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AG Nienaber

Two cheers for equality: A critical appraisal of Act 4 of 2000 from a plain language viewpoint

Summary

Legislative writing is often criticised by the lay person for its use of obscure words and complicated sentence structure. This contribution appraises the comprehensibility of the language of South Africa's new equality legislation, Act 4 of 2000. In its preamble, Act 4 of 2000 promises to undertake the facilitation of "the transition to a democratic society, marked by human relations that are caring and compassionate". I consider the question as to whether the promise contained in the preamble to the Act does not effectively nullify itself given that the Act is written in language that is accessible almost exclusively to legislators and members of the legal profession.

Opsomming

Twee hoera's vir gelykheid: 'n Kritiese waardering van Wet 4 van 2000 vanuit 'n eenvoudige regstaal-oogpunt

Die taal van wetgewing word dikwels deur die leek gekritiseer vir die onverstaanbare woorde en ingewikkelde sinstruktuur wat daarin voorkom. Hierdie bydrae ondersoek die verstaanbaarheid vir die leek van die nuwe gelykheidswetgewing, Wet 4 van 2000. In sy aanhef belowe Wet 4 van 2000 om die fasilitering van "the transition to a democratic society, marked by human relations that are caring and compassionate" te onderneem. In hierdie bydrae oorweeg ek of hierdie belofte wel uitgevoer kan word gesien in die lig van die feit dat die Wet in 'n taal geskryf is wat toeganklik is amper uitsluitlik vir wetgewers en lede van die regsprofessie.

Adv AG Nienaber, Senior Lecturer, Department of Legal History, Comparative Law and Legal Philosophy, Faculty of Law, University of Pretoria.

1. Introduction

In its preamble, the Promotion of Equality and Prevention of Unfair Discrimination Act[1] promises to facilitate 'the transition to a democratic society, […] marked by human relations that are caring and compassionate …'[2] and to 'eradicate social and economic inequalities'[3].

In this paper I critically appraise the comprehensibility of the language in which Act 4 of 2000 is written. I consider whether the promise contained in the preamble to the Act does not effectively nullify itself given that the Act is written in language that is accessible almost exclusively to legislators and members of the legal profession.

2. Analysis of Act 4 of 2000

Legislation is drafted for four groups of readers — members of Parliament; officials administering the particular act; judges, magistrates and lawyers; and persons affected by the act. Once an act has been passed, it is of vital importance that the fourth group — persons affected by the act — is able to understand its contents. The statement of law must be sufficiently clear so that affected persons may understand their rights and obligations. People affected by legislation must understand what they are entitled to or what they are required to do to escape penalties.

Legislative writing is regularly criticised and sometimes even ridiculed by lay persons for its use of obscure expressions, long complex sentences, Latin terms, technical terms, wordiness, seemingly meaningless repetitions and archaisms. The Equality Act is no exception. In the next section I undertake a brief analysis of selected sections of Chapter 2 of the Equality Act to illustrate why the language of the Act may be considered confusing to lawyers and outright incomprehensible to lay persons.

Sections 7, 10 and 12 are reprinted here for the sake of easy reference:

Prohibition of unfair discrimination on ground of race

7. Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including—

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;

1 Article based on a paper presented at the conference 'Equality: Theory and practice in South Africa and elsewhere' 18-20 January 2001 in Cape Town. Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000, hereafter called 'the Act or 'the Equality Act'.

2 Preamble, Act 4/200.

3 Preamble, Act 4/200.

(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;

(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;

(d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.

Prohibition of hate speech

10. (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—
(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(*n*) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

Prohibition of dissemination and publication of information that unfairly discriminates

12. No person may-

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice,
that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

2.1 Syntactic analysis

2.1.1 Sentence length

Sentences in legislative texts tend to be long because of drafters' perceived need to be clear and precise and also unambiguous.[4] All the selected sections contain unusually long sentences. Section 7 consists of an astonishing 149 words, section 10 consists of 116 words and section 12 of 76 words. One should compare these sentence lengths with the average of 27,6 words in a typical sentence written in scientific English.[5]

However, long sentences do not necessarily create difficulties in comprehension. In the case of sections 7, 10 and 12 problems in comprehension are not created by the mere fact that sentences are longer than usual, but rather by the way in which these longer sentences are structured. The following paragraphs isolate a few of the problems in relation to the way in which sections 7, 10 and 12 are structured.

2.1.2 Disruptions in sentence patterns separating subject and verb

A reader's innate knowledge of language and his or her experience of a specific language's structure cause that reader to become acquainted with possible sentence patterns.[6] Readers of a specific language tend to become used to a specific sentence pattern. When reading a text written in English, the reader expects to find a SUBJECT-VERB-OBJECT sequence. This SUBJECT-VERB-OBJECT sequence is common to quite a few of the Germanic languages.[7] Readers are accustomed to hearing, reading and speaking sentences which follow the SUBJECT-VERB-OBJECT pattern, for example:

> 'We went to visit my parents'; 'I took my cat to the vet for her vaccinations' and 'I just love beautiful flowers'.

Longer sentences, such as those commonly found in legislative language and other examples of "legal English", usually contain more frequent disruptions in the SUBJECT-VERB-OBJECT pattern than shorter sentences. These disruptions tend to obscure the structure of the sentence and the reader is unable to link different parts of the sentence to arrive at a coherent meaning.

Section 10(2) illustrates the disastrous effect upon comprehension that a disruption in the SUBJECT-VERB-OBJECT pattern creates. In section 10, the subject of the sentence — *the court* - is not found in its usual position at the beginning of the sentence, but is introduced by a rather long

4 Swales and Bhatia 1983:100.
5 Bhatia 1993:106.
6 Gopen 1987:54.
7 For instance Afrikaans and German.

prepositional conditional phrase — *[w]ithout prejudice to any remedies of a civil nature under this Act,*.. . The reader may be forgiven for wondering which is the subject of the sentence, 'the court' or 'this Act.'

2.1.3 Separation of auxiliary and main verbs

In everyday spoken and written language, the main and auxiliary verb in a sentence are seldom separated. Legislative language, however, frequently separates main and auxiliary verbs. Let us return to section 10(2). This section reads — *the court* ***may*** (auxiliary verb), *in accordance with section 21(2)(n) and where appropriate,* ***refer*** (main verb). By the time the reader reaches the main verb, *refer*, he or she will need to reread the sentence to make sure to what part of the sentence the verb is linked to. Difficulties in comprehension arise because readers cannot be expected to retain the auxiliary verb in their memories across a gap that sometimes spans as much as 100 or more words.

2.1.4 Initial case descriptions

Bhatia remarks that sentences in legislative writing typically begin with reasonably long initial case descriptions where the subject of the sentence is delayed by the introduction in the sentence of a long case description in the form of an adverbial clause.[8] Section 10(2) begins with such a case description — *Without prejudice to any remedies of a civil nature under this Act, the court may*, … The subject of this sentence — *the court* — follows only after this initial case description has been given. Bhatia notes that the pre-positioning of case descriptions is crucial in order to specify in which circumstances specific rules apply. However, this strategy contributes to syntactic discontinuities that are unfamiliar to the reader as they are rarely encountered in any other genre.

2.1.5 Prepositional phrases and conditions

Prepositional phrases are used to provide additional information in a sentence or to state a condition. We often use prepositional phrases in everyday spoken or written language, such as when we say *'[u]nless you listen to my advice, you will come to a sticky end'*. Although they are no doubt useful, prepositional phrases may sometimes disrupt connections between the main elements of that sentence, especially when used in more complex sentences.

The two prepositional phrases used in section 10(2) - *[w]ithout prejudice to any remedies of a civil nature under this Act and in accordance with section 21(2)(n) and where appropriate* — disrupt the associations between the different sections of the sentence. The confusion in the mind of the reader is increased by the fact that this section also starts with an extended

8 Bhatia 1993:110.

condition (in the form of a prepositional phrase), stating a condition that is fulfilled only at the end of the sentence.

When a condition is given at the beginning of a sentence such as is done in 10(2), readers do not have a context within which to interpret the condition until they get to the main clause of the sentence. In the case of section 10(2) the sentence is further complicated by another condition being inserted into the sentence, right after the verb — *in accordance with section 21(2)(n) and where appropriate* … .

2.1.6 Adverbial insertions between subject and verb

Frequent adverbial insertions between subject and verb cause the Act to be difficult to read. In section 12 the adverbial phrases — *disseminate or broadcast any information; and publish or display any advertisement or notice, …* are inserted. These adverbial phrases add considerably to the already complex syntactic character of section 12. Consider in this regard also section 10 — *the court may, in accordance with section 21(2)(n) and where appropriate, refer any case*.

2.1.7 Qualifying phrases

Another typical feature of legislative writing is the insertion of a qualification after the main verb of the sentence. Consider, for example, the middle part of section of section 10(2) — [...], *in accordance with section 21(2)(n) and where appropriate*, … and section 12(b) … *Provided that bona fide engagement in artistic creativity, […], is not precluded by this section*. Many lay readers may find it rather difficult to discover to which part of the sentence these qualifications refer.

2.1.8 Passives

Legislative writing makes extensive use of passives, enabling the author to omit the agent from the process for which he, she or it is responsible. Consider, for example, section 12 — *[…] that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person…*. From the readers' point of view it is certainly of vital importance to know the agent who is to pass a value judgement in such cases, but it is questionable whether the reader will be able to supply the agent without knowledge of the judicial process.

2.1.9 Cross-referencing

Cross-referencing to other sections of the Act and the Constitution — here found in all the selected sections - often presents problems to lay readers. Consider for example — *[s]ubject to section 6; [s]ubject to the proviso in section 12; in accordance with section 21(2)(n)* and *in accordance with section 16 of the Constitution*. Cross-referencing in these sections indicates

that the information is not autonomous, but subject to qualification by other sections or the Constitution.

Very few other texts demand from the reader that he or she integrate different sources. Because of this, readers feel at a loss to integrate different sections of legislation with one another in order to make sense out of such cross-referencing. This problem is relatively easy to remedy.[9]

2.1.10 Lists

Lists, such as the one in section 12, often create problems in comprehension for lay readers of legal texts. In section 12 the main verb of the sentence — *engagement in […] is not precluded* - is split by the list. This structure is confusing to the reader, as it is difficult to determine to which part of the sentence the list of activities refers.

2.2 Lexical analysis

2.2.1 Technical terms

Technical terms such as *bona fide (s 12), discriminate (s 7), prohibited grounds (s 10), remedies of a civil nature (s 10), jurisdiction (s 10)* and *common law (s 10)* intimidate the lay reader. Everyday spoken English very seldom includes these words, and they are often not found in a standard English dictionary. This makes it difficult for the lay reader to arrive at their precise meaning. The reader is consequently at the mercy of those with legal knowledge to explain the meaning of such technical terms. Lay readers may feel that the use of technical terms is a gate-keeping mechanism, designed to exclude them from the legal process.

2.2.2 Nominalizations (nouns constructed from verbs)

Sections 7, 10 and 12 contain examples of nominalizations,[10] such as *engagement (s 12) and incitement (s 7)*. Nominalizations are problematic as they obscure the distinct features of nouns and verbs and remove the immediacy of a sentence so that a sense of abstractness and detachment is created.[11] Although not all nominalizations present problems to readers, they are very often abstract concepts, which are alien to the reader's experience of the world. Nominalizations often also serve to conceal the agent of a process.

9 References may for instance be added in the margin, or short summaries of the section referred to may be provided at the point of reference.

10 Nouns made from verbs, for example, when the verb "achieve" is changed into the noun "achievement".

11 Gibbons 1994:23.

2.2.3 Latin terms

Lawyers use many Latin terms. For lay readers, Latin terms are an obstacle to effective communication. Although most lawyers would be able to cite the exact meaning of *bona fide* (s 12), it is doubtful whether many lay persons would be able to understand its meaning.

2.2.4 Inflated or unusual words and phrases

Although there is limited use of archaic words in the Act, inflated or unusual words and phrases are used often. Examples are *propounds* (s 7), *consideration* (s 7), *proviso* (s 10), *construed* (s 10), *in accordance with* (s 10) and *precluded* (s12). Because these words are not often encountered in every-day language, they present difficulties to lay readers.

2.2.5 Overlapping words

Words that overlap in meaning are used in the Act. Consider for instance *publish, propagate, advocate or communicate* (s 10). Although persons trained in the law or reasonably fluent in English may realise the slight nuances of difference in meaning between these four words, an average reader may wonder whether they are exclusive. What about *transmit* or *disseminate*? What about *convey* or *send*? Are actions where you *send* words covered by the Act or not?

2.2.6 Formal legal expressions

It is to be doubted whether many lay persons (or lawyers) know the exact meaning of formal legal expressions such as *without prejudice (s 10)*. The use of this expression in section 10 serves to intimidate and confuse the reader even further.

2.3 Tone, style and graphic design

2.3.1 Tone and style

To the lay reader, legal English often sounds pompous, especially because of the high incidence of words derived from Old English or Latin, its wordiness, its tendency to clothe the most mundane comment in a disproportionately important style, its attempts to appear precise, its use of words provoking awe and respect and its frequent use of complex sentences.[12] Mellinkoff describes the tone and style of legal language as follows:

12 As discussed above in 2.1 and 2.2.

> In and out of the law, pompous language gives an air of importance out of proportion to the substance of what is being said […] Incongruity is its essence, self-esteem its badge.[13]

The strange style of legal language discussed above is not merely regarded by the public as a source of ridicule,[14] it also functions to create distance between those who are the authors of legal documents, and those who need to make sense of these documents and whose lives are governed by them. Legal language in this sense becomes an instrument of social control - it imposes burdens upon people in a language they do not understand. What Rodell wrote in 1939 still holds true today:

> In tribal times, there were the medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the trick of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.[15]

Because of its use of long sentences and formal expressions the tone of Act 4 of 2000 may be described as pompous, thus creating distance between the legislator and the people who are to comply with the Act.

2.3.2 Graphic design

The visual appearance of any text is just as important as its content. The graphic design of texts sends messages to the reader in the same way as is done by the words in the text. A text is hard to understand if it is difficult to read.

Benson remarks that legal texts use punctuation, capitalization, sectioning, headings, indentation, typeface and type size in 'bizarre ways which do not tie in with the meaning or importance of what is being said'.[16] Poor graphic design and an illogical organization of material in a text create added problems in comprehension, as indicated in a study paper by the Canadian Law reform Commission, published in 1981 and quoted from by the Law Reform Commission of Victoria:

> [T]he order in which the ideas in a discourse appear has more than a merely aesthetic importance, for it also carries a functional significance that is relevant, on the one hand, for an understanding of the discourse, and on the other hand, for retrieving the various elements. Indeed, a disorganized discourse, in which the writer

13 Mellinkoff 1963:27.
14 As is shown by the number of literary authors who depict lawyers as stupid and ridiculous, such as Shakespeare, Dickens and Swift.
15 Rodell 1939 cited in Benson 1985:531.
16 Benson 1985:527.

> presents his ideas without following a logical sequence, has less of a chance of being understood than a discourse in which the reader can follow a certain chain of reasoning.[17]

Consider the graphic design and layout of Act 4 of 2000. Attempts have clearly been made at presenting the material in a more organised way,[18] but using a font size of 11 instead of 10 would have aided the reader considerably. Also, a page filled half-way with sub-sections, without headings to divide these sub-sections into logical units of thought, is very daunting to the reader. Section 7 is a good example of this practice.

Drafters and authors of legal texts should employ graphic design and organization in order to elucidate the meaning of texts, and not to obscure that meaning.[19]

3. A plain language version

Plain legal language is language that allows the audience to concentrate on the message instead of being distracted by complicated language. Plain legal language is clear, straightforward expression, that avoids obscurity or inflated words. It is neither simplistic nor simple-minded.[20] It is language that ensures that the audience understands the message easily.[21]

Although certainly not perfect, I have attempted the following draft plain language version of section 12. I reprint the original for the sake of comparison:

Original:

Prohibition of dissemination and publication of information that unfairly discriminates

12. No person may-

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

17 *Drafting laws in French* 241 cited in Law Reform Commission of Victoria 1987:31.
18 Such as the inclusion of an index.
19 For more about how graphic design and organisation may be used to make legal texts more accessible to lay persons, see Law Reform Commission of Victioria *Plain English and the law: Drafting Manual*.
20 Kimble 1992:19.
21 Eagleson 1990:4.

Plain language version:

Publication of information that discriminates unfairly

12 a) No one may communicate publicly information intending to discriminate unfairly against anyone or may reasonably be taken to have such an intention.

b) But people can sincerely take part in:

- artistic creativity; and
- academic and scientific inquiry.

c) A person can report information that is fair, accurate and in the public interest.

d) A person can publish information in line with section 16* of the Constitution.

*** Note:** Section 16 of the Constitution deals with freedom of expression, propaganda and related matters.

4. Conclusion

The use of plain language in legislation and in other legal documents is often criticised as being a compromise of the beauty and elegance of legal English.[22] Translations may in certain circumstances indeed compromise the original text. It would certainly compromise Shakespeare if *Hamlet* were to be translated into plain language as follows:

Original:

I'll call thee Hamlet.
King, father, royal Dane: Oh answer me,
Let me not burst in ignorance; but tell
Why thy canoniz'd bones hearsed in death,
Have burst their cerements, why the sepulchre
Wherein we saw thee quietly inurn'd
Hath op'd his ponderous and marble jaws,
To cast thee up again?[23]

Plain language translation:

What are you doing out of your coffin, Dad?
We buried you the other day and you're supposed to be dead,
Don't keep me waiting!
I am bursting to know![24]

22 Kimble 1992:19.
23 Shakespeare Act I, Sc IV.
24 Translation by G A Hackett-Jones, quoted in Law Reform Commission of Victoria *Drafting Manual*:40.

Legislation is not poetry. Legislation is read by a variety of audiences, including lay people. The Equality Act, aimed at bringing about social change, should be accessible to the average population, to persons of average intelligence and education.

The argument that legislation such as Act 4 of 2000 is the product of political compromise that leaves no space for clear and elegant drafting, is often put forward. While this is so, there should be a distinction between imprecise and muddled thinking by politicians, and imprecise and muddled legislative drafting. The one may not be used as an excuse for the other. Language should not be used to obscure inconsistent thinking or to conceal political agendas.

Act 4 of 2000 is a complex legal document. It sets about creating the framework for achieving a just and equitable society. It describes the structure and powers of the courts in cases of discrimination, hate speech and harassment and it describes the duty that rests on the state to promote equality. It is thus acceptable that a certain level of complexity should exist in those sections of the Act dealing with highly technical issues such as the burden of proof and the structure of equality courts. However, chapter 2, containing the most important substantial provisions of the Act, is intended for an audience different from that of the rest of the Act. Chapter 2 is also meant to be read by lay people.

Statistics show that only 3, 458, 434 people in South Africa have a matric or equivalent level of education.[25] It is often people who are less educated and who belong to a lower socio-economic sphere who are the victims of unfair discrimination.[26] Incomprehensible legislation such as Act 4 of 2000 would thus harm most the very people it is intended to benefit.

Act 4 of 2000 was enacted to 'prevent or prohibit unfair discrimination',[27] giving effect to the promise contained in section 9(4) of the South African Constitution.[28] The Act would have been better able to fulfil this promise if it had been drafted in a language accessible also to lay persons.

25 This figure is based on the results of the population census in 1996. Information obtained from the Central Statistical Services, Pretoria, in their report 1996 "Level of education among those aged 20 years or more".

26 In a study on the comprehensibility to the lay person of extracts from the Constitution, Act 108/1996, it was found that respondents who did not have at least a matric or equivalent qualification made virtually no sense at all of the extracts they were given. See Nienaber 2001:125.

27 Sec 9(4) Act 108/1996.

28 Act 108/1996.

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