



Law Society
of Scotland

Consultation Response

Caste in Great Britain and Equality Law

September 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Equalities Law Sub-committee welcomes the opportunity to consider and respond to the Government Equalities Office consultation: Caste in Great Britain and Equality Law. The Sub-committee has the following comments to put forward for consideration.

Option 1 – Prohibiting caste discrimination though developing case-law

Q1. To what extent do you agree or disagree that protection against discrimination on grounds of ethnic origin provides an appropriate level of protection against caste discrimination?

Strongly disagree.

Q2. Why do you think this? Please explain your answer to Q1.

While the Society recognises the importance of case law as the Supreme Court observed in *R (UNISON) v Lord Chancellor*,¹ the Society is not convinced that it is appropriate for Government to rely on the possibility of development of case law to provide protection. The decision of the EAT in *Chandhok & Anor v Tirkey*² is not an authority for the proposition that 'caste' will fall within the definition of 'racial origins' or 'ethnic origin' or 'race' in section 9(1) of the Equality Act 2010, but that it simply has the potential to do so, or that it might

¹ *R (UNISON) v Lord Chancellor* [2017] UKSC 51

² *Chandhok & Anor v Tirkey* [2014] UKEAT 0190_14_1912

be capable of doing so, provided that the tests as set out in the case law³ are satisfied. As such, it is not accurate to say that the case law has developed to such a state that 'caste' will invariably come within section 9(1) of the Equality Act: a claimant will still have to negotiate his/her way through the criteria for the establishment of the characteristics of 'race', 'ethnic origin' or 'racial origins', even though these do not map on neatly to 'caste'. There are also wider and more abstract difficulties associated with simply waiting for the case law to evolve. As the Supreme Court iterated in the Unison decision:

“Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced.”

Indeed, as the foregoing case demonstrates, case law can only develop after harm has occurred and will commonly take many years for binding appellate decision to provide effective protection. While some groups have achieved protection by case law without specific mention the protection has been secured only after many years of actual harm.

It is considered that case law is not an adequate response and it is noted that the UN Committee on the Elimination of Racial Discrimination has long affirmed that article 1 of the Convention encompasses situations of caste-based discrimination and analogous forms of inherited social exclusion. General Recommendation XXIX adopted on 22 August 2002 confirms that *“the consistent view of the Committee that the term “descent” in Article 1, paragraph 1 of the Convention does not solely refer to “race” and has a meaning and application which complements the other prohibited grounds of discrimination”*; and - reaffirms that *“discrimination based on “descent” includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights”*.

The Special Rapporteur on racism has extensively addressed discrimination on grounds of caste and other systems of inherited status as implicit in his mandate. The UN Sub-Commission on the Promotion and Protection of Human Rights has prepared Draft Principles and Guidelines for the Effective Elimination of Discrimination based on Work and Descent,⁴ which refer to *“any distinction, exclusion, restriction, or preference based on inherited status such as caste, including present or ancestral occupation, family, community or social origin, name, birth place, place of residence, dialect and accent”*. Further, Article 1(1) of International Convention on the Elimination of All Forms of Racial Discrimination defines 'racial discrimination' as follows: *“any distinction, exclusion, restriction or preference based on race, colour, descent, national or ethnic origin which has the purpose or effect of nullifying or impairing the*

³ For example, *Mandla v Dowell Lee* [1983] AC 548

⁴ Final Report of Mr. Yozo Yokota and Ms. Chin-Sung Chung, Special Rapporteurs on the topic of discrimination based on work and descent, A/HRC/11/CRP.3 (2009)

recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Case law remains uncertain as House of Commons Library Research Briefing on caste discrimination and the Equality Act 2010⁵ commented that the EAT in *Chandhok & Anor v Tirkey*⁶ held that, notwithstanding the fact caste, as an autonomous concept, did not fall within the Equality Act 2010 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). Again, as the research paper stated, Langstaff P’s analysis of the law suggests it is possible, under current law, for caste discrimination to be unlawful, but that this will only be so if at least one of the factual circumstances that make a claimant describable as being of a particular caste falls within the scope of the existing definition of race. This is an unnecessary complication. Useful comparison may be drawn with perception of disability and the legislative history of the Equality Act 2010,⁷ it is considered that that discrimination or harassment in relation to perceived caste could be covered by the relevant extension of the Equality Act 2010.

Q3. Which types of caste discrimination, if any, do you think would not be covered by the concept of ethnic origin in case-law? Please clearly list the features of caste which you think are not covered by ethnic origin and explain why you think this.

We have no comment on at this stage, but note the Equality and Human Rights Commission’s report on equality law and caste.⁸

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

We have no comment on the socio-economic implications of inserting caste into the Equality Act, but note the discussion in the House of Commons Library Research Briefing on caste discrimination and

⁵ D Pyper, *The Equality Act 2010: caste discrimination*, House of Commons Library Research Briefing Paper Number 06862 (2015)

⁶ *Chandhok & Anor v Tirkey* [2014] UKEAT 0190_14_1912

⁷ See, for example *English v Thomas Sanderson* [2008] EWCA Civ 1421, *J v DLA Piper UK LLP* UKEAT/0263/09/RN, and *Peninsula Business Service Ltd v Baker* UKEAT/0241/16/RN

⁸ M Dhanda, A Waughray, D Keane, D Mosse, R Green and S Whittle, *Caste in Britain: Socio-legal Review*, Equality and Human Rights Commission Research Report 91 (2014)

the Equality Act 2010⁹ and the findings of the National Institute of Economic and Social Research paper on caste discrimination in Great Britain.¹⁰

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

Legal uncertainty and actual harm required to be suffered by socio economically vulnerable groups.

Option 2 – Prohibition of caste discrimination by specifying caste in the Equality Act

Q6. What are the benefits (e.g. social and economic) of inserting caste into the Equality Act 2010 as a specific aspect of race?

We have no comment on the socio-economic implications of inserting caste into the Equality Act, but note the discussion in the House of Commons Library Research Briefing on caste discrimination and the Equality Act 2010¹¹ and the findings of the National Institute of Economic and Social Research paper on caste discrimination in Great Britain.¹²

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

It is considered that discrimination or harassment in relation to perceived caste could be covered by the relevant extension of the Equality Act and that disadvantages could be addressed by allowing for the concept of perceived caste.

⁹ D Pyper, *The Equality Act 2010: caste discrimination*, House of Commons Library Research Briefing Paper Number 06862 (2015)

¹⁰ H Metcalf and H Rolfe, *Caste discrimination and harassment in Great Britain*, National Institute of Economic and Social Research (2010)

¹¹ D Pyper, *The Equality Act 2010: caste discrimination*, House of Commons Library Research Briefing Paper Number 06862 (2015)

¹² H Metcalf and H Rolfe, *Caste discrimination and harassment in Great Britain*, National Institute of Economic and Social Research (2010)

Q8. There are also two specific provisions in the Equality Act 2010 that we would particularly like to get your opinion on – the Public Sector Equality Duty and positive action. To what extent do you agree or disagree that the following provisions should apply to caste:

a) Public Sector Equality Duty

Agree.

b) Positive action

No comment.

Q9. Why do you think this? Please explain the reason for your answers to Q8a and/or Q8b a) Public Sector Equality Duty

If caste is included as a specific aspect of race, a protected characteristic under the Equality Act 2010, applying the Public Sector Equality Duty would be consistent and would promote the aim of the Act.

Key summary questions

Q10. Which is your preferred option to tackle caste discrimination?

Using the legislative duty to insert caste into the Equality Act 2010 as an aspect of race.

Q11. Why do you think this? Please explain the reasons for your answer to Q10.

See answer at Q1 above.



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