaucratic commitment to gender-neutral drafting.

Keywords: legislation , policy, gender-neutral law drafting, New Zealand.

May I thank you for the invitation to deliver the Sir William Dale Memorial Lecture. It is an honour and privilege to deliver the lecture. As a long-time supporter and advocate of plain English drafting I have been aware of Sir William's work and that of the Institute. I leant early however that you need a long-term perspective as a plain English advocate. I recall my first job as a law clerk in Auckland in the early 1970s, when being asked to draft a will I attempted a plain English version as taught in Law School. I was informed such practices were unacceptable because it could create uncertainty and confusion. It was not the last time I was informed plain speaking and writing was unacceptable because people may understand what you are saying.

My advocacy of plain English drafting stems from a commitment to the rule of law as a fundamental principle of New Zealand's constitutional arrangements. I must admit that a commitment to the rule of law in the New Zealand context cannot however be assumed, as Mathew Palmer, a New Zealand constitutional writer has noted. He has argued that while the rule of law supported by judicial independence should be a cornerstone of New Zealand's constitution, he was not confident "...that New Zealanders currently understand the rule of law or, in a crunch, would necessarily stand by it as a fundamental constitutional norm". [1]

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1 M.S.R. Palmer, *New Zealand Constitutional Culture*, NZULR 565, 2007, at p. 589.

However if the law is not accessible to people then it is difficult to expect them to understand the important role the law plays in the maintenance of a society that is not only peaceful and orderly but also protects every citizen's human rights. Amongst the essential elements of accessibility are clarity of language and ease of purchase of legislation. As Sir William wrote in his book *Legislative Drafting: A New Approach*:[2] "Men and women should be encouraged to read and know the laws; and to buy the official print of a statute which is after all, the most direct and cheapest way of acquiring knowledge of the contents." I am pleased to report that in New Zealand all statutes are now freely available electronically. I am sure Sir William would have approved.

Although I have no expertise in the skill of legal drafting, I have been fortunate in the past to contribute a little to the cause of plain English advocates. In the late 1980s I was a member of the New Zealand Law Commission that undertook the research and work that eventually resulted in major reforms in legal drafting practice, including gender-neutral drafting, a new Acts Interpretation Act in 1999 and recently the Legislation Bill 2010 that is currently before the New Zealand Parliament. These reforms were the result of terms of reference that had been given to the Law Commission in 1986 by the then Minister of Justice Geoffrey Palmer who had a real interest in and commitment to improving the accessibility of the law to all. He understood the need for fundamental rethinking of not only drafting practices but also the delivery of legislation in an accessible form.

Sir Geoffrey's intention was clearly stated in the terms reference. First the purpose of the review was stated simply as being – to propose ways of making legislation as understandable and accessible as practicable and to keep it under review in a systematic way. The terms of reference then directed the Law Commission to explicitly examine and review the language and structure of legislation; the arrangements for the systematic monitoring and review of legislation; the law relating to legislation; and the provisions of the Acts Interpretation Act 1924 and related legislation.[3] In the 1980s and 1990s the Commission issued four Reports[4] that resulted in changes both in drafting practice and a new Acts Interpretation Act that was enacted in 1999.

The underlying approach in the various Reports and the proposed recommendations for change is best expressed in the *Legislation Manual: Structure and Style Report* (NZLC R35, 29 May 1996) in these terms:

> There is no mystery to plain language. Plain language is ordinary language, expressed directly and clearly. It is intended to simplify (to the extent possible) but not be simplistic; to enhance style rather than be stylistically bland.

2 Butterworths, London 2007, at p. 11.

3 Law Commission, Terms of Reference.

4 *Legislation and Its Interpretation: Statutory Publications Bill*, NZLC R11, 7 September 1989; *A New Interpretation Act to Avoid 'Prolixity and Tautology'*, NZLC R17, 20 December 1990; *The Format of Legislation*, NZLC R27, 20 December 1993; *Legislation Manual: Structure and Style*, NZLC R35, 29 May 1996.

> In legislation its use is intended to remove the barriers to communication, and in this way make the law more accessible.[5]

The Report then identified the barriers to communication as absence of underlying principle; poor organization; long convoluted sentences; unnecessarily arcane and archaic language; excessive internal reference; and unnecessary repetitive wording.[6]

These recommendations were eventually incorporated in the Acts Interpretation Act 1999 in the following terms. Section 2 provides:

> The purposes of the Act are –
> (a) To state principles and rules for interpretation of legislation; and
> (b) To shorten legislation; and
> (c) To promote consistency in the language and form of legislation.

While Section 5 provided the principles of interpretation in the following terms:

> (1) The meaning of an enactment must be ascertained from the text and in the light of the purpose.

Matters to be considered when ascertaining the meaning included the preamble, an analysis, the table of contents and explanatory material amongst other described materials. Perhaps more important than this Act were the changes in legislative drafting practices including the format and style which took place from 1997 onwards. Gender-neutral drafting was part of this new approach to drafting. This new plain English approach was formally acknowledged in the Acts and Regulations Publication Act 1989 in Section 17A to 17F inserted by a 2000 Amendment that also authorized changes in the format of reprinted legislation that was 'consistent with current drafting practice'. There was however no reference to ensuring gender-neutral language being employed as part of that drafting practice when changing reprinted legislation. This meant the text was still expressed in the male gender, though the interpretation was to include the female gender. Section 31 of the new Acts Interpretation Act 1999 provides that the use of the masculine gender in enactments passed or made before the commencement of the Act now includes females. I shall return to this issue later but I want now to complete the narrative of the reform process within which gender-neutral drafting was incorporated.

As you may recall, the terms of reference originally also provided for the review of legislation in a systematic way. After the productive period in the 1990s, the Law Commission's attention was diverted to other projects. In 2008 however it published a new Report, *Presentation of New Zealand Statute Law*[7] which provided the basis for the Legislation Bill 2010 that is currently before the

5 *Supra* at 1, NZLC R27, at p. 34.
6 *Ibid.* at p. 47.
7 NZLC R104, 2008.

Parliament. This Report marks the completion of the 25-year reform project and is primarily focused on making New Zealand statute law accessible to all. In the foreword to the Report, Sir Geoffrey Palmer, now President of the Law Commission acknowledges the changes already made to incorporate plain English drafting and to make legislation electronically accessible.

This Report was focused not on the text however but on the accessibility of the statutes themselves. Sir Geoffrey summarized the recommendations in this last Report as follows: providing an index so the law can be found; weeding out statutes that are out-of-date; providing a systematic program for revising statutes to ensure they are user-friendly; and to rescue historical statutes from self-destruction. The Legislation Bill is a fundamental review of existing legislation law and practices and replaces the Statute Drafting and Compilation Act 1920, the Acts and Regulations Publication Act 1989 and the Regulations (Disallowance) Act 1989. The fact that the recommendations in the Report were so quickly adopted by the government and incorporated in a government Bill is partly attributable to the Law Commission Report incorporating a draft Bill and that the members of the Law Commission included in addition to Sir Geoffrey Palmer, Emeritus Professor John Burrows QC, a noted expert on statutory legislation, and the former Chief Parliamentary Counsel, George Tanner QC. It is an excellent example of law reform being undertaken by real experts. It is also an example of persistence being rewarded as the whole project has taken nearly 25 years.

I want now to turn to the specific topic of this lecture, gender-neutral drafting and the New Zealand experience. I felt however it was not possible to understand the changes that have taken place without having some knowledge of the legal and social context within which they took place. Changes to drafting practice result from changes to drafting policy and it is this relationship between policy and gender-neutral drafting that was essential in the New Zealand context.

It was the second wave of feminism in the 1960s and 1970s that renewed interest in the gendered nature of legislation and the law generally. The pressure from feminists for a general change in policy to include the interests of women was also reflected in the movement to ensure the text reflected this development. The discovery of the 'persons' cases by feminists in the 1970s fuelled us with a sense of injustice and an awareness of the barriers to the inclusion of women within the legal system. The role of language in the social construction of gender during this time has been well studied and documented so I shall not review the arguments this evening. It is appropriate however for the purpose of the lecture to remind ourselves that the end purpose of adopting a gender analysis is "to redefine the basic assumptions of dominant cultural, social and economic structures in order to promote and secure women's basic human rights, needs and aspirations".[8]

The importance of language in securing the equality of women cannot be under-estimated. Through language we acknowledge or ignore women. Attitudes and prejudices are created and transmitted through language. We take language for granted and therefore so often under-estimate its effect on us. Language

8 *Guidelines on Gender-Neutral Language*, UNESCO 1999.

reflects our culture and as our culture evolves and develops through experience so does our language. As the role of women evolved then so does the expectation that our language reflects that development. That change process however is often difficult and different for formal and informal language.

Legal language is amongst the most formal uses of language because it defines rights and obligations. It is not surprising then that change came slowly to legal drafting and required clear direction and commitment from policy makers to ensure the change in policy was reflected in the language of the law.[9] The relationship between the policy maker and the legal drafters is a crucial one and not always well understood. It requires an understanding of the professionalism of both parties.

I had the opportunity to understand the importance of the relationship when I was appointed as the Minister Responsible for the Office of Parliamentary Counsel, which is a responsibility assigned to the Attorney General who has overall responsibility for legislation. This was not a political role that attracted much attention normally. However on my watch the Office was involved in a project to convert the statute book into electronic form accessible at no cost to anyone. This was a very complex and costly exercise that each year ran over budget and at times presented technical issues that seemed insurmountable. Such circumstances test the commitment of the executive to the notion bringing legislation to the people. There were no votes in it and the media was unsupportive. My advocacy would have been to no avail without the support of the Minister of Finance who fortunately was also Government Leader in the House of Representatives. He understood the value of legal drafters to progressing the government's legislative program and supported the increased funding required to see the project through to its successful conclusion. Perseverance with this development in technology has genuinely increased access of legislation to the people.

This experience also confronted me with the reality of the work of the law drafter. A great deal is expected of these professionals from officials and ministers who require Bills produced overnight to fit in with the government's timetable. I was left with no doubt that the quality of the drafting reflected not only the skill and professionalism of the drafter but also the quality of the drafting instructions which in turn reflected the quality of the policy proposal. In such circumstances reliance on tried and tested drafting techniques is essential. It was important then that gender-neutral drafting techniques are an integrated part of the drafter's toolbox.

The Law Commission was aware of the debates in the 1980s surrounding the masculine bias of legislative text and the need to incorporate gender-neutral language in its recommendations. In its 1996 Report on Format and Style it directly addressed the issue of gender-neutral drafting in the following terms: [10]

9 *See* S. Laws CB, First Parliamentary Counsel, 'Giving Effect to Policy in Legislation', Statute Society's Lord Renton Lecture, 10 November 2010, Institute of Advanced Legal Studies for an analysis of the relationship between policy and legislation.

10 *Ibid.*, para. 186 at p. 47.

"Always use gender-neutral language. Some of the more common methods of avoiding the traditional use of the male pronouns include the following. (The first four approaches are adaptations of the sentence *A member of the Tribunal may resign his office*)."

The Report then cites the following approaches:

- Omit the pronoun;
- use the masculine and feminine pronoun;
- repeat the noun;
- convert the noun to verb form;
- use a relative clause.

And the Report concludes this section with the observation: "Choose techniques that communicate the message as effectively and elegantly as possible."

This approach is consistent with that advocated by Helen Xanthaki who wrote:[11]

> If there is a conflict between gender-neutral language and plain language, again the deciding factor is clarity, precision unambiguity and ultimately effectiveness in legislation.

It is, therefore, evident that the highest virtue or value pursued by the drafters around the world is effectiveness.

I respectfully agree with this approach because unless the words are clear, precise and unambiguous legislation creates for both the courts and the lay reader an unnecessary barrier to understanding and acting on the purpose and intent of the enactment. It is interesting to note that in the 2008 Law Commission Report, the recommendations addressed not only the gender-neutral text and interpretation of legislation but the language of reprinted legislation. This recommendation is incorporated in the Legislation Bill in Section 25 (1)(a) that enables the Chief Parliamentary Counsel to make the following changes when reprinting legislation including:

> (a) language that indicates or could be taken to indicate a particular gender may be changed to a gender-neutral language so that it is consistent with current drafting practice , as long as it is also consistent with the purpose of the legislation being reprinted.
>
> Example
>
> The word 'he' may be changed to 'he or she' or replaced by the relevant noun.
>
> The word 'chairman' may be changed to 'chairperson'.
>
> The words 'Her Majesty the Queen' may be changed to 'the sovereign'.

11 H. Xanthaki, 'On Tranferability of Legislative Solutions: The Functionality Test', *in* C. Stefanou and H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, London 2008, p. 17.

This addresses a long-standing concern that while there has been a change in drafting practice in recent years, much of the statute book still contains masculine language.

The words then must accurately reflect the policy purpose of the legislation. This of course assumes the policy is also clearly stated so the drafter through the use of drafting techniques, rules and conventions can translate the idea through language into a rule. For those of us who have pursued the goal of gender-neutral – or for some us more accurately gender-equal – legal language in both legislation and judgments, there has been a twofold challenge. The first has been to get the policy reflecting the needs and interests of women, and secondly to then ensure the drafting techniques convey the gendered nature of all policy.

The struggle of women in New Zealand for equality can be viewed in many ways including through the lens of the change in language in legislation. The first challenge presented to us was that the law did not obviously discriminate against women in the sense it specifically identified women as being treated differently. Apart from a few provisions in legislation such as the Factories Act that specified the hours of work for women, it was difficult to point to discriminatory legislation. The inequality lay more deeply in the construction of legislation in the male experience which was expressed in the use of the male language in particular through the use of the male pronoun.

It was difficult to get policy makers and drafters to understand that the male pronoun did not include women. Sexist language, it was argued by feminists, contributed to the marginalization of women and to their unequal status. Initially then feminists sought to remove sexist language and replace it with gender inclusive language. Mary Jane Mossman, a Canadian legal academic explains the reasons for non-discriminatory language in law as being important to promote accuracy in legal speech and writing; to conform to requirements of professional responsibility; and to satisfy equality guarantees in laws and the constitution.[12]

A good summary of the development of gender-neutral language in legislative drafting is to be found in two articles by Sandra Petersson.[13] She notes the trend towards a policy of gender-neutral drafting from the 1980s with New Zealand, Australia, Canada and the United Kingdom all adopting this approach. The United States has only recently introduced gender-neutral drafting.[14] An update on the use of gender-neutral language in practice and the difficulties facing the slow implementation of the policy is to be found in a recent article by Christopher Williams.[15] For example, he highlights the difficulties with making legislation gender-neutral enacted before the policy change to gender-neutrality. Gender-neu-

12 M. J. Mossman, 'Use of Non-Discriminatory Language in Law', 20 *International Legal Practice* (1995), p. 8.

13 S. Petersson, 'Gender-Neutral Drafting: Historical Perspective', 19 *Stat. LR* 93 (1998), which reviews the language used to represent women in the statute book from the 1500s through to the 1800s: and S. Petersson, 'Gender-Neutral Drafting: Recent Commonwealth Developments', 20 *Stat LR* 35 (1999).

14 *See also* C. Williams, 'The End of the "Masculine Rule?", Gender-Neutral Legislative Drafting in the United Kingdom and Ireland', 29(3) *Stat LR* 139, 2008.

15 *Ibid.*

trality is not considered a sufficient reason to retrospectively amend legislation. The cost of such an exercise has been considered to be prohibitive.

The Legislation Bill, as noted, goes some way to addressing this issue when legislation is reprinted. The prospect of a gender-neutral statute book is also enhanced in New Zealand by other provisions in the Legislation Bill that require the Attorney General to place before Parliament a three year revision programme of the statute book. This revision is undertaken by the Chief Parliamentary Counsel in accordance with current drafting practice, including gender-neutral terms.[16]

The techniques employed by drafters to redress the use of sexist language are well known. The masculine rule was the most popular and was a rule of interpretation to be found in the Act dealing with the rules of interpretation. In essence the rule states that use of the male gender shall be deemed to include the female unless the contrary intention is expressed. This rule required no change to the language of the legislation and only ensured the interpretation of legislation included women. Variations on this rule were the 'two-way rule' where either the masculine or feminine words could be used to include the other sex. Again it did not require any change to the masculine text and was merely an add-on to the masculine rule. The other technique used to redress sexist language was the 'all-gender rule' which again meant little or no change was required to the text.

While these rules were an aid to interpretation of legislation then, they did not address the issue of sexist language in the legislative text. A rule that would have required considerable change to the text was the 'separate-gender rule' which expressly prevents the use of either the masculine or feminine words to include the other. This would require a redrafting of legislation to ensure specific reference was made to the gender referred to in the text. Not surprisingly this rule has not been widely used.

Although the use of gender-neutral interpretation rules has achieved little change in the text of legislation, the adoption of gender-neutral drafting policies has achieved much greater success though like all policies they are subject to political change. While drafting gender-neutral policies may not have the same status as drafting rules, drafters have developed techniques and practices that have changed the text of much legislation. Although drafters must be conscious of the costs involved in any change of drafting style, the requirement to produce gender-neutral drafting has resulted in an opportunity for innovation. Daniel Greenberg has described the challenge of gender-neutral drafting in the following terms:

> Ideally, however, drafters can approach a new requirement to draft in gender-neutral style in a more positive spirit than seeing its implementation only as an exercise in damage limitation. Anything that causes us to overhaul our drafting techniques, and that challenges our ingrained habits, is capable of being seen as an opportunity for rejuvenation and improvement.[17]

16 Clause 31(2)(e) Legislation Bill 2010.

17 D. Greenbery, 'The Techniques of Gender-Neutral Drafting', *in* C. Stefanou and H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, London 2008, p. 67.

Daniel Greenberg sets out the practices and techniques used by drafters to produce gender-neutral text. He identifies five techniques and practices – repetition, omission, reorganization, alternative pronouns, and tagging. The repetition of the noun as opposed to use of the pronoun is often recommended as a way to achieve gender-neutrality. For example, repetition of the word 'Director' instead of 'he' in the text would avoid the use of the masculine. This method is not always ideal however because it lengthens the text and may result in inelegant drafting that looks and sounds awkward and contrived. I note that this method is included in the Legislation Bill, Section 25(1)(a) currently before the New Zealand Parliament.

An alternative to repetition is to omit the pronoun 'he' altogether from the text. Often superfluous words are included in a text and though the 'plain English' style of drafting was designed to reduce words and phrases that add little to the understanding of the text and may in fact confuse the reader, they still exist. In this sense the requirement to draft in a gender-neutral way may assist the plain English movement.

Another useful drafting technique is to reorganize the text to omit the gender specific reference. For example, changing from the active voice to the passive is a common method of achieving gender-neutrality. Although using the passive voice offends a basic canon of drafting, it does provide a useful way of ensuring the text is gender-neutral. This technique only works successfully however where the sentence or clause is short, otherwise there is a lack of clarity in a longer text with many qualifications. An obvious answer is to draft shorter sentences and where possible this is the objective of the drafter because it provides clarity.

The use of alternative pronouns is another method employed to achieve gender-neutrality. Use of 'he or she', or of 'they' or 'one' are examples of this technique. They are not widely used however because such terms are thought to be artificial and lack clarity that may lead to ambiguity of meaning. Technically also using 'he' or 'she' is not gender-neutral, but gender inclusive and often raises the question should it be 'he' or 'she' or 'she' or 'he' or should the terms alternate. Finally a technique used in drafting to avoid repetition is 'tagging' which may be usefully employed in gender-neutral drafting.[18] The use of this technique is limited however and depends very much on the context.

These techniques and practices demonstrate there are many ways for the drafter to achieve gender-neutrality when drafting. Although the policy maker may give the direction for gender-neutral text, it is the drafter who has the responsibility of making it happen. In most instances the drafter achieves the objective while maintaining effectiveness, the primary objective of the drafter. Although my comments have related to domestic legislation, the same policy, techniques and practices are apparent in drafting of international instruments. Williams[19] notes the transition to gender-neutral drafting in the United Nations occurred during the latter half of the 1980s. I was also recently asked to give

18 *Ibid.* at 75 gives examples of this drafting practice.

19 Williams, n. 9, at pp. 141-142.

advice on the gender-neutrality of the International Labour Organization Consitution.

A quick review of the New Zealand statutes since the change in drafting policy will reveal a serious attempt to draft legislation in a gender-neutral way that avoids the use of the male or female term. The elimination of sexist language from the statute book is an important step in the inclusion of women's experience within the law. It is not sufficient by itself however because gender equal legislation is more than an issue of language. It requires the policy that fully takes account of the impact of policy on women as well as men. In New Zealand there has been an attempt to ensure the gender inclusiveness of policy as well as drafting rules, practices and techniques.

The first step toward gender inclusive policy was the establishment of the Ministry of Women's Affairs in 1986. It was part of the Labour women's strategy to give women a voice within the public service advice that is given to ministers. Although the story of the formation of the Ministry and its struggle to survive the various 'reforms' of the public service is beyond the brief of this lecture, what is relevant is the Ministry's development of guidelines for gender analysis that in the words of the then national government Minister of Women's Affairs[20] "offers a new tool in understanding and developing policies and services that promote gender equity".[21] The Guidelines set out a detailed framework for all policy to be subjected to a gender analysis during its development. The provision of the tools for gender analysis did not however ensure this analysis was applied to all policy advice. In 2002 the then Labour-led government approved a Cabinet Office circular[22] that required the inclusion of a gender implications statement in all submissions to the Cabinet Social Equity Committee. The circular was issued because the:

Cabinet noted its concern that the quality of statements to date has been variable, mainly because gender analysis has not been applied at the problem definition stage of policy development. This limits the usefulness and quality of the analysis and reduces the probability of successful policy outcomes for all population groups.[23]

The Legislation Advisory Committee, established in 1986 as part of the review of legislative form and practice, also provides advice to public officials preparing policy advice for ministers to include a gender analysis. The *Cabguide,* prepared by the Cabinet Office to advise officials on the preparation of Cabinet papers also includes reference to the 2002 Cabinet Circular on gender analysis as well as the Legislation Advisory Committee instructions on preparation of policy advice. It must be acknowledged that serious efforts have been made to embed gender-neutral practices in the preparation and delivery of advice to the executive.

20 Hon. J. Shipley.

21 *The Full Picture: Guidelines for Gender Analysis*, Ministry of Women's Affairs, 1996, Foreword.

22 Cabinet Office Circular CO (02) 2, 6 March 2002.

23 *Ibid.*, at p. 1.

Although the directions are in place, the effectiveness of a gender analysis depends on the political commitment to apply it. It is not an easy process, especially at a time of devising policies to address the economic failure of previous policies. I would argue however that unless such a policy analysis is undertaken seriously there is the likelihood that the inequalities of the past will be reinvented in the new policy framework. Still that is the subject for another lecture.

In conclusion it must be stated that while the efforts of legal drafters to incorporate gender-neutral practices and techniques in legislative text are to be commended, the real barriers to gender equality lie with the policy makers in both the executive and the public service. In the New Zealand context the efforts of women and men who have pursued legal equality over the past 40 years have produced many changes. There is a greater awareness of the importance of gender equal policy making and the expression of those policies in gender-neutral statutory text. The Legislation Bill currently before Parliament is a good example of progress being made. The struggle is far from over however and is on-going. The women of my generation can only hope it is continued by the next generation. As Sir William Dale so appropriately quoted in his autobiography:[24]

> Time present and time past
> Are both perhaps present in time future
> And time future contained in time past.
> T.S. Eliot. Four Quartets/ Burnt Norton

24 Sir W. Dale, *Time Past Time Present, An Autobiography*, Butterworths, London 1994.