



Government
Equalities Office

Caste in Great Britain and equality law: a public consultation

Government consultation response

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Introduction

This is the Government response to a public consultation about how to ensure that there is appropriate and proportionate legal protection against unlawful discrimination because of caste.

As the result of a 2013 amendment to section 9 (5) (a) of the Equality Act 2010, a duty exists to introduce specific legal protection against discrimination because of caste, by making caste an aspect of race for the purposes of the Act. However, the subsequent judgment of an Employment Appeal Tribunal [EAT] in the *Tirkey v Chandhok* case in 2014 established that many of the facts relevant in considering caste in many of its forms might be equally capable of being considered as part of a person's ethnic origins, which is already part of the existing race provisions within the Act.

The consultation therefore invited views on whether suitable legal protection against caste discrimination is better ensured by exercising the duty or by relying on emerging case-law under the Act as developed by courts and tribunals.

The public consultation ran from 28 March 2017 to 18 September 2017.

The consultation questionnaire consisted of 13 questions: 3 'closed' and 10 'open-ended'. Respondents were able to complete the questionnaire online, via email or in hard-copy.

As we wanted to be able to consider the widest possible range of public opinions on this matter, we encouraged everyone with a view on this issue to participate. In order to make participation easier, we accepted all forms of written response as part of the consultation. Some of these responses addressed the specific questions set out in the consultation but many expressed opinions more generally about caste discrimination and how best to provide the necessary legal protection without directly answering the set questions.

As part of the consultation, officials held two roundtable meetings, one with representatives from the lobby that is in favour of exercising the duty and so inserting explicit legislation in the Act and the other with those who are opposed to such legislation being introduced. Officials also discussed the consultation with the devolved administrations and with business interests. No other stakeholders requested meetings.

The consultation received over 16,000 responses. A large proportion of these (over 60%) were some form of campaign responses which meant there was a large amount of duplication in the views expressed. In total, 24 different campaign responses were identified – these ranged from batches with approximately a dozen responses to campaigns which produced several hundred submissions.

Because of the mixture of response types, and in particular the need to interpret the more narrative responses against the specific questions asked in the consultation, the analytical study of the consultation responses was outsourced to an independent company with specific experience and expertise in evaluating such exercises.

Therefore this Government response needs to be read in conjunction with the accompanying consultation analysis report which is being published at the same time.

Summary of responses received and the government's response

Throughout the consultation, Government was clear that this should be a qualitative exercise not a quantitative one. In other words, it would not simply be a matter of determining the majority view expressed by the responses and proceeding accordingly.

As much as the prevalence of particular views, we were looking for conclusive and persuasive arguments as to why one option was better than the other in terms of providing appropriate and proportionate legal protection against caste discrimination while minimising the risk of creating unintended consequences. In particular, we wished to avoid any outcome that risked promoting, creating or entrenching ideas of caste or heightening caste consciousness where they did not previously exist.

As well as seeking views on which was the better option, there were certain key issues that we wished respondents to give particular attention to as part of the consultation. These were:

- What types of caste discrimination, if any, would not be covered by the concept of ethnic origin in case-law under the existing race provisions in the Act; and
- What are the main costs and benefits of each option.

Responses

The consultation offered two choices on how to provide the necessary legal protection against caste discrimination:

- By relying on emerging case-law under the Act as developed by courts and tribunals; or
- By using the legislative duty to insert caste into the Act as an aspect of race.

However, a significant number of respondents rejected both options – they did not wish to see caste become an explicit part of the race provisions but they did not consider that reliance on emerging case-law was necessary either. Many expressed the view that the limited existing case-law should be ‘repealed’ along with the duty to insert caste into the Act.

Technically, case-law cannot be ‘repealed’ as it is something developed by the courts in compliance with existing legislation. In the light of our meetings with stakeholder groups, we understand ‘repeal of case-law’ as a desire for the Government to introduce legislation which would preclude the possibility of caste being a legal concept in domestic law.

As previously stated, we were keen to be able to consider the widest possible range of public views on options for tackling caste discrimination so responses in favour of this third option were accepted as legitimate contributions and were considered as part of the overall analysis.

This meant that there were three broad categories of response to the consultation:

- Those in favour of case-law;
- Those in favour of legislation;
- Those who rejected both options.

Main findings from the consultation

Responses were coded according to a coding framework developed specifically for this exercise by the independent analysts. Where respondents explicitly addressed specific consultation questions their responses were coded according to the framework. It was possible that a response was allocated more than one code, typically where a respondent had expressed several reasons for their answer.

Where a more narrative response had been supplied that did not directly answer any of the consultation questions it was read and qualitatively analysed to extract any sufficiently pertinent information that could contribute to the Government's overall consideration of the consultation responses.¹

Where a respondent had provided a more narrative response, it was nevertheless possible '*...in the vast majority of cases*'² for the analysts to be able to determine from the views expressed whether the respondent was in favour of case-law, legislation or neither.

Preferred option

Of the 16,138 consultation responses, analysis indicated that:

- 8,513 respondents were 'in favour of relying on case-law';
- 2,885 respondents were 'in favour of legislation';
- 3,588 respondents rejected both options;
- 1,113 respondents were 'not sure' which was the better option;
- 1 respondent was in favour of either option; and
- The views of 38 respondents were sufficiently unclear as to not be able to determine which option they supported.³

¹ See section 2.2 of the report.

² See section 4.3 of the report.

³ See section 4.3 of the report.

Caste as an aspect of ethnic origins

Question 3 of the consultation asked:

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

Over 7,000 people responded directly to this question. However, nearly 3,000 of these responses were not applicable to the specific question, for instance some simply restating general opinions about caste.

Almost 3,000 respondents thought that there were no features of caste that were not also aspects of ethnic origins as caste does not exist in the UK in any case. A further 731 responses stated that there were no aspects of caste that were not adequately covered by ethnic origins but without giving any reason for that position.

There were 568 responses that indicated that there were some aspects of caste that would not be captured by the concept of ethnic origins.⁴ However, very few provided any clear examples as to what those aspects actually were. Instead they either talked in general terms about the complexity of caste or referred to aspects such as religious belief or geographical ancestry. These are examples of concepts that would be actually be captured by other parts of the Act, namely the religion or belief and national or ethnic origins provisions respectively.

Costs and benefits

Question 12 of the consultation asked respondents to provide data on any costs and benefits in relation to each option.

Over 7,000 people responded directly to this question. However, the vast majority of those who responded to this specific question talked in general terms - no respondents were able to provide any precise data on the costs or benefits of either option,⁵ even those who otherwise provided very detailed consultation responses in other respects.⁶

⁴ See section 4.4.3 of the report.

⁵ See section 4.4.11 of the report.

⁶ See section 4.2.4.6 of the report.

Question analysis

Detailed consideration of the consultation responses on a question by question basis can be found in the consultation analysis report that accompanies this Government response.

Government response

At the beginning of the consultation the Government made it clear that it had no preferred or expected outcome. That is why the questions in the consultation were phrased in a neutral way without the Government expressing a preference for either option - explicit legislation or reliance on emerging case-law.

We saw the consultation as an opportunity for people to put forward persuasive arguments as to which of the two options offered the better way of providing the necessary legal protection against caste discrimination and we are grateful to all the respondents who took part in this exercise.

However, as identified by the independent analysts:

‘...there was a common tendency among respondents...not to answer the specific questions being asked. It was common for respondents to provide responses that outline their general view or perspective about ‘caste’.⁷

Many respondents also repeated these general opinions in response to several different questions, rather than address the particular question itself. This meant that many responses lacked the level of detailed consideration that we had hoped would help inform our decision about which was the better option to pursue.

Relying on emerging case-law

Flexibility

The existing duty in section 9 (5) (a) of the Act requires the word ‘caste’ to be inserted into the race provisions of the Act but it does not enable the power to include an accompanying definition, even if a commonly accepted definition could be agreed on.

This led some respondents to believe that the better option to provide protection against caste discrimination was through case-law. Case-law can be more flexible and allows the concept of caste to be developed and refined over time.

⁷ See section 4.1 of the report.

Some of the views expressed were: ⁸

‘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’.

‘Case-law is fluid and allows for an investigation of specific facts allowing it to be flexible to cultural and societal changes as well as being more nuanced in approach than a strict definition’.

Conversely, there were those who identified the same flexibility and fluidity of relying on case-law as being a drawback because there was no guarantee about the way in which it would develop.

‘There is no guarantee that case-law will develop to recognise that caste is covered by existing law and that discrimination on grounds of caste is unlawful’. ⁹

We have carefully considered the full terms of the judgment, but in our view, this fails to take into account that *Tirkey* shows that someone claiming caste discrimination may rely on the existing statutory remedy where they can show that their “caste” is related to their ethnic origin.

Another potential drawback of relying on case-law that was identified was the possibility that the *Tirkey* judgment could at some stage be overturned.

‘Development of case-law has already established that caste discrimination is prohibited as a form of discrimination based on ethnic origins, but that Tirkey was a decision only at EAT level and that therefore does carry a risk that a contrary decision could be made by a higher Court’. ¹⁰

We address this risk in the final paragraph of the “conclusions” section.

Social status / class

Many of those who were against relying on emerging case-law to provide legal protection cited the complex and nuanced nature of caste as a reason why the ethnic origins aspect of race did not provide the necessary comprehensive protection.

A more developed form of this argument was put forward, based on the outcome of the *Naveed v Aslam* case from 2011, that the stratification of groups within the concept of caste could potentially mean that discrimination could take place between

⁸ See section 4.2.4.3 of the report.

⁹ See section 4.2.4.4 of the report.

¹⁰ Ibid.

those at different 'levels' within the same caste and that this could not be captured by reliance on the ethnic origins provisions as the origins of A and B would both be broadly the same. One response stated:

*'...the complainant recognised that both he and the respondents were of the same Arain caste. The tribunal concluded therefore that his maltreatment could not have originated from his ethnic origin.'*¹¹

However, the Employment Tribunal in *Naveed v Aslam* found that the abuse suffered by the claimant was actually unrelated to caste – the treatment was because of his 'class'. In any case, the binding judgment that sets the legal precedent in this area is from the *Tirkey v Chandhok* EAT hearing, which both post-dates *Naveed* and derives from a superior court of law.

Other respondents also reflected on the nature of social status, and the possibility of social mobility, within the caste system.

'The systematic disadvantage suffered by certain castes may not be related to ethnicity...but to perceived social... status'

A further dimension to this argument concerns the historical 'social function' aspect of caste identity. A person's surname may be an indicator of their ancestors' occupation and so identify their historical social status.

*'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...'*¹²

Some responses maintained that it was better to insert caste directly into the Act because any and all dimensions that may in some way be 'caste related' would be captured that way rather than by relying on the more generic ethnic origins.

However, from the outset the Government had made clear that we wished to provide the necessary legal protection for caste discrimination without creating unintended consequences. Nor did we want to draw the protections so widely that they captured other concepts that were not desirable or which were not the focus of the exercise and which would need much wider and more detailed consideration of their implications before considering whether or not such legislation would be beneficial.

This was a consultation about caste discrimination, not about social status or social mobility, and we are not attracted to the idea of legal provisions that will potentially

¹¹ See section 4.2.1 of the report.

¹² Employment Lawyers Association response

encourage the concepts of class, economic standing or social status within individual castes, as grounds for claiming discrimination.

Sub-groups

A concern was expressed that if caste was treated as an aspect of ethnic origins that *'...complexities, such as sub-castes and sub-groups, including those within the Dalit caste, will not be covered'*.¹³ We do not agree with that view. We consider that the existing legislation is sufficiently flexible to be able to capture, and so protect, such sub-groups.

For instance, as made explicit within the accompanying Explanatory Notes to the Equality Act 2010, denominations and sects within a major religion are protected by the religion or belief provisions of the Act. Equally, it is clear that the "colour" protection under the race provisions in the Act is not limited simply to distinctions between radically different skin colours, but can also capture discrimination based on colour between individuals of similar skin pigment.

Finally, we are not aware from any of the research into caste discrimination by NIESR and others, of discrimination between such sub-groups or sub-castes being a real-life issue. Almost invariably, the problem in Great Britain has been presented as caste-related discrimination between those identifying or identified as 'high caste' and those identifying or identified as 'low caste', such as Dalits.

Religion

A number of respondents referred to the religious element that was part of the complexity of caste identity.¹⁴ However, it is important to bear in mind that if holding, or association with, a religious belief was an aspect of any potential discrimination, that a victim would already be adequately protected under the religion or belief provisions within section 10 of the Act.

Legislating to make caste an explicit aspect of race in the Equality Act 2010

Legal certainty

As well as the arguments for and against relying on emerging case-law (in particular see the 'Flexibility' section above), a common view among some respondents was the absolute legal certainty that they considered inserting 'caste' into the Act would

¹³ See section 4.2.1 of the report.

¹⁴ Ibid.

provide. It would be unambiguous that caste was protected under law and not have to rely on courts interpretation of the interplay between caste and ethnic origins.

Some responses highlighted the potential for courts to reach contradictory decisions based on the facts of individual cases brought before them.

*“Leaving the current legislation as it is, on the basis that developing case law could be relied upon to protect against caste discrimination would accordingly lead to very considerable legal uncertainty as to the circumstances in which such discrimination was unlawful, and, potentially, to inconsistent decisions turning on the particular evidence put forward in an individual case.”*¹⁵

Definition

Many respondents pointed out the lack of a clear and universally accepted definition of ‘caste’. This difficulty was acknowledged as part of the consultation document itself, but the consultation responses did not indicate any viable alternatives to the definition in the explanatory notes to the 2010 Act (which has been strongly criticised by certain groups in the years since its publication, and was again during the consultation).

As the analysts’ report acknowledged:

*‘...some of the more detailed consultation responses highlighted the inherent difficulties in adequately and appropriately defining caste, particularly in law’.*¹⁶

The implications of being legally unable to generate a definition of caste to accompany any inclusion of ‘caste’ into the race provisions of the Act are significant. Not having a commonly agreed definition of ‘caste’ would mean inserting a concept into law that had neither an accompanying legal definition nor any commonly accepted interpretation of what it was and what specifically it captured, even among those who are familiar with the nuanced concept of caste.

As one respondent noted:

*‘The greatest hurdle in seeking to include caste as a specific aspect of race is that there is no clear definition of what is meant by caste, particularly if it is not sought to be targeted towards any specific community or religion. The inclusion of caste, without a clear definition, runs the risk of creating a blurring of the lines of discrimination in an unanticipated way’.*¹⁷

¹⁵ See section 4.2.4.4 of the report

¹⁶ See section 4.2.2 of the report.

¹⁷ See section 4.2.2 of the report.

Rejecting both options

A significant number of respondents, 3,588, rejected both options. Many of those proposed repealing both the existing legislation (i.e. the duty) and the case-law. We understand that by this is meant that the Government should introduce new legislation that would prevent the possibility of caste being a legal concept in domestic law, whether as a direct and explicit concept or even as consideration as part of a wider concept such as ethnic origins.

The Government did not propose this course of action as an option and we do not wish to pursue it. It is not clear how it would work in legislative terms, not least because it would not fit with the normal approach to anti-discrimination law, which is inclusive rather than exclusive in its treatment of grounds for claiming unfair treatment. It could also result in the Government being in breach of its international legal obligations.

Most importantly though, while the response to the consultation has not challenged the consultation's factual observation that there are very few court or tribunal cases where caste is a factor, that does not mean there are none at all. The *Tirkey v Chandhok* case was a disturbing one, in which the employment and employment appeal tribunals were in no doubt that serious unlawful discrimination had occurred, including on grounds relating to caste.

We do not consider that anyone who suffers unlawful discrimination should be deprived of protection or redress. We consider that that would be morally wrong and unfair to those who would potentially find themselves victims of discrimination to be without any possible legal protection.

We are not inclined, therefore, towards the third option as identified by some respondents during the consultation and we have no plans to introduce legislation that would proscribe caste as a reason for bringing a claim for discrimination.

Volume of cases

One of the considerations that was taken into account in reaching our conclusions was the volume of caste-related cases that are likely to come before the courts.

While some respondents consider that discrimination because of caste is a common problem in Great Britain, we are not aware that there are a large number of potential cases of caste discrimination that would be captured under domestic equality law.

As noted in the consultation itself, we know of only three cases that have a caste dimension that have been brought before the UK courts. The specific circumstances of two of these (*Naveem v Aslam*, *Begraj v Heer Manak*) mean that no relevant legal conclusions can be drawn from them about caste.

Given the EAT judgment in *Tirkey v Chandhok*, we consider that it is likely that anyone who believes that they have been discriminated against because of caste could bring a race discrimination claim under the existing ethnic origins provisions in the Equality Act 2010. We are unaware of any subsequent caste-related cases being brought before the courts since that judgment, although we were told during the consultation period about a situation where an individual employee felt they were being discriminated against (or, more probably, harassed) because of their caste.

Conclusions

Having given careful and detailed consideration to the findings of the consultation, Government believes that the best way to provide the necessary protection against unlawful discrimination because of caste is by relying on emerging case-law as developed by courts and tribunals. In particular, we feel this is the more proportionate approach given the extremely low numbers of cases involved and the clearly controversial nature of introducing “caste”, as a self-standing element, into British domestic law.

Legislating for caste is an exceptionally controversial issue, deeply divisive within certain groups, as the last few years have shown: it is as divisive as legislating for “class” to become a protected characteristic would be across British society more widely. Reliance on case-law, and the scope for individuals to bring claims of caste discrimination under “ethnic origins” rather than “caste” itself, is likely to create less friction between different groups and help community cohesion.

The consultation responses identified no significant aspects of what constituted ‘caste’ that would not adequately be captured by either the ethnic origins provisions already in the Equality Act 2010, or by other parts of the Act such as those relating to religion or belief.

The inability to define ‘caste’ within the legislation, even if an effective and suitable definition could be agreed on, presented a significant complication to introducing a concept into law that would potentially be open to a variety of interpretations. Interpreting caste either too narrowly or too broadly could give rise to either the legislation failing to cover some of those it was intended to protect or risk importing concepts into law that it was not designed to cover.

We consider that the flexibility that case-law provides gives the greatest scope for any cases brought before the courts to take account of the particular facts of a case and evolve naturally to ensure that the necessary protection is provided.

Taken together with the low volume of genuine cases that are likely to be brought before the courts and tribunals, these factors meant that we were not persuaded by the argument that introducing explicit legislation into domestic law was the most

appropriate and proportionate way to provide the necessary legal protection against discrimination because of caste.

We have taken into account the full terms of the *Tirkey* judgment and the responses to the consultation commenting on it and we will keep any new cases of caste discrimination that come before the courts under review to ensure that the principles established by the *Tirkey v Chandhok* judgment are upheld. Should there be any question that the established case-law is under challenge, for instance by a case being referred to a court higher than an EAT, we will consider whether Government should intervene in order to support the existing legal interpretation of the interaction between caste and ethnic origins.

Next steps

The duty that currently appears in section 9 (5) (a) of the Equality Act 2010 requires Government to take action to include caste as an aspect of race for the purposes of the Act. The decision to rely on emerging case-law renders that duty redundant and we will identify the most suitable legislative vehicle that can be used to repeal it at an early opportunity.



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