AMENDING THE EQUALITY ACT 2010 TO INCLUDE CASTE DISCRIMINATION

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Summary

1. In our view, for reasons summarised below:
   a. to comply with the duty to legislate to make caste discrimination unlawful it is necessary to make it clear that discrimination, victimisation or harassment because of caste is to be treated as unlawful in breach of the Equality Act 2010 (“the Act”);
   b. this can be done by providing that caste is to be treated as an aspect of race for the purpose of the definition of “race” and “racial group” in the Act;
   c. it would be inappropriate to seek to define the meaning of “caste” for this purpose, any more than it was necessary to define the meaning of “Sikh” or “Jew” to bring members of those “ethnic” groups within the scope of the Act;
   d. it is not necessary to seek to include “descent” as a new and separate protected characteristic. The Committee on the Elimination of All Forms of Racial Discrimination (“CERD”) has recommended that the UK introduce in domestic legislation a prohibition of descent-based discrimination (such as discrimination on the basis of caste and analogous systems of inherited status) (2003), and has recommended that this may be achieved by making caste an aspect of race (2011);
   e. The Recital to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“the Race Directive”) makes it clear that “in very limited circumstances, a difference of treatment may be justified where a characteristic relating to racial
or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate”;

f. The addition of caste as an aspect of race would not seem to give rise to the need for further exceptions to be added to those already contained in the Act;

g. In any event, such exceptions would have to pursue a legitimate aim and use proportionate means to achieve that aim.

The Present Legislation on Racial Discrimination etc

2. Section 4 of the Act includes “race” among the characteristics protected against direct and indirect discrimination, harassment and victimisation. Section 9(1) provides that “race” includes
   a. colour;
   b. nationality; and
   c. ethnic or national origins.

3. Section 9(3) provides that “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. Before the Act was amended, section 9(5) provided that a Minister of the Crown had the power by order to:
   a. amend section 9 so as to provide for caste to be an aspect of race;
   b. amend the Act so as to provide for an exception for a provision of the Act to apply, or not to apply, to caste, or to apply, or not to apply, to caste in specified circumstances.

5. Section 9(6) provided that the power under section 207(4)(b) of the Act, in its application to subsection (5), included power to amend the Act.
The Explanatory Notes to the Act (paragraph 49) explained that section 9 “enables a Minister of the Crown to amend the Act by order so as to add ‘caste’ to the current definition of ‘race’. When exercising this power, the Minister may amend the Act, for example by including exemptions for caste, or making particular provisions of the Act apply in relation to caste in some but not other circumstances. 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 Dalit.”

The section 9(5) power has now been replaced by the Enterprise and Regulatory Reform Act 2013 which amends section 9 as follows: “(5) A Minister of the Crown may by order—
(a) must by order amend this section so as to provide for caste to be an aspect of race;
(b) may by order 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.”

The Enterprise and Regulatory Reform Act also includes powers to review the operation of section 9(5) and to make an order to repeal the protection against caste discrimination as follows:

“(5) A Minister of the Crown—
(a) may carry out a review of the effect of section 9(5) of the Equality Act 2010 (and orders made under it) and whether it remains appropriate, and
(b) must publish a report on the outcome of any such review.
“(6) The power under subsection (5)(a) may not be exercised before the end of the period of 5 years beginning with the day on which this Act is passed (but may be exercised on more than one occasion after that).

“(7) If a Minister of the Crown considers it appropriate in the light of the outcome of a review under subsection (5), the Minister may by order repeal or otherwise amend section 9(5) of the Equality Act 2010.

“(8) The power to make an order under subsection (7) includes power to make incidental, supplementary, consequential, transitional or saving provision, including doing so by amending an Act or subordinate legislation (within the meaning of the Interpretation Act 1978).

“(9) An order under subsection (7) must be made by statutory instrument.

“(10) A statutory instrument containing an order under subsection (7) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.”

**CERD**

9. The International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) defines “racial discrimination” (Article 1) 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.”
10. CERD has explained (General Recommendation XXIV, 27 August 1999) that the definition in Article 1 of ICERD “relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples.” CERD has treated “discrimination based on descent” as complementing the other prohibited grounds of discrimination, and as including “discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status” (General Recommendation XXIX, 11 January 2002 on Article 1(1) regarding descent).

11. Recalling its General Recommendation XXIX (2002) on descent, CERD recommended (14 September 2011) that the Minister responsible invoke section 9(5)(a) of the Act to provide for caste to be an aspect of race, in order to provide remedies to victims of caste-based discrimination.

The EU Race Directive

12. The purpose of the Race Directive is (Article 1) “to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in Member States the principle of equal treatment.” The Directive does not define “racial or ethnic origin”. It defines the principle of equal treatment to mean (Article 2.1) that there shall be “no direct or indirect discrimination based on racial or ethnic origin.”

The UK Courts’ Approach to the Concept of Racial Discrimination

13. The phrase “ethnic or national origins” as part of the long-standing statutory definition of “race” (and hence of “racial group”) has been interpreted and applied flexibly by British courts to include Sikhs and Jews: see e.g., *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548 (HL); *Seide v Gillette Industries Limited* [1980] IRLR 427 (EAT); and *R(E) v*
14. Lord Mance referred in the *Jewish Free School case* (paragraph 81) to the international legal background, and notably the definition of racial discrimination in ICERD, and the recommendation by CERD that states take “steps to identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status.” Lord Mance described (paragraph 82) the test adopted in *Mandla* as “broad, flexible and judgmental … adopted in order to embrace a group such as Sikhs, of whom it could not be said that they were a different race in any narrow sense.”

15. In these cases, it was not appropriate or necessary for the legislation to seek to define Sikhs or Jews in order to apply the statutory concept of unlawful racial discrimination (especially to protect them as members of (“descent-based”) “ethnic groups.”)

16. In the same way, it is not appropriate or necessary for the Act to seek to define caste in order to apply the concept of unlawful racial discrimination to victims of direct or indirect discrimination, or racial harassment or victimization, because they are a descent-based group that does not belong to a caste or belongs to the “wrong” caste.

17. It is necessary to consider whether there is need for an exception or exceptions in particular circumstances. Jo Swinson MP, the Minister for Equality, gave an example during the debate on the Enterprise and Regulatory Reform Bill on 23 April 2013, col. 790, to ensure that monitoring forms do not demand that people say which caste they are from. We doubt whether it is necessary to make an exception for this,
any more than for the other protected characteristics. However, this is an issue about which the Government will consult.

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