



Government  
Equalities Office

# **CASTE IN GREAT BRITAIN AND EQUALITY LAW: A PUBLIC CONSULTATION**

March 2017

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# Foreword

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No one should suffer prejudice or discrimination on any grounds. Behaviour based on prejudice and discrimination is wrong and should not be condoned, whether or not it is prohibited by legislation. Any prejudice and discrimination based on a person's origins is unfair and unacceptable in a modern society. There is no place for it. We want to eliminate any unlawful discrimination and create a genuinely meritocratic society that works for everyone.

However, in discussing caste, we want to be careful not to create or entrench any notion of caste consciousness or caste-based practices into British society, which may prove counterproductive or divisive. Nor do we want to associate caste issues with any one particular community or religion. This consultation is about how to ensure that there is appropriate and proportionate legal protection against unlawful discrimination because of a person's origins with due consideration given to how such protection would be implemented in practice.

Although the issues of caste and caste discrimination in Great Britain have been debated in Parliament during the passage first of the Equality Act (2010) and more recently the Enterprise and Regulatory Reform Act (2013), there has not, so far, been any universally accepted evidence produced nor any public consultation on these matters. This document provides an opportunity for the Government to open a public debate on whether caste is required to be an aspect of race in the Equality Act, and analyse the implications of the amendment in section 9 (5) (a) of the Equality Act, involving all those who may be affected by it in relation to work, the provision of goods and services and the carrying out of public functions. We are not consulting on extending the current scope of the Act to other areas.

We hope that employers, service providers and public authorities, as well as the wider public, will all contribute to this debate by responding to this consultation. That is why the consultation will run for 16 weeks in order to ensure that everyone will have the opportunity to express their opinions.

**GOVERNMENT EQUALITIES OFFICE**

# Responding to this consultation

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<b>Topic</b>	This public consultation sets out proposals for either reliance on case-law in courts and tribunals or for specific legislation for the prevention of discrimination on the basis of caste. The consultation sets out the background for an understanding of caste in Great Britain, and invites views on what, if any, legislative exceptions may be necessary if the specific legislative route is chosen.
<b>Geographical scope</b>	Great Britain.
<b>Audience</b>	This is a full public consultation that is open to all on the gov.uk website.
<b>Duration</b>	16 weeks. The consultation will close on 18 July 2017.
<b>How to respond</b>	<p>Once you have complete this consultation form you can either:</p> <p>Send it via email to: <a href="mailto:education.gov.uk@citizenspace.com">education.gov.uk@citizenspace.com</a> [<a href="mailto:education.gov.uk@citizenspace.com">mailto:education.gov.uk@citizenspace.com</a>]</p> <p>Or write to:</p> <p>Equality Act (caste) consultation responses          Government Equalities Office          Department for Education          Sanctuary Buildings          Great Smith Street          London          SW1P 3BT</p> <p>If you have any queries or require this consultation in an <b>alternative format</b> please email <a href="mailto:education.gov.uk@citizenspace.com">education.gov.uk@citizenspace.com</a> or write to us at the above address.</p> <p>When responding, please state if you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make clear whom the organisation represents and, where applicable, how you consulted your members.</p>

<p><b>Disclosure of responses</b></p>	<p>Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).</p> <p>The Government may publish responses received from organisations. If you want other information that you provide to be treated as confidential, please be aware that, under the Freedom of Information Act, there is a statutory code of practice with which public authorities must comply and which deals, among other things, with obligations of confidence.</p> <p>In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.</p> <p>The department will process your personal data in accordance with the Data Protection Act and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.</p>
<p><b>At the end of the consultation</b></p>	<p>A summary of responses will be published in due course following the closure of the consultation.</p>

# Section 1: INTRODUCTION

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1.1 This Government does not believe or accept that categorising or treating people by reference to their origins, in particular their caste, is acceptable. Both Parliament and the employment tribunals have indicated ways of preventing this through the Equality Act 2010 – Parliament by a duty to specify caste in the Act itself, the tribunals through acknowledging that caste is, at least in certain circumstances, an aspect of ethnic origin and is thus already covered, to that extent, by the Act. This consultation seeks views on which approach is the better course.

## **The Equality Act 2010**

1.2 The Equality Act 2010 is a comprehensive, consolidated statute. It brings together Great Britain's anti-discrimination legislation covering protection on grounds of gender and transgender, race, disability, religion or belief, age, sexual orientation and pregnancy and maternity in employment and the provision of goods and services, including transport, education and housing (see also "How the Equality Act Works" – Appendix A).

1.3 Parliament has determined that caste relates to the race characteristic in the Act and that caste discrimination is therefore an aspect of race discrimination. The key section of the Act that covers race is Section 9, which since 2013 reads as follows:

### **Race**

*(1) Race includes—*

*(a) colour;*

*(b) nationality;*

*(c) ethnic or national origins.*

*(2) In relation to the protected characteristic of race—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;*

*(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.*

*(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.*

*(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.*

*(5) A Minister of the Crown —*

(a) [must by order]<sup>1</sup> amend this section so as to provide for caste to be an aspect of race;

(b) [may by order]<sup>2</sup> amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.

(6) The power under section 207(4)(b), in its application to subsection (5), includes power to amend this Act.

1.4 This consultation document invites views from all those potentially affected by a legal prohibition against caste discrimination, on whether legal protection against this form of discrimination is best ensured by developing case-law under the Act or by making caste explicitly an aspect of race in the Act. Reliance on developing case-law in courts and tribunals (in particular, the Employment Appeal Tribunal ruling in the case of *Tirkey v Chandhok*<sup>3</sup>) would be likely to mean that caste, as an aspect of ethnic origins within the Act, is already covered by legislation and therefore an insertion of it as an aspect of race may not be necessary. It would therefore be subject to exactly the same exceptions and provisions that apply to ethnic origins (see Section 3 paragraphs 3.3 – 3.13 below).

1.5 By contrast, an explicit reference to caste in the Act would make it a new sub-section of race, alongside colour, nationality and ethnic origins: it would be treated as a unique element of the protected characteristic of race by courts and tribunals, and could potentially be subject to different exceptions in the Act and possibly excluded from provisions in the Act which otherwise apply to race (see Section 3 paragraphs 3.14 – 3.27 below).

1.6 In either case, the development of a legal prohibition on discrimination, harassment and victimisation on grounds of caste means that employers, service providers and other organisations need to consider caste discrimination in much the same way as they consider other forms of race discrimination. So this consultation is intended for:

- Members of communities within Great Britain who may encounter caste discrimination in their daily lives;
- Employers, service providers, educational and other institutions, and others who might at some point need to respond to a claim of caste discrimination by an employee, student, or customer;
- Business and trade organisations and trade unions which represent employers, service providers and employees;
- Members of the public who have an interest in or wish to know more about caste and caste discrimination in a British context
- Public bodies, and others who may have concerns about whether or how caste or caste-based discrimination should be monitored.

1.7 In 2013, amendments initiated in the House of Lords decided that specific legal protection against discrimination<sup>4</sup> because of caste should be introduced into domestic legislation, by

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<sup>1</sup> Text in square brackets inserted by the Enterprise and Regulatory Reform Act 2013, s97(1),(3)

<sup>2</sup> Text in square brackets inserted by the Enterprise and Regulatory Reform Act 2013, s97(1),(4)

<sup>3</sup> <http://www.employmentcasesupdate.co.uk/site.aspx?i=ed24995>

<sup>4</sup> This document uses the generic term “discrimination” (or discriminate) to cover discrimination, harassment and victimisation as defined by the Equality Act 2010. Please see Annex A for an explanation of the type of conduct that is unlawful under the Act.

making caste an aspect of race for the purposes of the Equality Act 2010<sup>5</sup>. A power to do this already existed in the Equality Act, and the further step which took place in 2013 was to turn this power into a duty – i.e. something which was required by law. However, the Coalition Government’s original timetable for introducing the duty was delayed by a number of factors, of which the most significant was carefully considering the developing implications of the *Tirkey v Chandhok* case – at that stage being heard first in an employment tribunal and then in the Employment Appeal Tribunal.

1.8 This Government is committed to minimising the risk of unintended consequences, whichever approach – reliance on case-law or specific legislation – is ultimately chosen. In assessing these risks, we need to recognise that caste is a controversial and sensitive issue where even key points are disputed by different groups. There is very little knowledge and understanding about caste in Great Britain and no universally accepted functional definition of caste which can be relied on. Organisations such as businesses and public bodies therefore have little, if any, awareness of what caste is and how it might be recognised. There remains the danger of stereotyping caste as a discriminatory practice of certain ethnic groups creating potential problems in the harmony of the social fabric of modern British society.

1.9 It is essential to get the legal approach to addressing caste discrimination right so that the law protects those it is intended to cover, but goes no wider than necessary. That is why the Coalition Government did not legislate on this matter immediately, and why this Government is seeking views through this public consultation, after which we will in due course announce a decision to legislate either to implement or to repeal the duty mentioned in paragraph 1.7 above<sup>6</sup>. The Government is committed to deciding the better approach between case-law and legislation in a way that is proportionate, and which protects people from discrimination and avoids unhelpful and socially divisive consequences such as promoting, creating or entrenching ideas of caste or heightening caste consciousness where they do not previously exist.

1.10 This consultation runs for 16 weeks and finishes on 18 July 2017.

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<sup>5</sup> Section 97 of the Enterprise and Regulatory Reform Act 2013 amends section 9(5) of the Equality Act 2010 so as to place a duty on a Minister of the Crown to make an order which includes “caste” within the definition of “race” in section 9 of that Act.

<sup>6</sup> Implementation of the duty would be by an affirmative order, - a type of secondary legislation which is debated by both Houses of Parliament and which either House can pass or reject but not amend. Repeal of the duty would be by primary legislation – an Act of Parliament.



# SECTION 2: UNDERSTANDING CASTE AND ITS RELEVANCE IN THE UK

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## What is “Caste”?

2.1 Caste and caste discrimination in Great Britain are complex, and their very understanding is highly polarised between different groups. The Government does not seek, nor claim to provide, a definitive view on these matters or to try to attach notions of caste simply to one section of society or one religion.

2.2 Establishing a workable definition of caste is highly challenging given it is not clear what social structures are covered by the concept. The UN Convention on the Elimination of Racial Discrimination links its definition of caste strongly to descent<sup>7</sup>. In domestic law, a definition of caste is included in the Explanatory Notes to the Equality Act 2010 but this contains origin and community identifiers, which has led to controversy and resentment because it associates caste with particular religions, which may be socially divisive:

*“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, Kshatriya, Vaishya 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 Dalits.”*

**[Explanatory note to Equality Act 2010]**

2.3 People who identify, or are regarded by others, as Dalits are considered to be the main victims of caste discrimination, and proposals to prohibit caste discrimination are normally associated with a desire to protect them. However, the inclusion of caste as an aspect of race within the Equality Act could potentially have unintended implications for members of those communities which are most naturally associated with issues of caste more generally.

2.4 Several studies have been carried out into caste discrimination, in particular – “Caste discrimination and harassment in Great Britain” (National Institute of Economic and Social Research – 2010)<sup>8</sup> and *Caste in Britain: socio-legal review* (University of Wolverhampton and

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<sup>7</sup> ICERD defines discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the 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”.

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<sup>8</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85522/caste-discrimination.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85522/caste-discrimination.pdf)

others, 2014)<sup>9</sup> – as well as a House of Commons Briefing Paper on caste discrimination (November 2015)<sup>10</sup>. These studies provide a number of examples of discrimination – some that would fall into the Act and others outside as described in 3.2, but no report provides universally accepted evidence of caste discrimination within the meaning of the Equality Act.

2.5 The Government is aware of three legal cases (all in the employment tribunals) in which caste discrimination has been included in the grounds of complaint:

*(i) Naveed v Aslam (2012)*. Mr Naveed was a chef recruited from Pakistan to work in a restaurant. His employers were disappointed with his work, as his cooking was not to their customers' taste and he was resistant to suggestions for improvement. This led to customer complaints and to disagreements between Mr Naveed, his employers and other staff. After the employment relationship ended, Mr Naveed made a claim against his former employers which included allegations of harassment and discrimination on grounds of race and caste. He said that he had been subjected to ridicule and abuse because of his Pakistani Arain caste. The tribunal did not accept his evidence, and thought that unpleasant exchanges at work were not related to Mr Naveed's caste but rather were caused by the difficult relationship between him and his employers. The tribunal also ruled that his claim could not have succeeded in any event. The reason for the abuse was not his ethnic origin, and in any case the power to make caste on its own an aspect of race had not been exercised.

*(ii) Begraj v Heer Manak Solicitors (2014)*. Mr Begraj was dismissed from his position as practice manager at Heer Manak and his wife later resigned from the same firm. He made a claim for wrongful dismissal and his wife for constructive unfair dismissal. Both alleged that the firm had been unhappy at the fact that the couple had married, as he was a Dalit and she, in common with their employers, was higher caste. The tribunal heard evidence for nearly 30 days, but because the judge recused herself no findings were ever made on the substantive claims. A subsequent human rights claim against the Secretary of State for Justice (failure to guarantee the Article 6 right to a fair trial) was struck out.

*(iii) Tirkey v Chandhok* – this case and its outcome is covered in more detail in the next section (paragraphs 3.5 – 3.8).

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<sup>9</sup> <https://www.equalityhumanrights.com/sites/default/files/research-report-91-caste-in-britain-socio-legal-review.pdf>

<sup>10</sup> <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06862>

# SECTION 3: HOW THE LAW COULD PROHIBIT CASTE DISCRIMINATION

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**This section includes questions which we would like you to answer – they can be found on pages 13 and 18-19**

## **What the Equality Act does and does not cover**

3.1 The Equality Act 2010 specifies the areas of activity in which discrimination is unlawful. These are when providing a service or delivering a public function, in selling or letting or managing premises, at work, in schools and higher education, and in private clubs and other associations. More detail on how the Act works is at Appendix A.

3.2 The Equality Act does not cover personal social relations, such as marriage, pupil-to-pupil behaviour in schools or actions that are potentially criminal in nature, such as threatening behaviour or vandalism. The Government has no intention to extend the Act to cover these activities, so they will not be covered by discrimination law irrespective of which of the two approaches set out below is chosen.

## **Option 1 - Prohibiting caste discrimination through developing case-law**

3.3 One way to ensure appropriate protection for victims of caste discrimination is to rely on the development of case-law to include caste within the meaning of the term ethnic origins in Section 9(1)(c) of the Act. This would not be a unique arrangement – for example various gypsy and traveller groups are accepted as being protected through case-law by the race provisions of the Act, although there is no mention of these groups in the Act itself.

3.4 The key case relating to caste discrimination is the Employment Appeal Tribunal case of *Tirkey v Chandhok*<sup>11</sup>.

### ***Tirkey v Chandhok*: summary**

3.5 In this case the Claimant worked for the Respondents as a domestic worker. She claimed that they treated her badly and in a demeaning manner, and that this was in part because of her low status which was infected with considerations of caste. The Respondents appealed to the Employment Appeal Tribunal against an earlier Employment Tribunal ruling in the Claimant's favour<sup>12</sup>, on the ground that caste did not fall within the definition of race in section 9 of

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<sup>11</sup> [http://www.bailii.org/uk/cases/UKCAT/2014/0190\\_14\\_1912.html](http://www.bailii.org/uk/cases/UKCAT/2014/0190_14_1912.html)

<sup>12</sup> <http://www.employmentcasesupdate.co.uk/site.aspx?i=ed24995>

the Equality Act 2010, and that the enactment of section 9(5) - both initially and as subsequently amended by the Enterprise and Regulatory Reform Act 2013 - demonstrated that Parliament recognised it was excluded from the definition in section 9(1).

3.6 In December 2014, the Employment Appeal Tribunal held that though caste as a specific concept did not presently come within section 9(1) of the Equality Act, many of the facts relevant in considering caste in many of its forms might be capable of doing so, since ethnic origins in section 9(1)(c) has a wide and flexible scope, including characteristics determined by descent.

3.7 The judge emphasised that his judgment was not a definitive assessment of whether caste is or is not within the scope of the Equality Act. He recognised that some cases where caste is a reason for less favourable treatment may fall outside the scope of protection of the Equality Act but did he not explain what these would be.

3.8 Nevertheless, the effect of the judgment is that it is likely that anyone who believes that they have been discriminated against because of caste could now bring a race discrimination claim under the existing ethnic origins limb of the race provisions in the Equality Act because of their descent. The Employment Appeal Tribunal is a superior court of record with equivalent status to the High Court and the judgment is binding on all employment tribunals which is the forum where victims of caste-based discrimination in the employment field are required to present their claims.

### **Effect of relying on case-law to protect victims of caste discrimination**

3.9 As noted in paragraph 3.7, the Employment Appeal Tribunal recognises that some cases where caste is a reason for less favourable treatment may fall outside the current scope of protection of the Equality Act. So far the Government is not aware of any aspects of caste that would appear to fall outside ethnic origins and we are not aware of any active legal cases beyond those summarised in paragraph 2.5. Other relevant factors – geography of someone's origin, religion, skin colour – all appear either secondary to ethnic origins or are already covered by race discrimination in the Equality Act.

3.10 Under this option, caste would not be specified in the Equality Act itself. It would develop over time through successive court judgments. Judicial developments to protect victims of caste discrimination would provide a degree of flexibility as to how the concept of caste discrimination develops as it would be governed by the facts of each particular case and also allow the definitional issues of caste to be developed through actual cases of discrimination. This approach is less likely to entrench the concept of caste into British society compared to placing caste on the face of the Act. It would also tend to reduce any additional burden on business.

3.11 Any claim would need to show that discrimination had been because of the claimant's descent (and thus their ethnic origins).

3.12 A claim of poor treatment because of caste might fail if a court found it was not related to descent.

3.13 The exceptions to race in the Equality Act would automatically apply to any form of caste discrimination as an aspect of ethnic origins (see below at 3.18 – 3.21 for a discussion of these and at Appendix B), and caste would automatically be covered within all those more general provisions in the Act which apply to race, including the public sector equality duty and positive action.

**Questions for you to consider on option 1 - Prohibiting caste discrimination through 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 Agree
- Agree
- Disagree
- Strongly Disagree
- Don't know

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

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.

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

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

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

3.14 A different way of protecting victims of caste discrimination is to ensure that the term caste appears on the face of the legislation as a self-standing, separate element of race in section 9(5) of the Act.

3.15 Following the 2013 decision of Parliament that caste should be added to the race discrimination provisions of the Equality Act, this document has noted (paragraph 1.3 above) that the relevant section of the Act reads as follows:

## **Section 9 of the Equality Act 2010**

### **Race**

*(1) Race includes—*

*(a) colour;*

*(b) nationality;*

*(c) ethnic or national origins.*

*(2) In relation to the protected characteristic of race—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;*

*(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.*

*(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.*

*(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.*

*(5) A Minister of the Crown —*

*(a) [must by order]<sup>13</sup> amend this section so as to provide for caste to be an aspect of race;*

*(b) [may by order]<sup>14</sup> amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.*

*(6) The power under section 207(4)(b), in its application to subsection (5), includes power to amend this Act.*

3.16 The Act as currently drafted therefore provides for **caste to become a specific aspect of the protected characteristic of race**. This is **in addition to** those aspects which race already includes; ie (a) colour, (b) nationality and (c) ethnic or national origins.

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<sup>13</sup> Text in square brackets inserted by the Enterprise and Regulatory Reform Act 2013, s97(1),(3)

<sup>14</sup> Text in square brackets inserted by the Enterprise and Regulatory Reform Act 2013, s97(1),(4)

3.17 The duty in section 9(5)(a) of the Act has not yet been implemented. This means that, at present, caste is not specified as an aspect of race and, in so far as it is currently covered by the race provisions in the Act, it may in certain circumstances be part of ethnic or national origins in section 9(1)(c). This is because of the Employment Appeal Tribunal judgment in *Tirkey v Chandhok* (see above).

### **Specifying Caste in the Act – Exceptions**

3.18 The legislation does however provide (Section 9(5)(b)) for a decision to be made about which exceptions to discrimination within the Act should apply, or not apply, to caste and which other provisions in the Act should or should not apply. This means that, if the duty to include caste is implemented, Parliament could decide that different exceptions should apply to caste than apply to other aspects of race; and it could also decide that other provisions in the Act which apply to all the protected characteristics (including race) should not apply to caste.

3.19 The Act contains a range of exceptions to the requirement not to discriminate. These define the circumstances in which it remains lawful to treat people differently because of a protected characteristic. This is to allow practices that are beneficial, justifiable, or genuine and proportionate. Some of these exceptions are general and apply to all protected characteristics. Examples of this type of exception include a ‘statutory authority’ exception, which allows differential treatment that would otherwise be considered discrimination, where it is required by other primary or secondary legislation.

3.20 Other exceptions are tailored to particular protected characteristics. Examples include businesses being able to offer special discounts only to pensioners<sup>15</sup>; or providers of extreme sports refusing to allow pregnant women to undertake high-risk activities<sup>16</sup>. Finally, some exceptions are specific to the different areas which the legislation covers – for example services and public functions or private clubs. The range of exceptions available for race is more restricted than that for some of the other protected characteristics, recognising that such differentiation is rarely acceptable and has often been pernicious: the scope for discrimination on grounds of colour – a sub-category of race in the Act – is especially limited for these reasons. For example while it is possible in certain circumstances<sup>17</sup> to give preference to people on the basis of sex or religion when selling or letting premises, or in admitting pupils to schools, it is not permissible on the basis of race. There are some provisions and exceptions in the Act that apply to aspects of race that may not be appropriate in relation to caste.

3.21 An order which implemented the caste duty might also amend the Act to include exceptions for caste, or make particular provisions of the Act apply in relation to caste in some but not other circumstances. The University of Wolverhampton report considered in detail Equality Act exceptions in relation to caste, but did not make any particular recommendation about which exceptions should or should not apply. (The exceptions which apply to race in the Act are at Appendix B).

### **Specifying caste in the Act – provisions which might not apply**

3.22 Work done into caste in the 2013-15 period, particularly by the EHRC and as part of the University of Wolverhampton-led research, identified two provisions in particular which might be

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<sup>15</sup> See Schedule 3 to the Equality Act 2010.

<sup>16</sup> See Schedule 3 to the Equality Act 2010 as amended by the Equality Act 2010 (Age Exceptions) Order 2010.

<sup>17</sup> See *Schedule 5 of the Equality Act 2010*

problematic if applied to caste – the public sector equality duty; and positive action. That is because there is a risk that in considering whether or not to take positive action or whether the public sector equality duty obligation applies, a body may consider that the best way to establish the necessary data would be to ask people about their caste, but the Government does not support people being asked such potentially intrusive and socially divisive questions.

### **1 - The Public Sector Equality Duty**

Section 149(1) of the Equality Act 2010 requires public bodies, when exercising their functions, to have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

The Duty is underpinned by specific duties set out in regulations, which differ between England, Scotland and Wales, with different detailed requirements applying to the public authorities in each country. In each case however, they include publication of varying amounts of equality-related data.

The Duty applies to various protected characteristics, including race. Schedule 18 of the Act contains some exceptions to the coverage of the Duty. For example, the requirement to have due regard to the need to advance equality of opportunity does not apply to race when a public body is exercising immigration functions, except in relation to colour.

There could be advantages and disadvantages of the Duty applying specifically to caste, rather than ethnic origins as at present. An advantage would be that public bodies would need specifically to consider the need to eliminate caste discrimination and to advance equality of opportunity etc. between people who share a particular caste and people who do not. Moreover, a complete exclusion of caste from the duty would put it in a different position from almost every other characteristic.

However, one particular risk of caste legislation further entrenching caste-identity would arise if personal, caste-related, information was requested from people. The Government is quite clear that there is no reason why employees or service recipients should be required or encouraged to disclose their caste. Nevertheless, the 2013 Review of the Duty found many examples of public authorities seeking and using diversity data in ways which seemed excessive and in some cases inappropriate. Excluding caste from the scope of the Duty would discourage authorities from seeking information to enable them to take caste into account in making decisions and would guard against public authorities requesting this information for that purpose. The University of Wolverhampton report noted that “in relation to caste there appears to be widespread agreement ... that the collection of data on caste would be counter-productive”.

In the event that caste becomes a separately defined aspect of race, a compromise might be for only section 149(1)(a) to apply in relation to caste, but not section 149(1)(b) and (c). This approach would be similar to that already taken for marriage and civil partnership. It would mean that public authorities would be under a basic duty to have due regard to the need to eliminate caste discrimination, harassment and victimisation, but would not be required to consider interventions to advance equality of opportunity or foster good relations between different caste groups – actions which might encourage some authorities to seek information about caste identity.



## **2 - Positive Action**

The Act contains specific provisions about taking “positive action”. These provisions can for instance be used where someone such as an employer “reasonably thinks” that people with a particular characteristic – for example men or women or disabled people – suffer a disadvantage because they are disproportionately under-represented in a job or a training opportunity or other activity. In such circumstances, the employer may be able to take positive action to address the under-representation, by assisting people who share that characteristic and not people who don’t.

Race is one of the characteristics covered by positive action, and therefore if we took no further action, the inclusion of caste as an aspect of race would mean that caste would also be covered. This might be helpful, for example in a situation where an employer with a substantial workforce of South Asian ethnic origin knew or suspected that employees of a particular caste background were being ignored for management development opportunities.

However, the ability to take positive action might create similar drawbacks to those mentioned above on the Duty: this is because for an employer to “reasonably think” that there was a problem of the kind mentioned, they would probably need evidence about what caste his or her employees were. And, as we have already noted, we do not think that for those in authority to start routinely asking people to disclose their caste would either be helpful or proportionate.

### **Effect of how the law would be if the duty was exercised and caste became a specific aspect of race within the Equality Act**

3.23 Caste would be a separate, specific ground for claiming race discrimination.

3.24 The Act’s exceptions to race discrimination (Appendix B) could be changed for caste, and specific provisions in the Act – such as the public sector equality duty – could be disapplied to caste.

3.25 Caste could not be defined in the Act: we would expect courts to use the Act’s Explanatory Notes definition (para 2.2 above) to help them decide what caste is.

3.26 Caste would not simply be an aspect of ethnic origins, so aspects of caste and caste discrimination not related to descent (if these exist) could also be covered by the law.

3.27 The duty includes a review power enabling Government to review the need for explicit caste legislation after a specified period and, if appropriate, introduce an Affirmative Order to repeal the caste provisions (see section 97, Enterprise and Regulatory Reform Act 2013). The review power would only become relevant – and then only after a period – if the Government decides to implement the duty.

### **Questions for you to consider on option 2 – Prohibiting caste discrimination by specifying caste in the 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?

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

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

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Don't know

b) Positive action

- Strongly Agree
- Agree
- Disagree
- Strongly Disagree
- Don't know

Q9. Why do you think this? Please explain the reason for your answers to Q8a and/or Q8b

a) Public Sector Equality Duty

b) Positive action

**Key summary questions for you to consider on options 1 and 2:**

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

- Case-law
- Using the legislative duty to insert caste into the Equality Act 2010 as an aspect of race
- Other

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

# SECTION 4: NEXT STEPS

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**This section contains questions that we would like you to answer - they can be found on page 20 - 21**

4.1 Two possible ways to provide legal protection against caste discrimination have emerged. Parliamentary debate has led to a statutory requirement to include caste in the Act itself as a separate aspect of race. Tribunals, through case-law, have separately considered the existing provisions in the Act and concluded that, under the relevant circumstances, caste is an aspect of ethnic origin so legislative protection against caste discrimination already exists. This consultation seeks views on which approach provides better protection and why.

4.2 However, these issues do not involve only certain individuals and communities within Great Britain. They also potentially affect employers and those who provide goods and services. Few employers or service providers would knowingly discriminate against someone on grounds of caste; indeed, as some of the case studies in the 2010 NIESR report show, few would be able to recognise this form of discrimination at all. But it is possible they might unwittingly become liable to a claim of discrimination, either through their own actions or those of their employees.

4.3 We are therefore seeking evidence on the potential impact on businesses and individuals of caste becoming an aspect of race – either specifically or following the judgment in *Tirkey v Chandhok*. The Government will prepare an impact assessment to take account of responses to the consultation and in the light of discussions with stakeholders. To support this impact assessment the Government welcomes reliable statistical evidence about the pervasiveness of caste discrimination.

4.4 We are also seeking evidence on any other unintended consequences of either option on the communities within Great Britain.

Q12. Can you provide any data on costs and benefits, including costs and benefits to individuals, of caste becoming an aspect of race in the Equality Act either through:

(A) A specific change to the legislation

(B) Through reliance of case-law following the judgment in *Tirkey v Chandhok*?

4.5 Irrespective of the outcome of the consultation and subsequent Government action, the Government Equalities Office will engage with employer and service provider organisations to promote greater awareness of the issues covered in this document, and of their responsibilities under Section 9 of the Equality Act.

**Equality Impact**

4.6 The public sector equality duty emphasises the importance, in the way public authorities carry out their functions, of:

- i. Eliminating discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- ii. Advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- iii. Fostering good relations between persons who share a relevant protected characteristics and persons who do not share it.

In deciding what action to take following this consultation, the Government Equalities Office will ensure that it pays due regard to the public sector equality duty. The responses to the consultation will help us to do that.

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

**Government response to the consultation**

4.7 This consultation closes on 17 July 2017. The Government will carefully consider the responses to it before setting out its views on how to proceed and whether in the light of the consultation we intend to implement the caste duty in Section 9 of the Equality Act, or to repeal it at a suitable legislative opportunity and let caste develop in equality law through case-law as an aspect of race.

# APPENDIX A

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## HOW THE EQUALITY ACT WORKS

The Equality Act 2010 makes it unlawful to discriminate against a person because of a protected characteristic in certain specified areas of activity (primarily work, providing services, and carrying out public functions). Under the Act, discrimination can arise in different ways, including:

- Direct discrimination - treating someone with a protected characteristic less favourably than others. Direct discrimination can also take place because of a protected characteristic that a person does not personally have. For example, a person can be discriminated against because of their association with a person who has a protected characteristic, or because they are wrongly perceived to have one, or are treated as if they do<sup>18</sup>.
- Indirect discrimination - putting rules or arrangements in place that apply or would apply to everyone, but that put someone with a particular protected characteristic at a disadvantage when compared with persons who do not share that protected characteristic, and such rule or arrangement cannot be shown to be a proportionate means of achieving a legitimate aim.
- Harassment - unwanted behaviour related to a protected characteristic that violates someone's dignity or creates an intimidating, hostile, humiliating or offensive environment for them.
- Victimisation - treating someone unfairly because they've complained about discrimination or done anything for the purposes or in connection with the Act.

In this document the collective terms discriminate or discrimination are used to cover all of the types of unlawful conduct listed above. All of them apply to caste whether caste is a specific element of race under the Act, or whether it is an aspect of ethnic origin, developing through case-law.

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<sup>18</sup> Even when this treatment is by someone who knows the person does not have this protected characteristic.

# APPENDIX B

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## Exceptions from the ban on discrimination which apply to the protected characteristic of race

These are activities covered by the Act where discrimination on grounds of race can be justified.

### Services and public functions exceptions

- Constitutional matters – the work of Parliament, preparing, making, approving legislation, including Scottish and Welsh legislation, judicial functions and national security.
- Refusing to accept a blood donation provided there is reliable evidence that doing so would put the public or donor at risk and it is not unreasonable to refuse the donation
- Providing foster care or other similar forms of care in own home.
- Immigration functions such as visa requirements or decisions to grant asylum in relation to ethnic and national origins or nationality.
- Continuing to apply the terms of insurance policies that pre-date the Equality Act.
- Supplying a service in a way that is commonly only used by people with a particular protected characteristic
- Television, radio and on-line broadcasting including decisions about editorial matters and what programmes to commission and broadcast.

### Premises exceptions

- None

### Work exceptions

- Occupational requirements where being of a particular protected characteristic is a requirement and the application of that requirement is a proportionate means of achieving a legitimate aim.
- Providing an employment service (such as training or careers guidance) for work covered by an occupational requirement.

### Education exceptions

- Higher or further education training for work covered by an occupational requirement.

## **Associations exceptions**

- An association whose main purpose is to bring together people who share a particular characteristic may restrict membership and invitations as a guest to such people. This exception does not cover people of a particular colour.
- Registered political parties may make arrangements in relation to the selection of candidates to address the under-representation of people with particular protected characteristics in elected bodies. These arrangements must be proportionate and cannot include single protected characteristic shortlists (apart from single sex shortlists).

## **General exceptions**

- Differential treatment where required by law.
- Doing anything that is proportionate in order to safeguard national security.
- Charities may provide benefits (but not jobs, contracts or vocational training) only to people who share a protected characteristic where this is in line with their charitable instrument and is objectively justified or to prevent or compensate for disadvantage. This exception does not allow charities to limit their beneficiaries to people of a particular colour.
- Selection arrangements of national sports teams and competitions in which only people of a particular nationality, place of birth or residence may participate.
- Direct nationality discrimination and indirect race discrimination on the basis of residency requirements where the discrimination is required by law, Ministerial arrangement or Ministerial conditions.
- Restrictions on employment of foreign nationals in the civil, diplomatic, armed or security and intelligence services and restrictions on foreign nationals holding public offices.
- Differential treatment because of nationality when providing training to persons who do not live in a European Economic Area state and it is believed that these persons will not use the skills acquired through the training in Great Britain.