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BY ALISON WILKINSON

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Why Language Matters: Gender Diversity in Legal Writing

The Primary Tool of Law is Language

There are entire textbooks drafted on the construction of statutes. Lawyers and judges study the word choice of contracts, legislation, and case law. Passages of judgments are analyzed endlessly to match an argument or intended purpose. We underline and bold passages that capture the meaning of a law or a judicial decision.

Words are the bricks with which we work. For gender diverse individuals, these bricks have often constructed a wall.

A Word Can Change Everything

In the legal profession — even more than in other professions — *the words we choose* are fundamentally important.

Words don't just shape the law; they are the law. They dictate application and enforcement. For example, the difference between *shall* or *may* can impact whether a person obtains an outcome or not. The wrong word can result in injustice and exclusion.

This is often the experience of gender diverse individuals and those in non-traditional families. Take for example a recent case involving a polyamorous triad.¹ The British

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Columbia *Family Law Act* does not acknowledge three parents if a child is conceived through sexual intercourse.² As a result, the impacted family had to apply to court to have a third parent recognized. For children conceived through sexual intercourse, the British Columbia *Family Law Act* only considers a *birth mother* and a *biological father*.³ The use of these words is to the exclusion of all others. Justice Wilkinson recognized this fact in stating that the law did not contemplate this family.⁴ As a result, the Court had to use its *parens patriae* jurisdiction to legally acknowledge what they lived every day.

Language Shapes Attitudes

The words we use to describe our world also impact how we see it.

Certain words exude judgement and negative connotations. Words that make us cringe now were commonly used not so long ago.

The problem is not limited to discriminatory words. It is not limited to people who actively hold negative beliefs and stereotypes about gender diverse people.⁵ These things can exist in the language of well-meaning individuals as well.⁶ Accidentally misgendering someone, for example, can cause pain and distress. Only using he/she constructions in our writing overlooks the existence of an entire group of people. Human rights law understands this fact — it is not about intentions, but real-world implications.⁷

Many have retaken and reframed the language used to describe them. This work has been undertaken by various groups including:

- Persons with disabilities;
- First Nations, Inuit, Métis, and Indigenous people;
- People of diverse races and places of origin;
- People with diverse sexual orientations and gender identities;
- Those over 65.

This is a process of restoring identity and dignity. It is also about respecting how people understand and express their experiences.

For example, we capitalize First Nation and Indigenous to recognize the unique governmental, spiritual, and cultural identity of Indigenous Peoples.⁸ Where imposed labels diminish power, chosen language can increase it.

We can only discover chosen language *by asking*. We must restore the power of each individual to identify who they are, and what they want to be called.

There is no one-size-fits-all for identity. It is by its nature unique. And by its nature, it must be determined by those who hold and embody that identity. In other words, we must ask, consult, and not assume to know.

Writing is an Actionable Step

For the same reason, it matters what we write. When we address our letters ‘dear sir or madam’ we live in a world of sirs and madams. By changing our language to reflect a broader spectrum, we are recognizing gender diversity.

For example, a recent Human Rights Tribunal decision held that failure to use a person’s correct pronouns in the workplace is discrimination under the *BC Human Rights Code*.⁹

This decision clearly communicates why it is important to use the correct pronouns for individual dignity. The Tribunal stated:¹⁰

Like a name, pronouns are a fundamental part of a person’s identity. They are a primary way that people identify each other. Using correct pronouns communicates that we see and respect a person for who they are. Especially for trans, non-binary, or other non-cisgender people, using the correct pronouns validates and affirms they are a person equally deserving of respect and dignity.

Our word choice is an actionable step that each of us can take and is one of the most powerful gestures of care we can offer one another. When we speak of persons who become pregnant, we are recognizing that pregnancy is not exclusive to cisgender women. When we use examples without gendered pronouns, we are reflecting a world that contains more than binary ideas of gender. When we ask about someone’s partner as opposed to husband or wife, we give space by not assuming heteronormativity.

These represent adjustments each of us can make. They are choices that indicate our willingness to learn, to change, and to recognize the dignity of others.

As we have seen, every word has extraordinary power to represent or exclude, empower or disempower. At times, we may choose the wrong words. A phrase or word can have unintended and unforeseen consequences.

This is the dance we undergo to move forward. No person can be a member of all communities. Mistakes will be made. If we approach this task with a beginner’s mind — with a sense of curiosity — we can learn the overlooked nuances and impacts of our word choices. More importantly, we can be guided towards meaningful solutions by those who live with the consequences.

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Tools for Change

Writing is a skill. It is also a choice. These are two things directly in our control.

We can learn to write in a gender inclusive way. It may take a little work upfront to change our writing style, but as we have seen, every word matters.

When we put pen to paper, we can choose to reflect the world as it truly is — a world that is anything but binary.

The British Columbia Law Institute recently released ‘Gender Diversity in Legal Writing: Pronouns, Honorifics, and Gender-Inclusive Techniques.’ This publication is a guide to support writers in moving towards a more inclusive writing style. It is free for download at [bcli.org](https://www.bcli.org).

Editor’s Note: For more on this topic, watch the TLABC webinar on Gender Diversity in Legal Writing by Alison Wilkinson, British Columbia Law Institute & Canadian Centre for Elder Law on-demand at https://www.tlabc.org/?pg=2022_GenderDiversityLegalWriting. Permissioned for members only. 

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- 1 British Columbia Birth Registration No. 2018-XX-XX5815 (Re), 2021 BCSC 767.
 - 2 Ibid at para 19.
 - 3 Ibid.
 - 4 Ibid at para 31.
 - 5 “Bias and prejudice” online: Ontario Human Rights Commission <https://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression/4-bias-and-prejudice#_ftn12>.
 - 6 Ibid.
 - 7 Nelson v Goodberry Restaurant Group Ltd. Dba Buono Osteria and others, 2021 BCHRT 137 at para 84 [Nelson].
 - 8 Gregory Younging, Elements of Indigenous Style: A Guide for Writing By and About Indigenous Peoples (Canada: Brush Education Inc., 2018) at 77.
 - 9 Nelson, supra note 7.
 - 10 Ibid at para 82.

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