







SEX

Women served in military for many years but Women's Services only established after WWII

Women's Services disbanded in 1994

SDA75 s 85(4) excluded from scope of Act service in...the naval, military & air forces of the Crown'

EU ETD76 contained no such provision & in a series of cases CJEU ruled against UK when pregnant women were dismissed from the armed forces

S 85(4) was amended to read '[n]othing in this Act shall render unlawful an act done for the purpose of ensuring the combat effectiveness of the naval, military or air forces of the Crown.'

This has come to be known as the combat effectiveness exception.

ETD75 Art 2(2) provided an exception for Member States to exclude occupational activities where by reason of their nature or context in which they were carried out 'the sex of the worker constitutes a determining factor'

Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651

Case C-273/97 Sirdar v The Army Board & The Secretary of State for Defence [1999] ECR I-7403

Case C-285/98 Kreil v Bundersrepublik Deutschland [2000] ECR I-69

ETD75 Art 9(2)

ETD75 Art 2(2) did not include the combat effectiveness restriction, and nether did SDA75 s 7 which implemented it – could be argued that a number of situations in s 7 could have covered the armed forces but this was not considered by CJEU in Sirdar

Equality Directive 2006 still does not mention combat effectiveness restriction but does include a general gender mainstreaming duty (Art 31) with periodic reviews of derogations every 8 years (Art 31(1))

Therefore, female combat effectiveness exclusion is *prima* facie discriminatory against women on the basis of sex, justified by UK through combat effectiveness/unit cohesion. That justification though must be a legitimate policy aim, established through genuine empirical evidence & must satisfy the principle of proportionality

GENDER ORIENTATION

Sexual Offences Act 1967 s 1(1) decriminalised most homosexual offences between consenting adults over the age of 21 & in private but excluded the armed forces (s 1(5))

R v Ministry of Defence, ex parte Smith [1996] 1 All ER 257 (CA)

Lustig-Prean and Beckett v UK [1999] ECHR 71 (ECHR) & Smith and Grady v UK [1999] ECHR 72 (ECHR)

1992 statement in Parliament that homosexual acts would not be criminalised anymore but only put into law in 1994. Personnel still discharged for homosexuality

2000 abolition of gender orientation restriction & introduction of Armed Forces Code of Social Conduct

AGE

Directive 2000/78 Art 1 prohibited discrimination on, *inter alia*, the grounds of age. However, Art 3(4) enabled Member States to derogate from the Directive on the grounds of age for the armed forces

SI 1031/2006 The Employment Equality (Age) Regulations 2006

s 28 – 'Nothing in Part 2 or 3 shall render unlawful an act done for the purpose of safeguarding national security, if the doing of the act was justified by that purpose'

s 44(4) – 'These regulations do not apply to service in any of the naval, military or air forces of the Crown'

Disability

Disability Discrimination Act 1995

s 59(3) – 'Nothing in this Act makes unlawful any act done for the purpose of safeguarding national security'

s 64(7) – 'It is hereby declared (for the avoidance of doubt) that Part II [Employment] does not apply to service in any of the naval, military or air forces of the Crown'

Directive 2000/78 Art 1 prohibited discrimination on, *inter alia*, the grounds of disability. However, Art 3(4) enabled Member States to derogate from the Directive on the grounds of age for the armed forces



ELEMENTS

s 4 – list of prohibited characteristics

s 13 - direct & s 19 - indirect discrimination

s 23 - harassment & s 26 - victimisation

s 29(6) – prohibited a person from conducting this outlawed discriminatory behaviour when exercising a public function

s 39 - discrimination prohibited in employment

SPECIAL MEASURES FOR ARMED FORCES

s 4(1) of Part 1 of Schedule 3 disapplied S 29(6) when it applied to age, disability, gender reassignment and sex 'for the purpose of ensuring the combat effectiveness of the armed forces'

s 4 of Part 1 of Schedule 9 provided a further combat effectiveness exception from s 39 where the 'relevant requirement' was either to be a man or not to be a transsexual person

s 4(3) of Part 1 of Schedule 9 excluded the whole of Part 5 on Work service in the armed forces over claims of discrimination based on age or disability





SDR98 encouraged military to take equality, diversity & non-discrimination seriously. Equality Schemes were published for 2002-2005 (just for race), 2006-2009, that was then superseded by 2008-2011

Annual Reports on Equality & Diversity were published by the MoD with policy aims, objectives & detailed statistics

Since 2010 no Annual Report has been published & no new Equality Scheme produced. This is a result of spending cuts at the MoD – see SDSR10

RACE

Military policy to race has evolved from one of focusing on equal opportunities to concentrating on diversity

Racial minority representation has increased from 1% in 1999 to 6.6% in the last Equality & Diversity report (3.4% for the Royal Navy, 9.4% for the Army and 2.1% for the RAF)

Unfortunately, the 9.4% for the Army includes 6.3% of personnel recruited from Commonwealth countries. Thus the true figure of UK racial minorities is 3.1%

Ministry of Defence v DeBique [2010] IRLR 471 illustrates how far attitudes still need to change

SEX

3 reviews so far carried out on combat effectiveness restriction

2002 MoD Review

- 4 factors considered when making the assessment, as well as attitudes of serving personnel:
- 1. Physiological;
- 2. Psychological;
- 3. Combat effectiveness; and,
- 4. Legal position

Due to lack of empirical evidence from field & other States' experiences, military judgment had to form basis of any decision

"To admit women would involve a risk with no gains to offset it"

2010 MoD Review

Decided to keep combat effectiveness exclusion in place on sole basis of unit cohesion

- 2 studies (qualitative & quantitative) were able to assess frontline ground combat experiences. Principle concerns over having women in ground combat roles were:
- 1. Lack of women's physical capability/robustness:
- 2. Women being a distraction/problems with relationships between men & women; and,
- 3. Men wanting to protect women/react differently if hurt/harder to deal with female casualties

As for unit cohesion, it was perceived a minor problem & men did not perceive presence of women to reduce cohesion

2014 MoD Review

Report recommended a further programme of psychological research should be conducted to further assess the risks and mitigation to women in GCC roles, in order to inform a decision by mid 2016

In the meantime the first women in the RN earned their Dolphins as part of the Submarine Service.

RN – 10.1% of officers & 8.9% of other ranks are women Army – 11.7% of officers &8.1% of other ranks are women RAF – 16.6% of officers & 13.1% of other ranks are women

Majority of roles are now open to women: RN 79%, Army 70% & RAF 94%



Since the abolition of the ban on homosexuals serving in the military, 2 reviews were carried out in 2000 & 2002. Neither reported major issues.

Unfortunately the military then considered the matter a non-issue & n further empirical research was conducted.

In January 2015 the MoD announced that new recruits would be asked their gender orientation.

Marching at Pride.

AGE DISCRIMINATION

Derogation from discrimination on the grounds of age appear to be on firm foundations in EU & UK legislation.

Case C-144/04 Mangold v Helm [2005] ECR I-9981

Case C-555/07 Kücükdeveci v Swedex [2010] ECR I-365

Age is employed by the military in 4 ways: recruitment; release; specialist selection; and, promotion

There have been no empirical reviews so far on the impact of age discrimination on the military

DISABILITY DISCRIMINATION

As with age, the derogation from discrimination on the grounds of disability appears to be on firm foundations in EU & UK legislation

UNCRPD & Optional Protocol has been ratified by the UK but not yet given effect in law, whilst the EU has ratified & given effect in law through a 2010 Decision

Joined Cases C-335 & 337/11 HK Danmark v Dansk almennyttigt Boligselskab & Dansk Arbejdsgiverforening [2013] 3 CMLR 21

Art 1(1) of Decision notes Member States can derogate from scope of UNCRPD to extent of Art 3(4) of Directive 2000/78. The UK has attached a Declaration to the UNCRPD to that effect

ECtHR? Glor v Switzerland (13444/04), unreported 30 April 2009 (ECtHR (Grand Chamber))



- 1. Distancing of Military Society from Civilian Society
- 2. Closing the gap
- 3. Armed forces must reflect the democratic values of the society they represent
- 4. Examples of good practice need to be celebrated and embraced
- Age is increasingly seen as a barrier to recruitment, retention and promotion
- 6. The military needs to recruit physically fit and able individuals. However, wars create disabilities if discharged then loss of experience but also abrogation of military duty to personnel



Armed forces have been reactive & not proactive when faced with the challenge of equality & non-discrimination

However, UK military has come a long way in a short space of time – e.g. gender orientation. When accepted then policy is embraced wholeheartedly.

Race – need to actively address the the aim of 8% of ethnic minorities

Sex – combat effectiveness restriction of women serving in GCC roles should be removed

Gender orientation – more empirical analysis

Age – research should be conducted to determine the impact of the age discrimination exception, with a view to it being lifted



