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## Exploring the Textual Alchemy of Legal Gender: Experimental Statutes and the Message in the Medium

Emily Grabham\*

### Abstract

This article draws on original empirical research to explore the politics of experimental feminist statutes. It has two main aims. First, it traces how conventional legislative drafting techniques have participated in the wider social creation and continuance of sex/gender norms. It shows how dominant statutory expressions of sex and gender that might otherwise appear timeless have shifted with social change and legal innovation. The article contributes to debates in feminist legal studies, legal anthropology, and legislative drafting by making visible, and analysing the particular power of legislative text, its ‘alchemy’, in expressing and re-creating sex/gender as a social, cultural and political artefact. Second, drawing on this research, the article explores what the *Future of Legal Gender* project might consider and do when drafting an experimental statute to decertify legal gender. Addressing questions of positionality, believability, legal form and the use of potentially innovative or contested drafting techniques (the singular “they”, the second person), the article explores tensions between legislative drafting and feminist legal method, as well as the benefits for bringing feminist analysis and perspectives to this important aspect of legal practice. Given that legislative drafting does not merely inscribe pre-agreed policy ideas into legal text but helps to shape emerging ontologies of gender, then drafting an experimental statute invites feminists to pay attention to interlinked questions of substance and form in the exploration of prefigurative legal futures.

... what I really want is for all the many gendered possibilities in the world to be, not normal, but rather profoundly ordinary and familiar. (Eli Clare, 2015, p.xxviii)

The medium is not the message. (Office of the Parliamentary Counsel Drafting Guidance, July 2018)

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## Introduction

Feminist legal research aims to understand how law shapes and limits social life, creating inequalities through gendered norms, practices and processes. This article contributes to such debates by exploring how legislative drafting supports the social construction of sex/gender – in other words how the writing of statutes has both drawn on and created powerful sex/gender norms.<sup>1</sup> Legislative drafting is the practice of writing primary or secondary legislation for later debate in Parliament and, depending on the outcome of those debates, eventual enactment into law.<sup>2</sup> As is evident from the current special issue, for the past two years I have been working on the *Future of Legal Gender* project, an interdisciplinary research project that critically explores ways to reform the status of sex/gender in the law of England and Wales.<sup>3</sup> Our research is currently engaged with thinking through what it would mean for feminist legal scholarship and activism if gender were decertified in law – in other words, if the state no longer officially determined, guaranteed or registered required sex/gender and changed the law to reflect this (see further Cooper and Renz, 2016). What would be the implications for feminist politics if sex and gender were dis-attached from a legal edifice that stretches through the life course? This is an experimental or ‘prefigurative’ initiative, in other words, which engages with present and legal policy debates through a law reform question that has ‘not yet officially been asked’ (see Cooper, 2018, 2020).

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<sup>1</sup> I am using the term sex/gender for two reasons. First, sex/gender refers to the mutual inter-relationship between concepts, embodied experiences, and social processes that support sex and gender. This term acknowledges the power of processes of social gendering, which often incorporate dominant concepts about sex and in turn have very strongly affected how sex has been interpreted as a ‘fact’ by a wide range of social actors. Second, across many statutes and in wider literatures on legislative drafting, the terms sex and gender have not been used consistently to reference distinct social, physical or other facts or meanings. In this sense, I also use the term to reference the conceptual, semantic, and political unsteadiness of the words ‘sex’ and ‘gender’. Where necessary in the article, I refer to the precise term that drafters, statutes, or commentators themselves use.

<sup>2</sup> Some forms of secondary legislation do not require debate in Parliament. See further: <https://www.parliament.uk/about/how/laws/secondary-legislation/> (last accessed 24 September 2020).

<sup>3</sup> See further: <https://futureoflegalgender.kcl.ac.uk/>

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Part of such an inquiry is to create an experimental statute that performs the ‘decertification’ of sex/gender. As such, the current article draws on in-depth interviews with legislative drafters and feminist legal scholars to explore the politics of drafting sex/gender.<sup>4</sup> This is an engagement with text and form; drafting as feminist method. My research in this area has led to the belief that legal substance and legal form are inextricably linked, and that we might usefully pay attention to the power of drafting itself as much as our prefigurative thinking and substantive suggestions for law reform. Given this, I have two main aims in the present article. The first is to explore what legislative drafting does, and has done, to participate in the wider social creation and continuance of sex/gender norms. As the article shows, dominant expressions of sex and gender in statutes that might otherwise appear timeless have shifted with social change, legal innovation and new bureaucratic forms. Whilst legislative drafting experts and socio-legal scholars have explored the history of sex and gender categories in legislative drafting practice (Pettersson, 1999, 1998), as well as the politics of gender neutral (King and Fawcett, 2018; Wilson, 2011; Xanthaki, 2019) and gender silent (Revell and Vapnek, 2020) drafting, this article focuses on the particular power of legislative text, what I come to term later on in the article its particular ‘alchemy’ in expressing, performing, and re-creating sex/gender as a social, cultural and political artefact.

This is a distinct approach to legislative drafting that engages feminist legal scholarship in dialogue with debates in legal anthropology about the ‘agency of legal form’ (Riles, 2016, p. 808): the power of legal knowledge to shape social reality.<sup>5</sup> As Annelise Riles puts it: ‘we can speak of

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<sup>4</sup> This article draws on the data from one double interview and four single interviews of drafters and drafting experts in England, Wales, Scotland, Australia, and New Zealand, which took place between April 2018 and July 2020. Interviews were secured on the basis of longstanding research contacts, performed in person or via Skype, and transcribed for later analysis. This represents an adequate sample for the purposes of this article as the international community of legislative counsel is small and interviews with currently practicing drafters, in particular, are difficult to secure. In-depth interviews were also performed in the same period with five feminist scholars with experience in feminist judgment projects or legislative drafting. Care has been taken to anonymise participants unless particular identifying information is needed to explain context.

<sup>5</sup> Such an enquiry will in future turn to Marxist debates about legal form and their relation to capitalist modes of production, through engaging with the work of Evgeny Pashukanis and others. Many thanks to Davina Cooper for

legal categories and techniques as *generative* of certain kinds of social, political, and epistemological realities' (Riles, 2016, p. 808). My aim in this article is to connect feminist concerns and experiments with legislative drafting to scholarship in legal anthropology and socio-legal studies that analyses the craft, politics and institutional dynamics of legislative drafting for their effects on the making of law and legal subjects (Pottage, 2014; Pottage and Mundy, 2004). Legislative drafting techniques have not been consequence-free for feminists; they have helped usher in specific legal and textual formations with attached concepts and ontologies that have travelled far and combined with other long-lasting bureaucratic and wider social understandings of sex and gender. As such, we might try to understand not only how legislative drafting has apparently responded to social changes concerning sex/gender equality – for example through 'gender neutral drafting' – but also how the sex/gender constructions and innovations used in drafting themselves support complex wider social processes of gendering.

The second, related, aim is to explore what feminists are engaging with when we participate in the act of drafting an experimental statute. If legislative drafting does not merely inscribe pre-agreed policy ideas into legal text but helps to shape emerging ontologies of gender, then both form and substantive content are important aspects of prefigurative feminist legal projects such as the *Future of Legal Gender*. Here, the argument is that the method matters: the act of writing an experimental statute pulls us into relationships, norms, professional debates, and epistemologies of expertise and governance that are likely to fundamentally affect what we think is possible and what we can achieve. Over the past decade or so, feminist engagements with law have increasingly turned to legal form, engaging with judgments in many jurisdictions, for example, through 'feminist judgments projects' that adopt or challenge the traditional conventions of judicial reasoning to varying degrees in exploring what it would mean to create law otherwise (Enright et al., 2017; Hunter et al., 2010). Feminists have often also engaged in

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suggesting this line of analysis and to Moritz Neugebauer for increasing my understanding of the significance of Pashukanis.

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law-writing projects, either as part of established international legal processes, for example (Riles, 2006), or as a means of working through an aspirational text for feminist law reform purposes, as was the case with an aspirational ‘model for change’ for feminist abortion law reform in Ireland, drafted in 2015 by a group of feminist legal academics in advance of the successful campaign to repeal the Eighth Amendment to the Irish constitution, thereby paving the way for the removal of the constitutional ban on abortion (Enright et al., 2015a, 2015b). Inspired by such engagements, my aim is to foster debate about the meaning, potential and pitfalls of legislative drafting for feminist purposes. What understanding of statutory law and its gendering power does this task bring with it? What opportunities and drawbacks attend such initiatives and what do they bring forth?

In the following sections, I introduce the practice of legislative drafting and then tell one of many stories that could potentially be told across diverse jurisdictions and colonial contexts about the relationship of sex/gender to legislative drafting – the story of the development of certain approaches to sex and gender in English law culminating in current debates over gender-neutral drafting. Whilst gender-neutral drafting and other similar techniques might appear to do little to shape the substantive content of statute, they are enmeshed in powerful webs of gendered norms, meaning, and symbolism that provide useful material for feminists to consider. I begin by tracing the genealogy of the ‘he or she’ construction, an expression with its own attached epistemologies that have been formed through shifting relationships with the use (or not) of binary gender pronouns. Drawing on feminist research into the long history of legislative drafting, I then outline the distinct contribution of interpretation legislation to the legal drafting of gender, before engaging with original interview data to discuss more recent approaches to ‘gender neutral drafting’ that have evolved since the formal adoption by the previous UK Labour government of a gender-neutral drafting policy in 2007. The article concludes by setting out

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some issues, opportunities, and challenges that the project may face when drafting an experimental statute decertifying legal gender.

### **The Message in the Medium**

Our language and our grammar is gender-specific. There is nothing we can do about that.

(Legislative drafting expert, 2019)

Because law is made up of words: words which are *written* in constitutions, statutes, reported decisions and negotiated agreements, and words which are *spoken* in courts and tribunals and other professional settings by lawyers and adjudicators, the use of language is fundamental to law. (Mossman, 1995, p. 8)

Legislative drafting has a long institutional history and a foundational role in contemporary law-making (see Greenberg, 2011). In the United Kingdom, drafters now work in legislative counsel offices in London, Cardiff, Edinburgh, and at Stormont. Drafters write, rewrite, and settle the text of legislation in collaboration with government departments, testing instructions they receive from government lawyers, providing advice on the structure and likely effects of different legislative models and expressions, and drafting amendments where necessary (Greenberg, 2011; Page, 2009; Xanthaki, 2015, 2014). The technical expertise of drafters is a common theme in conversations with lawyers and ministers, and it instantiates the drafting phase as an important process through which policy is materialised into legally effective language (Grabham, 2016; Xanthaki, 2014).

It is relevant for our project that the work of drafters is still understood as highly technical and quite unique within the legal system as a whole (Greenberg, 2011). We should be

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wary of assumptions that this technical focus somehow obviates the political significance of drafting more broadly. Indeed, drafters have long been engaged in a struggle over the extent to which changing social experiences and definitions of sex and gender should be reflected, or made effective, through legislation. Current debates about sex/gender and drafting have emerged from specific epistemologies of gender and structural discrimination, specific ways of imagining the political and social struggle of sex/gender inequalities as they relate to law, which have been especially influential since the late 1960s and 1970s, as second wave feminism began to permeate academic and legal professional circles. As will become clear, over the past few decades, professional communities of drafters and drafting experts have created technical solutions to these social struggles, mobilising their own legal practice in adjusting drafting to ameliorate, or at least not exacerbate, such gendered harms. As such, one object of our current study – understanding the potential role of drafting as a tool to pose an “as if” question – emerges against the backdrop of innovation and controversy in legislative drafting that has been, to very different degrees, responsive and future-oriented in terms of gender expression and inequalities, conjuring sex/gender as an object of attention in many different ways. The idea of one ‘best practice’ approach does not describe the plural, almost polyphonic sets of techniques and arguments on this issue that continue into the present. Rather than attempting to make sense of these productively rowdy debates and ontologies, we are hoping to use them as resources when drafting our own experimental statute. Yet in order to understand the legal and social context for these debates, we need to understand the contexts that have produced them. As such, this section provides a brief history of gender and legislative drafting, culminating in feminist challenges to the use of interpretation legislation to inculcate a ‘masculine rule’ in drafting.



*“He or She”*

A key assertion of this article is that the genres of sex/gender that have become so much a part of our institutional, social and cultural landscape have often been co-constructed through legal, textual, innovations. As such, they are also likely to change in the future. Take, for example, the idea that binary oppositions of ‘he or she’ should provide a natural linguistic background to our conceptualisation of sex and gender and should structure our legal treatment of gendered experience and obligations. The ‘he or she’ binary is ubiquitous within social expression and legal and public texts (see further Cameron, 1985; Mills et al., 2011). As a feature of professional courteous language, it seems to reference an androcentric natural order that politely opens the door to women, signalling a public-facing yet essentially patriarchal type of post-World War Two inclusion, with its tone almost of surprise, self-arrest, or afterthought (“*or she*”). Yet the use of apparently binary gender pronouns has a long institutional history in English law, dating back to the mid-1500s if not earlier. And over that time, the politics surrounding the binary and its attachment to law have shifted several times, revealing multiple overlapping ontologies of sex and gender along the way. This is a story not only about centuries of sex/gender inequality in English law, but also about the unsteady grammatical basis for an apparently natural binary, and its relationship with the innovation and operation of interpretation acts as a modernist legal project.

The story weaves in and out of third person pronouns. Feminist legal scholars have long pointed to the problems occasioned by the lack of a non-gendered singular third person in the English language. The singular and plurals of both the first (I/we) and the second person (you) are not explicitly gendered. The third person is gendered in the singular (he/she) but not in the plural (they) (e.g., Mossman, 1995, p. 10).<sup>6</sup> I return to this point later on when considering the potential for disruptive feminist drafting techniques. Legislation is written in the third person, so

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<sup>6</sup> The singular ‘they’ is discussed further below.

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the conditions exist for gendered differences to be inevitably structured into the text of the law itself through the use of binary, gender-specific pronouns. Yet, as Petersson demonstrates, the picture is not quite as straightforward as this might suggest. English law shows a history of highly variable sex/gender pronouns as language has evolved, along with distinct changes in how law has attached legal responsibility to these gender markers through statutory drafting (Petersson, 1998). In Middle English (1150-1500), pronouns changed considerably. In Old English, *he* referred to the masculine and  *heo*  to the feminine. For part of Middle English, when the ‘o’ was dropped, masculine and feminine nominative pronouns were phonetically indistinguishable and ‘he’ was both masculine and feminine (Petersson, 1998, p. 96). Later, distinct pronunciations and spellings distinguished, again, between masculine and feminine such that late Middle English saw the prevailing use of *she* for the feminine (Petersson, 1998, p. 96). Using vagrancy law as an example, Petersson shows that for many centuries, male terms were not consistently used in statutory drafting to represent women. By contrast, following an initial period of inconsistent pronoun use, a system of using female terms to represent women emerged in the Elizabethan period with the Vagrancy Act 1572 and continued to the Vagrancy Act 1744. Differences in wording in the 1824 version of the Act made it even clearer when provisions applied distinctly to women.

The shift towards distinct gender pronoun use in the Elizabethan period could not have happened without the distinctions between nominative pronouns that had been reintroduced into Middle English. As such, changes to statutory drafting – and the legal conceptualisation of identity along gendered lines – were dependent in part on the evolution of the English language. Through the use of phrases such as “hee or shee” and “his or her” when both sexes were targeted, and “he” or “she” when one sex was targeted, Elizabethan vagrancy laws referenced very real differences in status between men and women at that time (Petersson, 1998). Petersson terms this the ‘system of express reference’. The point about the system of express reference

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was that it recognised women's distinct legal status under law, even as this status was often subordinate to men. For example, in the Vagrancy Act 1572, provisions suspending punishments for vagrancy on the basis of a property threshold were addressed only to men, and not to women, because women could not at that time legally hold property in their own name (Petersson, 1998, p. 98). Subordinate status therefore did not reside in legal invisibility or occlusion under an androcentric norm, it existed in plain daylight. When a statute affected both men and women, it would often employ both masculine and feminine pronouns.

### *Interpretation Legislation: Modernisation Through the 'Masculine Rule'*

The system of express reference gave way to a new set of drafting norms – the 'masculine rule' – through an era of reform in the 1800s, through which interpretation statutes were used to pare down the statute book, making legislation more consistent.<sup>7</sup> This was part of overall efforts to render the statute book more manageable through a push to standardise and universalise common legal terms and definitions. The masculine rule was first introduced in the United Kingdom in 1827 and included reference to the feminine within references to the masculine. Interpretation statutes had previously been enacted in several British colonies (Petersson, 1998, p. 103). As Sarah Keenan has shown, this process of colonial experimentation was at the heart of many modern law reform initiatives – such as land title registration, for example (Keenan, 2017). This should make us attentive to the colonial histories and ongoing effects of large-scale law reform projects such as interpretation legislation itself.<sup>8</sup>

Through a general wave of interpretation legislation in the 1850s and later, common defined words that were found throughout legislation were gathered together in a separate

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<sup>7</sup> Contemporary writing on interpretation statutes still references its objects of simplification, the avoidance of repetition, the promotion of consistency of form and language, and the clarification of laws' effects (see Xanthaki, 2013, p. 127).

<sup>8</sup> This point is the focus of ongoing research and due to limitations of space, will be addressed in future publications.

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statute that was to apply to all others. And as Petersson points out, the masculine rule was one of the earliest and most widely deployed examples of all the efforts at universal interpretation. However, legislative innovations and norms such as this were in constant tension with wider social movements. Feminist legal activists were not dissuaded by the masculine rule in their efforts to achieve the vote, and indeed its inclusion within the Abbreviation Act 1850 led to an anxious flurry when some legislators perceived it as a threat to male-only entitlements. In a Parliamentary debate in 1851 over a proposed repeal bill on this point, it was argued that one consequence of the rule would be to allow women the vote through reading women into those given voting entitlement (Petersson, 1998, p. 107). These fears were later realised when 5,347 Manchester women claimed the right to be put on the voting list on the basis that the Representation of the People Act 1867 should be read in conjunction with the masculine rule in the 1850 Act so as to read women into the grant of the franchise to ‘every man’ with certain qualifications.<sup>9</sup> In this case, *Chorlton v Lings* (1868), the court stated that the legislature would not grant the franchise to women on the basis of an interpretation act. Reading against the apparent meaning of the masculine rule, the judges reasserted the common law incapacities of women, including in relation to voting and public office (Ritchie, 1975, p. 694). Through important subsequent cases dealing with women’s inclusion within political and professional realms, the potentially radical effects of the masculine rule were asserted by feminists, only to be limited by judges’ use of context-related arguments (Ritchie, 1975). This was in part due to the rule’s clarity, inclusivity and universal nature, which lent it to arguments that if all legal subjects were male, then all legal subjects should benefit from male entitlements.

The argument here is that the apparently naturalistic and ubiquitous “he or she” binary found in much contemporary legislation and bureaucratic writing has a long and complex history, referencing fractious relationships between women’s distinct and subordinate status in law,

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<sup>9</sup> *Chorlton v Lings* (1868) L.R. 4. C.P. 374. See further Ritchie (1975, p. 693).

gendered language (the very construction of nominative pronouns), and techniques for expressing sex and gender within statutes. The advent of interpretation acts forced the issue, occluding specific reference to genders based on distinct perceived social status or responsibilities with the ‘masculine rule.’ And the rule itself quickly became vulnerable to feminist legal attempts to re-seize the universal in pursuit of the franchise and other elements of civic status. Yet despite these flurries of contestation, the masculine rule continued in the background over subsequent decades, driving drafting in such a way as to ‘promote uniformity’, constructing the legal sphere as apparently androcentric. As this drafter put it:

The first Interpretation Act was 1850 ... (t)he aim of the first act and subsequent ones is to promote uniformity. If you had within the Interpretation Act “he includes she”, that would obviously drive the drafting in a certain way. The people who hitherto said “he or she” - because it wasn't clear if they said “he” it meant men - would depart from that approach on the basis of now the background against which we’re legislating is this Interpretation Act. (Interview with legislative drafter, 2019)

### ***Feminism and the Language of Law: A ‘Contaminated’ Magic?***

As the previous section has shown, the practices, institutional dynamics, relations, epistemologies, and innovations associated with legislative drafting have helped fabricate diverse ontologies of sex/gender we see circulating in law at present. For reasons of brevity, this section turns to the question of how second wave feminists challenged legal language, with new and distinct perspectives on the politics of legislative drafting. Motivated by feminist attention to gendering language (e.g., Martyna, 1980; Spender, 1980), lawyers and legal scholars from the 1960s onwards opposed the occlusion caused by the continued use of specific interpretation rules. Canadian drafters and scholars watched as a now-famous debate played out in the pages of the *McGill Law Review* in the mid 1970s between the revered Canadian drafter Elmer Dreidger

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and the feminist lawyer Margeurite Ritchie QC, who differed on the question of whether the Canadian federal Interpretation Act 1970 had failed to protect women in the context of feminist protests about the continued use of the masculine rule (Dreidger, 1976; Ritchie, 1977, 1975).

These were debates about law, English, grammar, and the oppression of women. At the same time, however, critical legal scholars were turning to the power of legal language itself. In the late 1980s, Karen Busby argued that because of the unique power of language to construct reality, and because of its close connections with ideology, it was particularly necessary to trace the means by which legal language excludes and devalues women (Busby, 1989). As Busby put it, her task was to examine the idea that: 'grammatical features of the legal register such as pronouns, generics, lexicon, semantics and syntax trivialize, exclude and devalue women and characteristics associated with women' (Busby, 1989, p. 192). She stated that analysing the language of legal text allowed a picture to emerge of its 'preconstructions and preferred meanings' that would allow better understanding of what law has emerged, with what implications for women (Busby, 1989, p. 192). Drawing on the feminist theorist Mary Daly, Busby noted that legal language was in effect a 'contaminated language', which had been constructed along androcentric lines. This was a particular problem because of the tendency of law to place emphasis on legal signifiers or words, thereby creating a gendering symbolism that enacted exclusionary norms whilst simultaneously instantiating these norms as law through legal language in textual form. As Wendy Martyna put it, the widespread opposition that feminists faced in drawing attention to gendered and sexist terms was not merely due to antifeminism, but also perhaps to a cultural resistance against recognising the power of language itself: 'We may still be in the midst of a cultural reaction against early preoccupation with the magical power of words' (Martyna, 1980, p. 492).

Many feminists at the time, and since, have understood the 'magical power of words' to go far beyond legal texts, encompassing a range of social and cultural expression. For feminist

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legal activists and academics in the 1960s and 1970s, the sheer power of language to shape and enact social norms when mobilised through law demanded a strategy that would intervene into legal text and expression, conjuring otherwise the magic of androcentric legal expression by bringing back in the neglected sex/gender. The results of these feminist interventions are inherently difficult to trace, leaving feminists curious about the social effects of language:

... the more interesting question for me is, has it really changed? Has language really changed the way people actually act? I don't know the answer to that. I do know that women have more opportunities than they had than when I started out. (Interview with Margaret Wilson, former New Zealand Minister with responsibility for legislative drafting, 2019)

Yet the power of gendering language is now widely accepted within professional communities of legislative drafters. As the influential text *Thornton's Legislative Drafting* puts it: 'the enactment of legislation in 'masculine' language contributes to the perpetuation of a male-oriented society in which women are seen as having a lower status and value' (Xanthaki, 2013, p. 80).

### ***Reforming "He or She"***

Reintroducing the feminine into statutory text has not been easy. An obvious target might be interpretation legislation itself. Petersson identifies four potential reforms to the 'masculine rule,' for example: the two-way rule, the all-gender rule, the separate gender rule, and the removal of the masculine rule altogether (Petersson, 1999, p. 36). The two-way rule is particularly interesting. It provides for words importing the masculine and the feminine to be read as each including the other. It was initially used in Canada between 1837 and 1840 and much later adopted in the UK in section 6 of the Interpretation Act 1978:

In any Act, unless the contrary intention appears, -

(a) words importing the masculine gender include the feminine;

(b) words importing the feminine gender include the masculine;

(c) words in the singular include the plural and words in the plural include the singular.

The rule is still in force. The ‘vice versa’ nature of the rule appears to bestow a certain form of binary equality between two genders – masculine and feminine. Petersson’s criticism of the rule is that it is merely to be used in reading, rather than in writing, legislation, and so does not necessarily require a change to drafting practice.<sup>10</sup> The formal structure of the rule is an issue for Petersson because it promotes ‘false neutrality’, retaining the masculine rule despite appearing to be balanced. The rule sets up an unhelpful equivalence between gender and number, running alongside and paralleling the number rule at section 6(c) (see above). As Petersson puts it:

In adopting the same structure, the two-way rule aspires to the neutrality of the number rule. However, the number rule is neutral because number is not socially significant.

Therefore any comparison between the number rule and the two-way rule is false because gender is socially significant ... (Petersson, 1999, p. 41)

Not only that, but the structure of the two-way rule preserves the integrity of the masculine rule by playing it first and having the feminine rule in a subsequent section (Petersson, 1999, p. 42).

Finally, and perhaps most importantly, the two-way rule seems to have little effect in ‘real life’ on how people perceive gender equivalence.

In interviews, drafters referred to the rule’s self-recursivity through equivalence whereby one gender was to be treated ‘as’ the other. This was felt not to recognise wider social dilemmas about very real gender inequalities. Helen Xanthaki, Professor of Law and Legislative Drafting at UCL, explained the reasons for this in an interview in 2019. She described a performative

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<sup>10</sup> Yet this does not mean that drafters have not been, and are not, influenced by such rules. As interview participants stated above, the masculine rule itself is taken to have driven the way that drafters approached legislative expression of gender from the mid-nineteenth century onwards. Furthermore, Margaret Wilson recalls from her experience in the New Zealand context that it was ‘difficult to get policy makers and drafters to understand that the male pronoun did not include women’ (Wilson, 2011, p. 205).



experiment she uses in teaching, in which she encourages students to stand up in line with the proposition that “she includes he”:

I simply say to everybody okay, so in this class the following rule applies. “She includes he.” Ladies, would you stand up? I still have not had a single male standing up on that basis. Nobody, no man stands up if I say “she includes he”. (Interview with Helen Xanthaki, 2019)

If feminists have been looking for a type of interpretation rule that effectively re-includes women, the two-way rule has not reached this objective. In this way, far from merely writing statutes to government directions about the substance of legislation, therefore, legislative drafters have to resolve intense on-going dilemmas about how to adjust legislative expression to current and future sex/gender norms.

### *“Waving a Wand”*

These deliberations are relevant not only for gender-neutral drafting techniques more broadly, which are addressed in the following section, but also because they intersect with debates about the structure and use of interpretation legislation. Given the problems outlined with the two-way rule, it is clear that interpretation legislation is legally significant and has practical and symbolic importance within debates about legislation, attracting critique when not sufficiently inclusive or precise and also sometimes appearing to offer solutions to new social expressions of sex/gender. In an interview, for example, this drafter suggested a mechanism whereby interpretation legislation could be amended to provide that reference to one gender includes reference to any gender or people not of that gender:

One way of recognising another gender or no gender would be to amend the Interpretation Act. You could have this as part of any general recognition of change or decision to do away with recording of genders, or whatever else there might be. The

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Interpretation Act at the moment refers to the masculine and the feminine and vice versa, for things post 1979. And it would be possible to say something like: “any reference to a person of one gender includes a reference to a person of any gender or a person who is not of any gender”. (Interview with legislative drafter, 2019)

I return below to the question of using interpretation legislation in relation to the decertification of gender. In the meantime, the drafter’s suggestion appears to offer an elegant solution to the structural inequalities found in the ‘vice versa’ or ‘two-way’ rule currently in force in the UK. It is worth noting that the solution is similar (but not identical) to what Petersson has identified as the ‘all-gender rule’, which was adopted in the Australian Commonwealth in 1984:

In any Act, unless the contrary appears –

(a) words importing a gender include every other gender.<sup>11</sup>

Similarly, the gender interpretation rule in the New Zealand Interpretation Bill 2017 states:

**16. References to specific gender or kind of person include others**

(1) Words denoting a gender include every other gender.

The difference between what my legislative drafting informant suggested and the examples from Australia and New Zealand is the addition of the words “or who is not of that gender”, thereby including not just non-binary individuals, but also individuals who do not identify as any gender. An analogous approach can be found in the Legislation (Wales) Act 2019, which aims to consolidate and eventually codify Welsh law (Welsh Government, 2018, p.11), and which contains a broad provision explicitly allowing for the non-binary, even plural, gender interpretation of legislation:

**Section 8: Words denoting a gender are not limited to that gender**

In an Assembly Act or a Welsh subordinate instrument, words denoting persons of a particular gender are not to be read as limited to persons of that gender.

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<sup>11</sup> Acts Interpretation Amendment Act 1984 (Cth) no 27 s 11; see Petersson (1999, p. 43).

This provision expressly goes beyond the two-way interpretation rule in the UK's Interpretation Act 1978. As the explanatory notes to the 2019 Act put it:

This section is equivalent to section 6(a) and (b) of the 1978 Act, but it does not refer expressly to the male and female genders and **therefore has a wider scope**. (emphasis added)

The explanatory notes point out that the rule is limited by context in a similar way as other interpretation legislation; that is, if 'express provision is made to the contrary or the context requires otherwise' then it will not apply.<sup>12</sup> This means that if a policy area requires specific application to one gender, then the rule will not override interpretation of legislation along those lines.

In explicitly going far beyond the current interpretation rule in the 1978 Act, the Welsh provision raises intriguing questions about why such innovation has been possible in a devolved assembly and not at Westminster. Christopher Williams proposes that this may be in part due to the Welsh Assembly legislating in two languages (Williams, 2008, p. 152). Welsh legislative drafters face particular challenges when drafting gender-related provisions across English and Welsh with their very different approaches to gender (see further below). Such dilemmas, with their associated potential for innovation, are a feature of any jurisdiction encompassing more than one language system and often accompany attempts (however effective they might be, or not) to devolve power or recognise plural legal systems within postcolonial legal contexts, often with associated language implications. For example, as King and Fawcett point out, the te reo Māori word *ia* is a gender neutral pronoun and can mean 'he', 'she', 'him', 'it' or 'they' (King and Fawcett, 2018, p. 113). *Ia* is used through the Te Ture mō Te Reo Māori 2016/the Māori Language Act 2016 in New Zealand. In this way, dilemmas of addressing the masculine rule within interpretation legislation have distinct valences depending on colonial and linguistic

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<sup>12</sup> Section 71, Explanatory Notes to the Legislation (Wales) Act 2019.

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context. Given the spread of interpretation acts with their associated masculine rules (and variations thereof) throughout jurisdictions colonised by the British (Petersson, 1999), and given changing developments in the legal recognition of diverse political and cultural constituencies, diverse legal solutions are likely to be forged as the continued use of interpretation legislation meets distinct gender ontologies with their associated terms and expressions.

A final point to consider when we think about the sort of ‘meta’ solutions to legal problems that interpretation acts seem to offer is the matter of retrospectively altering or removing gender terms across the legislative field as a whole. As this legislative drafter put it, because this would be ‘a lot more work’, people might accept statutes as they have been historically gendered on the basis that future legislation would look very different:

... in terms of a societal solution of saying “we don't like the fact that there is gender in the existing statute book”, that’s obviously a lot more work if you wanted to solve that rather than simply making a change in future Acts. Maybe people could live with it on the basis that it's part of the history or something and that the future doesn't look the same. It already doesn't look the same because of our move away from gender-specific drafting. (Interview with legislative drafter, 2019)

This is based on an assumption that as drafting techniques, government policies, and social norms change, anachronistic sex/gender expressions will eventually fall away. As such, the idea of using legislative drafting techniques to incrementally alter the statute book over time displays faith in the ‘drafter’s toolbox’ and ultimately in the potential for drafting to respond to its social context. Margaret Wilson juxtaposes the incrementalism of using a ‘toolbox’ with the immediate wholesale transformation of ‘waving a wand’ in her discussion of New Zealand’s approach to legislative reform:

You can't go through easily your whole legislative programme, particularly when you pass so many laws and make them gender neutral. The idea was, each time they came up for

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renewal or you had new and then you should actually have this as the norm in the toolbox of the drafter. If it is in the drafter's toolbox, and it is actually seen as part of what they do, then you are part way there or mainly there, unless there is then another political reaction and their toolbox has changed politically or there is a movement within the legal drafting community ... At the end of the day, *it would have been lovely to have waved a wand*. (Interview 2019; emphasis added)

“Waving a wand” therefore references a tension between approaching statutes individually, bringing to bear new gender-related drafting techniques as they arise, and approaching the reform of legislative expression in a more universal and holistic fashion. However, both the toolbox and the wand metaphors evoke the idea of a body of legislation – termed ‘the statute book’ by drafters and lawyers - which can be conceptualised in totality, as a ‘whole’. The New Zealand Chief Parliamentary Counsel is empowered by New Zealand’s Legislation Act 2012 to make certain editorial changes to the text of legislation when re-printing it, including changing gender-specific language to gender-neutral language.<sup>13</sup> Is this using a toolbox or waving a wand? In all drafting contexts, however it is conceptualised, the role of the drafter as the technician, or wand-bearer, is central to continued efforts towards intervening into the ‘magic’ of gendered legal terms. Yet the conceptual pull of ‘statute book’ is significant: drafters tend to feel that measures should not be taken that create undue distortions or inconsistencies across the body of legislation as a whole (e.g. Grabham, 2016). Such considerations inevitably bear on any attempts to propose new forms of gender expression in

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<sup>13</sup> See section 25(1)(a) Legislation Act 2012:

The Chief Parliamentary Counsel may make the following changes in a reprint:

(a) language that indicates or could be taken to indicate a particular gender may be changed to 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:

**Examples**

The word “he” may be changed to “he or she”, or replaced with the relevant noun.

The word “chairman” may be changed to “chairperson”.

The words “Her Majesty the Queen” may be changed to “the Sovereign”.

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statutes. With this in mind, the next section turns to the multiple techniques and concepts relating to gender-neutral drafting that are used, debated, and contested within UK drafting practice at present.

### **Nothing But the Words?**

...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. (Wilson, 2011, p. 207)

In their survey of gender-neutral drafting in New Zealand and internationally, Ruby King and Jasper Fawcett state that ‘there seems to be an attitude among law-makers in the United Kingdom of prioritizing traditional grammar over gender-neutral language’ (King and Fawcett, 2018, p. 123). Whilst the UK is not considered to be at the forefront of innovation in this area, the situation may be more complex than King and Fawcett’s observation suggests. In a House of Lords debate on the issue in 2013, Lord Kennedy of Southwark wryly acknowledged that the UK was not at the forefront of innovation: ‘You could say that we have not been quick off the starting blocks here’.<sup>14</sup> Yet UK drafters are aware of shifts in social norms and actively engaged in discussions about when and how to respond. Gender-neutral drafting has been UK government policy since 2007 when it was announced by the then leader of the House of Commons Jack Straw. Straw stated that using male pronouns to refer to men and women was believed to ‘reinforce historic gender stereotypes’ and that it presented an ‘obstacle to clearer understanding for those unfamiliar with the convention’.<sup>15</sup> Without explaining what gender

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<sup>14</sup> HL Deb 12 Dec 2013, col 1011.

<sup>15</sup> HC Deb 8 March 2007, col 146 WS.

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neutral drafting entailed exactly, Straw then stated that Government Bills would ‘take a form which achieves gender neutral drafting so far as it is practicable, at no more than a reasonable cost to brevity or intelligibility’ and that legislative drafters would need to ‘adopt a flexible approach to this change’.<sup>16</sup> He pointed out that the policy already applied in relation to tax law rewrite bills.

Interviews with UK legislative drafters and experts indicate a ‘very high premium placed on freedom’, which allows drafters to solve problems independently whilst also deliberating their practice with colleagues on an on-going basis.<sup>17</sup> Drafting is thus understood as something akin to both skill and art, resulting in work that is based on universal principles, yet specific to the drafter and to the instructions they get from the relevant government department (Bowman, 2015). As this legislative drafting expert put it:

I actually don’t think that two people could come up with the same draft. I don’t think it’s possible. I think there is so much subjectivity in drafting and again, that’s a good thing. (Interview, 2019)

Nevertheless, innovations inevitably bring with them some kind of conversation about what is, and should be, ‘standard’. When I asked about how the Office of the Parliamentary Counsel (OPC) responded internally to the 2007 House of Commons statement, drafters responded that it was not ‘uniformly liked or disliked’ but that there were debates in the OPC about the extent to which gender-neutral drafting techniques would affect clarity:

There was a mixture of views. Some people thought that it would make our drafting less easy to understand and less clear. Other people supported it and didn’t think it would particularly damage the clarity of the drafting. (Interview, 2019)

After the 2007 statement, attention turned to developing techniques to achieve gender neutrality.

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<sup>16</sup> Ibid.

<sup>17</sup> Interview with legislative drafter, 2019.

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Another common theme in interviews with drafters and legislative drafting experts is that efforts to draft in gender-neutral ways are often understood as resulting in improvements to drafting overall due to the dexterity and intense attention to the drafting process that this new approach requires:

... one of the things that I found surprising was how often trying to rephrase it to avoid the issue, we ended up with a much better draft in any event than we could have got to in the first place. It sort of prompted us to rethink the way we were drafting more generally. (Interview with legislative drafter, 2019; see also Wilson, 2011, pp. 206–207)

In any case, the emerging techniques have made their way into the OPC's Drafting Guidance, the most recent version of which is dated July 2018. The guidance states that it is OPC practice to draft in a gender-neutral style 'so far as it is practicable to do so', following the wording of the 2007 ministerial statement. Gender neutrality is thus a provisional goal. Importantly, the OPC notes that gender-neutral drafting applies both to drafting freestanding text in a new Bill and also to drafting text that will amend an older Act that is not gender neutral (OPC, 2018, p.7). And once again, gender neutrality is not defined outside efforts towards its technical achievement, which is expressed in the guidance in terms of avoidance rather than positive suggestion:

**What does gender-neutral drafting require?**

2.1.3 In practice, gender-neutral drafting means two things—

- avoiding gender-specific pronouns (such as “he”) for a person who is not necessarily of that gender;
- avoiding nouns that might appear to assume that a person of a particular gender will do a particular job or perform a particular role (eg “chairman”). (OPC, 2018, p.7)

The guidance then sets out three categories of techniques for avoiding gender-specific pronouns:

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(1) repeat the noun; (2) change the pronoun; (3) rephrase to avoid the need for a pronoun or noun (OPC, 2018, p.7). Similar techniques are used in jurisdictions across the Commonwealth to varying degrees, and difficulties and controversies attach to each. In the remainder of this section, I address the first two categories, leaving an assessment of the final category (rephrasing to avoid the need for a pronoun) for future consideration.

The first technique for achieving gender neutrality, therefore, is repeating the noun. The OPC gives the following example:

EXAMPLE ...earnings, in relation to a person, means sums payable to the person in connection with the person's employment... (OPC, 2018, p.8)

This technique is widely used and advocated (see, e.g. Salembier, 2015; Xanthaki, 2013), yet it has a couple of acknowledged drawbacks. Thornton's *Legislative Drafting* succinctly states that it 'creates verbosity' (Xanthaki, 2013, p. 81). The OPC goes into more detail, explaining that '(c)onstant repetition of a noun or phrase in a way which would not occur in speech can jar and might detract from readability' (OPC, 2018, p.8). As such, the OPC proposes slight variations, including using a defined term – for example "the offender" – or replacing the noun with a letter. Using a letter is stated not to reflect English usage and the OPC also notes that it creates a 'mental hoop' for the reader to go through, which decreases readability and means that the technique should only be used 'judiciously' (OPC, 2018, p.8). For this feminist legal academic, the problem with using a letter instead of a pronoun is that it might create false equivalences or otherwise decontextualize the social harm or phenomenon that the legislation targets, creating a bar to interpretation:

It tries to turn it into a maths problem. It is like the old maths problem with humans thing. It completely decontextualises the whole issue. So because A and B are equivalent, A and B just happened, it removes the whole context. It is not an aid to interpretation, it's a bar to interpretation, because if some judge comes along and thinks "What is all this

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about? I don't get it" then they can continue to be ignorant of it, because there is nothing that tells them what the actual social problem is that this thing is trying to address.

(Interview with feminist legal academic, 2019)

Whilst the technique was previously used quite widely in gender-neutral drafting, possibly being seen as a solution of sorts, it has now waned as drafters have re-considered its effectiveness:

The more old-fashioned approach was sometimes to use "the first mentioned person", "the second mentioned person" and your head starts to spin, especially if they're mentioned quite a few times. In that case, we might still use letters. But there was a time when I think people were using letters, for example "P's" rather than "his", to make drafts gender-neutral ... I think that we would now say "we tried that and it didn't work". We are not sure that is the best way of doing it. (Interview with legislative drafters, 2019)

As such, the situation now seems to be that letters may be used instead of pronouns in some situations to avoid repetition, but otherwise drafters do not consider it to be 'the best way of achieving gender neutral drafting.

The second technique of gender-neutral drafting – changing the pronoun – brings with it much more potential controversy than repeating the noun. There are two main debates here: the familiar conversation about "he or she"; and an intense ongoing controversy about the use of the singular "they". Beyond stating that 'frequent use of "he or she" ... can be awkward', the OPC guidance remains silent on the genesis of the "he or she" construction and its current reception within drafting circles. As we have seen, discussions about using "he or she" reference both its continued necessity and the risk of creating obsolescence. King and Fawcett support these views, noting a shift away even from the 'dual-gendered language' that was seen as an improvement on the widespread use of 'he' (King and Fawcett, 2018, p. 111). They argue that despite being more inclusive than the masculine rule, "he or she" wording currently still in use in New Zealand, for

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example, does not recognise people outside the binary, and is perceived to ‘pigeonhole gender into two categories’ (King and Fawcett, 2018, p. 111). Within international conversations about legislative drafting, therefore, it seems that “he or she” is losing currency.

This assessment of the direction of “he or she” is shared by legislative drafters, who consider its use not to be at the forefront of current practice:

In the guidance, we still do mention that one of the techniques you can use is “he or she”. That's the one that isn't necessarily as gender-inclusive. We've examined it quite recently. There was a lively discussion ... and different views were expressed on it. We reached the conclusion that we hadn't yet got to the point generally in society where “he or she” is regarded as an unusual way of expressing things. (Interview with legislative drafters, 2019)

Drafters' preoccupation with drafting to current social norms prevents them from adopting techniques that might be viewed as overly challenging of binary views of sex and gender. However, drafters appear to believe that as social norms and experiences change, it may be necessary in the future to draft for non-binary legal subjects, or for other genders, and hence do not perceive “he or she” as being useful in the long-term:

There would have been a time when I might have thought, if I'm just talking about natural people, “he or she” or she is quite handy and I don't have to create contortions around restructuring my words, especially if it's “his or her” something or other. But now I think, well, hold on a second, I can see that there must be a time when there is a possibility, to put it no higher than that, that there will be some other gender or non-gender, whether it's within the UK or abroad. And therefore, from my perspective, I think ... there will have to be a technical solution if that happens. (Interview with legislative drafters, 2019)

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These views extend to technical concern that using “he or she” might at some future point actively create anachronism or obsolescence within legislation:

... from a personal position, I wouldn't use “he or she” just because I think I am building in obsolescence into the statute book. (Interview with legislative drafters, 2019)

Another option for ‘changing the pronoun’, of course, is using the singular “they”. This technique has already been adopted in Canada, Australia, South Africa, Hong Kong and the province of Ontario (King and Fawcett, 2018; Revell et al., 1994; Salembier, 2015). Canadian federal legislative drafting guidance, for example, positions the use of the singular “they” as the first of a number of techniques for avoiding gender-specific nouns:

1. use the singular “they” and its other grammatical forms (“them”, “themselves” and “their”) to refer to indefinite pronouns and singular nouns. (Government of Canada Department of Justice, 2015)

The OPC’s drafting guidelines on this technique recognise that “they” is used in common parlance to refer to a person of either sex in the singular, but also acknowledge that this usage is contested:

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 (2<sup>nd</sup> ed, 1989) records the usage without comment; SOED (5<sup>th</sup> ed, 2002) notes “considered erron. by some”. It is certainly well-precedented in respectable literature over several centuries. In the debate on gender-neutral drafting in the House of Lords in 2013 a number of peers expressed concern about the use of “they” as a singular pronoun.

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. (OPC

2018, 8-9, references omitted)

In fact, the singular “they” has now been debated twice in Parliament, in 2013 and in 2018, evidencing gradually decreasing hostility towards the construction. In December 2013, Lord Scott of Foscote submitted a question for short debate in the House of Lords asking the government ‘what guidance they issue to Parliamentary Counsel with regard to the use of gender-neutral language in the drafting of legislation’.<sup>18</sup> Having introduced the context of the 2007 ministerial statement and section 6 of the Interpretation Act 1978, Lord Scott then largely turned his attention to the use of the singular “they” in legislative drafting practice, outlining a number of examples from primary and secondary legislation and explanatory memoranda, and describing them as ‘grammatically inappropriate plural pronouns coupled with references to a single person’.<sup>19</sup> Arguing that primary and secondary legislation should serve as models for the ‘correct use of the English language’, he then asserted that ‘(t)o prostitute the English language in pursuit of some goal of gender equality is, I suggest, unacceptable’.<sup>20</sup> He further argued that using the singular “they” was unnecessary in light of section 6 Interpretation Act 1978.

Lord Scott’s speech was followed by a short intervention by Lord Quirk, notable in light of his long academic career as an internationally renowned linguist and the originator and for many years director of the first international Survey of English Usage at University College London. Lord Quirk’s *Grammar of Contemporary English* (1972, with Geoffrey Leech and Jan Svartvik) and *Comprehensive Grammar of the English Language* (1985, with Leech and Svartvik) were standard setting reference grammars in modern English for many years and he trained or helped train many specialists now working in the fields of linguistics and corpus linguistics. Lord Quirk did not directly criticise the use of the singular “they” in legislation. Instead, he framed this technique as originating in an essential grammatical lack in English for which either of two

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<sup>18</sup> HL Deb 12 Dec 2013, col 1005-7.

<sup>19</sup> HL Deb 12 Dec 2013, col 1004.

<sup>20</sup> HL Deb 12 Dec 2013, col 1007.

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fudges were often used: the singular “they”, on the one hand, and the universal “he”, on the other:

... in grammar, like many other languages, English lacks an epicene third person pronoun that can have anaphoric reference to an ungendered antecedent – that is putting it in plain language. For literally hundreds of years, we have vacillated between solutions that partly fit the bill, especially “he”, which is third person and singular but not, of course, epicene, and “they”, which is third person and epicene but not, of course, singular.<sup>21</sup>

Lord Quirk’s intervention put the use of the singular “they” on equivalent footing to the use of the universal “he”, positioning the latter as just as much of a problem, grammatically, as the former. He managed to acknowledge his colleagues’ fear of “they” ‘creeping into legislation’ whilst also performing the equivalent of a polite linguist’s shrug of the shoulders: what can you do if you lack the grammatical tools? And his reference to the practice of using the singular “they” as having existed over ‘hundreds of years’ positioned drafters’ use of the technique within a much longer time frame than possibly understood by Lord Scott and others. Lord Quirk finished his remarks by directly critiquing section 6 of the Interpretation Act on the basis that deeming the masculine to include the feminine had been shown by ‘convincing psycholinguistic experiments’ to create images of men as the legal subjects.<sup>22</sup> During the remainder of the debate, Lord Kennedy of Southwark referred to the evolution of the English language which, he asserted, ‘is not a stand-alone, stand-still language,’ but which is ‘developing and shaping us into who we are today’.<sup>23</sup> Finally, Lord Gardiner of Kimble, in formally responding to the question, acknowledged the risks of using the singular “they” but stated that it ‘reflects common usage ...

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<sup>21</sup> HL Deb 12 Dec 2013, col 1008.

<sup>22</sup> HL Deb 12 Dec 2013, col 1010.

<sup>23</sup> HL Deb 12 Dec 2013, col 1011.

and is well preceded in literature over the centuries'.<sup>24</sup>

The 2013 debate did enough to raise concerns about the use of gender-neutral drafting techniques such as the singular “they” but never had the scope to settle any of these concerns. Essentially, the debate seems to have spooked drafters in the OPC, leading to the insertion of wording into the 2014 version of the OPC Drafting Guidance recommending its avoidance.<sup>25</sup> Yet drafters seem to be continuously assessing the use of this construction, to the extent that by the time of a later debate in 2018, drafters had already re-assessed the use of the singular “they”:

... there was the political context. We were ... gently encouraging people not to the singular “they” because of debates in the House of Lords. Then we reviewed it again more recently and thought that things had moved on. In the more recent debate, which came shortly after we changed our guidance, but wasn't linked to our guidance, I don't think anybody objected to the use of the singular “they” on grammatical grounds.

(Interview with legislative drafters, 2019)

The 2018 debate centred much more explicitly from the outset on the use of the singular “they” but evidenced a qualitatively different attitude to the issue amongst peers. Notably, this debate took place shortly before the launch of a consultation on the Gender Recognition Act 2004 and just after the national LGBT survey, which received over 108,000 responses, of which 6.9% were from non-binary people, 3.5% were from trans women, 2.9% were from trans men, and 2% were from intersex people (see further Government Equalities Office, 2019). Lord Lucas asked the Government whether they would ‘adopt the use of “they” as the singular pronoun in all future legislation in preference to gendered pronouns’.<sup>26</sup> He described the OPC drafting guidance as a

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<sup>24</sup> HL Deb 12 Dec 2013, col 1011.

<sup>25</sup> The guidance put it this way:

2.3.15 Nevertheless, it was clear from the debate on gender-neutral drafting in the 2013 House of Lords debate that to use “they” in legislation to refer to a singular subject is controversial. On that basis it is best avoided. (OPC, 2014).

<sup>26</sup> HL Deb 28 June 2018 col 7.

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“halfway house” and asked whether the ‘whole aspect of gender in legislation and public practice’ should not be reviewed given the upcoming review of the Gender Recognition Act.<sup>27</sup>

Baroness Lister of Burtersett shortly after followed up on the point, asking why using the singular “they” would be a ‘step too far’.<sup>28</sup> Lord Young of Cookham replied that it had been used but that to require it in every case would deprive legislative drafters of flexibility. Baroness Barker then followed up with a question directly relating to trans people’s use of pronouns:

My Lord, trans activists who I know very well do not wish to stop anybody using gender pronouns; they simply wish to add more ways in which people can use terms that describe them more accurately. Private sector companies are way ahead and are latching onto this.<sup>29</sup>

Lord Young replied that he hoped that the consultation on the Gender Recognition Act and the LGBT survey would reassure her that the Government took the issue seriously, even though neither of these addressed the matter of legislative drafting, as such.<sup>30</sup> Following the 2018 debate, the OPC guidance which formerly recommended avoiding the singular “they” was changed to merely assert that it may be more ‘more natural in some contexts rather than in others’ (OPC, 2018, p.9).

Amongst legislative drafters, drafting experts, and legal scholars, diverse views on the singular “they” remain. The Canadian academic and drafter Paul Salembier, for example, asserts that the use of the singular “they” is grammatically incorrect, that it impedes comprehension by introducing subject-verb mismatches, and that it introduces ‘the potential for syntactic ambiguity’ resulting in a legislative text with two or more meanings, only one of which can be correct (Salembier, 2015, p. 178). On the other hand, the Australian drafter James Dalmau argues

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<sup>27</sup> HL Deb 28 June 2018 col 8.

<sup>28</sup> HL Deb 28 June 2018 col 8.

<sup>29</sup> HL Deb 28 June 2018 col 8.

<sup>30</sup> HL Deb 28 June 2018 col 9. With thanks to Flora Renz for pointing out that the consultation and the survey did not address drafting.



strongly in favour of an open approach to issues of ‘contested usage’, such as the use of the singular “they”. He points out that the expertise of legislative counsel derives in large part from a large repertoire of techniques that drafters develop and practice. As he puts it, ‘denying recourse to a contested usage reduces this repertoire’ (Dalmau, 2019, p. 28). King and Fawcett note that language is organic, and that considering of shifting language norms should inform the reception of techniques such as the singular “they” (King and Fawcett, 2018, p. 114). Indeed, the singular “they” is endorsed by Thornton’s Legislative Drafting on the basis that ‘grammar is simply a tool and not a chain’:

Although this technique has not been fully accepted, it is gaining ground rapidly ... What seems to annoy most opponents to the technique is the grammatical error in its expressions ... But is grammatical correctness that important? Since grammar is simply a tool, and not a chain, in the hands of drafters, gender neutrality cannot continue to remain anchored down by the inherent limitations of language. (Xanthaki, 2013, p. 82)

The use of the singular “they”, therefore, evidences an approach to legislative drafting which is not “anchored down” by the limitations of language. In a similar vein, feminist legal scholar Rosemary Hunter notes the flexibility of “they” in responding to changing social context and the specific circumstances of each legal situation:

... “they” is a travelling concept. It can run the characteristics that are relevant at the particular time. (Interview, 2019)

And as she put it, “they” is widely understood in public as referring to each gender. A similar breadth of opinion seems to be reflected within the OPC, where views range from those who find the construction to be ungrammatical to those who consider there to be a movement in favour of its more widespread adoption:

Within the Office, views are divided. I find that the use of the singular “they” grates at the moment. I would probably use it in a letter, but not in a draft. ... I suppose that our

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discussion within the Office of “they” reflects what is going on in society more widely.

(I)f all the newspapers and most people start using the singular “they” in writing, I think that it will become second nature even if it once felt wrong grammatically. (Interview with legislative drafters, 2019)

A further potential option for ‘changing the pronoun’ is through using terms such as “ze” to replace “her/his” and “he/she”. Such terms have become more widespread in educational and political organising contexts, for example, to avoid mis-gendering people and to acknowledge the need for gender-neutral pronouns (Dembroff and Wodak, 2018). Indeed, successive generations of drafters seem to display less surprise at gender neutral drafting and more awareness of new evolving pronouns, as this drafter suggested:

When we get a new batch of recruits we sit down and talk about the drafting guidance and I mention the chapter on gender-neutrality, we get some quite blank faces, because it's just not an issue ... The discussion normally then turns to non-binary issues and have we considered using “ze” or other things like that. (Interview with legislative drafters, 2019)

However, when asked whether the OPC would consider using terms such as “ze”, the reply was in line with the OPC’s approach of reflecting standard English usage but trying to avoid innovating beyond current social norms:

I think “ze” isn’t standard English usage, so that would be one of the reasons. That’s why we wouldn’t use it at the moment. Gender-neutral drafting is an area that we keep revisiting and talking and thinking about. (Interview with legislative drafters, 2019)

Yet terms such as “ze” might come into use in legislative drafting if new proposals for ‘gender inclusive’ and ‘gender-silent’ drafting take hold. Helen Xanthaki has written about the conceptual potential of ‘gender inclusive’ drafting, encouraging an approach in which ‘the subject does not need to identify as one of the two genders: they can see themselves as any or none or

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anything in between' (Xanthaki, 2019). Xanthaki strongly endorses the use of the singular "they" within the gender inclusive approach, recognizing that 'everyone, not just men and women, is equal before the eyes of the law' (Xanthaki, 2019), and thereby clearing a path for recognising a wider range of genders. She views the singular "they" as grammatically controversial, yet she argues that its adoption within drafting practice is ideal in eliminating gender as a relevant factor in legislation. As Xanthaki put it during an interview:

My personal view is, no, we need to be brave. This is a problem in our society and it's a problem generally, for me. It's unacceptable that we exclude people because they are not of a specific gender at that specific moment in time. For me, it needs to be dealt across the board. If this is considered to be too much, okay, experimental legislation has happened before. It's not a novel thing. (Interview, 2019)

In a similar vein, Donald Revell and Jessica Vapnek have recently advocated for the 'gender silent' approach, which is explicitly oriented at reflecting and supporting the rights of transgender and non-binary individuals (Revell and Vapnek, 2020). Based on an extensive summary, internationally, of drafting in English speaking countries, Revell and Vapnek argue for an increased recognition by drafters that 'gender and sexual identities exist along a continuum' (Revell and Vapnek, 2020, p. 105). They note that many jurisdictions are moving towards such an approach through the use of techniques already addressed above, for example, repeating the noun or using the singular "they". As they put it, such an approach is 'not a fad: it reflects the fact that society is changing' (Revell and Vapnek, 2020, p. 145).

What emerges from this debate is a set of evolving drafting techniques that drafters use, re-assess, and drop or alter, depending on whether they work well and on wider legal, and particularly Parliamentary, debate. Drafters described coming up with an initial set of practices after the 2007 government statement, some of which became over-used when drafters started adopting them in other contexts. The overall impression is that drafting practice is alive with

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controversies of ‘contested usage’ (Dalmau 2019) and fosters ‘technical pluralism’ (Grabham, 2016) through which multiple techniques are adopted, developed, and phased out (if necessary) over a field of legislation. As indicated, each of these techniques is associated with a slightly different political ontology of sex/gender. That these very different orders of thinking about sex/gender attach to distinct drafting techniques provides fascinating material for the project’s ongoing work on statutory law.

### **Balls, Bones, and Grenades**

In preparation for this debate, I asked myself: what is the English language? (Lord Kennedy of Southwark, HL Deb 12 Dec 2013, col 1010)

.. the question is are the drafters communicating or are they simply passing on others’ attempts to communicate? (Stefanou, 2015, p. 4)

What does the drafting feel like? The drafting feels like juggling a number of different balls in the air, I suppose if you want an overused metaphor [laughs]. And they are not all balls. Some of them are bones. Some of them are grenades. (Feminist legal scholar, 2019)

This article has charted longstanding and more recent debates in legislative drafting about the expression of sex/gender in order to provide a basis for the project’s future work on an experimental statute decertifying gender in law. With that in mind, the *Future of Legal Gender* project has two main sets of questions to consider in relation to legislative drafting. The first is how to achieve decertification in an experimental statute – how to draft the statute, what principles and sources to use, how to make it as potentially effective as it would need to be. This

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is as much an aspirational question as it is a technical dilemma and our ongoing work engages with legislative drafters and feminist activists, policy-makers and scholars to further explore it. In terms of substance, the experimental statute will target specific areas where the gender assigned at birth is used for identification or other legal reasons throughout the life course and where raise particular questions of opportunity, note of caution in the context of feminist politics (Cooper and Emerton, this issue; Peel and Newman, this issue). Our ongoing work in this area focuses intensely on the gendered character of dominant social systems, how law upholds these systems, and the potential benefits and disadvantages of unpicking legal gender status through decertification. This special issue has canvassed certain of these substantive concerns, for example relating to same sex provision (e.g. Renz, this issue) and future publications, including in relation to the experimental statute itself, will further explore these issues.

In terms of drafting, however, we have a number of potential concerns, routes, dilemmas, and solutions. For example, we might consider using interpretation statutes to support the decertification of gender: changing the text of the interpretation statute so as to support a reading of all legislation that dis-attaches legal gender from the subject or which references decertification itself. This has already been proposed and analysed as a more ‘meta’ technique, which addresses not only the reception, but also the drafting, of legislative text. However, this kind of technique would do very little to help the project address the substance of sex/gender inequalities more broadly. Given the genealogy of interpretation statutes in erasing female legal subjects, using this route within a decertification project could bring with it unhelpful associations, and within contemporary practice in the Westminster system (through which policy-making and drafting are divided and distinct) it would not help ongoing feminist activist or policy concerns if legislation ‘invisibilised’ sex/gender dynamics and politics. The temporality of interpretation statutes is also a potential issue, as they tend to look forwards and not backwards, leaving a legacy body of legislation subject to a distinctly gendered regime oriented at people

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with certified sex/gender. Yet clearly interpretation statutes are also seen as a locus for legal change and innovation, with examples from the Welsh Assembly and Australia already referring to a wider range of genders than male or female, as we have seen, and it may well be that attention to interpretation legislation could become one aspect of a broader legislative approach.

The evolution of new techniques of gender-neutral drafting is positioned as a key means of bringing about change in drafting overall following the 2007 government statement and recent moves towards ‘gender-inclusive’ and ‘gender silent’ drafting. We have already seen that drafters have a degree of independence, yet they work in teams and engage in dialogue about drafting problems and innovations (Xanthaki, 2015), leading to incremental shifts in adoption, the uptake of new techniques, and even the use of linguistic research to help advance their practice (Dalmau, 2019). Essentially, then, if we imagined that our project would respond to the wider legal world as it currently is, then we would be interested in how drafters would engage with decertification over time. If sex were not formally recorded at birth, or not attached to a lifelong, gendering, system of state identification, would this require drafters to draft sex/gender differently, and if so, how? What would a move to decertify gender do to the techniques of gender-neutral drafting currently used by the OPC, which focus on repeating the noun, changing the pronoun, and rephrasing to avoid the need for a pronoun or noun?

It seems that decertifying gender would have most effect on the group of drafting techniques outlined above that focus on changing the pronoun, with possibly fewer effects on the other two groups of techniques. This is because gendered third person pronouns have been used across the statute book and it is still within drafters’ technical range to use such pronouns where they see fit. Decertifying sex/gender would certainly challenge the continued use of gendered pronouns in the third person, including the familiar “he or she” construction. Given that decertification would not claim to erase widespread inequalities of sex/gender, as Davina Cooper has pointed out (this issue), it might be possible that gendered third person pronouns

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may still be used in some circumstances when it is important to recognise the effect on an individual of a social system or phenomenon that is acknowledged to be gendered. This could apply even with the use of “they”, which is not necessarily always understood as ‘non-gendered’ but often as ‘gendered differently to male and female’.<sup>31</sup> There is in any case a move away from using the “he or she” construction when alternatives are present and using only “he” is falling well outside of contemporary drafting practice, especially following the 2007 government statement on gender neutral drafting. Furthermore, gender-inclusive and gender silent approaches to drafting increasingly shift away from assuming in advance what sex/gender a legal subject wishes to claim.

It may well be that too much attention to pronouns would be inappropriate for the kind of re-orientation of focus that decertification would perform. If decertifying gender is about not putting all the work of sex/gender onto individuals to carry through their lifetime, but instead to focus on sex/gender as a set of social systems and institutional orientations, then the focus on pronouns, with their inherent targeting of gendered individuals, may shift. For this reason, our statutory drafting practice may focus on techniques currently used by drafters to ‘rephrase to avoid the need for a pronoun or noun’ (OPC 2018, 7). Given that legislation still occasionally needs to target legal subjects as individuals, it is possible to imagine a situation in which decertification might encourage drafters increasingly to use the singular “they” as a non-gendered third person singular, and this would also align with Xanthaki’s ‘gender inclusive’ approach, although from a different conceptual direction.

Another approach might be to question the continued use of the third person as the ‘voice’ for legislation. This appears more radical than rephrasing to avoid the need for a pronoun, but both techniques effectively engage in a shift in expression. As many commentators have pointed out (Mossman, 1995; Salembier, 2015; Xanthaki, 2013), the issue that drafters face is that

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<sup>31</sup> Many thanks to Flora Renz for making this point.

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there is no gender-free third person singular pronoun in the English language – that is, if objections to the widespread use of the singular “they” are taken as read. However, the second person (“you”) is un-gendered. The second person is often associated with the imperative, which is used more readily in other languages (e.g. German) and not generally considered for use in statutory text.<sup>32</sup> As Salembier puts it: ‘the imperative mood (*Put that cookie back in the jar*) is commonly used for speaking but is not appropriate for legislation’ (Salembier, 2015, p. 176). The Office of the Scottish Parliamentary Counsel (OSPC) has also considered the use of the second person within the context of plain language drafting. The OSPC points out that referring to ‘you’ would catch readers of legislative texts who are not the intended audience of the obligations or rights contained in the statute, for example judges or lawyers. However, it also acknowledges that ‘there may occasionally be circumstances in which it may be advantageous to draft in the second person’.<sup>33</sup> As the project continues investigating the rich intersections of sex/gender and legislative drafting, future work could focus on the potential for using the second person as part of a broader set of feminist techniques that sit comfortably with a more disruptive approach to drafting overall (see further below). As such, the second person might provide a technique for avoiding the binary dilemmas of gendered third person pronouns, helping to support the decertification of gender (along with its focus on social relations of gender rather than gender as an individual property of the legal subject), and also unsettling communicative conventions of drafting within broader processes of law-making (see further Stefanou, 2015).

The second set of questions in this final section builds on these latter concerns by asking how feminists can and should engage with legislative drafting. We might, for example, try to alter the current tools, contributing to on-going debates about sex/gender within current legislative

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<sup>32</sup> There is not space here to engage with speech-act theory in relation to critical legal studies but my future work on the project will explore this. See, for example, Martel (2015).

<sup>33</sup> Office of the Scottish Parliamentary Counsel (2006, p.33).



drafting practice from the perspective of a situation in which people would not enter legal forms of address with formally sexed or gendered subjectivities. Conversations about gender and drafting, the on-going controversy over the use of the singular “they”, for example, and historical debates over the use of interpretation statutes, all reference the performative power of legal statutes and their gendering effects. The unsteady histories of sex/gender in English law as well as current dilemmas of contested usage indicate that this area of legal practice is as full of controversy as any other. With that in mind, it would be inaccurate to frame any feminist approach to drafting as challenging a monolithic institution or practice.

Yet writing statutes from an explicitly feminist perspective also necessarily engages questions of positionality right from the outset. For feminists engaging with statute writing, using the tools, conventions and aesthetics of drafting does not necessarily mean aspiring for the same norms of independence and neutrality found in legislative counsel offices. However the need to follow something akin to the received conventions of statutory drafting is still felt to be necessary in order to make a convincing enough argument about what could be different, substantively or formally, in the law. As Erika Rackley put it:

... my concern with not following the rules, the traditional rules of legislation, is that you would end up with something that looks so different to legislation that the people would no longer see it as legislation. The powerful argument of “you could do it this way” would be much harder to make. (Interview, 2019)

In addition to positionality, the political and legal orientation of feminist statute-writing can vary depending on whether the proposed statute is the result of academic initiative, engagement with NGOs, or work undertaken for political parties. Máiréad Enright, who with many other feminist legal academics has co-organised and written feminist judgments as well as feminist legislation, spoke of the effect on decisions about form and substance being driven significantly by context, as she highlights here, when speaking about the different expectations

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involved in writing proposed legislation for the Alliance for Choice in the Northern Irish context, compared with writing proposed legislation on abortion reform for the Irish Labour Party:

Their [The Alliance for Choice] political position was “draft something that is the gold standard, so that we can measure whatever we get in the future or we can educate ourselves and we can think ourselves in terms of the gold standard”. Whereas with the Labour Party it was draft something that's not too frightening and that meets the constitutional requirements. (Interview, 2019)

Enright refers here to ‘gold standard’ drafting, a request to draft the kind of feminist statute that would recognise the ‘best’ on offer to feminists on abortion across jurisdictions, made applicable to the Northern Irish context. The difference between ‘gold standard’ and ‘not too frightening’, then, relates to content and form and can draw on very diverse sources. Yet, importantly, writing statutory text is felt to be a more immediate kind of prefigurative intervention than judgment writing or other forms of feminist legal praxis.

With these points in mind, we might aim for a believable ‘gold standard’ with the aim of safely persuading as many policy makers as possible of the workability of our proposed experimental stature. Or we might forge distinctly feminist tools, challenging aspects of drafting practice that are currently very well embedded. There are precedents for this kind of legal squatting/vandalism/re-orientation (depending on your politics): the Feminist Judgments project, the African Feminist Judgments project, and the Northern/Irish Feminist Judgments projects are some examples.<sup>34</sup> This might mean turning away from text towards performance or other art forms, strategically de-stabilising certain epistemologies and practices of drafting, such

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<sup>34</sup> See Enright et al. (2017); Hunter et al. (2010); the African Feminist Judgments project at: <https://www.lawandglobaljustice.com/the-african-feminist-judgments-project>; the Scottish Feminist Judgments project at: <https://www.sfpj.law.ed.ac.uk/> and Cowan et al. (2019).

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as the distinction between policy-making and drafting, or the tools of neutrality, distancing, and objectivity that often structure current ‘best practice’ in drafting communities (Greenberg, 2011).

Inevitably, the process of producing an experimental statute takes place outside of the usual Westminster (or relevant other jurisdictional) processes whereby the substance of primary legislation is formed through policy considerations within government departments and then transmitted to drafters by means of ‘instructions’. In interviews, legislative drafters were careful to convey their observance of this norm, establishing the limits to their deliberative technical engagement with departments. As such, any feminist attempt to use the tools of drafting to write law ‘otherwise’ inevitably collapses what are considered to be important procedural distinctions between the policy phase and the drafting phase into each other (see further Greenberg, 2011; Page, 2009). Nevertheless, there may be considerable power in occupying both roles at once, making more radical interventions into both substance and form than would otherwise be expected. Precedents for this kind of approach include the Northern/Irish Feminist Judgments project and the Scottish Feminist Judgments project, both of which aimed to trouble the usual form of judicial writing and decision-making by involving a wider group of artists, litigants, and social activists (Cowan et al., 2020; Enright et al., 2017). It will be for the next stage of our research to consider whether and how to take a similar approach.

Finally, those who have engaged in feminist judgments or statutory drafting have become increasingly aware of the limited role of each aspect of law-making within wider legal assemblages. Speaking of the provisional power of legislative drafting in the context of judicial decision-making, one feminist academic described it as a ‘choreographed free for all’ in which judges had wide scope to use their tools in such a way as to read down legislative provisions if they wanted. As she put it:

It's a very sort of choreographed free for all. I do think that there are hard boundaries, but they are pretty wide. I think that there are an awful lot of ways that judges can decide

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which particular tools they are going to deploy in a particular situation, whether it's to uphold something, to read it narrowly, to read it broadly, to make sense of it or to make nonsense of it, and then they have those options and they have the perfectly legitimate rational ways of making that seem inevitable. (Interview, 2019)

These remarks point to the interconnections and relationships existing between different arenas, types, and registers of law, reminding us of the importance of statutory interpretation alongside legislative drafting, and the purchase of wider debates about the limits of authorial power (e.g. Kamuf, 1988; Walker, 1990).

### **Concluding Remarks: Grasping the Alchemy of Legal Gender**

The synthesis of words and legal meaning, text and expression, that we find with legislative drafting means that 'drafting otherwise' is not simply a matter of using current techniques to implement a new approach to legal gender, it is much more productive and political than might otherwise be assumed. This project has led me to become preoccupied with the question of whether a technology that has contributed many of the legal categories, idioms, exclusions, and ideologies that contribute powerfully to norms of sex/gender can be employed in decertifying gender. In line with new materialist perspectives on the 'mattering of methods', I find myself bewitched with the politics and materiality of text just as others ask about the ontological force of legal gender and the material and political effects of changing how sex and gender attach to law (Coleman et al., 2019). Over recent months, I have brought to research meetings the shiny things I have been finding in interviews with legislative drafters: debates over the singular "they", discussions over gender in the Interpretation Act 1976, the fact that drafters know about gender-transformative expressions of "ze" and will readily discuss non-binary gender. These debates have raised second wave feminist insights about the power of legal language – its magical quality – as a matter of ongoing enquiry. Magic is, in some ways ineffable, and the legal technical

fabrication of sex/gender through text and innovation over the past few centuries has come to seem slightly more scientific, something more like alchemy. In such moments, the larger project of working out what would be the implications of dis-attaching sex/gender from legal personhood has appeared to be as just as much a question of legal expression, the oddly tenacious power of legal text, as about an iterative working-through of feminist prefigurative legal and political thinking, requiring, as it does, careful assessment of how this whole web of meaning, effect, politics, and inequality is connected. In other words, I have become entangled in this research somewhere between text and substance.

My problem is that when the task is done, we may well have expressed ourselves, again, through legal text and certainly, to some extent, through legal form. I cannot dis-attach my own involvement in this project from the emerging realisation that whatever we wish to do, prefigurative, revolutionary, or transformative has to engage with an archetypal practice of law-making that has been a ‘black box’ until very recently. The mutual inter-relationship of sex/gender and legislative drafting has raised more questions than it has answered, and it seems like risky work, having identified the alchemy, to try and harness it. Yet with such risks come new opportunities. I hope this article has conveyed some sense of our statutory dilemmas as we continue our research on decertifying gender.

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