

# PARLIAMENTARY COUNSEL

## Drafting Direction No. 2.1 English usage, gender-specific and gender-neutral language, grammar, punctuation and spelling

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### Contents

<b>Part 1—English usage and grammar</b> .....	3
Plain English Manual .....	3
Lessons from <i>Chew v The Queen</i> —distinguishing purpose from result in prohibitions....	3
Background.....	3
Distinguishing purpose from result.....	3
Nouns of multitude.....	4
<b>Part 2—Gender-specific and gender-neutral language</b> .....	4
New drafting.....	4
Use of masculine and feminine personal pronouns.....	4
Use of “Chair” (instead of “Chairperson” or “Chairman”).....	4
“Gender-specific” words.....	4
Amendments of existing Acts.....	5
Insertion of feminine pronouns.....	5
Chairman/Chairperson and deputies.....	5
“Gender-specific” words.....	5
Resistance to change from instructors.....	6
<b>Part 3—Punctuation</b> .....	6
More lessons from <i>Chew v The Queen</i> —use of punctuation.....	6
Punctuating a final paragraph or subparagraph.....	6
<b>Part 4—Spelling</b> .....	7
Adoption of Style Manual.....	7
Spelling of “internet”.....	7
Spelling of “website”.....	7
Spelling of “Indigenous”.....	7
Spelling of “judgment” and “lodgment”.....	7
<b>Part 5—Numbers, percentages and fractions</b> .....	7
Cardinal numbers.....	7
The general rule.....	7

Exception—“zero” and “one” .....	7
Exception—cardinal numbers at the start of sentences.....	8
Ordinal numbers .....	8
Percentages.....	9
Fractions .....	9

## Part 1—English usage and grammar

### *Plain English Manual*

1 The Plain English Manual should be regarded as having the same status as a Drafting Direction.

### ***Lessons from Chew v The Queen—distinguishing purpose from result in prohibitions***

#### **Background**

2 In *Chew v The Queen* (1992) 173 CLR 626, the High Court interpreted subsection 229(4) of the Companies (Western Australia) Code which read:

An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.

3 Five Justices held that an officer or employee contravenes the provision if he or she makes improper use of his or her position as such **for the purpose of** gaining an advantage etc. or causing detriment etc. One Justice held that it is enough if the officer or employee makes such use of the position and this **results in** a gain or detriment, regardless of the purpose of the officer or employee. One Justice held that the provision requires both the purpose and the result.

4 The judgments in the case yields some lessons for drafters that may require a change in drafting practices.

#### **Distinguishing purpose from result**

5 The spread of judicial opinion in *Chew* forces the conclusion that the infinitive construction in the provision (“to gain ... or to cause detriment ...”) did not convey the intended meaning clearly enough.

6 In similar provisions, you should in future indicate expressly whether a purpose or result is meant. If both are intended, expressly state that.

7 In drafting a provision intended to cover purpose, you should consider:

- (a) whether it is necessary to cover the case of multiple purposes and, if so, how the proscribed purpose should relate to the others; and
- (b) whether it must be the sole purpose, or the sole or dominant purpose, or whether it needs only to be a substantial purpose; and
- (c) if the purpose is to be the dominant purpose, whether it should be dominant over each other purpose, or dominant over all the other purposes taken together.

8 Although the question of multiple purposes did not arise in *Chew*, the provision should perhaps have dealt with it.

9 If the provision had been intended to operate by reference to result rather than purpose, it should probably have read as follows:

An officer or employee of a corporation contravenes this subsection if he or she makes improper use of his or her position as such an officer or employee and the improper use:

- (a) results in the officer or employee gaining, directly or indirectly, an advantage for himself or herself or for any other person; or
- (b) causes detriment to the corporation.

10 The “must not” form is inappropriate here, because the contravention is not complete until one of the specified results happens.

11 In expressing purpose or result, different forms of words may be appropriate in different cases.

### ***Nouns of multitude***

12 Nouns of multitude such as “number”, “majority” etc. are not always singular in number. On the contrary they are usually plural. The most common mistake is to assume that the word “number” must be singular. For example, it is correct to say that “the number of books on the table is six” because it is the number that is six, not the books. But “a number of books are on the table” is correct because it is the books that are on the table, not the number. Fowler says that a good working rule (although not an inflexible one) is that the definite article before a noun of multitude usually means that the noun is singular and an indefinite article usually means that the noun is plural.

## **Part 2—Gender-specific and gender-neutral language**

### ***New drafting***

#### **Use of masculine and feminine personal pronouns**

13 A masculine personal pronoun in a Bill must always be accompanied by a feminine personal pronoun (and *vice versa*) except in the very rare case of legislation intended to apply to people of one sex but not the other (eg maternity leave legislation). Drafters should use their discretion in deciding, in individual cases, whether it would be better to avoid the use of pronouns altogether by repeating the relevant noun instead.

#### **Use of “Chair” (instead of “Chairperson” or “Chairman”)**

14 “Chair” should be used (instead of “Chairperson” or “Chairman”) when establishing new offices. If your instructors do not wish to use “Chair”, you will need to explore other titles such as “President”, “Senior Member”, “Convener”, etc.

#### **“Gender-specific” words**

15 Words ending in “man” which might reasonably be seen as importing the masculine gender should be avoided in favour of gender-neutral words, eg “police officer” instead of “policeman”. However, you should avoid substitutes created simply by replacing “man” with “person” (“policeperson” would not be acceptable).

## **Amendments of existing Acts**

### **Insertion of feminine pronouns**

16 There are still large numbers of occurrences of masculine pronouns without equivalent feminine pronouns in the statute book. However, most of them do not require amendment. The occurrences that don't require amendment include the following:

- occurrences in agreements or other documents set out in Acts (these occurrences would only be amended if the agreements or other documents are themselves amended);
- occurrences in Acts that have little or no current or future operation (many such Acts remain on the statute book for years, often because this is easier for administrators than repealing them and making any necessary transitional or savings provisions—it would be a waste of time to update their language);
- occurrences in Acts in which the use of masculine pronouns alone might reflect a deliberate policy, and where amendments should not be made without a conscious policy decision (these Acts would usually be a subset of the Acts with little or no current or future operation, but not always—see the discussion about the Navigation Act in paragraph 23).

17 If you come across a case in which feminine pronouns should be inserted, you should make the necessary amendments if time permits. There may be some efficiency in arranging for an Executive Assistant to prepare a first draft of the amendments.

18 A method for making these amendments using a “short form” amendment is set out in the Amending Forms Manual. However, most of the Acts that are still likely to require these amendments are not large Acts, and in general there should be no need to use the short form. In future, this should not be used without First Parliamentary Counsel's approval.

### **Chairman/Chairperson and deputies**

19 If you are amending an Act that establishes an office of “Chairman”, you should replace that title with “Chair”.

20 If you are amending an Act that establishes an office of “Chairperson”, you should not replace that title with “Chair” unless requested by your instructors to do so.

21 If you are amending an Act to establish an office of deputy to an existing office of “Chairperson”, the titles of the offices should be consistent (eg “Deputy Chairperson” and “Chairperson”).

22 Note that section 18B of the Acts Interpretation Act allows the occupant of an office of Chair to be referred to as the Chair, Chairperson, Chairman, Chairwoman or any other such term. Similar provision is made in respect of the office of Deputy Chair. No express provision is made in respect of the offices of Chairman or Chairperson or their deputies.

### **“Gender-specific” words**

23 The few possibly “gender-specific” words that do remain in Commonwealth legislation need to be treated with considerable care. For instance:

- “Ombudsman” is, I believe, generally accepted as having an origin unrelated to the English use of “man” as a suffix.
- The Navigation Act still refers to “seamen”, and “masters” of ships. I understand that these expressions are still found in relevant international treaties and there is considerable reluctance to change them without a careful examination of any possible legal consequences.

24 If you come across an apparently “gender-specific” expression in existing legislation, you should discuss the matter with your instructors, and with First Parliamentary Counsel, before deciding to replace it.

### ***Resistance to change from instructors***

25 Please let me know if instructors resist your proposals to add feminine pronouns or ignore your advice about the use of “Chair”.

## **Part 3—Punctuation**

### ***More lessons from Chew v The Queen—use of punctuation***

26 Most of the judgments in *Chew v The Queen* considered the first comma in the provision and speculated about its origin and effect, but no Justice thought that the comma helped resolve the issue in the appeal.

27 Although 2 Justices expressed something like the traditional reservations about punctuation as an aid to interpretation, the others all treated it as an integral part of the provision. It is clearly appropriate for drafters to rely on punctuation in order to convey meaning. OPC has been doing so for many years.

28 However, it is plain from the result of the case that the first comma in the provision served no useful purpose.

29 Punctuation that is required neither by the rules of grammar nor to help convey a provision’s meaning should be avoided. Before using a comma simply as an aid to readability, you should consider whether it would be better to recast the provision.

### ***Punctuating a final paragraph or subparagraph***

30 A final paragraph or subparagraph that is not the end of a section or subsection should be punctuated with a semi-colon (as in paragraph (1)(b) of the following example):

- (1) If:
  - (a) ... ; and
  - (b) ... ;then ....

## Part 4—Spelling

### *Adoption of Style Manual*

31 Spellings recommended in the Macquarie Dictionary or the Style Manual should generally be used in legislation.

### *Spelling of “internet”*

32 The word “internet” must not have an initial capital.

### *Spelling of “website”*

33 The word “website” is to be used in preference to “web site”. You should not use “internet site”.

### *Spelling of “Indigenous”*

34 Always capitalise “Indigenous” when it refers to the original inhabitants of Australia—as in “Indigenous Australians” and “Indigenous communities”. It needs no capitals when used in a general sense to refer to the original inhabitants of other countries.

35 However, it is not necessary to amend existing uses of “indigenous” that should be capitalised according to this approach, unless this would lead to glaring inconsistencies with new material being inserted into the Act concerned.

### *Spelling of “judgment” and “lodgment”*

36 You should use the word “judgment” or “lodgment”, not “judgement” or “lodgement”.

## Part 5—Numbers, percentages and fractions

### *Cardinal numbers*

#### **The general rule**

37 Cardinal numbers must be expressed as Arabic numerals (for example “2”). There are 2 exceptions to this rule, which are set out in paragraphs 38 and 41 below.

#### **Exception—“zero” and “one”**

38 The cardinal numbers “zero” and “one” should be expressed as a word unless:

- (a) the number is to be preceded by or followed by a mathematical symbol, or a unit of measurement, currency or time; or
- (b) the number represents an abstract mathematical concept such as an indexation factor; or
- (c) the number is used in a date; or

(d) the number is used to indicate a number of penalty units.

39 This means that the following uses of the numbers “zero” and “one” are correct:

- (a) “one of the following”;
- (b) “if one person is a child of another person”;
- (c) “at least one application”;
- (d) “1 year/1 month/1 week/1 day”;
- (e) “1 penalty unit”;
- (f) “0%” or “1%”;
- (g) “\$0” or “\$1”;
- (h) “0” or “1”
- (i) “0 megalitres” or “1 megalitre”;
- (j) “0 kilometres” or “1 kilometre”;
- (k) “1 January 2009”.

40 If you are uncertain whether to use “zero” or “0”, consider using “nil”.

**Exception—cardinal numbers at the start of sentences**

41 Cardinal numbers that start a sentence should be expressed as words. For example, the following subsection is correct:

- (4) Two or more fees may be prescribed for the same matter.

***Ordinal numbers***

42 Ordinal numbers up to and including “tenth” should be expressed as words. Ordinal numbers above “tenth” should be expressed using Arabic numerals (for example “12th”).

43 This means that the following uses of ordinal numbers are correct:

- (a) “the first day of the month”;
- (b) “the second of the following”;
- (c) “a third person”;
- (d) “the 21st day”;
- (e) “the 48th hour”.

44 This also means that the following amending forms are correct:

### **1 Subsection 22(1)**

Omit “wombat” (first and second occurring), substitute “wallaby”.

### **2 Section 39 (table item 8, second column)**

After “dog”, insert “or cat”.

### **3 Subsection 26(2) (first sentence)**

Repeal the sentence.

45 In an ordinal number that is expressed using an Arabic numeral, the 2 letters coming immediately after the numeral should not appear in superscript.

### ***Percentages***

46 Percentages should be expressed using the symbol “%”, not the words “per cent”.

### ***Fractions***

47 Non-decimal fractions with a denominator greater than 10 must always be expressed using Arabic numerals (for example, “ $11/12$ ” or “ $1/26$ ”). It is a matter for the drafter’s discretion whether a non-decimal fraction with a denominator of 10 or less should be expressed as words or using Arabic numerals (for example, “three-quarters” or “ $3/4$ ”).

48 If a fraction is expressed in 2 words, a hyphen should be used (for example, “one-quarter”, “one-half” and “three-quarters”). If a fraction is expressed using Arabic numerals, the fraction should be inserted by clicking the OPC Fraction ( $1/2$ ) button on the OPC tab or by selecting the OPC Macros menu, Formatting, Insert Fraction (see Word Note 12).

49 The rule in paragraph 47 does not affect the use of decimal fractions (for example, “0.5%” or “rounding 0.5 cents upwards”).

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