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Government Equalities Office consultation

Caste in Great Britain and Equality Law

Response from the Employment Lawyers Association

18 September 2017

ELA Response to Government Equalities Office consultation:

Caste in Great Britain and Equality Law

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Introduction

The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment. Our membership includes those who represent and advise both employers and employees. It is not our role to comment on the political merits of proposed legislation, rather we make observations from a legal standpoint.

ELA's Legislative and Policy Committee is made up of both Solicitors and Barristers who meet regularly for a number of purposes; including to consider and respond to proposed new legislation.

A working group was set up by the Legislative and Policy Committee under the chairpersonship of Ellen Temperton of Lewis Silkin LLP to consider and comment on the Government Equalities Office's consultation on "Caste in Great Britain and Equality Law". *A full list of the members of the working group is set out at the end of this paper.*

Questions 1 and 2: To what extent do you agree or disagree that protection against discrimination on grounds of ethnic origin provides an appropriate level of protection? Please explain your answer.

In summary, ELA's view is that case law does provide considerable protection because of the purposive interpretation of the meaning of ethnic origin adopted in the cases both under the predecessor legislation, the Race Relations Act 1976 and under the Equality Act 2010, (the "Equality Act"). This protection is however limited. The real question is whether any "gap" should be plugged by further case-law or by legislation. On this issue, the working party was unable to reach consensus, as further set out below in this response.

The definition of race in section 9(1) of the Equality Act does not specifically include caste; it refers to colour, nationality, ethnic origin and national origin. The definition however is non-exhaustive in the sense that race is said to "include" the characteristics listed at 9(1) (a) - (c) of the Act.

In the leading case of *Mandla v Dowell Lee* [1983] 2 AC 548 HL Lord Fraser of Tullybelton set out the essential and non-essential but relevant, characteristics which make up the definition of an ethnic group falling within the predecessor legislation, the Race Relations Act 1976.

The essential characteristics ("the essential characteristics") are:

- A long shared history of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive
- A cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

The non-essential characteristics which may be relevant are:

- Either a common geographical origin or descent from a small number of common ancestors
- A common language, not necessarily peculiar to the group
- A common literature peculiar to the group
- A common religion different from that of neighbouring groups or from the general community surrounding it
- Being a minority or being oppressed by a dominant group within a larger community.

In the subsequent leading case *R(E) v Governing Body of JFS and another* [2010] 2 AC 728 SC Lord Phillips noted that the word “origins” required one “*to focus on descent*”, (at paragraph 33) and he continued that descent “*will only be such a ground if the descent in question is one which traces racial or ethnic origin*”. Discrimination based on “descent simpliciter” is not necessarily race discrimination. In other words the essential characteristics would also need to be present.

Applying these principles in the case of *Tirkey v Chandok* [UKEAT/0190/14/KN] Mr Justice Langstaff was able to give a wide and flexible scope to the meaning of “ethnic origins”. In his carefully considered judgment, Mr Justice Langstaff said that “*since ethnic origins is a wide and flexible phrase and covers questions of descent at least some of those situations which would fall within an acceptable definition of caste would fall within it*”,(at paragraph 44).

Mr Justice Langstaff rejects any argument that the effect of section 9(5)(a) of the Equality Act is to shut out any consideration of caste by an employment tribunal (at paragraph 29). Thus the sorts of arguments which were advanced in *Naveed v Aslam and Ors* (ET case number 1603968/2011) that a case will fail because no Ministerial Order has as yet been implementing section 9(5) cannot now succeed.

Protection under existing case law is however limited in that Mr Justice Langstaff goes on to confine his decision to the facts, namely that:

“there may be factual circumstances in which the application of the label “caste” is appropriate, many of which are capable- depending on their facts- of falling within the scope of section 9(1), particularly coming within “ethnic origins”, as portraying a group with characteristics determined in part by descent, and of sufficient quality to be described as “ethnic”, (at paragraph 51 of his decision):

Again, at paragraph 51 Mr Justice Langstaff indicates that “*caste is an integral part of the picture in the present case”.*

(our emphasis added).

To succeed in a claim based on caste discrimination therefore the facts need to establish that the reason for the treatment asserted is “*reasons which more than minimally included their view of her status or origins, and if that status, or that view is bound up with her ethnic origins as understood in domestic law*” (at paragraph 46).

Although the Claimant could bring a claim for caste discrimination under existing interpretations of the concept of ethnic origin pursuant to section 9(1) Equality Act 2010, Mr Justice Langstaff expressly declines to lay down any definitive principles. He says:

“I was taken to seven treaties, Conventions and UN reports; nineteen authorities; and eleven other publications... together with a further eleven authorities, two publications and three Hansard extracts in a supplementary bundle of authorities. Given this, the parties may have been gearing up to secure a definitive decision in principle that discrimination on the ground of caste as such either was, or was not, within the scope of the Equality Act 2010....My focus has been on the appeal in this particular case, in its particular circumstances: I have not seen my role to resolve academic disputes, and establish more general propositions, of no direct relevance to the case in hand...” (at paragraph 55).

So the current state of protection is that “many forms” of caste discrimination may fall within the concept of ethnic origins, but some may not, and there is a basket of factors which make up the judicial definition of “ethnic origin” leaving it open to Respondents to place the emphasis elsewhere. There is room for argument about whether, for example, *“the reasons more than minimally include their view of status and origins”*.

Thus it may be argued by Respondents that any less favourable treatment is not based on “caste” as a concept, which seeks to define a set of elements or descent but on specific elements of what makes up “caste” e.g. less favourable treatment based on a person’s social standing/function (more akin to class than caste). If a respondent were to argue that discrimination is based on someone’s occupation or socio- economic standing this may evade the scope of “ethnic” origins.

This risk is compounded by the fact that the essential and non- essential factors are not the same as the factors listed in the Explanatory Notes to the Equality Act although there is clearly overlap and, further that there is no single, commonly accepted definition of caste at all.

In theory it could be said that this uncertainty could be addressed by legislation which sought to define caste. To plug the gap such legislative intervention would need to include a definition of caste. (In the absence of a definition no additional protection would be provided (as the courts would need to draw on existing cases to elaborate what the legislature meant by “caste”)). But to define “caste” is controversial and to choose another word, such as “descent”, would create confusion and may lead to inadvertent consequences in enabling claims to be brought based solely on socio economic factors.

Difficulties over the concept and definition of caste and how to define it however present considerable hurdles to providing any greater protection by legislative means than exist already. The definition (and indeed the theoretical need for greater clarity) rests on the assumption that further protection is needed and that a definition could be arrived at which would not create further division on what has proved to be a divisive issue. To draw the definition too broadly risks encompassing class per se, but to keep the definition to South Asian concepts of caste runs the risk of entrenching discrimination and seems to fuel the divisive nature of the discussion.

In such circumstances it may be said that the willingness of the judiciary to permit claims to proceed where caste discrimination may be the explanation for particular treatment offers sufficient/ adequate protection provided that claimants are not deterred from bringing claims in the first place (see below). This way of affording protection in deserving cases is more flexible and less divisive.

The issue then becomes whether there is any evidence that applicants are deterred or prevented from bringing claims due to the uncertainty of the outcome or ignorance of their right to bring a

claim at all. Publicity would be achieved by legislation but could be achieved now in the absence of legislation, by the publication of government and ACAS guidance that caste is protected. Fears about the uncertainty of the outcome could be allayed by the publicity explaining how the Mandla guidelines and concepts of ethnic origins are broad enough to encompass caste.

Question 3: Which types of caste discrimination, if any, do you think would not be covered by the concept of ethnic origin in case- law? Please clarify list the features of caste which you think are not covered by ethnic origin and explain why you think this:

It is difficult to identify aspects of caste which fall outside ethnic origin or religious belief. The working party identified the following concerns in discussion with some of the clients that individual members of the working party had represented:

1. Historically related to social function (membership of which is involuntary, hereditary that is determined by birth and permanent – unlike class): social function as a distinct feature of caste would not easily fall within the definition of ethnic origin whether this is based on occupation or wider economic position – if a respondent were to argue that discrimination is based on someone’s occupation or socio economic standing (more akin to class than caste) this may evade the scope of “ ethnic” origins (or at least lead to further case law and lack of clarity).
2. Ritual purity: it may be argued that discrimination based on ritual purity is not in itself “ethnic origins”; it may also be difficult to make a case of religious discrimination where the issue is between people practising the same religion.
3. Surname: this is one indicator of caste, seems to be linked to descent, but of itself it may not fall within ethnic origins – it may be argued that again this is indicative of social status which is the cause of the discrimination in an attempt to evade the scope of “ethnic origin”.
4. Intra-caste discrimination (where two people are of the same caste but there is a hierarchy within a caste). A broad interpretation of ethnic origins (covering descent as it does) may however offer a more flexible way of affording protection than a defined narrow view of caste. We can however foresee difficulties in making a case for direct discrimination which when the alleged treatment is intra-caste. Direct discrimination relies on a comparison between an individual with a particular protected characteristic, and someone who doesn’t have that characteristic. For example, less favourable treatment of someone with a particular ethnic origin as compared to someone with a different ethnic origin. It may be more difficult to establish this comparison in a case of intra-caste discrimination, because arguably both individuals are from the same caste and so may be regarded as having the same ethnic origin.

As noted above separating out the individual elements which make up aspects of commonly accepted views of caste may leave claimants open to arguments that certain elements forming caste were significant factors/causes for the treatment while other features of caste were not significant. As caste is multi-faceted, would there be scope for respondents to seek to separate elements in terms of the reasons for any treatment and argue the activating cause/s of the treatment is not covered or was only minimal and so on? A respondent may express more prejudice towards economic status than ritual purity and argue that socio economic inequality is not a protected characteristic.

On the other hand the basket of factors does provide the judiciary with flexibility in circumstances where rigid definition is difficult (see below and above) because there is no single view of caste.

Q4 What are the benefits of case law to implement a legal ban on caste discrimination (e.g. social and economic):

As noted above there is no commonly accepted sociological or legal definition of caste.

Attempting definition provokes controversy and division. The explanatory note to the Equality Act attempts to define caste. It focuses on caste in the context of South Asian communities but as the Consultation states, *“it would be an over-simplification to “attach notions of caste simply to one section of society or one religion”*. This is perceived by significant groups within the South Asian community as highly controversial and entrenching prejudice. Leaving the courts to develop case law to apply the principles already established in case-law would be less divisive and provoke less controversy, as we note in response to Q1 and Q2 above..

Development through case law may be less provocative and prevent certain groups within the community feeling less targeted that if the legislative route is followed. Developing case law where the claims are perceived to have merit may be perceived as less divisive, if the claims have merit then the effect on a community is secondary because there are legitimate claims that must be addressed and justice done. The difference in legislating is that this is a more “blanket” and upfront way of addressing the issue, so divisive effects may be felt more starkly, politically and quickly.

The lack of any commonly accepted definition of caste also makes the task of coming up with a statutory definition which creates certainty and does not lead to further litigation very difficult. The Consultation itself states that there is *“no universally accepted functional definition of caste that can be relied on”*. Case law may therefore be better equipped to evolve and respond to arguments presented on what ethnic origins may cover and provide greater flexibility.

The report commissioned by the Government Equalities Office (Measuring Caste in Britain- a feasibility study) for example notes that “caste” covers many different social systems but with key common elements: hereditary, endogamous and hierarchical encompassing ritual purity. Terminology for such social systems varies by group (caste / jati / baradari system). Although the definition within the explanatory note would perhaps be fitting and appropriate in order to protect individuals who originate from South Asia, as the protected characteristic of race within the Equality Act seeks to protect individuals from all ethnic backgrounds in the UK, it raises the question as to whether an alternative definition of caste should be created which does not seek to focus on certain sections of society and religions but is instead wider; but at the same time is not so wide that its intention or purpose becomes “diluted” (where there is a risk that it could go beyond the intended scope). We are mindful of the risks of any legislative definition of caste which includes social standing/function or occupation as this would be overly broad and could have unintended consequences. This is more likely to be avoided if the judiciary apply precedent to the facts in a given case.

Unfortunately, there does not appear to be a useful definition that could be carried over or used as a starting point from other international jurisdictions and the CERD definition appears to be too wide-ranging (see Consultation, page 9, footnote).

As it is seemingly so difficult to come up with a universally accepted definition of caste, it may be prudent for a definition to come about or become refined through case law.

Moreover, by repealing the duty in section 9(5)(a) EqA to provide for caste to be an aspect of race, some members of the working party thought that it would send a message that the legislature considers, following *Tirkey v Chandok*, that caste is covered within the existing provisions, although we can see that this argument cuts both ways; repelling could lead to an accusation that the Government does not take the need for protection seriously enough. Publicity of the issue could however be achieved as we note above in making it clear that caste is already covered, how it is covered, and setting out the tests which will be applied by the Courts in determining whether there has been discrimination on the grounds of a protected characteristic.

Case law development potentially provides for greater flexibility and a more sensitive approach, allowing cases to be considered on an individual basis and arguments developed which may assist in providing a better understanding on which to perhaps introduce legislation at a later date.

We do not believe that the effect of section 9(5)(a) Equality Act requires the government to legislate if protection exists under existing case law. If case law already provides the required protection however legislation may be considered necessary pursuant to section 9(5)(b) to dis-apply certain requirements which are triggered if caste is already part of the definition of ethnic origins (which following *Tirkey v Chandok*, it already is).

Finally we are not aware of similar common law jurisdictions such as the US or Australia or New Zealand having legislated specifically for caste as a standalone protected characteristic.

Q5. What are the disadvantages (e.g. social and economic) of using case law to implement a legal ban on caste discrimination?

The main disadvantage is that development in this way is dependent on cases coming before the Employment Tribunals. This is potentially a slow and unpredictable route to plugging any identifiable gaps in protection. As a result case law may be slow to develop clarity around the definition of caste.

While the Supreme Court decision in *R(on the application of UNISON) v Lord Chancellor 2017 UKSC 51* may have removed one significant barrier to those in lower caste groups being in a position to bring claims, especially where the result was uncertain, there is still considerable uncertainty and a lack of awareness as to the potential to bring a claim based on caste. This lack of awareness may preclude claims being brought. Legislation would create publicity and therefore awareness but as we note in response to earlier questions, it is not the only way that awareness of the right can be achieved..

More flexibility has the downside/ disadvantage of more uncertainty, another disincentive to bringing a claim.

A lack of awareness could also lead to claims being brought on an erroneous basis (for example on the grounds of religious discrimination rather than on the grounds of ethnic origins) as a decision may raise less awareness than legislative change.

Uncertainty will generate potentially more expensive litigation with preliminary hearings and appeal.

Anecdotally the working party's experience is that while the decision of the EAT in *Tirkey v Chandok* was a significant landmark decision, there has been no noticeable response from employers in terms of amending their diversity policies, or extending their training programmes to cover caste discrimination issues. Legislation may have a much more noticeable effect on education and awareness than case law although an alternative way to address this would be to update the notes to the Equality Act to refer to *Tirkey v Chandok* and also to update ACAS guidance to raise awareness amongst employers.

Linked to this (and again anecdotally) the working party's experience is that it may be more difficult for employers and private and public service providers properly to understand and grasp the inclusion of caste as a facet of race discrimination if it is left to develop ad hoc through case law and commercially there is less of an imperative to do so.

Qs 6: Benefits and disadvantages of inserting caste into EqA as a specific aspect of race;

Section 9(5) was added to the Equality Act to impose a duty on the Government to include caste as an aspect of the protected characteristic of race (with the express ability in section 9(5)(b) Equality Act to provide for exceptions to other provisions of the Equality Act applying to caste). The government commissioned the National Institute of Economic and Social Research ("NIESR") to explore nature, extent and severity of caste discrimination in GB: this would shape the Government's approach on whether the section 9(5) power should be used.

In summary, this report found that:

1. Caste awareness in Britain is concentrated among people with roots in the Indian sub-continent (around 5% of the population).
2. There is evidence of caste discrimination and harassment in the workplace and in the provision of services. The discrimination identified was higher amongst higher castes against lower castes.
3. It is unclear whether the extent of discrimination is changing.
4. To reduce caste discrimination and harassment the government might take educative or legislative approaches however non-legislative approaches are less likely to be effective in the private sector.
5. The provisions in the Equality Act outlawing religious discrimination cannot protect against caste discrimination and harassment as effectively as caste specific provisions, as caste is non-religion specific.

To implement legislation expressly incorporating caste as a protected characteristic would address some of these concerns although unless any statutory definition is flexible it will not address point 3 above.

Carefully drafted legislation will introduce more certainty although settling on a single definition is problematic (see above). Certainty would encourage meritorious claims rather than uncertainty operating as a practical disincentive for cases to be brought.

Any such definition therefore needs to be broader and address similar systems rather than the South Asian concept of caste if it is not to be perceived as divisive; (to avoid being perceived as targeting one group e.g. the Hindu Community and thus entrenching prejudice) It may for example define protection for social systems which include caste, jaiti, biraderi or similar systems which have common elements of descent, endogamy and hierarchy encompassing ritual purity. The definition could also encompass the idea that the individual has no control or influence over the characteristic, which would help to narrow the definition so that general perceptions of socio-economic class and occupation are not included.

To address this by using “descent” rather than “caste” would not add anything (per Lord Phillips in *JFS* since origins requires a focus on descent) and would risk extending the protection to socio- economic factors which the legislature has specifically chosen not to implement.

Legislation should be supported by statutory guidance explaining the obligations on employers to educate and train and to amend diversity policies.

The impact may be wider and more immediate than relying on case law, recognising and preventing workplace discrimination, leading to more opportunities and social mobility amongst certain groups, partly because legislative change will raise awareness and may therefore act as a more powerful deterrent.

As is the case with race and gender, an individual is not able to control or influence into what caste they are born into. In the absence of there being legislation specific to caste, there is an argument that the problem is being ignored and so the lines are unclear between what should be considered as discrimination and what should not.

Legislation seeks to protect those individuals who come from a caste (e.g. Dalits) who may not feel that they have a voice or who would otherwise find it difficult to have the means to pursue a claim by relying on the current provisions of the Equality Act and where there is uncertainty as to the outcome.

Not introducing this protection in legislation may be seen as condoning this type of treatment or at least not giving it sufficient importance.

If caste was included in the Equality Act, formal and defined exceptions could be created. For example, the legislation could be amended so that the public-sector equality duty (or specific parts of it) are explicitly excluded. This would mean employers need not enquire about caste (see *Disadvantages* below). There also would be scope to explicitly set out where certain actions might be justified. For example, if there is a genuine occupational requirement.

Q7 What are the disadvantages (socio and economic) of inserting caste into the Equality Act 2010 as a specific aspect of race?

In our view the main disadvantages are really identified above but they include the fact that definition is difficult, that the issue is controversial and that once caste is covered it would automatically be covered by the more general provisions within the Equality Act which apply to race - including the public-sector equality duty and the option to take positive action. Arguably however this is already the case, to the extent that caste is accepted as falling within ethnic origins.

To comply with the public-sector equality duty, and to think about whether there is any need for positive action, employers would invariably need to ask employees about their caste. The consultation paper suggests that asking “*such potentially intrusive and socially divisive questions*” would inappropriately highlight caste divisions and be uncomfortable for both employers and employees. As set out in *Advantages* above, if caste were to be included in the Equality Act, formal exceptions relating to caste discrimination could be created and the Act could be amended to state, for example, that the public-sector equality duty does not apply. This would mean that employers need not ask about caste.

Q8 and Q9 To what extent do you agree or disagree that the Public Sector Equality duty and positive action should apply to caste? And why...

Public Sector Equality Duty

To the extent that case-law already protects against caste discrimination this duty is triggered. Public sector employers should already be including caste awareness within their diversity training and policies and monitoring should occur. On that basis specific legislation should be enacted under section 9(5)(b) to dis-apply these requirements whether or not an order is made pursuant to section 9(5)(a).if caste is to be excluded from the PSED.

There is a concern that in order to have due regard to policy impact on the basis of caste, there may be a requirement for public authorities to hold details of caste make-up – this is a sensitive and complex issue. It is unlikely that many individuals would be willing or be able to disclose their caste as part of any ethnic monitoring form. Many second generation immigrants are unlikely to be aware of their ancestral caste; further, those deemed within a group to be of “lower” caste may be uncomfortable with disclosing such information

Given that the purpose of the duty is to have due regard to the elimination of discrimination and to advance equality of opportunity, it would be unfortunate to dis-apply caste within the PSED and members of our working group felt very uncomfortable suggesting that an element of race discrimination should be excluded from the PSED. As it is difficult to understand how monitoring could occur without questions being asked and considerable guidance (via ACAS for example) would be needed on how to address the issue sensitively.

Positive action

There is very little evidence to suggest that caste impacts on recruitment or promotion at work. The NIESR report dated December 2010 stated that there was little evidence to suggest that there was caste discrimination on recruitment – the examples given showed general poor recruitment practices of recruiting “people like us”. Similarly, with promotion, it was rare to find a case of caste discrimination.

The difficulty would also lie in monitoring the caste of individual employees, which is a complex and divisive issue. In the working party’s view, it is not appropriate to ask

employees and workers as to their caste as part of the data collated for monitoring purposes.

A universal adoption of anonymised applications may be a more inclusive approach towards recruitment biases.

Q10 and Q11: Which is your preferred option to tackle caste discrimination and why?

As a group ELA's working party was unable to reach consensus on this issue, reflecting perhaps the broader community and just how controversial an issue this is.

Q13 Apart from the options covered in this document, is there anything else you think the Government can do to prevent discrimination on grounds of caste in Great Britain?

See above.

Greater publicity through, for example, the publication of ACAs guidance explaining the effect of *Tirkey v Chandok* and obligations on employers proactively to take steps to train and raise awareness of this issue in their workforces and to amend their diversity policies accordingly.

Wider workplace recommendations would be welcomed by employers so that there is clarity as to the extent of their obligations and by employees so that sufficiently publicity is afforded to this issue. It may be that the judiciary would be willing (and encouraged) to make recommendations in a case where there is a finding of caste discrimination.

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