

Gender-neutral drafting techniques

The Office of the Parliamentary Counsel has the following policy on gender-neutral drafting:

Government Bills are to 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. It is recognised that in practice a flexible approach to this change will need to be adopted (for example, in at least some of the cases where existing legislation is being amended): see the statement of the Leader of the House of Commons on 8.3.07.

See further “The implementation of a policy of gender-neutral drafting” (paper of 19.6.07).

This paper is intended to aid implementation of that policy by illustrating possible ways of achieving gender-neutral drafting. The approaches discussed are not exhaustive and should not be taken as “recommended approaches”.

In particular, the examples are not being held up as examples to be followed: they are just examples of techniques that have in fact been used. Readers should form their own judgment about them.

The Drafting Techniques Group would very much welcome further suggestions.

I. GENDER-SPECIFIC PRONOUNS - “he” and “she”; “his” and “her” etc

1. Repeat the noun

Examples

“...“earnings, in relation to a person, means sums of any of the following descriptions that are payable to the person in connection with the person’s employment...” (Pensions Act 2008 section 13(3)).

“The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so.” (Planning Act 2008, section 6(1)).

Comment

Constant repetition of a noun or phrase in a way which would not occur in speech is unlikely to be thought to be “plain English” and might detract from readability.

This is particularly the case with a long phrase like “the Secretary of State”, where in speech one would instinctively say “he” or “she”.

2. Use a defined term

Long compound nouns are likely to be unsuitable to be repeated. So it may be possible to find a shorter defined term which can be repeated.

Example

“... may give a youth conditional caution to a child or young person (“the offender”) if (a) the offender...” (Crime and Disorder Act 1998, section 66A, as inserted by Schedule 9 to the Criminal Justice and Immigration Act 2008).

It may be possible to use a defined term for a lengthy official title (for example, “the Comptroller” for the Comptroller and Auditor General).

Comment

This kind of approach reduces, but does not entirely eliminate, the awkwardness of a repeated noun. Consider whether it is really worthwhile to require the reader to substitute the actual wording intended for the defined term: it may only be worthwhile if the actual wording is long and would have to be repeated a lot.

Care also needs to be taken that the alternative noun does not import an unwanted or tendentious meaning.

3. Use “he or she” etc for individuals

Examples

“...had he or she not died” (Pensions Act 2008, Schedule 5, paragraph 7(1)).

“A person holds and vacates office as a member of LBRO in accordance with the terms and conditions of his or her appointment” (Regulatory Enforcement and Sanctions Act 2008, Schedule 1, paragraph 6(1)).

“...an application by her or him for child support maintenance” (Child Maintenance and Other Payments Act 2008, section 15(a)),

Comment

In many ways this is a natural solution. But it is only possible where natural persons are involved. Some may object that “he or she” still betrays a gender bias (though sometimes the context may suggest a case for the feminine pronoun preceding masculine, as in the example above).

It can be awkward where “he or she” needs to be repeated a lot. “Himself or herself” is particularly unsuitable for frequent repetition.

4. Use “he, she or it” etc for all persons

Where a non-natural person needs to be referred to as well as an individual, this is possible. But it is likely to be cumbersome unless used very sparingly. The lack of examples here is perhaps telling.

5. Use the plural pronoun: they etc

Examples

“References in this Part to a person being dealt with for or in respect of an offence are to their being sentenced...in respect of the offence” (Counter-Terrorism Act 2008, section 61(1)).

“...references in this Part to the time at which a person is dealt with for an offence are to the time at which they are first dealt with...” (Counter-Terrorism Act 2008, section 61(2)).

“The chair of the Boundary Committee for England holds office as chair...in accordance with the terms of their appointment” (Local Democracy, Economic Development and Construction Bill, Schedule 1, paragraph 2(3)).

Comment

This use of the plural pronoun is thought by some to be grammatically incorrect, though it reflects common usage and is well-precedented in respectable literature over several centuries (*OED* (2nd ed, 1989) records the usage without comment, *SOED* (5th ed, 2002) notes “considered erron. by some”).

This usage may be less obtrusive in the case of “them” or “their”: “they” may require a verb in the plural form, which some readers may find disconcerting.

Given the mismatch between singular and plural, care needs to be taken that “they” or “them” clearly relates to the noun in question.

There may also be a risk that statutory use of “they” to connote a singular subject might cast doubt on cases in legislation where it is being or has been relied on unambiguously to connote a plural one.

6. Use a plural noun followed by “they”

Example

“The regulations may provide that participants may only carry on activities... if they hold a permit” (Climate Change Act 2008, Schedule 2 paragraph 10).

Comment

Section 6(c) of the Interpretation Act 1978 may facilitate use of this technique. But take care to ensure that the plural does not allow in an ambiguity that would be avoided if the singular were used.

7. Replace the noun with a letter

Rather than finding an alternative noun, it may be possible to use a letter.

Examples

eg “P was in “qualifying detention” at any time when P was detained in a prison...” (Criminal Justice Act 1988, section 113B(2) as inserted by section 61(7) of the Criminal Justice and Immigration Act 2008).

“If a person (“S”) who is registered under this Chapter as a service provider in respect of a regulated activity carries on that activity while S’s registration is suspended, S is guilty of an offence.” (Health and Social Care Act 2008, section 34(1)).

Comment

Use of a letter in place of a noun is not exactly “plain English”. It requires the reader to go through the mental hoop of substituting the actual noun being referred to and may thereby decrease readability. Consider whether this is worthwhile if the letter is used only a few times; or replaces a noun which is itself reasonably short. (There may of course be other reasons for using letters - in formulae, or where one is referring to two or more people of the same description (person 1 and person 2). But that is another matter.)

If a letter is used, it helps if it is reasonably intuitive, eg “P” for purchaser, “V” for vendor, rather than random tags eg “A” and “B”. But again take care not to use a letter which might have unwanted connotations (eg “V” for victim, even if the word “victim” is never used).

8. Substitute “the” or “that” for the personal pronoun

Examples

“...local police area”, in relation to the offender, means the police area in which the home address is situated” (Criminal Justice and Immigration Act 2008, section 112(5)).

eg “the reasonableness or otherwise of that belief” (*rather than* “his belief”) (Criminal Justice and Immigration Act 2008, section 76(4)).

Comment

This approach on occasion may risk losing the link between the noun and the person being spoken of and thereby lose clarity, or at least may give the reader an unexpected jolt.

9. Omit the pronoun

Examples

“...circumstances which justify doing so” *rather than* “circumstances which justify his doing so” (Criminal Justice Act, section 133A(4), as inserted by Criminal Justice and Immigration Act 2008, section 61(7))

...“immediately before death” *rather than* “immediately before his death” (Child Support Act 1991, section 43A(1), as inserted by Child Maintenance and Other Payments Act 2008, s. 38).

This technique relies on the reader using the context to supply the omitted pronoun. Care is needed to ensure that resulting proposition does not become uncertain, apply too widely or read unnaturally; and to ensure that the omission does not affect the operation of caselaw to supply the meaning of the phrase concerned or the meaning as generally understood by readers (and lawyers in particular).

10. Omit the phrase which requires the pronoun

It may be worth considering whether the phrase requiring the personal pronoun is really worth having.

Example

“the Secretary of State may” *rather than* “the Secretary of State may, if he thinks fit”.

Comment

This involves taking a view as to the redundancy of the words omitted. Obviously care needs to be taken to ensure that the omission does not affect operation of caselaw or sit unhappily with approaches adopted elsewhere in legislation being amended.

11. Use the passive

Example

“... explaining why the regulations have not been laid” *rather than* “...explaining why he has not laid the regulations”

Comment

This has its attractions - but excessive use of the passive is usually thought to detract from “readability”.

12. Use “who” instead of if...he

Examples

“This section applies to a jobholder who...” Pensions Act 2008, section 3(1)

“A person commits an offence who...” (Counter-Terrorism Act 2008, section 54(1))

“A person who—

(a) obstructs a person acting under section 11A(7) or (11(C)(2),

(b) remains on closed premises, or

(c) enters closed premises,

commits an offence.”

(Section 11D(2) Anti-Social Behaviour Act 2003, as inserted by Criminal Justice and Immigration Act, Schedule 20).

Comment

One danger of the approach in the last example is that it postpones the operative words to the end, making the conditions a “sandwich” in the middle of the sentence. That can distract from readability if the conditions go on for too long.

13. Use an impersonal construction

Examples

“It is an offence for a person to...” (Criminal Justice and Immigration Act 2008, section 63(1)).

“A member may...be removed from office by Her Majesty on any of the following grounds-

- (a) failure to discharge the functions of membership...;
- (b) failure to comply with the terms of appointment...;
- (c) conviction of a criminal offence...”.

(Local Democracy, Economic Development and Construction Bill, Schedule 1, para. 1(8)).

Comment

Again, care needs to be taken not to produce an unnatural dislocation between the person and the thing or event being spoken of.

14. Use a present or past participle

Examples

“Before giving such guidance...” rather than “Before he gives...” (Climate Change Act 2008, section 40(2)).

eg “...a person is not to be taken to have a conflict of interest for these reasons alone- (a) being or having been previously been engaged...” rather than “merely because he is or was previously engaged...” (Pensions Act 2008, Schedule 1 paragraph 2(6))

II. GENDER-SPECIFIC NOUNS

The gender-specific noun most likely to be encountered is “chairman”.

Possible replacements include “chair” (eg Pensions Act 2008, Schedule 1) or “person appointed to chair” (eg Child Maintenance and Other Payments Act 2008), Schedule 1).

These approaches can be combined by using “chair” as a defined term: “a person appointed...to chair the Committee (“the chair”)...” (Climate Change Act 2008, Schedule 1).

It may be possible to use a different word entirely, such as “convenor” or “president”. But query whether these necessarily have the same connotations as “chair” (ie consider clarity and effectiveness).

There are some nouns which in principle have feminine forms but which office policy regards as gender-neutral: “manager”, “actor”, “testator”, “executor”.

*Drafting Techniques Group
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