**AGE AND DISABILITY DISCRIMINATION: CREEPING CHALLENGES FOR THE MILITARY**

The principle of equality, and its legal rights to non-discrimination, has had a considerable impact on all aspects of society, the military included. The latest evidence of this in the US are the repeal of DADT and the abolition of the restriction of women serving in ground combat roles, both of which are grounded in pragmatic policy decisions but also in legal and theoretical reasoning. In the UK there are two specific areas that are not covered by the Equality Act 2010 as it applies to the armed forces, namely non-discrimination on the basis of age and disability. However, the impact of EU law is starting to be felt, and the reality of reduced manpower for all three services could see a pragmatic reassessment required for the reconsideration of the restriction of age and disability discrimination as applied to the military. This paper will analyse the legal situation and consider the possibilities of the restrictions being removed in the future in the light of practical requirements.

**Introduction**

Equality has developed in the C20th and C21st into a fundamental principle at the heart of the western democratic model of governance. However it has been suggested that equality is an empty vessel[[1]](#footnote-1) that can only be filled through the principle of non-discrimination[[2]](#footnote-2). This overarching principle of non-discrimination holds that an individual should not be treated unfairly on the basis of a defining characteristic in comparison with others who do not exhibit that characteristic. In the UK two characteristics have been protected through law since the 1960s and 1970, namely race[[3]](#footnote-3) and sex[[4]](#footnote-4) respectively, later added to incrementally by sexual orientation. It was not though until 2000 and through the EU’s legislative process[[5]](#footnote-5) that *inter alia* age and disability were added. Disability has been augmented by the UN Convention on the Rights of Persons with Disabilities (UNCRPD) that has been ratified by the EU and UK. This has been codified in the Equality Act 2010 (EA10). This paper will examine the legal position with age and disability as it applies to the armed forces in the UK and possible alternative positions.

**Legal Position**

The UK EA10 has three distinctive features. First, it is comprehensive, creating a unitary conception of equality and a single enforcement body, the Equality and Human Rights Commission. Second, it ‘harmonises, clarifies and extends the concepts of discrimination[[6]](#footnote-6), harassment[[7]](#footnote-7) and victimisation[[8]](#footnote-8) and applies them across nine protected characteristics’[[9]](#footnote-9), specifically, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation[[10]](#footnote-10). Third, it transforms anti-discrimination protection into equality law although does not go as far as establishing a constitutional right to equality[[11]](#footnote-11). This means that, unlike Germany[[12]](#footnote-12) or South Africa[[13]](#footnote-13) that utilise human dignity[[14]](#footnote-14) as the moral value that underpins equality law[[15]](#footnote-15), no one moral value supports the equality edifice and indeed Hepple identifies seven meanings for equality[[16]](#footnote-16).

The EA10 contains some innovative developments in general and for the armed forces in particular. The first is the duty on public sector authorities to mainstream equality of outcomes as a result of socio-economic disadvantage when making strategic decisions on the exercising of functions[[17]](#footnote-17). In the context of the military these authorities include Ministers of the Crown and government departments[[18]](#footnote-18). Fredman[[19]](#footnote-19) suggested that this duty did not apply to the armed forces and on the face of the Act she was correct but it would have applied to the Ministry of Defence (MoD) and Secretary of State for Defence when making strategic decisions, e.g. the Strategic Defence and Security Review 2011[[20]](#footnote-20). As it was the Coalition government decided against bringing this duty into force although the aspirational nature of the obligation would have created difficulties for enforcement[[21]](#footnote-21).

The armed forces are classified as a public authority[[22]](#footnote-22) and the new public sector duty set out in section 149(1)[[23]](#footnote-23) applies to the military and is extended to persons performing a public function who are not public authorities[[24]](#footnote-24). To demonstrate compliance with this duty, public authorities must publish annual equality information[[25]](#footnote-25) covering all protected characteristics[[26]](#footnote-26). Furthermore, according to section 29(6) of the EA10 ‘[a] person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.’ However, this is disapplied when relating to relevant discrimination ‘for the purpose of ensuring the combat effectiveness of the armed forces’[[27]](#footnote-27) with ‘relevant discrimination’ made up of four of the protected characteristics, age, disability, gender reassignment and sex but does not include race and sexual orientation.

As a general employer the armed forces are prohibited by section 39(1) from discriminating when deciding who to or not to employ and the terms of employment and in section 39(2) from discriminating against an employee over terms of employment, opportunities for promotion, transfer or training, dismissal or any other detriment. However, there is another exception provided for the military when deciding who to or not to employ and opportunities for employees for promotion, transfer or training ‘by applying...a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces’[[28]](#footnote-28), where a ‘relevant requirement’ is either to be a man or not to be a transsexual person[[29]](#footnote-29). Furthermore, Part 5 on Work, which contains section 39, does not apply to service in the armed forces as far as relating to age or disability[[30]](#footnote-30).

Finally there is a general exception for national security but only to the extent that it is proportionate to do so[[31]](#footnote-31). However, there is no definition of national security and so the exception is uncertain.

1. Age

Article 1 of the EU Framework Directive on Equal Treatment in Employment provides for the prohibition of discrimination on *inter alia* the grounds of age. However, Article 3(4) enables Member States to derogate from the Directive on the grounds of age for the armed forces. The UK, as we have seen in the EA10, has taken advantage of this derogation. There is a danger here though in a line of case law from the ECJ. In *Mangold*[[32]](#footnote-32) the Court held that although the Directive could not apply when an individual brought an action against another individual (horizontal direct effect), discrimination on the basis of age was a general principle of EU Law and as such existed prior to the entry into force of the Directive. This has been further entrenched and extended in the case of *Kücükdeveci*[[33]](#footnote-33) where the ECJ held that this fundamental right could be enforced by an individual in a national court.

For age discrimination can either be direct or indirect (EA10 ss 13 and 19) but such discrimination can be justified if it can be shown that it is a proportionate means of achieving a legitimate aim (EA10 s 13(2)).

1. Disability

As with age above, the Directive prohibits discrimination on the basis of disability but Article 3(4) enables Member States to exclude this for the armed forces, which as we have seen the UK has taken advantage of. Disability discrimination does though have a different angle to age discrimination with the adoption of the UNCRPD and the Optional Protocol. This instrument contains a broader definition of disability, does not require a comparator to establish discrimination and contains no exclusions. The UK ratified the UNCRPD and the Protocol in 2009 but has yet to give them effect in UK domestic law, whilst the EU also ratified them in 2010[[34]](#footnote-34). The result of the EU’s ratification is that the EU Courts must take into consideration these instruments and read EU Law in accordance with them[[35]](#footnote-35). This was confirmed in *Danmark[[36]](#footnote-36)* where the Court held that the provisions of the UNCRPD are “from the time of its entry into force, an integral part of the European Union order”. However, Article 1(1) of the Decision notes a reservation to Article 27.1 of the UNCRPD on Work and Employment, which explains that the UNCRPD is concluded without prejudice to the right of Member States to derogate to the extent of Article 3(4) of Directive 2000/78 by entering their own reservations to the UNCRPD. The UK’s Declaration to the UNCRPD states that the UK “accepts the provisions of the Convention, subject to the understanding that none of its obligations relating to equal treatment in employment and occupation, shall apply to the admission into or service in any of the naval, military or air forces of the Crown.” No cases have come before the CJEU for interpretation of these provisions and at first blush it would appear that the armed forces exclusion from disability discrimination legislation is watertight. However, the CJEU, as can be seen in *Mangold* and *Kücükdeveci*, can be an activist court and this can be stronger in situations where fundamental principles are involved, such as equality and non-discrimination.

However, the ECtHR (unconnected to the EU) has started to take note of the UNCRPD when ruling on the discrimination provisions of the ECHR. Article 14ECHR is parasitic and so for it to bite another convention right must be activated first. Most individuals claiming discrimination on the basis of a disability will first claim infringement of Article 3ECHR, the right to freedom from torture and inhumane treatment[[37]](#footnote-37), or Article 8ECHR, the right to respect for private and family life[[38]](#footnote-38). Stavert[[39]](#footnote-39) and O’Brien[[40]](#footnote-40) suggest that in the case of *Glor v Switzerland*[[41]](#footnote-41) the ECtHR displayed tendencies to follow the principles contained in the UNCRPD. In *Kiss v Hungary*[[42]](#footnote-42) the ECtHR sets out the appropriate provisions of the UNCRPD and the applicant and third party intervener use them to support their claim based on the ECHR, but the Court does not refer in its *ratio decidendi* to the UNCRPD.

As with age there can be direct and indirect discrimination for disability discrimination (EA10 ss 13 and 19) and there can be no reverse disability discrimination (EA10 s 13(3)) i.e. no discrimination if someone treats an able-bodied person less favourably than someone with a disability[[43]](#footnote-43). Again like age discrimination, discriminatory treatment on the basis of disability can be justified if the treatment is a proportionate means of achieving a legitimate aim, with knowledge of the person’s disability being a necessary quality (EA10 s 15). No definition is included in the EA10 but the CJEU in *Chacón Navas[[44]](#footnote-44)* found that the concept of disability refers to a “limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”[[45]](#footnote-45) and it must be probable that it will last for a long time[[46]](#footnote-46). However, in *Danmark* the Court that this definition now needed to be read in accordance with Article 1 of the UNCRPD[[47]](#footnote-47) and thus the definition in *Chacón Navas* could fall short in certain circumstances, though what those circumstances were was not explained[[48]](#footnote-48). Discrimination occurs where the duty to make reasonable adjustments (EA10 s 21(1)) is not complied with (EA10 s 21(2)). Reasonable adjustments consist of three requirements: a provision, criterion or practice (EA10 s 19(3))[[49]](#footnote-49); a physical feature (EA10 s 19(4))[[50]](#footnote-50); and, a physical feature (EA10 s 19(5))[[51]](#footnote-51).

**Impact on Armed Forces**

It is quite clear that as things stand at present the provisions of the EA10 on age and disability discrimination do not apply to the armed forces. There are though possible backdoor routes to their application. The first as we’ve seen in *Mangold* and *Kücükdeveci* for age discrimination the CJEU could find that the actual fundamental principle pre-exists the exclusion contained in Article 3(4) of Directive 2000/78. This could also apply to disability discrimination, although a Member State would have an opportunity to put forward reasons to justify any findings of discriminatory treatment so long as they were proportionate. The second is through the route of the ECtHR and its employment of Article 14. It should be noted here that the EU and ECHR are not connected (although Article 6(2)TEU requires the EU to accede to the ECHR) and the Council of Europe is not a signatory to the UNCRPD. This though has not stopped the ECtHR mentioning the UNCRPD as an instrument of International Law, nor of utilising the rationale behind the Convention in its reasoning[[52]](#footnote-52). There is the possibility therefore that a challenge based on Article 14, through Article 3 or 8, could see the ECtHR hold discriminatory treatment of military personnel on the basis of disability as an infringement of basic human rights. As yet there has been no attempt to consider age discrimination in this arena. If infringement is found then the contracting State is likely to have a considerable margin of appreciation, though again this would need to be applied in accordance with the principle of proportionality.

There are four specific times that the law could impact on the military during the service of armed forces personnel: recruitment; release; specialist selection; and, promotion.

1. Recruitment

Each branch of the armed forces has different age requirements for recruitment, which again differ for ratings and officers. Thus in the Army, ratings can join from the age of 16 up to a maximum of 33 (must have commenced Phase 1 training before 33rd birthday) and officers from 18 until 26, although this can be extended for some specialisations to 29. In the Navy ratings can join from age 16 (though some trades have different ages) until 36 (33 for Royal Marines), and officers from 18 until 30. The RAF has a different age structure dependent on jobs and ranks. For ratings the minimum age is 16 and maximum 29, whilst officers (focusing here on pilots) can join at 17 years and six months up to 25.

As such therefore there are reasonably strict minimum and maximum age limits.

1. P. Westen, ‘The Empty Idea of Equality’ (1982) 95 HLR 537 [↑](#footnote-ref-1)
2. C. Barnard, ‘The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?’ (1998) 57 CLJ 352; C. Barnard, ‘Gender Equality in the EU: A Balance Sheet’ in P. Alston, The EU and Human Rights (London: OUP, 1999) 215, 223 [↑](#footnote-ref-2)
3. Race Relations Acts 1967, 1968 and 1976 [↑](#footnote-ref-3)
4. Sex Discrimination Act 1975 [↑](#footnote-ref-4)
5. Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16 [↑](#footnote-ref-5)
6. Direct discrimination is defined in EA10 s 13, indirect discrimination, applicable to all protected characteristics, is defined in EA10, s 19 and no real comparator is required to assess discrimination (EA10, ss 23 and 24). Furthermore EA10, s 14 contains a new provision on multiple discrimination [↑](#footnote-ref-6)
7. EA10, s 26 [↑](#footnote-ref-7)
8. EA10, s 27 [↑](#footnote-ref-8)
9. ibid [↑](#footnote-ref-9)
10. EA10, s 4, with definitions of each characteristic provided in ss 5-12 [↑](#footnote-ref-10)
11. J. Jowell, ‘Is Equality a Constitutional Principle?’ (1994) 47 *Current Legal Problems* 1. See also J. Stanton-Ife, ‘Should Equality Be a Constitutional Principle?’ (2000) 11 KCLJ 133 opposing Jowell’s argument [↑](#footnote-ref-11)
12. See J. Jones, ‘"Common Constitutional Traditions": Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?’ [2004] PL 167 [↑](#footnote-ref-12)
13. See E. Grant, ‘Dignity and Equality’ (2007) 7 *Human Rights Law Review* 299 [↑](#footnote-ref-13)
14. This is a highly contested concept – see for example D. Beyleveld, R. Brownsword, ‘Human Dignity, Human Rights, and Human Genetics’ (1998) 61 MLR 661, D. Feldman, ‘Human Dignity as a Legal Value’ [1999] PL 682 and [2000] PL 61 and C. McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 EJIL 655 [↑](#footnote-ref-14)
15. See G. Moon, R. Allen, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’ [2006] EHRLR 610 who suggest a structured approach to the use of dignity as the basis for equality law [↑](#footnote-ref-15)
16. B. Hepple, *Equality: The New Legal Framework* (Oxford: Hart Publishing, 2011) 12 and B. Hepple, ‘The Aims of Equality Law’ (2008) 61 CLP 1, 3 [↑](#footnote-ref-16)
17. EA10, s 1(1) [↑](#footnote-ref-17)
18. EA10, s 1(3)(a) and (b) [↑](#footnote-ref-18)
19. S. Fredman, ‘Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage Onto the Equality Agenda’ [2010] EHRLR 290, 297 [↑](#footnote-ref-19)
20. Ministry of Defence, *Securing Britain in an Age of Insecurity: The Strategic and Security Review*, Cm 7948 (London: HMSO, 2011) [↑](#footnote-ref-20)
21. n 16 above at 142 [↑](#footnote-ref-21)
22. Schedule 19, s 150(1) [↑](#footnote-ref-22)
23. A public authority must ‘in the course of its functions, 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.’ [↑](#footnote-ref-23)
24. EA10, s 149(2). See S Fredman, ‘The Public Sector Equality Duty’ (2011) 40 ILJ 405 [↑](#footnote-ref-24)
25. SI 2260/2011, The Equality Act 2010 (Specific Duties) Regulations 2011 Article 2(1) [↑](#footnote-ref-25)
26. ibid Article 2(4) [↑](#footnote-ref-26)
27. Schedule 3, s 4(1) [↑](#footnote-ref-27)
28. Schedule 9, s 4(1) [↑](#footnote-ref-28)
29. Schedule 9, s 4(2) [↑](#footnote-ref-29)
30. Schedule 9, s 4(3) [↑](#footnote-ref-30)
31. EA10, s 192 [↑](#footnote-ref-31)
32. Case C-144/04 *Mangold v Helm* [2005] ECR I-9981 (ECJ); noted M. Schmidt, ‘The Principle of Non-Discrimination In Respect of Age: Dimensions of the ECJ’s Mangold Judgment’ (2005) 7 *German Law Journal* 505; S. Krebber, ‘The Social Rights Approach of the European Court of Justice to Enforce European Employment Law’ (2006) 27 *Comparative Labor Law and Policy Journal* 377; E. Muir, ‘Enhancing the Effects of Community Law on National Employment Policies: The Mangold Case’ (2006) 31 ELR 879; D. Schiek, ‘The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation’ (2006) 35 ILJ 329; O. Thomas, ‘Case Commentary’ (2006) 18 *Denning Law Journal* 233; L. Waddington, ‘Recent Developments and the Non-Discrimination Directives: Mangold and More’ (2006) 13 MJ 365; J.H. Jans, ‘The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law’ (2007) 34 LIEI 53; A. Masson, C. Micheau, ‘The Werner Mangold Case: An Example of Legal Militancy’ (2007) 13 EPL 587; A. Wiesbrock, ‘Case Note’ (2011) 18 MJ 201 [↑](#footnote-ref-32)
33. Case C-555/07 *Kücükdeveci v Swedex* [2010] ECR I-365 (ECJ); noted A. Albors-Llorens, ‘Keeping Up Appearances: The Court of Justice and the Effects of EU Directives’ (2010) 69 CLJ 4555; M. de Mol, ‘Case Note’ (2010) 6 EuConst 293; S. Peers, ‘Case Comment’ (2010) 35 ELR 849; T. Roes, ‘Case Note’ (2010) 16 *Columbia Journal of European Law* 497; G. Thüsing, S. Horler, ‘Case Note’ (2010) 47 CMLRev 1161; A. Wiesbrock, ‘Case Note’ (2010) 11 *German Law Journal* 539; P. Cabral, R. Neves, ‘General Principles of EU Law and Horizontal Direct Effect’ (2011) 17 EPL 437; F. Fontanelli, ‘General Principles of the EU and a Glimpse of Solidarity in the Aftermath of Mangold and Kücükdeveci’ (2011) 17 EPL 225; A. Gabinaud, ‘Case Note’ (2011) 18 MJ 189; E. Howard, ‘ECJ Advances Equality in Europe by Giving Horizontal Direct Effect to Directives’ (2011) 17 EPL 729; T. Papadopoulos, ‘Criticising the Horizontal Direct Effect of the EU General Principle of Equality’ [2011] EHRLR 437 [↑](#footnote-ref-33)
34. Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ 2010 L23/35 [↑](#footnote-ref-34)
35. Case 181/73 *R & V Haegeman v Belgium* [1974] ECR 449 para 5 [↑](#footnote-ref-35)
36. Joined Cases C-335 & 337/11 *HK Danmark v Dansk almennyttigt Boligselskab & Dansk Arbejdsgiverforening* [2013] 3 CMLR 21 para 30 [↑](#footnote-ref-36)
37. *Price v UK* (2002) 34 EHRR 53 [↑](#footnote-ref-37)
38. *Goodwin v UK* (2002) 35 EHRR 18 [↑](#footnote-ref-38)
39. J Stavert, ‘*Glor v Switzerland*: Article 14ECHR, Disability and Non-Discrimination’ (2010) 14 Edin. L.R. 141, 145-146 [↑](#footnote-ref-39)
40. C O’Brien, ‘Equality’s False Summits: new Varieties of Disability Discrimination, “Excessive” Equal Treatment and Economically Constricted Horizons’ (2011) 36 ELRev. 26, 48 [↑](#footnote-ref-40)
41. *Glor v Switzerland* (13444/04), unreported 30 April 2009 (ECHR (Grand Chamber)) [↑](#footnote-ref-41)
42. *Kiss v Hungary* (2013) 56 EHRR 38 [↑](#footnote-ref-42)
43. See A Lawson, ‘Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated’ (2011) 40 ILJ 359 for a comprehensive analysis of disability discrimination in the EA10 [↑](#footnote-ref-43)
44. Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467 [↑](#footnote-ref-44)
45. ibid para 43 [↑](#footnote-ref-45)
46. ibid para 45 [↑](#footnote-ref-46)
47. “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” [↑](#footnote-ref-47)
48. n 36 above paras 25-27 [↑](#footnote-ref-48)
49. “…where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.” [↑](#footnote-ref-49)
50. “…where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.” [↑](#footnote-ref-50)
51. “…where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.” [↑](#footnote-ref-51)
52. ibid para 45 [↑](#footnote-ref-52)