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THE MASULINE RULE AND ITS ALTERNATIVES: A COMPREHENSIVE ANALYSIS

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Dedication

To My Parents

It may seem a small thing in one sense, but language is important. We have a society in which we believe men and women are equal, so why shouldn't the law refer to us equally?

Many other English-speaking jurisdictions do so already[1].

[1] Cited in the Guardian, Friday 9th March, 2007: *"Straw: Future laws to be Gender Neutral"* by Tania Branigan.

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Abbreviations

TCI	Turks and Caicos Islands
BVI	British Virgin Islands
UK	United Kingdom
N.S.W.L.R	New South Wales Law Reports
C.L.R	Commonwealth Law Reports
Wash	Washington
Wis	Wisconsin
I.C.L.R	Incorporated Council of Law Reporting

CHAPTER1
INTRODUCTION

Communication is the essence of every society and unless its members can communicate with one another, a society cannot exist as a social community. Language, defined as a method of human communication by a people with a shared history, whether spoken or written, is the most important medium of communication between members of society[2]. It conveys the norms, values, beliefs, and perceptions that help ensure an ordered social environment and help define the boundaries of acceptable social discourse[3]. One essential function of language is the communication of meaning;[4] and this is especially important in written communication since words, a unit of language consisting of one or more spoken sounds or their written representation and functioning as the principal carrier of meaning, essentially stand alone lacking visual or vocal aids. The law, a profession of words, uses this medium to, inter alia enact and sustain statutes. But despite all good intentions, the meanings of words found in statutes are not always clear and unequivocal. They may be capable of being understood in more ways than one, they may be doubtful or uncertain, and they may lend themselves to various interpretations by different individuals. When differences in understanding are irresolvable, the parties having an interest in what is meant may end up in litigation and ask the Court to come up with its interpretation. In the eyes of the law, when this kind of situation arises, the legislation contains "ambiguity".[5] This would be avoidable if the language was precise[6], as it would minimize the risk of uncertainty and consequent disputes. But a document which is precise without being clear is as dangerous in that respect as one which is clear without being precise.[7] Therefore, clarity is also important because it assists in

[2] G. C. Thornton, *"Legislative Drafting*", 3rd Edition Chap 1, p. 1.
[3] William B Hill Jr, *"A need for the use of Nonsexist Language in the Courts",* p. 275.
[4] G. C. Thornton, *"Legislative Drafting*", 3rd Edition Chap 1, p. 5.
[5] Sandford Schane, *"Ambiguity and Misunderstanding in Law",* p. 1.
[6] Essentially exactness of expression or detail.
[7] E. Majambere, "*Clarity, precision and unambiguity: aspects for effective legislative drafting",* p. 420.

making draft legislation as easy as possible for the reader to understand what is being said and thus enhances understanding and transparency of legislation[8].

It is imperative therefore that drafters be clear, precise and unambiguous so as to ensure that the meaning intended by the language, is accurately conveyed; particularly in this era when legislation is no longer considered to be written only for judges and lawyers but is the concern of and should be comprehensible, or at least capable of explanation, to those individuals who comprise the legislature, to those persons whose duty it is to administer the law, the members of that section of society that is to be regulated by the law and the members of the judiciary who may have the final duty of interpreting the law.[9]

To this end, drafters have, in recent times, employed a number of methods to ensure that laws are clear, precise and free from ambiguity. One aspect of this "modern style" adopted by drafters and instituted by some Governments, is the requirement that laws be drafted in language that is gender neutral. Gender neutral" language[10] is essentially language that requires that expressions used to describe women have a parallel meaning when used in reference to men.[11] The aim of this "type of language" is to eliminate references to gender when using terms that describe people by discouraging the use of gender-specific[12] terms to refer to persons of an unspecified sex. The suitable language to be used is one free from explicit or implicit references to gender. A drafter who decides to use this "type of language" has various options available, including repeating the noun, using a defined term, use of plural pronouns (they/their/them), use of a plural noun followed by "they", replacing the noun with a letter, by replacing the personal pronoun with "the" or "that", by omitting the pronoun, by using the passive voice, by using "who" instead of "if…he", by using an impersonal construction and by using the present or past participle[13] or alternatively

[8] Ibid.
[9] G.C. Thornton , *"Legislative Drafting",* 3rd Edition, Chap 1. p.4.
[10] Also called gender inclusive language, inclusive language or gender neutrality.
[11] Karen Busby, "*The maleness of legal language",* p 211. Gender is a grammatical term that describes the classification of nouns and related words as masculine, feminine, or neuter; Neutral, on the other hand, means impartial or unbiased, having no strongly marked characteristics.
[12] Also called gender-biased language, sexist language or exclusive language.
[13] "Gender-neutral drafting-outline", OPC Policy.

by inserting both male and female pronouns and adjectives, for example, he or she, him or her.[14]

1.1 BACKGROUND

Within the last year, the State of Washington[15] concluded a six year onerous task of rewriting state laws to achieve gender neutrality; this initiative replaced, inter alia, words such as "fisherman" and "freshman" with "fisher" and "first-year student" respectively. On the other side of the Atlantic Ocean, Sweden adopted a new gender neutral pronoun to refer to a person without including reference to that person's gender.[16] Why the effort to achieve gender neutrality? And why are these changes necessary?

Until fairly late in the development of the English language, the pronoun "he" referred to both females and males[17]; there was no separate pronoun for females. When the word "she" was introduced, it had the sole function of referring to females; but the pronoun "he" continued to refer to both females and males.[18] This meant that male pronouns were used in contexts where a reference to men was intended and also where a reference to women and men was also intended. This usage spilled over to "legal language" and was institutionalized by the legal profession via the codification of this practice into the laws. As such, the pronoun "he" along with other words inferring the masculine gender, for example, fireman, postman etc., were used to refer to both genders. This practice however, could not guarantee that the particular statute or regulation conferred any rights on women. And therefore women coming before the Courts to have the Court come up with its interpretation realized that any official or any Court had ample authority to decide that the male did not include the female. This credence was noticeable from members of the judiciary in a number of cases. In

[14] Christopher Williams, *"The End of the "Masculine Rule"? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland",* p. 1.
[15] United States of America.
[16] Instead of the common "hon" for female or "han" for males, Sweden now has a common "hen" to refer to a person without including reference to that person's gender.
[17] Scholars concluded that this rule was first established in the mid eighteenth century.
[18] Kathering de Jong, "*On Equality and Language",* p. 120.

Chorlton .v. Lings[19] the consideration before the Court was to determine whether a provision that "everyman shall….be entitled to be registered and to vote in Parliamentary elections" included women. The Court refused to interpret the provision as including women. Also in ***State of Wisconsin .v. James Jagodinsky***[20], the Court noted that where the statute about qualifications of petit jurors used the masculine pronoun "he", the reference was to males only. But Courts sometimes held that "he" referred to both genders. For example, in ***Snyder's Estate .v. Denit***[21], the Court stated that in statutory construction, the masculine includes the feminine, but the feminine does not include masculine. However, various precedents show that this inclusion of women was seemingly done when the statute imposed a burden and not in instances where the statute imposed a privilege. One example where this dichotomy was profoundly corroborated is in the case of ***De Souza .v. Cobden***[22]***;*** Cobden was duly elected to the London County Council and her election was not challenged within the limitation period. The Court ruled that Cobden, as a woman, was not a "person" qualified to hold office. But she was a "person" liable to a fine for the unqualified exercise of a public office. It was immaterial that the gender neutral word "person" was used and this was also noted in the case of ***Re Goodell***[23]***;*** the Supreme Court of Wisconsin faced with the first application for admission of a female to the bar refused to include women within the construction of the word "person" and noted that the statute applied to males. And even though under the rules of statutory construction, the Court could extend the terms of the statute to include females as long as such construction was not inconsistent with the legislative intent, Chief Justice Ryan noted that the admission of women to the bar was not something contemplated by the state legislators.

Even more compelling is the fact that the "ordinary man" tended to exclude women from their mental landscape when such language was used. This premise is supported by ***State of Washington .v. Wanrow.***[24] Wanrow was convicted of second degree

[19] (1868) L.R. 4CP. 374.
[20] Case No. 96-2927-CR.
[21] 195 Md 81, 72A.2d 757 (1950).
[22] [1891] 1QB, 687.
[23] (1875) 39 Wis 232; See Bradwell .v. the State (1869) 55 I11. 535 also with similar circumstances.
[24] 88 Wash 2d 221, 559 P.2d 548.

murder and first degree assault for a fatal shooting. On appeal, the Washington Supreme Court upheld the reversal of the conviction of second degree murder because of the prejudicial effect of the instructions given to the jury. The instructions continuously employed "he" when the defendant was female and the Court found that the persistent use of the masculine gender left the jury with the impression that the objective standard to be applied was that applicable to an altercation between men.

Such decisions were reached regardless of the rule that specified that the masculine included the feminine (masculine rule) within the various Interpretation Acts. One would surmise therefore, that if the language within the various provisions in the above cases clearly and precisely specified the gender to be included or was drafted in a gender neutral manner, exclusion, unequal treatment and ultimately discrimination would have been eradicated. As such, unless the words are clear, precise and unambiguous, legislation will always create for both the Courts and the lay reader an unnecessary barrier to understanding and acting on the purpose and intent of the enactment.

1.2 HYPOTHESIS

Although various jurisdictions have departed from the masculine rule because their Governments' have viewed it as discriminatory and incapable of including women; some Governments' have, in their quest to achieve gender neutrality, struggled to find the most effective replacement and, as such, have adopted and changed various alternative rules before settling for a particular one. Some such jurisdictions include, South Australia, that changed from the two way rule to the masculine rule and then to the two way rule, Victoria that changed from the masculine rule to the two-way rule to the all gender rule, and Nova Scotia that changed from the Masculine rule to the two way rule and then back to the masculine rule.[25] Moreover, some Governments' have made the change to gender neutral language via gender neutral policies and as such drafters have developed various techniques and practices that have changed the text of much legislation. This was done to give effect to the language of the law to

[25] Summarised in Appendix A of Sandra Peterrsson, *"Gender-Neutral Drafting: Recent Commonwealth Developments"*.

reflect the fact that women have all of the same rights, powers, obligations and privileges under the law as men enjoy. But while these policies have achieved great success, Governments' still retain interpretive rules within their Interpretation Act that permits the use of the masculine gender to include the feminine. This is worrisome since like all policies, these policies do not have the same status as drafting rules and are subject to political change. What is more is that some jurisdictions still retain the masculine rule. For example, Grenada[26], TCI[27], Saint Vincent and the Grenadines[28] and Guyana[29]. And in at least two of these jurisdictions, namely, the BVI and Grenada, drafters have in order to ensure gender neutrality within their laws, specified both genders when the provision(s) related to both male and female despite the masculine rule within their Interpretation Act.

Based on the foregoing therefore, it is imperative to determine the most effective rule to be adopted to replace the masculine rule in each jurisdiction; a rule that will not give any "wriggle room" for members of the judiciary or any other authority, to interpret laws in a manner that will discriminate against women, that will exclude women or foster inequality. But rather, will guarantee women's inclusion, treat women equally and eradicate discrimination, while simultaneously producing clear, precise and unambiguous legislation that definitively communicates the intent of the legislature. It is against this background that this thesis proposes that the best rule to adopt as an adequate replacement for the Masculine Rule is the Separate Gender Rule. But, notwithstanding that, the ultimate solution to the problem of discrimination, exclusion and unequal treatment meted out to women by members of the judiciary or otherwise, is to simply forego a rule regarding gender within the Interpretation Act and to strive to draft in each instance without a reference to a particular gender altogether when both genders are intended.

[26] Interpretation and General Provisions Act, Cap. 153; Revised Edition Issue 1/2011.
[27] Section 4, Interpretation Act, Cap. 1:03; Revised Edition as at 31st August, 2009.
[28] "In every written law, except where a contrary intention appears, words and expressions importing the masculine gender include females" (Section 3(4), Interpretation and General Provisions Act; Revised Edition 2009).
[29] "In any written law made after 8th March 1856, and in any public document made or executed after 15th July, 1981, unless the context otherwise requires- (a) words importing the masculine gender shall include females"- Section 6(1) Interpretation and General Clauses Act Cap: 2:01.

1.3 METHODOLOGY

Sandra Petersson in her work *Gender-Neutral Drafting: Recent Commonwealth Developments*[30] classified the alternatives to the Masculine Rule as the Separate Gender Rule, the Two-Way Rule and the All Gender Rule. The Separate Gender Rule expressly prevents the use of either the masculine or feminine to include the other.[31] An example of this rule is often phrased as "words importing the masculine gender shall include only the masculine gender and words importing the feminine gender shall include only the feminine".

The Two-Way Rule on the other hand, allows for either masculine or feminine words to be used to include the other. Common examples are worded as follows:

"words importing the masculine gender include the feminine and words importing the feminine gender include the masculine".

Finally, the last alternative to the masculine rule is the All Gender Rule. This rule allows for words importing a particular gender to include all other genders. It provides for reciprocity among the masculine, feminine and neuter genders.[32]

It is this classification, as put forward by Petersson that will be utilised to prove this hypothesis coupled with the application of each rule to legislation currently in force in the BVI, Grenada and the TCI. These include the Police (Amendment) Act, 2013 (No. 1 of 2013) of the BVI, the Divorce Law Cap. 11.04, the Criminal Law Ordinance Cap. 3:01 and the Legal Profession Act Cap. 2:01 of the TCI and the Legal Profession Act, No. 25 of 2011 and the Drug Abuse (Prevention and Control) Act Cap. 84A of Grenada. The result of the application will then be analysed and a comparative analysis done using three criteria, namely, whether women are treated equally under the law, whether women's inclusion can be guaranteed and whether there is a possibility that, with the specific rule, Judges or any authority can interpret

[30] Statute Law Review, (1999) Volume 20 (1): 35.
[31] Sandra Petersson, *"Gender-Neutral Drafting: Recent Commonwealth Developments"*, p. 7.
[32] Ibid, p. 6.

the provision to exclude women. Thereafter, with achieving clarity, precision and unambiguity in the law as the ultimate goal, the most effective rule will be chosen.

1.4 AIMS AND OBJECTIVES

The aims and objectives of this study are:

- To prove that the Separate Gender Rule is the best rule to adopt as an interpretive rule regarding gender within the Interpretation Act of each country;

- To corroborate and support the premise that the change to the Masculine rule through the use of any other rule besides the Separate Gender Rule (i.e. The All Gender Rule, the Two-Way Rule) will still perpetuate discrimination on, and exclusion of, women;

- To make a determination and substantiate that if each country is to strive to ensure the elimination of discrimination of women under any statute, to guarantee women's inclusion and equal treatment while simultaneously ensuring legislation is clear, precise and unambiguous, it is better to forgo an interpretation rule within the Interpretation Act, and to draft in a manner that avoids specifying a particular gender altogether;

- To highlight that the practice by drafters of using words to indicate both genders in jurisdictions that have retained the Masculine Rule, the Two-Way Rule or the All Gender Rule within their Interpretation Acts in an effort to make their laws gender neutral, only contribute to a lack of clarity, imprecision and ambiguity within the law.

1.5 STRUCTURE

- Chapter one consists of the Introduction, a brief background to the problem, the Hypothesis, Methodology, Aims and Objectives and the Structure of the thesis.

- Chapter two provides the reader with a detailed description of the main concept and instrument at the genesis of the problem with regard to legislation.

- The third chapter examines, analyses and applies the Masculine rule and its alternatives i.e. the Two- Way Rule, the All Gender Rule and the Separate Gender Rule and concludes with a comparative analysis of the alternatives by using three criteria.

- In chapter four the ultimate solution to the problem is revealed.

- The final chapter proffers a conclusion relative to this research.

CHAPTER 2
DESCRIPTION AND DISCUSSION OF THE INTERPRETATION ACT AND THE MASCULINE RULE

2.1 THE MASCULINE RULE

The Masculine Rule, once the most popular rule of interpretation to be found in the Interpretation Act, essentially states that "words importing the masculine gender include the feminine gender", i.e. words such as "man", "father", "son", "brother" etc. But though these instances of nouns such as "man", "father" etc. import the masculine, the most frequent male terms in legal texts are the masculine pronouns such as "he", "his", "him" and "himself".

Numerous calls have been made for the reform of this rule and those who oppose it argue that drafting legislation in "masculine" language is discriminatory; it raises an inference that the male is more fundamental than the female, it contributes to some extent to the perpetuation of a society in which men, and perhaps more significantly, women, see women as lesser beings[33] and its usage gives the impression that it is a privilege for women to be accepted in some instances as being within the category of "man". Further, it has the effect of excluding women from the reader's mental landscape;[34] especially since men use and understand "he" more often in its' marked or gender specific sense rather than its unmarked or generic sense. Moreover, it contributes to ambiguity in circumstances where singular masculine pronouns and words including "man" are used to refer to men and women, and are also intermingled with usage that refer to men only, i.e. when certain words sometime mean males, sometimes mean females and sometimes include both sexes[35]. And while the use of a neutral word will suffice in instances where an effort is made to alleviate the confusion, because a neutral noun such as "person" is often used in

[33] Volume 11, Commonwealth Law Bulletin, p. 590.
[34] Karen Busby, "*The maleness of legal language* ", p. 211.
[35] Judith D Fischer, "*Framing Gender: Federal Appellate Judges" Choices About Gender-Neutral Language",* p. 487.

connection with a masculine pronoun, the described individual will [still] be perceived as a man.[36]

Furthermore, it is unreasonable, unrealistic and possibly naive to expect or believe that most readers of a statute either know the contents of or refer to an Interpretation Act where necessary since readers who are not lawyers may not even know such legislation exists. What is more is that Courts have often used the context within which the "masculine language" was used to exclude women when conveying a privilege but included them when imposing a penalty. And because, the inequality that flows from male terms is not isolated in the past but is also located in the present text of the law, women who seek even the smallest hope of equality must demand express legislation, written in the clearest possible terms[37]. Such express legislation, they argue, is only possible by the reform of the rule, either by repealing and replacing it coupled with a change to gender neutral language, or by repealing it without replacement and draft to expressly include women.[38]

On the other hand proponents of the Masculine Rule argue that the masculine rule does not discriminate against women because "he" (and other masculine pronouns and words) is accepted as embracing both genders and that the Interpretation Acts in jurisdictions that use masculine pronouns almost invariably provide that a reference to a man is deemed to include a woman, so that in practice women are not being ignored.[39] And further it is a matter of "convenience" for drafters to draft by reference to one gender only and that the "established drafting practice" or the "established canons of drafting" require drafting in terms of the male[40]. Moreover, the issue of male terms is trivial and its usage merely reflects a defect in the English Language; a defect that exists in all English speech or writing and is not confined to legislation[41].

[36] Karen Busby, "*The maleness of legal language*", p. 196.
[37] Marguerite E. Ritchie Q.C, *"Alice Through the Statutes"*, p. 706.
[38] Sandra Petersson, *"Locating Inequality-The Evolving Discourse on Sexist Language",* p. 67.
[39] Paul Solembier, "*Legal and Legislative Drafting*", p. 141.
[40] Marguerite E. Ritchie Q.C, *"Alice Through the Statutes",* p. 703-704.
[41] E. A Driedger, Q. C, "*Are Statutes Written for Men Only*", p. 666.

And there is no adequate substitute, as gender-neutral language may annoy readers who do not support it[42] and must necessarily be awkward.

But regardless of the arguments for and against the use of the Masculine Rule, many Governments have, accepting that the usage of gender specific language is, inter alia, discriminatory against women, directed that such language be eliminated from legislation.[43] Towards this end, in many jurisdictions, gender-neutral drafting is the accepted standard. Current policy and practice across the United Kingdom, Australia, Canada and New Zealand endorse gender neutral language.[44] The United States has only recently introduced gender-neutral drafting.[45]

2.2 INTERPRETATION ACT

An Interpretation Act is essentially a statute that applies to all other enactments. The objectives of an Interpretation Act are to shorten and simplify written laws by the avoidance of needless repetition, to promote consistency of form and language in written laws and to clarify the effect of laws by the enactment of rules of construction.[46] In the same manner a definition section operates in an "ordinary statute", by providing short forms for expressing longer names and phrases, an Interpretation Act simplifies the drafting process of all statutes and makes them easier to read.[47] This is often achieved by providing short forms for commonly used expressions, by providing standard definitions for certain words and expressions commonly found in statutes, by standardizing the meanings of other words and expressions that might otherwise be subject to a variety of interpretations, and by providing a set of standard provisions that are deemed to be present in all statutes (or at least in all statutes where they would be appropriate).

The standard definitions can be delimiting, extending or narrowing. A delimiting definition determines completely the limits of significance to be attached to the term defined and an extending definition is one which stipulates for the defined term a

[42] Judith D Fischer, "*Framing Gender: Federal Appellate Judges" Choices About Gender-Neutral Language",* p. 482.
[43] G. C. Thornton, *"Legislative Drafting",* 3rd Edition, p. 416.
[44] Christopher Williams, *"The End of the "Masculine Rule"? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland",* p. 152.
[45] Margaret Wilson, "*Gender-Neutral Law Drafting: The Challenge of Translating Policy into Legislation*", p199-205.
[46] G.C. Thornton, "*Legislative Drafting*", Chapter 5, p. 100.
[47]Paul Solembier, *"Legal and Legislative Drafting",* Chapter 10 , p. 374.

meaning which in some respect goes beyond the meaning or meanings conveyed in ordinary and common usage by the term. The narrowing definition stipulates a meaning narrower in some respect that the meaning commonly conveyed by the term.[48] Definitions of words and expressions are generally included in the Interpretation Act if they are genuinely of general application to a reasonably broad range of legislation and conform to the criteria applicable to all statutory definitions. As such, these standard definitions serve the same function as a definition in an "ordinary statute".[49] Aside from the abridgement achieved by not having to repeat standard provisions in each statute, the fact that these provisions are set out only once avoids the temptation that individual drafters might have to "improve upon" them if they had to be redrafted in each statute.[50]

Therefore, the masculine rule, being an extending definition, allows drafters to achieve a degree of concision that would not be possible if the additional attributes set out in this definition had to be spelt out or qualified each time the term was used in drafting statutes or regulations. And this, coupled with its placement within the Interpretation Act, essentially allows the rule to be applicable to all statutes (or at least in all statutes where it would be appropriate) and it functions as though it was placed in the definition section of each statute.

[48]Thornton, *"Legislative Drafting*", 3rd Edition, p. 56-58.
[49] Paul Solembier, *"Legal and Legislative Drafting",* Chapter 10, p.380.
[50] Ibid, p. 381.

CHAPTER 3
ANALYSIS AND APPLICATION OF THE MASCULINE RULE AND ITS' ALTERNATIVES

3.1 The Masculine Rule

Section 4 of the Interpretation Act Cap. 1:03 of the Turks and Caicos Islands reads as follows:

"In this Ordinance and in all Ordinances and other instruments of a public character relating to the Islands now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided-

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

(b) words in the singular include the plural, and words in the plural include the singular;"

And Section 20 of the Legal Profession Act Cap. 2:01 of TCI reads thus,

*"**Secretary and staff of Bar Council***

*20. (1) The Bar Council shall employ **a person** to be the Secretary of the Bar Council to perform **his** functions under this Ordinance and such other functions as may be required of **him** by the Council.*

(2) The Bar Council may employ such other staff as it considers necessary to carry out its functions."

Therefore**,** based upon section 4 of the Interpretation Act, "his" and "him" being a pronoun that infers the masculine gender, interpreting section 20 of the Legal Profession Act Cap. 2:01 should be as follows:

*"20. (1) The Bar Council shall employ **a person** to be the Secretary of the Bar Council to perform **his or her** functions under this Ordinance and such other functions as may be required of **him or her** by the Council.*

(2) The Bar Council may employ such other staff as it considers necessary to carry out its functions."

But while the application of section 4 of Cap. 1:03 would allow the female to be "read into" the provision; it is this usage that has caused widespread criticisms of the Masculine Rule. Based upon the prejudicial nature with which Judges have, in cases such ***Re Goodell*** and ***State .v. James Jagodinsky,*** interpreted the provisions therein, the TCI example leaves open room for this history to be repeated and thereby for women to be excluded, discriminated against and be unequally treated. For example, if this provision were to come up before the Courts in *Re Goodell* and using the reasoning therein, women would be excluded from being able to take up the position of Secretary of the Bar Council since the employment of women as the Secretary of the Bar Council would not have been contemplated by the legislature, and in accordance with Chief Justice Ryan's reasoning, though words importing the masculine gender may be extended to females, this should only be applied where the construction is not inconsistent with the intention of the legislature and the legislature clearly would not have intended for a woman to be the Secretary of the Bar Council. On the other hand, if the said provision were interpreted in accordance with *Snyder's Estate .v. Denit*, women may perhaps have been given the opportunity to function as the Secretary of the Bar.

Alternatively, take for example section 5 of the Criminal Law Ordinance Cap. 3:01 of TCI that reads as follows:

"Penalties for assisting offenders

5. (1) Where a person has committed an arrestable offence, any other person, who knowing or believing ***him*** *to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede* ***his*** *apprehension or prosecution shall be guilty of an offence.*

(2) If on the trial of a person charged with an arrestable offence the jury are satisfied that the offence charged (or some other offence of which the accused might on that charge be found guilty) was committed, but find the accused not guilty of it,

*they may find **him** guilty of any offence under subsection (1) of this section of which they are satisfied that **he** is guilty in relation to the offence charged (or that other offence).*

(3) A person committing an offence under subsection (1) of this section with intent to impede another person's apprehension or prosecution shall on conviction be liable to imprisonment according to the gravity of the other person's offence, as follows-

*(a) if that offence is one for which the sentence is fixed by law **he** shall be liable to imprisonment for ten years;*

*(b) if it is one for which a person (not previously convicted) may be sentenced to imprisonment for fourteen years, **he** shall be liable to imprisonment for seven years;*

*(c) if it is not one included in paragraphs (a) and (b) but is one for which a person (not previously convicted) may be sentenced to imprisonment for ten years, **he** shall be liable to imprisonment for five years;*

*(d) in any other case, **he** shall be liable to imprisonment for three years……".*

Similarly based upon section 4 of Cap. 1:03, this section should have the following meaning:

"Penalties for assisting offenders

*5. (1) Where a person has committed an arrestable offence, any other person, who knowing or believing **him or her** to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede **his or her** apprehension or prosecution shall be guilty of an offence.*

(2) If on the trial of a person charged with an arrestable offence the jury are satisfied that the offence charged (or some other offence of which the accused might

on that charge be found guilty) was committed, but find the accused not guilty of it, they may find ***him or her*** *guilty of any offence under subsection (1) of this section of which they are satisfied that* ***he or she*** *is guilty in relation to the offence charged (or that other offence).*

(3) A person committing an offence under subsection (1) of this section with intent to impede another person's apprehension or prosecution shall on conviction be liable to imprisonment according to the gravity of the other person's offence, as follows-

(a) if that offence is one for which the sentence is fixed by law ***he or she*** *shall be liable to imprisonment for ten years;*

(b) if it is one for which a person (not previously convicted) may be sentenced to imprisonment for fourteen years, ***he or she*** *shall be liable to imprisonment for seven years;*

(c) if it is not one included in paragraphs (a) and (b) but is one for which a person (not previously convicted) may be sentenced to imprisonment for ten years, ***he or she*** *shall be liable to imprisonment for five years;*

(d) in any other case, ***he or she*** *shall be liable to imprisonment for three years.....".*

Noteworthy, this provision, unlike section 20 of the Legal Profession Act, imposes a penalty and like section 20, based upon the masculine rule, women should be included; but unlike section 20 precedents tend to show that women were included in provisions where a penalty was imposed and excluded when a benefit was add. Cases such as *Chorlton .v. Lings*, *R .v. Crosthwaite*, *Re Goodell* and *De Souza .v. Cobden*

corroborate these findings.[51] Based upon these findings therefore, this provision would be read as including women.

Finally, taking Section 10 of the Divorce Law Cap. 11:04 of TCI which reads:

"Grounds for decree of judicial separation

*10. A petition for judicial separation may be presented to the Court either by the "**husband"** or the **"wife"** on any grounds on which a petition for divorce might have been presented ……..".*

Based upon the Interpretation Act the word "husband" in section 10 signifying the masculine gender should import both genders, so therefore the first line of section 10 should be read, "A petition for judicial separation may be presented to the Court either by the "***husband or wife"*** or the "**wife"** on any grounds……". However, because the word "husband" was used, that word would not infer the feminine since there's a difference in applying this rule to pronouns as against specific words such as "husband". This rule was applied in the case of ***Automobile Fire and General Insurance Company of Australia Limited .v. Davey***[52] where the term "the insured or his wife" was not read as being referable to "the insured or her husband". The Court said that there was distinction between general references of pronouns such as "he" and "she" and specific words such as in that case "wife". Whilst the general interchangeability rule applies in relation to the former, in this case a different contract would have to be made to accommodate the feminine. Moreover, the words in section 4 provides that the application of the masculine rule applies except where "there is something in the subject or context inconsistent with the construction or unless it is therein otherwise expressly provided", and in this case both husband and wife were expressly provided so there's no need to apply the rule.

However, although not every jurisdiction employing the masculine rule will have those modifying words, it is imperative to note that all of the above provisions apply

[51] Many other cases support this premise though not included in this research; including Beresford-Hope .v. Lady Sandhurst (1889), 23 QBD 79, Wilson .v. Town Clerk of Salford (1868), L.R 4 C.P.398, Hall .v. Incorporated Society of Law Agents in Scotland (1901), 3F 1059.

[52] 54 CLR 534.

"unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided" and "where a contrary intention appears" respectively. Because of these words, the provisions can be interpreted in two different ways; on one hand that the words could mean that women were included at all times whenever the male was used except for those instances where there was something repugnant in the context or subject matter to this interpretation, and it was evident that a woman should be specifically excluded as was done in ***R .v. Crosthwaite***[53]*;* where the words of the Interpretation Act were interpreted as deliberately written in the manner to mean only males or secondly, based upon the wording of the particular provision there was no need to "read in" the feminine gender into the provision, for example in section 6(2) of the Drug Abuse (Prevention and Control) Act or section 10 of the Divorce Law. Except for the latter case, the words "a *contrary intention" and "unless there is something in the subject or context inconsistent with such construction"* clearly leaves the door open for the Court to deny rights to women by finding that a contrary intention existed. Therefore, women could still be excluded based upon personal biases of the authority or the judge and as a result, women are automatically believed to be excluded unless from the context it is obvious that they are meant to be included. And removing those words would not solve anything because it would still be open to the Courts to hold that the meaning or scope or words in a particular context differs from formal definitions.[54]

Therefore, the application of the masculine rule to all provisions outline above have highlighted the problems encountered upon interpreting a provision using the masculine rule; and whether the provision was interpreted to include or exclude women, every territory using the masculine rule retains the possibility that women will be discriminated against, treated unequally and excluded from its legislation. And although the cases outlined were determined years ago and arguably society has more or less relinquished those biases, it's imperative that drafters find an adequate replacement that will ensure women are included within legislation without

[53] (1867) 17 ICLR 463.
[54] Elmer A Dreidger, *"Are Statutes Written for Men Only",* p. 669-670.

discrimination or inequality and all readers of the statute book are clear as to who exactly is included within the law without having to use different rules to make such a determination.

3.2 The Two- Way Rule

The Two-Way Rule was the first attempt at reforming the Masculine Rule. It essentially stipulates that where the masculine gender is used within enactments it includes the feminine and the feminine, when used, includes the masculine. As such, wherever words importing the masculine gender are used it is deemed to include the feminine and where words importing the feminine gender are used, the masculine is also included. Many jurisdictions[55] have adopted the two-way rule in order to rectify the problems associated with the Masculine Rule, although the wording of the rule slightly varies depending upon jurisdiction. One such jurisdiction is the Virgin Islands (British) that specifies in section 36 of its Interpretation Act Cap. 136 that:

"(1) Words in an enactment importing (whether in relation to an offence or otherwise) persons or male or female persons shall include male and female persons, corporations (whether aggregate or sole) and unincorporated bodies of persons……..

(2) In an enactment-

(a) words in the singular include the plural; and

(b) words in the plural includes the singular."

Does this therefore mean that in every enactment in the BVI where a masculine term is used, it is to be read as including both genders? And is a similar interpretation applicable where the feminine is used?

Section 32C of the Police Act Cap. 165 can lend assistance in this regard. The Police Act Cap. 165 was amended in 2013 via the Police (Amendment) Act, 2013. The Amendment inserted a new Part IIIA and section 32C reads as follows,

[55] Including the United Kingdom, Canada.

*"A **person** who*

(a) obstructs or hinders; or

(b) aids or incites another to obstruct or hinder;

*a police dog working under the control of a police dog handler while the police dog handler is performing **his** duties as a member of the Force obstructs or, as the case may be, hinders that officer."*

Additionally the definition of "police dog handler" within the Act is as follows:

"police dog handler" means a member of the Force who at the material time

(a) is certified by the Commissioner as a police dog handler; and

*(b) is performing **his** duties as a police dog handler;"*

Taking section 36 in parts and applying the first limb, i.e. w*ords in an enactment importing (whether in relation to an offence or otherwise) persons or male or female persons shall include male and female persons"* to section 32C, wherever the word "persons" is used, in all enactments, it should be interpreted to include "male and female persons", therefore the word "person" in section 32C essentially means "male person and female person", for although the plural was used, section 36 specifies that this include the singular as well. Additionally, the pronoun "he" within the section should be interpreted to mean "he or she". Using this principle therefore and redrafting section 32C in light of section 36 of the Interpretation Act, it should be read as follows:

*"A **male or female** who*

(a) obstructs or hinder; or

(b) aids or incites another to obstruct or hinder;

a police dog working under the control of a police dog handler while the police dog handler is performing ***his or her*** *duties as a member of the Force obstructs or, as the case may be, hinders that officer.";* and

"police dog handler" means…….(b) is performing ***his or her*** *duties as a police dog handler".*

Also because section 36 allows words importing the feminine to include the masculine, section 32C could have been drafted with slight variations and still produce the same or similar results. If drafted as follows

"A ***person*** *who*

(a) obstructs or hinders; or

(b) aids or incites another to obstruct or hinder;

a police dog working under the control of a police dog handler while the police dog handler is performing ***her*** *duties as a member of the Force obstructs or, as the case may be, hinders that officer"* and the definition of "police dog handler" with a similar change, the section would have nevertheless included the masculine.

Therefore, from section 32C it is evident that the woman can be included both expressly and impliedly; impliedly, although via the same means as was done under the masculine rule, namely by being included within the masculine. And expressly, as the redraft shows that the alternative, i.e. the feminine could have been used to garner the same result even though that provision would be different from the implied inclusion since it will be the feminine that will import the masculine.

Finally, the second limb of the two-way rule provides for the inclusion of "corporations and unincorporated bodies of persons" by use of the word "persons, male or female persons". As such, does this mean where "he", "she" or "persons" are used, corporations and unincorporated bodies of persons are intended also? Is corporation intended where "person" and "he" is used in section 32C? To rectify this,

adherence will have to be given to the context within which the particular words were used. Can a corporation be considered as hindering or obstructing of aiding or inciting another corporation to obstruct or hinder a police dog under the control of a police dog handler? These are the difficulties magnified by the two-way rule. When the word "person" is used by itself instead of with clarifying modifiers, it may refer only to male, female or corporate entities, or it may refer to any two of those, or it may refer to all three.[56] "Person" is defined for legal purposes, as a (natural) human being or an (artificial) body corporate with recognized rights and duties but a legal person is an entity which is recognized as a person or unit for legal purposes: "anything" which is treated by the appropriate legal system as capable of entering legal relationships is a legal person, whether it can act and will for itself or must be represented by some designated human being(s).[57]

3.3 The All Gender Rule

Most common in jurisdictions such as New South Wales, Queensland and Western Australia is the second alternative to the masculine rule, i.e. the all-gender rule. This rule essentially provides that *"words importing a gender include every other gender",* i.e. masculine, feminine and neuter genders. Because the neuter gender allows words not classed as either masculine or feminine to be used, it is the inclusion of this that grounds the rule's neutrality. However, the rule doesn't require a change in drafting style and permits reciprocity among the masculine and feminine gender except that this inclusion is extended to the neuter gender as well. As such, the masculine gender can still be used to include the feminine; for example, the word "person" is frequently cited as an example of "neutral" language. "Person" is usually used to describe an entity without referring to any relationship in which that entity may be involved. But because this rule doesn't prohibit one gender to be subsumed in another, neutral words can still be used with a sex specific pronoun as shown in section 32C of the Police (Amendment) Act.

[56] Kathering de Jong, "*On Equality and Language,* p. 123.
[57] Ibid.

3.4 The Separate Gender Rule

Assuming that the BVI had a Separate Gender Rule within its Interpretation Act instead of the Two-Way Rule and section 32C of the Police (Amendment) Act remains as is, i.e.:

> *"A **person** who*
>
> *(a) obstructs or hinders; or*
>
> *(b) aids or incites another to obstruct or hinder;*
>
> *a police dog working under the control of a police dog handler while the police dog handler is performing **his** duties as a member of the Force obstructs or, as the case may be, hinders that officer."*

That section would only be applicable to men as the Separate Gender Rule does not allow the "reading in" of a gender but rather expressly prevents the use of either the masculine or the feminine to include the other.[58] As such, where words importing the masculine gender are used, such words are only given their "ordinary masculine meaning" and where words importing the feminine are used, those words are also given their ordinary meaning. As such, in order for section 32C to be applicable to women, the feminine pronoun would have to be used. Essentially, the separate gender rule would spell out specifically within the legislation what the two-way rule will imply when applied to the provision. For that reason, unlike the two-way rule and the all gender rule, the separate gender rule requires a change in drafting style.

For example, when redrafted applying the two way rule, section 32C should, upon proper application be read as follows:

> *"A **person** who*
>
> *(a) obstructs or hinder; or*
>
> *(b) aids or incites another to obstruct or hinder;*

[58] Sandra Petersson, *"Gender-Neutral Drafting: Recent Commonwealth Developments*", p. 7.

*a police dog working under the control of a police dog handler while the police dog handler is performing **his or her** duties as a member of the Force obstructs or, as the case may be, hinders that officer."*

It is this said result the separate gender rule will generate, except that, with the separate gender rule, the determination of whether the female or male gender should be included within the provision is not dependent upon the subjective interpretation of the reader of the provision, but rather the specific gender intended is "spelt out" within each provision in each enactment.

3.5 Comparative Analysis of the Alternatives to the Masculine Rule

In order to determine the effectiveness of the two way rule, the all gender rule and the separate gender rule in eliminating the problems associated with the Masculine Rule, the following questions must be answered in the affirmative; failing which, any of the above mentioned rules would not be an adequate replacement. Has the two-way rule, the all gender rule or the separate gender rule expressly included women within the enactment? Has the two way rule, all gender rule or the separate gender rule brought women to the forefront of the readers mind? Has either rule abandoned the subsuming of the feminine gender within the masculine thereby eliminating the possibility for discrimination? Has it allowed for the equal treatment of women within our legislation? And by the usage of either rule, can the reader of the provision determine with certainty the particular gender to which the provision applies?

3.5.1 Possibility for Discrimination

In determining which rule would be an adequate replacement of the Masculine Rule, the first issue to be resolved is whether the two-way rule, all gender rule or the separate gender rule will eliminate the possibility that a reader of the legislation, whether judge, authority or "an ordinary person" can discriminate against women?

Firstly, because the first limb of the two way rule has essentially retained the masculine rule and consequently permits male terms to be used, and in some jurisdictions are used, to represent women, there is still a possibility that provisions

can be interpreted to discriminate against women. As seen with the masculine rule, even though the Interpretation Act specified that wherever the masculine was used it included the feminine, judges nevertheless used their own biases/prejudices and interpretation to discriminate against women and excluded them from various activities, including admission to the bar ***(Re Goodell)***, right to vote ***(Charlton .v. Lings***), jury selection ***(State of Wisconsin .v. James Jagodinsky***), inter alia while including them for a penalty ***(De Souza .v. Cobden)***. And further, the ordinary citizen has had difficulties in understanding that even though a judge may have used the masculine it applied to the feminine as well ***(State of Washington .v. Wanrow)***. Regardless of the fact that these cases was decided under the masculine rule, the two way rule would produce a similar result because of its retention of the masculine rule as its first limb. Section 20 of the Legal Profession Act, section 5 of the Criminal Law Ordinance as well as section 10 of the Divorce Law, it is submitted, could have all been transported verbatim to a jurisdiction that uses the two way rule and those sections would nevertheless have the same meaning as it did under the jurisdictions using the masculine rule. Therefore, it is evident that, the two way rule does not improve the manner in which women are represented in legislation and thus it still retains the discriminatory effect perpetuated by the Masculine Rule. Moreover, if by the use of the masculine gender to include the feminine gender discrimination is perpetuated upon the female gender, surely there's a possibility that by the use of the feminine to include the masculine gender, discrimination can be perpetuated upon the masculine gender. A judge, authority or the "ordinary person" can, in reading a provision within which the feminine was used, determine that the masculine was not intended or included since the connotation of the words used are overwhelmingly feminine, thereby discriminating against the masculine gender. The adoption of an adequate replacement should enhance the law not open the door for added discrimination or difficulties.

Secondly, the all gender rule although it allows neutrality by eliminating the need to refer to either gender, it has failed to eliminate the possibility that the masculine can still be used to include the feminine. And because it has left this possibility open, it cannot be said that discrimination against women will certainly be eliminated from

our laws. But with the separate gender rule, because it allows only the masculine to import the masculine and the feminine to include only the feminine, it eradicates the discriminatory effect a provision is likely to have by subsuming one gender in another whether male or female. It is with this usage, the possibility that the reader will "misinterpret" the provision to exclude one gender over another will be erased, and with it, the likelihood of discrimination, as provisions would be clear about the particular gender included in, and excluded from, the provision.

3.5.2 Equal Treatment

Have women been equally treated under our laws, not only in terms of the outcome of the enactment but by the linguistic form of the enactment? When the drafter intended that a provision was applicable to the masculine gender, male terms were used to specify this, as such, in the name of "equal treatment" the feminine should also be specified when the same is intended. Christopher Williams in his work "*The end of the "Masculine Rule"? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland"* echoed similar sentiments when he stated that "ensuring gender equality is achieved [can be done] by inserting both male and female pronouns and adjectives".

However, it is imperative to note that although the two way rule has, as a means of signaling equality, allowed the feminine to import the masculine, amazingly, within the thousands of pages of laws of the BVI there are no instances where the feminine pronoun is used to refer to both the masculine and feminine gender; in fact words importing the feminine are only used when referring to a feminine importation such as wife[59] or when standing alongside the masculine. This suggests that although the rule has equalized the usage of either gender to include the other, one gender is still used as per norm; a phenomenon apparently not peculiar to the BVI. Sandra Petersson remarks in her work *Gender-Neutral Drafting: Recent Commonwealth Developments*[60]*,* supports this argument when she reiterated that, "regardless of the

[59] For example, section 124(3) of the Criminal Code, No.1 of 1997 of the BVI, "Where a marriage is invalid under section 24A of the Marriage Ordinance, because the wife is under the age of sixteen years, the invalidity of the marriage does not make the husband guilty of an offence under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief".

[60] Statute Law Review (1999) Volume 20(1):35.

two-way rule's physical arrangement, its parts are not valued equally in practice. The masculine rule achieves primacy through the non-use of the feminine rule. If female terms are rarely or never used to include males, the feminine rule serves no purpose. The masculine rule is functional, the feminine mere ornament". Therefore, the two way rule essentially functions as the masculine rule by mainly allowing the masculine to import the feminine and thereby the same problems evident with the masculine rule persist. And as such, even though it appears to offer an equal or neutral solution, ultimately the two-way rule is no solution at all.[61] Moreover, the inclusion of the male in the female referent does not operate to empower women or ensure equality before and under the law; nor does a legal decree that men are included in references to women make women and men equal.

On the other hand, the all gender rule, though importing all other genders, allows for any gender to include the other, whether male, female or neuter and thus cannot afford equal treatment since one gender is nevertheless used and there is no requirement for the mentioning of the other gender. So whether it is the two way rule or the all gender rule there remains the probability that women will not receive equal treatment under the law even in linguistic form. However, the separate gender rule, by allowing only the feminine to import the feminine and vice versa, would allow equal treatment to both the male and female genders and no one gender would be seen as superior to the other or more fundamental that the other.

3.5.3 Women's Guaranteed/Expressed Inclusion

The Separate gender rule requires considerable change to the text, as it expressly prohibits the use of either the masculine or feminine to include the other. If there is not an expressed inclusion, then the provision will not be applied to the excluded gender as every intended gender must be expressly stated. This would require a redrafting of legislation to ensure specific reference is expressly made to the intended gender within the particular statute. And by this usage women would be brought to the forefront of the reader's mind and as a result the effect of excluding women from the reader's landscape will be eliminated.

[61] Sandra Petersson, *"Gender-Neutral Drafting: Recent Commonwealth Developments*", p. 4.

Has women been expressly included within the legislation by the usage of the all gender rule? Because the all gender rule doesn't require a change in drafting style to expressly include women, it cannot guarantee their inclusion and although it permits the use of neutral words, because these "neutral words" are often coupled with a sex specific pronoun, a usage which the all gender rule allows, words such as "everyone", "person" and "any person" though considered to include women, when coupled with a sex specific term (whether masculine or feminine), has the effect of making neutral words sex specific thus making it unclear as to who is included and excluded from the provision. Katherine de Jong in her work "*On Equality and Language"*[62]*,* reinforces this when she argues that "the combination of a neutral word with a masculine pronoun…has the effect of making the neutral word masculine-it becomes identified with maleness in the mind of the reader. Thus neutral words will continue to automatically exclude women as a *matter of perception* if masculine pronouns are used". Therefore, in order to ensure inclusion in such a situation, non-neutral terms like "she" has to be added to (ambiguously) neutral terms like "he" in order to ensure that a reference is understood unambiguously to include both females and males.[63] But to add "she" to terms like "he" to ensure inclusion is in effect entering the realm of the separate gender rule. Therefore, it is considered inadequate because although it permits the use of the neuter gender, it has failed to also switch to neutral pronouns.

On the other hand, although women can be expressly included by the use of the two way rule, because the rule allows either gender to include the other, there is no requirement that women must be expressly mentioned; and once there's no expressed inclusion of the feminine gender there remains a possibility for guaranteed exclusion. What is more is that "corporation or unincorporated bodies" can also be imported by the masculine or feminine gender under this rule. As such, masculine, feminine or a neutral word can be a (natural) human being or an (artificial) body corporate with recognized rights and duties. Therefore, it may refer only to male, female or corporate entities, or it may refer to any two of those, or it may refer to all three. A reader has to depend upon the context within which the word was used to exclude one or the other.

[62] Volume. 1 Can. J Women & L. 119 1985-1986, p. 132.
[63] Kathering de Jong, "*On Equality and Language"*, p. 123.

And as long as the reader of a provision has the discretion to exclude or include a particular gender there is no guarantee that the feminine will be included. The double (triple) meaning of "he" , for example, means that wherever the word "he" is used it will produce ambiguity, for it could be understood as referring to either male only or to both male and female persons and the ordinary person will have difficulty understanding to whom a specific piece of legislation applies. And even though the rule stipulates that references to male persons is to be understood as including a reference to female persons "unless a contrary intention appears", this does not turn sexist words like "his" or "he" into words such as "her" or "she" or words that are gender neutral either in meaning or in effect but rather leaves the door open for a finding of a "contrary intention" to exclude women.

In concluding therefore, it is submitted that, because the separate-gender rule demands a change in drafting style[64], unlike the two-way and all gender rule, it would definitely bring an end to the practice of using male terms to represent women in legislation which will in effect eradicate the discrimination against women and the possibility of it, guarantee that women will be expressly included within legislation and provide for equal treatment of women under the law while at the same time promoting clear, precise and umambiguous legislation. Therefore, a reader of a particular piece of legislation using the separate gender rule can confidently determine whether the masculine or feminine gender is included in, or excluded from, the provision. However, the Separate Gender Rule has drawbacks.

3.6 Drawbacks of the Separate Gender Rule

Firstly, using the alternate "he" or "she" contravenes the legislative drafting convention that stylistic variations are to be avoided.[65] And a legislative sentence is likely to be easier to understand if it is not cluttered with phrases such as "he or she" (she or he) or his or her (her or his). Further, besides being unduly cumbersome, this solution is also considered as not being entirely gender neutral since one of the

[64] Sandra Petersson, *"Gender-Neutral Drafting: Recent Commonwealth Developments*", p. 7.
[65] Paul Solembier, *"Legal and Legislative Drafting",* p. 149.

pronouns must come first and although alternating "he or she" and "she or he" is a possibility, maintaining this alternation as new provisions are inserted into, or existing provisions are deleted from, a draft may be an unattractive addition to the drafter's burdens.[66] Also, if "he" and "she" were used alternately in the same text, they would be presumed to refer to different antecedent nominal subjects, leading to confusion or, at the very least, ambiguity in the interpretation of the statute in question.[67]

Secondly, using the Separate Gender Rule would result in longer legislation. Sandra Petersson in her work *Gender-Neutral Drafting: Recent Commonwealth Developments* remarking on the additional pages that may be added to the Australian statute book remarked that, "an estimated 50,000 occurrences of masculine pronouns [are] in commonwealth legislation. Amending each occurrence by adding the corresponding feminine pronoun has been estimated to add 150 pages to the Australian statute book". A similar occurrence would be imminent within any territory wishing to add the feminine gender to their statute book, and the longer the statute the more difficult it is for the reader to navigate and consequently understand, whether judge, authority or the ordinary person. Paul Solembier in his work *"Legal and Legislative Drafting"*[68] supports this proposition when he argues that "the longer a statute is the more difficult it becomes for readers to use…….overly long statutes can also mislead readers because their length and detail obscures the statute's main messages".

The cost associated with this 'upgrade' is another drawback of the Separate Gender Rule. While the cost difference between drafting new legislation and using this rule is at most minimal; a programme to change existing legislation adds a new expenditure to the "maintenance cost" of the statute book.[69] And because the usage of the Separate Gender Rule will increase the statute book, there will also be an additional cost attached to production, since additional pages will have to be produced in order to accommodate the change. While the cost of this "upgrade" should not be a

[66] Ian Mc Leod, *"Principles of Legislative and Regulatory Drafting",* p. 77.
[67] Paul Solembier, *"Legal and Legislative Drafting",* p. 149.
[68] Paul Solembier, *"Legal and Legislative Drafting",* Chapter 10, p. 406.
[69] Sandra Petersson, *"Gender-Neutral Drafting: Recent Commonwealth Developments*, p.8

deterrent if discrimination, exclusion and inequality will cease, when considered in light of all the other drawbacks highlighted, it is more efficient to adopt a solution that will deliver clear, precise and unambiguous legislation that doesn't discriminate, exclude or has scope for unequal treatment while at the same time doesn't use cluttered phrases, contravene legislative drafting conventions or causes overly long statutes that would obscure the main message of the statute.

Finally, because with the Separate Gender Rule words importing a particular gender only includes that particular gender, there is no need to place a rule within the Interpretation Act. As noted, definitions serve three purposes, namely delimiting, extending and narrowing; but with the Separate Gender Rule there is no extension, narrowing, or delimiting, words are simply attributed their ordinary meaning. And although embodying a standard definition in a single Interpretation Act contributes to brevity of other statutes and brings consistency of expression, because such a provision i.e. the separate gender rule, would not serve to advance the successful communication of law, it should not be there. Moreover, if by reason of a Court decision or the evolution of drafting techniques, [this] rule of interpretation must be amended or added, an interpretative rule requires amending, policy makers can make the change in a single statute that applies to the entire statute book but with the separate gender rule the entire statute book have to be combed through for applicable provisions and multiple changes will have to be made.

3.7 Deviation by Drafters

In some jurisdictions even though the masculine rule is adopted, drafters nevertheless in recent times, in an effort to achieve gender neutrality, have used both the masculine and feminine pronoun within the specific provision. One such jurisdiction is Grenada, where the Interpretation Act specifies that, "in every written law, except where a contrary intention appears, words and expressions importing the masculine gender include females. Section 6(2) of the Drug Abuse (Prevention and Control) Act[70] *"Subject to section 39, it is an offence for a person to have a controlled drug in* ***his or her*** *possession…"* while section 12(3) of that country's Legal Profession Act of the

[70] Chapter 84A, Revised Edition Issue 2/2012.

said year reads, *"The Chairperson shall preside at all meetings of the Council at which **he** is present....."* This conflict with the interpretive rule, though embodied in different pieces of legislation, leads to inconsistency within the statute book and thus adds to the confusion as to how gender should be interpreted and also circumvents one of the main reasons for placing the rule within the Interpretation Act, i.e. to avoid the temptation to "unnecessarily improve upon" it.

But this phenomenon is not peculiar to jurisdictions using the masculine rule for despite the two way rule within in the Interpretation Act of the BVI, drafters have also in recent times sought to expressly include both genders within the various laws. And while such actions will no doubt guarantee the inclusion of women, it produces redundancy within the law leading to difficulties where clarity, precision and ambiguity are concerned. For example section 88A (7) of the said Police (Amendment) Act reads:

*"Where fingerprints have been taken pursuant to an application under this section, such fingerprints shall be destroyed or handed over to the applicant at **his or her** option."* If the strict interpretation of the Act is applied in accordance with section 36 redrafting this provision to include the definition of masculine and feminine terms will produce the following text:

*"Where fingerprints have been taken pursuant to an application under this section, such fingerprints shall be destroyed or handed over to the applicant at "**his or her" or "her or his"** option."* This certainly could not be the intent of the drafter, but nevertheless if the Interpretation Act is strictly applied, this is the result obtained. And notably this provision is within the said Police Act, where the masculine was used to import both genders in other provisions. And even though an Act will be applied unless there's a "contrary intention" even if those words are omitted[71], since it may appear not only from the expressed terms or necessary implication of a legislative provision but from the general character of the legislation itself[72], this

[71] *Matter of the Fourth South Melbourne Building Society (1883) 9VLR (Eq) 54; Buresti v Beveridge (1998) 88 FCR 399 at 40).*
[72] Mc Hugh J in *Pfeiffer v Stevens (2001) 209 CLR 57.*

practice by drafters does nothing but causes lack of clarity and precision within our laws which will in effect lead to ambiguity.

CHAPTER 4
THE ULTIMATE SOLUTION

Although, the best rule to replace the masculine rule is the separate gender rule, that rule is not without its difficulties. What then is the appropriate solution to gender specific language within legislation when referring to both genders? Can legislation be drafted in such a manner that drafters would not feel compelled to depart from interpretive rules in order to achieve gender neutrality? And how do we remove discrimination, exclusion and inequality from our laws while ensuring laws are clear, precise and unambiguous?

To adequately rectify the problems outlined, Governments' must follow three essential steps. Firstly, Governments' must embark on a Consolidation and Revision exercise. This exercise essentially involves combining or unifying into one mass or body, all legislative provisions on a particular subject into a single statute, often with minor amendments and drafting improvements. These are then collected, arranged and reenacted as a whole by the legislative body. While this process will have a cost attached to it, every territory would require, at some stage, a Consolidation and Revision exercise as long as the legislature continues to amend old laws and enact new ones. Therefore Governments can use this inevitable obligation as an opportunity to bring an end to the discrimination, exclusion and inequality while simultaneously achieving clear, precise and unambiguous legislation without incurring an additional cost associated solely with a "gender neutrality" upgrade.

Secondly, since one of the requirements in carrying out the Consolidation and Revision exercise is to make "drafting improvements" to statutes that require it, Governments must improve those provisions that refer to a particular gender as a means of importing or including another. In making these improvements, drafters must redraft those provisions by avoiding the use of pronouns entirely and those words that infer a particular gender, i.e. by using gender neutral language. Although the use of non-discriminatory [gender neutral] language requires careful choices to

prevent unintended over-inclusiveness, the objective remains an important one: the accurate expression of ideas in legal writing.[73] And by making the important switch to gender neutral language this will ensure that the content of legal discourse is changed to ensure the equality of women, eliminate discrimination against women, ensure the construction of a legal system that includes and empowers both genders and bring women to focus. Making these improvements using gender neutral language can be achieved by using the techniques listed above, namely, by repeating the noun, by using a defined term, use of plural nouns, by replacing the noun with a letter, by replacing the personal pronoun with "the" etc. But, there is no single best manner to achieve this and most rewrites will require the use of a combination of different techniques to achieve the most readable result[74].

Evidently, drafting without the use of pronouns and without using words that infer a particular gender is difficult, but this can be achieved. This practice is visible in a number of jurisdictions that have incorporated many of the aforementioned techniques within their laws; these include the UK and Australia. For example section 10 (1) of the Academies Act, 2010 of the UK reads, *"Before entering into Academy arrangements with the Secretary of State in relation to an additional school,* ***a person*** *must consult such persons as* ***the person*** *thinks appropriate".* And section 56 of the Crimes and Courts Act, 2013 that inserted a new section 5A into the Road Traffic Act 1988 reads,

"(1) This section applies where a person ("D")

(a) drives or attempts to drive a motor vehicle on a road or other public place,

(b) is in charge of a motor vehicle on a road or other public place;

and there is in D's body a specified controlled drug."

Also section 27 (1) of the Work Health and Safety Act, 2011 of Australia: *"If a* ***person*** *conducting a business or undertaking has a duty or obligation under this Act, an officer of* ***the person*** *conducting the business or undertaking must exercise due*

[73] Mary Jane Mossman, *"Use of Non-Discriminatory Language in Law",* p. 8.
[74] Ibid, p. 148.

*diligence to ensure that **the person** conducting the business or undertaking complies with that duty or obligation".* These provisions ignore the use of pronouns or a reference to a particular gender thus cementing the argument that drafting in this manner is achievable.

Moreover, embarking on a small exercise of redrafting the provisions alluded to above from the various jurisdictions using different techniques will support this argument as well. These are as follows:

Section 32C of the Police (Amendment) Act

> *"A **person** who*
>
> *(a) obstructs or hinders; or*
> *(b) aids or incites another to obstruct or hinder;*
>
> *a police dog working under the control of a police dog handler while the police dog handler is performing the duties of a **police dog handler** as a member of the Force obstructs or, as the case may be, hinders that officer."*
>
> ***Or*** *"A **person** who*
>
> *(a) obstructs or hinders; or*
> *(b) aids or incites another to obstruct or hinder;*
>
> *a police dog working under the control of a police dog handler while performing duties as a member of the Force obstructs or, as the case may be, hinders that officer."*

Section 6 of the Drugs Abuse (Prevention and Control) Act:

> *"Subject to section 39, it is an offence for a person to have a controlled drug in contravention of subsection 1".*
>
> ***Or** "Subject to section 39, a person who possesses a controlled drug contravenes subsection (1)".*

Or *"Subject to section 39, possession of a controlled drug by any person contravenes subsection (1)".*

Section 20 of the Legal Profession Act (TCI),

*"**Secretary and staff of Bar Council***

20. (1) The Bar Council shall employ a person to be the Secretary of the Bar Council to perform the functions of Secretary under this Ordinance and such other functions as may be required by the Council.

(2) The Bar Council may employ such other staff as it considers necessary to carry out its functions."

Section 5(1) and (3) of the Criminal Law Ordinance:

"Penalties for assisting offenders

*5. (1) Where a person **('D')** has committed an arrestable offence, any other person **('A')** who, knowing or believing **D** committed the offence or some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede **D's** apprehension or prosecution commits an offence.*

*(3) If convicted, **A** is liable to imprisonment according to the gravity of **D's** offence, as follows-*

*(a) if that offence is one for which the sentence is fixed by law, **A** is liable to imprisonment for ten years;*

*(b) if it is one for which **D** (if not previously convicted) may be sentenced to imprisonment for fourteen years, **A** is liable to imprisonment for seven years;*

*(c) if it is not one included in paragraphs (a) and (b) but is one for which **D** (if not previously convicted) may be sentenced to*

*imprisonment for ten years, **A** is liable to imprisonment for five years;*

*(d) in any other case, **A** is liable to imprisonment for three years……".*

And finally, to complete the process of ensuring gender neutrality within our laws, while at the same time ensuring that laws are clear, precise and unambiguous, the Masculine Rule must then be repealed from the Interpretation Act without replacement, or as in certain instances like the BVI, the alternative to the masculine rule. The deletion of the rule is imperative since regardless of how drafting practices are changed as long as there's an interpretation provision within the Interpretation Act that stipulates the manner in which gender should be interpreted in all other statutes and that interpretation permits the masculine gender to include the feminine or vice versa, there remains a possibility that discrimination, exclusion and inequality will ensue. Additionally, if drafting practices conflict with the interpretive rule laid down by the Interpretation Act, difficulties will arise that can jeopardize clarity, precision and unambiguity within legislation. Therefore, the opportunity provided by the completion of a consolidation and revision exercise to 'redraft' the Interpretation Act to bring it in sync with the 'new' revised edition of the laws, should be seized. Paul Solembier in his work *"Legal and Legislative Drafting*" lends support to the proposal outlined when he reiterated that, "problems posed by changes in statutory terminology or drafting practices can sometimes be resolved by conducting a consolidation and revision of the entire statute book [and] any consolidation of existing statute law, if combined with a review of terminology, also provides an excellent opportunity to renovate an Interpretation Act, since the terminology in the newly revised statutes can be standardized in accordance with newly enacted interpretive rules". The amendment to the Interpretation Act can be facilitated via a Miscellaneous Amendment Bill that will be needed at the end of the Consolidation and Revision exercise.

CHAPTER 5
CONCLUSION/RECOMMENDATIONS

In concluding therefore, because the law uses words as the medium to communicate the intended meaning to the reader of the legislation, it is important that the language used is clear, precise and unambiguous while simultaneously fostering a change that will bring an alt to discrimination against women ***(Re Goodell)***, the denial of rights ***(Chorlton .v. Lings)***, exclusion ***(State .v. Wanrow)***, and inclusion when a penalty is instituted but exclusion when conferring a benefit ***(De Souza .v. Cobden).*** Therefore, the ultimate solution is to conduct a consolidation and revision exercise; and in carrying out this exercise, endeavour to make improvements to the provision(s) containing a reference to one gender as importing another, by refraining from the use of gender specific terms and the use of pronouns entirely. This can be achieved by employing techniques such as repeating the noun, using a defined term, use of plural pronouns, use of a plural pronoun followed by they, replacing the noun with a letter, by omitting the pronoun, by using the passive voice, etc. After completing the consolidation and revision exercise, an amendment must then be done to the Interpretation Act to delete the masculine rule or any of its alternatives being used by the particular jurisdiction. This is considered essential since a change in drafting practice with retention of an interpretive rule that allows one gender to be subsumed in another, also retains the possibility that discrimination, exclusion and inequality will ensue; and also the possibility that the rule will cause conflict with the goal of clear, precise and unambiguous legislation. The deletion of the rule can be facilitated by a miscellaneous amendment Bill.

In addition, the solution is considered to be the most optimum solution since even though the most appropriate rule to adopt from the masculine rule's alternatives in order to eliminate the possibility of discrimination, exclusion or inequality while simultaneously ensuring laws are clear, precise and free from ambiguity is the Separate Gender Rule, sentences are easier to understand without being cluttered with

"he or she", longer legislation can mislead readers and obscure the main message, monies can be saved and finally, with this alternative, there is no need to have such a rule within the Interpretation Act since words are merely given their ordinary meaning. But regardless of the flaws associated with the separate gender rule, the other two alternatives weren't found to be adequate because, on one hand, the two way rule, by its first limb, still allows male terms to represent women and therefore there's the possibility that the problems associated with the masculine rule will ensue. And even though one limb permits the feminine to be used to include the masculine and thus has provided women with some equality, this limb is hardly, if ever used. So in essence the two way rule fundamentally functions as the masculine rule disguised. Moreover, including the male in the female referrent does not make women and men equal nor does it turn masculine words into words that are gender neutral in effect or meaning. Also, if by the use of the masculine to include the feminine, discrimination can be perpetuated upon the feminine, surely by the use of the feminine to include the masculine, discrimination can be perpetuated upon the masculine. Additionally, because the two way rule allows the female or male to mean male only, female and male, sometimes female, male and corporation, it lacks precision and clarity and can consequently lead to ambiguity since sometimes a pronoun can refer to male and female or corporate entities or it may refer to any two of those or all three. And although the rule embodies the words "unless there's a contrary intention", this solves nothing because it leaves it up to the reader to exclude or include either gender depending upon the context of the provision. And deleting these words would also not solve anything since those words need not be expressly stated as they can be inferred by necessary implication or the general character of the legislation. Therefore, the two way rule is ineffective in eliminating the problems associated with the masculine rule.

On the other hand, although the all gender rule allows other genders to be imported by the use of either masculine, feminine or neuter genders, it doesn't prohibit the masculine from importing the feminine. As such, it doesn't demand the expressed inclusion of the feminine gender; and because of this, it suffers from the two way rule's problem of ineffectiveness. Moreover, even though a neutral word such as "person" is used it is often coupled with a sex specific word and this combination has

the effect of making the neutral word masculine as it becomes identified with maleness in the mind of the reader. And therefore in essence, it has solved nothing except include another gender within the interpretive rule. Therefore, regardless of the whether it is the two way rule or the all gender rule being used, when applied to a provision both still leaves open the possibility that a Court or any official can deny rights and privileges from women that were clearly intended by the provision based upon the lack of precision and clarity as to the particular gender intended; and the "ordinary man" will have difficulty in deciphering whether the male or female is included and whether male, female and corporations are intended.

Furthermore, the practice by drafters of departing from the interpretive rule within the Interpretation Act in an effort to ensure gender neutrality only compounds the problem instead of alleviate it, since if those rules are applied in those specific provisions, redundancy will result. And again, reliance is made on the particular context within which the words are used in order to make a determination as to what is included and excluded.

The BVI, TCI and Grenada provisions are only used as examples to reinforce the arguments outlined but the findings outlined by their application are valid to all jurisdictions that use the masculine rule, two way rule, all gender rule or separate gender rule.

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