

DLA response to “Caste in Great Britain and Equality Law: A public consultation”

Introduction

1. The Discrimination Law Association (“DLA”) is a non-profit network that brings together a broad range of discrimination law practitioners, policy experts, academics, and concerned individuals and organisations, all united around a commitment to strengthening anti-discrimination law, practice, advice and education in the UK. The DLA has around 300 members and reaches many more through organisations that are our members, allied networks, groups and institutions.
2. The DLA is a registered charity – number 1124892.

Questions relating to option 1 – Prohibiting caste discrimination through developing case-law

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 against caste discrimination? Please explain your answer.

3. The DLA agrees that the protection against discrimination on grounds of ethnic origin provides substantial protection against caste discrimination.
4. There is no universally agreed definition of caste and it is not a straightforward concept. However, the explanatory notes to the Equality Act 2010 (“EA 2010”) define caste as follows:

The term “caste denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin, Kshatriva, Vaishva and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed “untouchable”) are known as Dalit” [emphasis added].

5. A 2016 report of the UN Special Rapporteur on minority issues did not attempt to define caste, though stated that “*Discrimination based on caste and analogous systems of inherited status refers to a form of discrimination based on descent.*”¹ The Special Rapporteur went on to identify distinguishing characteristics of caste and analogous systems as follows:
 - a) Hereditary nature: caste status is inherited by birth and follows the individual until death;
 - b) Labour stratification and occupational segregation: caste status determines and is confined to certain occupations, which are compulsory and endogenous. Individuals from lower-caste strata are traditionally assigned to tasks deemed “polluting” or menial by higher caste groups;

¹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/013/73/PDF/G1601373.pdf?OpenElement>

- c) Untouchability practices: a set of collective behaviours and norms stemming from the belief that contact with individuals from lower castes is “polluting”;
 - d) Enforced endogamy: inter-caste interactions are limited and in some cases *de facto* prohibited.
6. Research commissioned by the Equality and Human Rights Commission on caste in Britain also did not attempt to define caste, but stated:

Caste is a form of identity that is used as a basis for social differentiation and usually involves inequality. It is generally accepted that caste is acquired by birth and sustained by endogamy, in which marriage is restricted to individuals of the same caste [emphasis added].²

7. Following the publication of that research, the EHRC issued a press release recommending that:

The definition of caste should be neither too precise nor too broad. A minimum definition of caste in terms of endogamy (marriage restricted within a specific group), inherited status and social stratification would be useful [emphasis added].³

8. In each of the above cases, a fundamental feature of caste is identified as being its hereditary nature, acquired at birth. If this is, indeed, accepted as a characteristic of caste, the DLA considers that the existing prohibition of discrimination on the grounds of ethnic origin, as an aspect of race in s.9(1)(c) EA 2010, does provide protection against caste discrimination. “Ethnic origin” has been given a purposive interpretation by the courts and tribunals, both in reference to the EA 2010 and the predecessor legislation, the Race Relations Act 1976 (“RRA 1976”), and has been said to include “descent”.
9. For example, in *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) the House of Lords established that “ethnicity” should not be construed in a narrow, biological sense, but that it should be construed “*relatively widely*” in a broad cultural/historic sense. Lord Fraser identified the following as essential characteristics for a group to constitute an ethnic group:
- i. a distinct and long shared history as a group ;
 - ii. a cultural tradition of its own, including family and social customs.
10. However he also identified additional non-essential characteristics, which may be relevant, including “*descent*”.
11. More recently, in *R(E) v Governing Body of JFS and another* [2010] 2 AC 728 (SC), the Supreme Court took an approach to ethnic origins as not defined only in the wide *Mandla* sense but also in a narrower sense related to birth or descent. Lord Phillips said [at 33] that the word “*origins*” requires one “*to focus on descent*”. On the meaning of descent, Lord Mance referred to the definition of racial discrimination in the ICERD, which includes discrimination by descent, and to the interpretation of decent by the Committee on the Elimination of Racial Discrimination (CERD) as including caste and “*analogous systems of inherited status*” (CERD general recommendation 29).

² <https://www.equalityhumanrights.com/sites/default/files/research-report-91-caste-in-britain-socio-legal-review.pdf>

³ <http://webarchive.nationalarchives.gov.uk/20141003215501/http://www.equalityhumanrights.com/mission-publishes-new-caste-research>

12. In *Tirkey v Chandok* [2014] UKEAT/0190/14/1912, however, applying the principles in *Mandla* and *JFS*, Langstaff J upheld a complaint of caste discrimination stating, at [44] “*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*”.

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 clearly list the features of caste which you think are not covered by ethnic origin and explain why you think this.

13. As described above, there is no universally accepted definition of caste. However, having regard to the characteristics of caste identified above in the EA 2010 explanatory notes, by EHRC-commissioned researchers, and by the UN Special Rapporteur, all identify caste as a hereditary/inherited characteristic acquired by descent. The DLA therefore considers that, for the reasons set out above, discrimination based on caste (or assumed caste) would indeed be subsumed under discrimination based on ethnic origin.
14. This would likely still be the case even if the discrimination was triggered by a perception of an individual’s caste based, for example, on surname or occupation, provided the reason for the treatment was the discriminator’s conscious or subconscious association with that name or occupation with caste as a hereditary status based on descent. This is confirmed by the conclusion of Langstaff J in *Tirkey* that to succeed in a claim for caste discrimination the facts need to establish that the reasons for the treatment are “*reasons which more than minimally included their view of [the victim’s] status or origins, and if that status, or that view is bound up with her ethnic origins as understood in domestic law*” [46].
15. It may, therefore, be open to a discriminator to assert that discrimination was based not on caste but rather based on a discrete characteristic such as social standing, class or occupation. If the findings of fact concluded that this was in fact the case, and that such discrimination was unrelated to any notion of descent or hereditary status, then this would fall outside discrimination on the basis of ethnic origin, but would also unlikely to be considered caste-based discrimination (as opposed to class-based discrimination) in any event, having regard to the definitions and characteristics of caste discussed above.
16. The DLA has therefore not been able to identify aspects of caste-based discrimination that would fall outside discrimination based on ethnic origin, having regarded to the definitions/characteristics of caste identified above. The DLA does not go as far as to say that no aspects of caste would fall outside ethnic origin and much would depend on the definition of caste adopted, and whether caste was to be defined in a way which did not have reference to hereditary status/descent.

Questions 4 and 5: What are the benefits and disadvantages (e.g. social and economic) of using case-law to implement a legal ban on caste discrimination?

Advantages

17. As described above, the DLA considers that the development of case law has already established that caste discrimination is prohibited as a form of discrimination based on ethnic origins.
18. Furthermore, as described above, there is no commonly accepted definition of caste. It is multi-faceted and complex. Such subtleties may be better dealt with by case law, which

can evolve and respond to arguments and facts, and provide greater flexibility than a rigid statutory definition.

Disadvantages

19. As described above, the DLA considers that the development of case law has already established that caste discrimination is prohibited as a form of discrimination based on ethnic origins. The DLA does, however observe that *Tirkey* was a decision only at EAT level and that therefore that does carry a risk that a contrary decision could be made by a higher Court, though the DLA considers that unlikely in light of *Mandla* and *JFS*.
20. It is also unclear whether the decision in *Tirkey* has had any real impact on, for example, employment practices. Legislative amendment may have the effect of raising awareness of the issue of caste-discrimination, although an alternative route to awareness raising and education would be through updating the Code of Practice to refer to *Tirkey* and to update ACAS guidance.

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

Questions 6 and 7: What are the benefits and disadvantages (e.g. social and economic) of inserting caste into the Equality Act 2010 as a specific aspect of race?

Advantages

21. A benefit of inserting caste into the EA as a specific aspect of race is that it would send a clear message that caste-based discrimination is unacceptable. Research by the National Institute of Economic and Social Research (NIESR) has identified that discrimination and harassment based on caste does exist both in the workplace, in the provision of services, and in schools (pupil-pupil bullying). Legislative awareness may have the effect of raising awareness, not only amongst employers, schools and service providers, but also amongst victims who may feel empowered to bring claims.
22. Furthermore the UN Committee on the Elimination of Racial Discrimination's concluding observations on the twenty-first to twenty-third periodic reviews of the United Kingdom, in 2016, expressly recommended that section 9(5)(a) be invoked "*without further delay to ensure that caste-based discrimination is explicitly prohibited under law*".⁴

Disadvantages

23. However, a disadvantage of inserting caste into the EA 2010 as a specific aspect of race is the difficulty of defining caste in a manner which is not overly restrictive, reflects the complex nature of caste, and that does not unwittingly focus exclusively on caste as it exists in South Asia and the South Asian diaspora. The government itself observes in the consultation that "*establishing a workable definition of caste is highly challenging*". However, it could be that interpretation and definition is simply left to the courts and tribunals to consider on a case-by-case basis, in response to the particular facts of the cases that come before them.

Questions 8 and 9: To what extent do you agree or disagree that the Public Sector Equality Duty and Positive Action should apply to caste? Why do you think this?

⁴ http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf

24. In order for public bodies to positively promote good relations and advance equality of opportunity pursuant to their obligations under s.149(1)(b) and (c), it is common place for public bodies to engage in diversity and equal opportunities monitoring, which is generally a sensible and welcomed practice. However, there is a concern that public bodies requesting and holding information about caste could have unintended negative consequences. Aside from the fact that many individuals may be unwilling or unable to disclose details about caste, even in confidential ethnic monitoring forms,⁵ there is a risk that asking specific questions about caste could result in actually entrenching caste consciousness. Indeed, the EHRC commissioned research into caste in Britain concluded that *“in relation to caste there appears to be widespread agreement...that the collection of data on caste would be counter-productive.”*
25. However, disapplying caste within the PSED may send a message that caste discrimination is of less importance or less serious than other forms of racial discrimination, which would be undesirable. It would therefore be advisable for guidance to be published on how caste-based ethnic monitoring could be dealt with sensitively and proportionately.
26. Similar concerns about unwittingly entrenching caste consciousness arise in respect of the application of caste to the positive action provisions of the EA 2010. Indeed, the consultation itself states that the Government *“does not support people being asked such potentially intrusive and socially divisive questions”*.
27. It may not be worth running this risk in light of the NIESR’s findings that although caste discrimination and harassment does exist in the UK, there was little evidence to suggest that it was prevalent in respect of recruitment and promotion.

Key Summary Questions

Questions 10 and 11: Which is your preferred option to tackle caste discrimination? Why do you think this?

28. This is a complex issue and there are advantages and disadvantages in respect of both options put forward by the government’s consultation. The DLA has not polled its members, though has sought their input in respect of this consultation. As a result, the DLA does not take a formal position either way, but hopes that the views stated above will help to inform the government’s decision.

Question 12: Can you provide data on costs and benefits, including costs and benefits to individuals, of caste becoming an aspect of race in the Equality Act either through specific change to the legislation or through reliance on case-law following the judgment in *Tirkey v Chandhok*?

29. The DLA holds no relevant data and is therefore unable to answer this question.

Question 13: 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?

⁵ For example, the NIESCR report noted that in conducting their research, although it was necessary to identify the castes (or perceived castes) of the people involved in incidents which were perceived as discriminatory, many interviewees either rejected a caste label or the idea of caste entirely.

30. As described above, additional steps could be taken to raise awareness of the decision in *Tirkey* and the unacceptable nature of caste-discrimination, including an amendment to the Equality Act Code of Practice and Acas guidance.