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DISCRIMINATION IN THE ARMED FORCES: 10 YEARS ON FROM THE ABOLITION OF THE BAN ON HOMOSEXUALS SERVING IN THE UK MILITARY

INTRODUCTION

2000 was a monumental year for human rights law. Most people consider that statement to refer to the Human Rights Act 1998 coming into force¹. However, for the UK Armed Forces probably the most significant human rights act was the Secretary of State for Defence's statement to the House of Commons that the ban on homosexuals serving in the military would be lifted². This paper will examine the position of the Armed Forces within society, the so-called civil-military relationship, and analyse this from a legal perspective. Whilst acknowledging the hierarchical nature of military life, different discrimination on the basis of an individual's characteristics will be critically examined to determine acceptable behaviour on the part of military personnel and military institutions. Finally recommendations will be advanced for confronting any further problems that may continue to exist with discrimination and the UK military that could provide a model for other nations' armed forces.

CIVIL-MILITARY RELATIONSHIP

There has been much written about the civil-military relationship³ that has focused predominantly on the US military. The debate in the US has mainly been led by political scientists and sociologists. On the political science side the examination has centred on political institutions, the relationship between the civilian political

¹ HRA98 s22(3) and SI 2000/1851, The Human Rights Act 1998 (Commencement No. 2) Order 2000

² Right Hon Geoff Hoon MP, Secretary of State for Defence, *Hansard, HC Debates*, 12 January 2000, columns 287-88

³ See L Cohn, 'The Evolution of the Civil-Military "Gap" Debate' http://www.poli.duke.edu/civmil/cohn_literature_review.pdf, paper prepared for the TISS Project on the Gap Between the Military and Civilian Society, 1999 for a comprehensive analysis of the literature up to 1999

machinery and the military and the democratic control of the military. The two sides of the debate are exemplified by Huntington⁴ and Feaver⁵. Huntington focused on the professional officer corps and concluded that “the optimal balance between the functional imperative (military effectiveness) and the societal imperative (responsiveness) is achieved – contrary to conventional belief – not when the officer corps is forced to incorporate civilian values as the price of the authority and influence it requires to fulfil its duties (“subjective civilian control”⁶), but when it is allowed to be fully professional (“objective civilian control”⁷)”⁸. Feaver on the other hand establishes an agent-principal model with the armed forces as the agent acting in accordance with the civilian political principal’s intentions⁹. The result is that there are considerable mechanisms for civilian oversight of the military¹⁰, the availability of civilian punishment of the military¹¹ and an overall goal of protecting democratic values¹².

The sociological perspective of the civil-military relationship is dominated by Janowitz¹³ and Moskos¹⁴. Janowitz identified a convergence of the military and civilians with the civilianisation of the military leading to a “constabulary” role for the armed forces¹⁵. His focus, like Huntington’s, was on the officer corps. The officer undertakes his duties “because he is a professional with a sense of self-esteem and moral worth”, “who accepts civilian political control because he recognises that civilians appreciate and understand the tasks and responsibilities of the constabulary

⁴ SP Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Belknap Press, Cambridge 1957)

⁵ PD Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Harvard University Press, Cambridge 2003)

⁶ Ibid. 80

⁷ Ibid. 83

⁸ B Boëne, ‘How “Unique” Should the Military Be? A Review of Representative Literature & Outline of a Synthetic Formulation’ (1990) 31 *European Journal of Sociology* 3 at 15

⁹ Op. cit. n.5 chapter 3

¹⁰ Ibid. 75

¹¹ Ibid. 87

¹² J Burk, ‘Theories of Democratic Civil-Military Relations’ (2002) 29 *Armed Forces and Society* 7 at 22

¹³ M Janowitz, *The Professional Soldier: A Social and Political Portrait* (Free Press, New York 1964)

¹⁴ CC Moskos, ‘From Institution to Occupation: Trends in Military Organization’ (1977) 4 *Armed Forces and Society* 41; CC Moskos, ‘Institutional/Occupational Trends in Armed Forces: An Update’ (1986) 12 *Armed Forces and Society* 377

¹⁵ Op. cit. n.13 chapter 20

force. He is integrated into civilian society because he shares its common values”¹⁶. Moskos¹⁷ observed a similar development to Janowitz but this was framed within the transition from conscription to an all volunteer force. As convergence occurred between the military and civilians so the nature of the military personnel’s relationship with the armed forces also altered, moving from institutional to occupational.

An attempt has been made by Schiff¹⁸ to navigate a middle way utilising both political science and sociology. She advances a theory for a cooperative relationship between the military, the political elites and the citizenry¹⁹ dependant on society’s institutional and cultural conditions²⁰. The concordance model that is constructed depends on four indicators of concordance for analysis: the social composition of the officer corps; the political decision-making process; the military recruitment method; and, the military style²¹. From the analysis Schiff concludes that there is no ideal typical blueprint of civil-military relationship as each country’s model will be dependent on that society’s cultural circumstances. This is a valuable attempt to explain when a country’s military may step into the civilian affairs of the State but does not examine what drives the civil-military relationship or the civil forces that can shift the attitudes within the armed forces over time.

In the UK the debate over the civil-military relationship has rarely come alive. The only notable analysis was conducted by Strachan²², an historian. Another significant gap is that of a legal analysis of the civil-military relationship. A recent attempt has been made by Woo²³ in the USA from an administrative law angle and in the UK

¹⁶ Ibid. 440

¹⁷ Op. Cit. n.14

¹⁸ RL Schiff, ‘Civil-Military Relations Reconsidered: A Theory of Concordance’ (1995) 22 *Armed Forces and Society* 7; RL Schiff, *The Military and Domestic Politics: A Concordance Theory of Civil-Military Relations* (Routledge, London 2009)

¹⁹ Ibid. 43

²⁰ Ibid. 12

²¹ Ibid. 44

²² H Strachan, ‘The Civil-Military “Gap” in Britain’ (2003) 26 *Journal of Strategic Studies* 43

²³ J Woo, ‘Administration of War’ (2009) 58 *Duke LJ* 2277

Rubin²⁴ has examined the civilianisation and juridification of military law, particularly the military law aspects and the process of courts martial. However, although a valuable analysis of changes that have occurred in military law as a result of some aspects of civilian law this latter evaluation does not examine the impact on the military, rather than military law, by civilian laws.

The question has to be asked why law should be considered to be a useful discipline for this analysis. Clausewitz famously described war as “not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means”²⁵. As such the armed forces are the organ of the State that conducts war as a political instrument. Politics is concerned with power²⁶ and the capacity of social agents to maintain or transform their social environment and to create a regulated order for managing human conflict and interaction. Law can be considered to be “the enterprise of subjecting human conduct to the governance of rules”²⁷ or “the human attempt to establish social order as a way of regulating and managing human conflict”²⁸. As such it deals with human action and human social action, is the method used to enact the rules required to regulate this human social action and is the final outcome of the political process. From these definitions politics and law are inevitably intertwined with the laws and rules of the polity providing the positive evidence of the policy stance of the polity. Therefore it is the law that needs to be examined to determine the political will of the polity and as war is a political instrument legal analysis is essential to determine the position of the military vis-a-vis society.

I suggest that there have been four major legal developments in the areas of anti-discrimination and human rights that have significantly influenced the societal position of the military in the UK today with a fifth taking effect from 1 October 2010.

²⁴ GR Rubin, ‘United Kingdom Military Law: Autonomy, Civilianisation, Juridification’ (2002) 65 MLR 36

²⁵ C von Clausewitz (Edited & Translated by M Howard & P Paret), *On War* (Princeton University Press, Princeton 1976) 87

²⁶ D Held, *Models of Democracy* (2nd Edn. Polity, London 1996) 309

²⁷ LL Fuller, *The Morality of Law* (Yale University Press, New Haven 1969) 96

²⁸ D Beylveld, R Brownsword, *Law as a Moral Judgment* (Sweet & Maxwell, London 1986) 2

SEXUAL OFFENCES ACT 1967

The Sexual Offences Act 1967 (SOA67) was adopted following the 1957 Wolfenden Report²⁹. It decriminalised most homosexual offences between consenting adults over the age of twenty-one³⁰ in private³¹ but excluded the armed forces³². As might be expected the impact of this piece of legislation was not immediate on the military but it did, over a period of time, create a perspective in society at large of acceptance of homosexuality. This normalisation of homosexuality and homosexual relationships created a lacuna between civilian society and the military, where the military was perceived by society at large to be out of touch and “stuck” in a previous age.

EUROPEAN COMMUNITIES ACT 1972

The UK joined the European Economic Community, now European Union, on 1 January 1973. The legislation that enabled that was the European Communities Act 1972 (ECA72). The result was that legislation adopted at the European level either entered directly into domestic law (Regulations) or was transposed into domestic law by domestic legislation (Directives). Furthermore domestic courts had to interpret EU Law, make references to the ECJ if unable to interpret either EU legislation or domestic legislation if adopted to transpose EU Law and were required to give precedent to judgments of the European courts.

It is as a result of the ECA72 that much of the transforming secondary legislation on the subject of discrimination has been adopted at the EU level and then transposed

²⁹ Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, London 1957)

³⁰ Homosexual and heterosexual age of consent was eventually equalised at 16 by the Sexual Offences (Amendment) Act 2000 s 1

³¹ Sexual Offences Act 1967 s 1(1): “with no other person present”. This requirement was repealed with the passage of the Sexual Offences Act 2003

³² Sexual Offences Act 1967 s 1(5)

into UK law. This includes the Equal Treatment Directive³³, the Race Directive³⁴, the Framework Directive on Equal Treatment in Employment³⁵ and the Equality Directive³⁶.

The interface between Member State competence and EU Law coalesced around the issue of the organisation of the armed forces and the question of when EU Law would take effect. It was originally thought that the Member States retained absolute competence over the military and the composition of the armed forces such that EU Law had no impact on the operation of the military. Indeed the ECJ has held that the Member States have competence to take decisions on the organisation of their armed forces in order to ensure their security³⁷. However, this competence has to be exercised with the genuine aim of guaranteeing public security whilst being appropriate and necessary to achieve this aim³⁸. A blanket ban on women serving in the armed forces on the basis of combat effectiveness would be unjustified³⁹, whilst a ban on women serving in the Royal Marines would be justified⁴⁰ as it would be confined to a small force and applied to the principle of inter-operability, a requirement that all personnel would have to carry out a wide range of tasks and front-line fighting⁴¹.

³³ Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40

³⁴ Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L180/22

³⁵ Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16

³⁶ Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast) OJ 2006 L204/23

³⁷ Case C-273/97 Sirdar v The Army Board & The Secretary of State for Defence [1999] ECR I-7403 (ECJ) para 15

³⁸ *Ibid.* para 28

³⁹ Case C-285/98 Kreil v Bundesrepublik Deutschland [2000] ECR I-69 (ECJ)

⁴⁰ *Op. Cit.* n.37

⁴¹ For commentary see P Koutrakos, 'Community Law and Equal Treatment in the Armed Forces' (2000) 25 ELR 433; M Trybus, 'Case Note' (2000) 37 CMLRev 1433; P Koutrakos, 'How Far is Far Enough? EC Law and the Organisation of the Armed Forces after Dory' (2003) 66 MLR 759; and, M Trybus, 'Sisters in Arms: European Community Law and Sex Equality in the Armed Forces' (2003) 9 ELJ 631

Since this time the competence of the EU has been extended into the area of defence by the Lisbon Treaty. Article 24(1)TEU specifies that “[t]he Union’s competence in matters of common foreign and security policy shall cover...the progressive framing of a common defence policy that might lead to a common defence”, the requirements for which are set out in Articles 42 and 46TEU.

SEX DISCRIMINATION ACT 1975

The third piece of legislation was the adoption of the Sex Discrimination Act 1975 (SDA75). The military experienced a number of difficulties with the SDA75. The first emerged over the treatment of pregnant servicewomen⁴². The original SDA75 contained a provision, s 85(4), that excluded from the scope of the Act “service in...the naval, military and air forces of the Crown”. Unfortunately no such exception existed in the EU’s Equal Treatment Directive (ETD) with Article 5(1) prohibiting discrimination on grounds of sex with regard to working conditions and the conditions governing dismissal. In Marshall I⁴³ the ECJ held that Article 5(1) could be relied upon by an individual in a national court to avoid a national provision that was inconsistent with it and denied the right that flowed from it. Furthermore in Hertz⁴⁴ the Court found “that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as is a refusal to appoint a pregnant woman”. Therefore it was now clear that SDA75 s 85(4) was irreconcilable with the ETD and that the armed forces were vulnerable to a legal challenge. In 1991 two judicial review applications were brought with the backing of the Equal Opportunities Commission challenging the military’s policy to sack pregnant servicewomen⁴⁵. Before the case came to court the Secretary of State for Defence conceded that the policy was incompatible with the legal rights in the ETD and that compensation claims could be heard before Industrial Tribunals. Two further ECJ

⁴² See A Arnall, ‘EC Law and the Dismissal of Pregnant Servicewomen’ (1995) 24 ILJ 215 for a full account of this episode

⁴³ Case 152/84 Marshall v Southampton and South-West Hampshire AHA [1986] ECR 723 (ECJ)

⁴⁴ Case C-179/88 Handels-og Kontorfunktionoerernes Forbund [1990] ECR I-3979 (ECJ) para 13

⁴⁵ R v Secretary of State for Defence, ex parte Leale, Lane and EOC, unreported (HC)

cases created further problems for the Ministry of Defence. First in Marshall II⁴⁶ Article 6 of the ETD required Member States' measures to be "such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer". It went on to conclude that an upper compensation limit was inconsistent with Article 6 "since it limits the amount of compensation *a priori* which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal"⁴⁷. Second in Emmott⁴⁸ it was held that a time limit could not start to run until the Directive had been correctly transposed into domestic law. Therefore the Ministry of Defence was exposed to damages actions from ex-servicewomen dismissed on the basis of their pregnancy from the transposition date of the Directive, August 1978, and the summer of 1990 when maternity leave was introduced for servicewomen. Many claims were brought for damages that were dealt with inconsistently by the courts. Eventually seven test cases were selected in Ministry of Defence v Cannock and others⁴⁹ for an appeal before the Employment Appeal Tribunal (EAT) so that guidelines could be provided for industrial tribunals to apply in future compensation cases.

The response of the government was to amend s 85(4) of the SDA75, through the Sex Discrimination Act 1975 (after amendment by the Sex Discrimination Act 1975 (Application to Armed Forces etc.) Regulations 1994⁵⁰, to read that "[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."

HUMAN RIGHTS ACT 1998

⁴⁶ Case C-271/91 Marshall v Southampton and South-West Hampshire AHA [1993] ECR I-4367 (ECJ) para 24

⁴⁷ *Ibid.* para 30

⁴⁸ Case C-208/90 Emmott [1991] ECR I-4269 (ECJ)

⁴⁹ Ministry of Defence v Cannock and others [1994] IRLR 509 (EAT)

⁵⁰ SI 1994/3276, The Sex Discrimination Act 1975 (Application to Armed Forces etc.) Regulations 1994

The Human Rights Act (HRA) was passed in 1998 that enabled the UK courts to develop human rights judgments based on the European Convention of Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) but did not come into force until 2000. Section 6(1)HRA states that “[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.” A limited and non-exhaustive definition of “public authority” is included in s 6(3)HRA that includes “any person certain of whose functions are functions of a public nature”⁵¹. Furthermore to bring a claim against a public authority that has acted in a way that is unlawful under s 6(1)HRA, s 7(1)HRA requires an individual to be, or potentially to be, a victim. The armed forces undoubtedly come within the definition of public authority as do individual members of the armed forces when on duty and furthermore they can also be victims of the military operating as a public authority.

However, the HRA does not incorporate all the provisions of the ECHR with Article 1ECHR being a notable exclusion⁵². This requires the Contracting States to “secure to everyone within their jurisdiction the rights and freedoms” of the ECHR. This has not hindered cases being brought before the UK courts over the meaning and extent of the term “jurisdiction”. In the case of Gentle⁵³ Lord Bingham held that the death of two UK soldiers in Iraq did not fall within the jurisdiction of the ECHR as Iraq was not part of the territorial ambit of the UK. The territorial nature of jurisdiction would only be extended in exceptional circumstances. The ECtHR set out in Bankovic⁵⁴ when such extra-territorial jurisdiction was exercised. This occurs when the State, “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government”⁵⁵. Further examples include

⁵¹ HRA s 6(3)(b)

⁵² See HRA s 1(1) and Schedule 1

⁵³ R (Gentle and another) v Prime Minister and others [2008] 1 AC 1356 (HL) para 8(3) (Lord Bingham); noted S Palmer, ‘Military Intervention, Public Inquiries and the Right to Life’ (2009) 68 CLJ 17

⁵⁴ Bankovic v United Kingdom (2007) 44 EHRR SE5 (ECtHR); noted LG Loucaides, ‘Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case’ [2006] EHRLR 391

⁵⁵ *Ibid.* para 69

cases “involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State”⁵⁶. The sphere of this extra-territorial jurisdiction was considered again by the House of Lords in Al-Skeini⁵⁷ where it was held that the death of five Iraqis in separate shooting events involving British forces fell outside the UK’s jurisdiction, but the death of an Iraqi civilian in UK custody at a British military base was within the UK jurisdiction so that the HRA applied. The new Supreme Court, on a 6-3 split, has recently confirmed in Smith⁵⁸ the previous case law and suggested that Article 1 ECHR, unlike the other articles of the ECHR, was not to be interpreted as a living document subject to changing conditions and so should not be construed as reaching any further than the jurisprudence of the ECtHR⁵⁹. It should be noted there were strong dissenting judgments by Baroness Hale, Lord Mance and Lord Kerr, supporting the Court of Appeal’s judgment given by the Master of the Rolls, Sir Anthony Clarke⁶⁰. Indeed there is a significant element of artificiality in the majority’s view that a soldier operating abroad and outside a British military base was not within the jurisdiction of the UK as the Armed Forces Act 2006 s 367(1) provides expressly that “[e]very member of the regular forces is subject to service law at all times”⁶¹. It should be further noted that the former European Commission consistently observed that “authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property “within the jurisdiction” of that State, to the extent that they exercise authority over such persons or property”⁶².

⁵⁶ Ibid. para 71. See Occalan v Turkey (2003) 37 EHRR 10 (ECtHR) para 93

⁵⁷ R (Al-Skeini and others) v Secretary of State for Defence [2008] 1 AC 153 (HL); noted D Feldman, ‘The Territorial Scope of the Human Rights Act 1998’ (2008) 67 CLJ 8; T Thienel, ‘The ECHR in Iraq: The Judgment of the House of Lords in R (Al-Skeini) v Secretary of State for Defence’ (2008) 6 JICJ 115; N Bamforth, ‘The Methodology and Extra-Territorial Application of the Human Rights Act 1998’ (2008) 124 LQR 355; H King, ‘The Extraterritorial Human Rights Obligations of States’ (2009) 9 HRLR 521; H King, ‘Unravelling the Extraterritorial Riddle: An Analysis of R (Hassan) v Secretary of State for Defence’ (2009) 7 JICJ 633

⁵⁸ R (Smith) v Oxfordshire Assistant Deputy Coroner [2010] 3 WLR 223 (SC)

⁵⁹ Ibid. para 60 (Lord Phillips)

⁶⁰ R (Smith) v Secretary of State for Defence [2009] 3 WLR 1099 (CA) paras 28-30 (Sir Anthony Clarke MR)

⁶¹ Op. Cit. n.58 para 190 (Lord Mance)

⁶² Cyprus v Turkey (1975) 2 DM 125 (European Commission on Human Rights) para 8(2)

This question of jurisdiction and extra-territorial reach of the ECHR could be resolved by the end of the year as Al-Skeini⁶³ has now been heard on 9 June 2010 before the Grand Chamber of the ECtHR, the proper tribunal to resolve this issue according to Lord Phillips⁶⁴.

EQUALITY ACT 2010⁶⁵

The fifth significant legal development is the Equality Act 2010, 90% of which came into force on 1 October 2010⁶⁶.

a. Equality and non-discrimination

Equality is an ephemeral concept that has engendered considerable academic debate about its substance and purpose. Westen⁶⁷ separated formal and substantive equality. Formal equality was non-comparative as no exterior criterion was specified to enable comparisons to be made. It was defined by Aristotle as: “equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood”⁶⁸. Furthermore, “equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal”⁶⁹. Westen claimed that both elements of formal equality were viciously circular and thus tautologous. In the first definition the fundamental nature of human beings was their individuality such that each individual human was different and

⁶³ Al-Skeini & Others and Al Jedda v United Kingdom, application nos. 5572/07 and 27021/08 (ECtHR)

⁶⁴ Op. Cit. n.58 at para 60 (Lord Phillips)

⁶⁵ See also Equality Act 2010: Explanatory Notes – Revised Edition, August 2010, accessed at http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen_20100015_en.pdf

⁶⁶ SI 2010/2279, The Equality Act 2010 (Consequential Amendments, Saving and Supplementary Provisions) Order 2010 and SI 2010/2317, The Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010

⁶⁷ P Westen, ‘The Empty Idea of Equality’ (1982) 95 HLR 537. See also CJ Peters, ‘Equality Revisited’ (1997) 110 HLR 1211

⁶⁸ Aristotle, *Ethica Nicomachea* V.3.1131a-1131b (Ross W., trans., 1925), cited in Ibid. (Westen) 543

⁶⁹ Aristotle, *Ethica Eudemia* VII.9.1241b (Ross W., trans., 1925), cited in Ibid. (Westen) 543

unique. Any attempt to determine alikes was impossible. Thus equality “tells us to treat like people alike; but when we ask who ‘like people’ are, we are told they are ‘people who should be treated alike’. Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we act”⁷⁰. The second definition is claimed to be just as empty of moral substance as “justice can be reduced to equality, equality can be reduced to a statement of justice”⁷¹. Substantive equality received less normative but greater descriptive analysis from Westen. Substantive equality required an external criterion so that a comparison could be made between two equals. Westen concluded that comparative analysis involving substantive equality could be reduced to a series of constituent and substantive rights that more correctly protected individual concerns. Simons⁷² attacked Westen over this analysis of substantive equality. He defined formal equality as “equality” and substantive equality as “the principle of equal treatment”⁷³. Thus the principle of equal treatment was a comparative right that prescribed a relation of equality⁷⁴. “It is relational and social”⁷⁵ and as it involved a comparison between individuals or groups it had to be imbued with moral standards.

Barnard has attempted to fill the vacuum of formal equality with the concept of non-discrimination⁷⁶. This is a valid attempt to find answers to the questions that Westen sets and indeed the concept of non-discrimination in the UK has developed in an incremental and singular manner, first with the Equal Pay Act 1970, then the SDA75, and the Race Relations Act 1976 and so on. The effect has been to establish discrete areas of non-discrimination without a defining principle of equal treatment imbued with moral values that constitutes substantive equality. This is at odds with the experience of the USA and in particular the Civil Rights Act 1964.

⁷⁰ Ibid. (Westen) 547

⁷¹ Ibid. (Westen) 557

⁷² KW Simons, ‘Equality as a Comparative Right’ (1985) 65 Boston University L Rev 387. See also KL Karst, ‘Why Equality Matters’ (1983) 17 Georgia L Rev 245 and K Greenawalt, ‘How Empty is the Idea of Equality?’ (1983) 83 Columbia Law Rev 1167

⁷³ Ibid. 389

⁷⁴ Ibid. 479

⁷⁵ Ibid. 482

⁷⁶ C Barnard, ‘The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?’ (198) 57 CLJ 352; C Barnard, ‘Gender Equality in the EU: A Balance Sheet’ in P Alston, *The EU and Human Rights* (OUP, London 1999) 215 at 223

b. The Equality Act 2010

The position in the UK has undergone a transformation with the adoption of the Equality Act 2006 (EA06) followed by the Equality Act 2010 (EA10). EA06 s 1 established a new single Commission for Equality and Human Rights to replace the patchwork of different bodies designed to protect single issue areas of non-discrimination. The Commission was presented with a general duty in s 3 to “exercise its functions...with a view to encouraging and supporting the development of a society in which: (a) people’s ability to achieve their potential is not limited by prejudice or discrimination; (b) there is respect for and protection of each individual’s human rights; (c) there is respect for the dignity and worth of each individual; (d) each individual has an equal opportunity to participate in society; and, (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.”

This has been taken further by the EA10, abolishing the previous non-discrimination law and replacing them with a single law based on the principle of equality. This does not go as far as establishing a constitutional right to equality⁷⁷ but it does establish a substantive principle of equal treatment. It first imposes in Part 1 a 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 (s 1(1))⁷⁸. In the context of the military these authorities include Ministers of the Crown and government departments (s 1(3)(a) & (b)). Fredman⁷⁹ has recently stated that this duty does not apply to the armed forces. On the face of the Act she is correct but it will apply to the MoD and Secretary of State for Defence when making strategic decisions, e.g. the forthcoming Strategic Defence Review.

⁷⁷ 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

⁷⁸ The UK Government is still considering the implementation of this provision, accessed at http://www.equalities.gov.uk/equality_act_2010.aspx

⁷⁹ S Fredman, ‘Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage Onto the Equality Agenda’ [2010] EHRLR 290 at 297

Part 2 outlines the substantive issues of equality. Chapter 1 provides a list of protected characteristics constituting age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (s 4) and a definition of each characteristic (ss 5-12). Chapter 2 outlines prohibited conduct of which direct discrimination, indirect discrimination, harassment and victimisation are significantly modified from previous legislation. Direct discrimination is defined in s 13(1) as “[a] person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.” Discrimination can be justified if proportionate if the protected characteristic is age (s 13(2)) but the remaining parts of s 13 provides more protection for specific persons with specific protected characteristics. For example less favourable treatment for race includes segregating B from others (s 13(5)) and a woman breast-feeding (s 13(6)(a)). These are augmented by ss 15-18. A new development is the provision on multiple discrimination⁸⁰ contained in s 14 that provides that “[a] person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.”⁸¹ Indirect discrimination in s 19(1) is defined as “[a] person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.” Paragraph 2 provides it is discriminatory if: “(a) A applies, or would apply, it to persons with whom B does not share the characteristic; (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; (c) it puts, or would put, B at that disadvantage; and, (d) A cannot show it to be a proportionate means of achieving a legitimate aim.” It should be noted that ss 13, 14 and 19 do not require a real comparator and indeed a comparator is not mentioned. However, to determine if something is discriminatory there has to be some form of comparison and s 23(1) requires there to be no

⁸⁰ See P Uccellari, ‘Multiple Discrimination: How Law can Reflect Reality’ (2008) 1 Equal Rights Review 24; D Ashagbor, ‘Multiple Discrimination in a Multicultural Europe: Achieving Labour Market Equality Through New Governance’ (2008) 61 Current Legal Problems 265; S Barri, D Sciek, *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Commission, Brussels 2009) for discussions about multiple discrimination

⁸¹ The UK Government is still considering the implementation of this provision, accessed at http://www.equalities.gov.uk/equality_act_2010.aspx

material difference between the circumstances relating to each case when comparing and s 24(1) does not require person A to possess the protected characteristic for direct discrimination under s 13(1). Harassment is also prohibited conduct (s 26) and is defined as “(1) A person (A) harasses another (B) if: (a) A engages in unwanted conduct related to a relevant protected characteristic; and, (b) the conduct has the purpose or effect of: (i) violating B’s dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.” Specifically this can be sexual (s 26(2) & (3)). To determine harassment involves a substantive assessment (“the perception of B”), the other circumstances of the case and an objective analysis (“whether it is reasonable for that conduct to have that effect”) (s 26(4)). Finally there is victimisation in s 27 where “(1) A person (A) victimises another person (B) if A subjects B to a detriment because: (a) B does a protected act; or, (b) A believes that B has done, or may do, a protected act.” Protected acts are: “(a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; or, (d) making an allegation (whether or not express) that A or another person has contravened this Act.”

Part 3 deals with services and public functions. S 29(6) is important for the armed forces and provides that “[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, paragraph 4(1) of Part 1 of Schedule 3 disapplies this when relating to relevant discrimination “for the purpose of ensuring the combat effectiveness of the armed forces”. The “relevant discrimination” is made up of four of the protected characteristics – age, disability, gender reassignment and sex but does not include race and sexual orientation. Part 5 is entitled Work and Chapter 1 deals with employment. S 39(1) prohibits an employer (A) from discriminating against a person (B): (a) in the arrangements A makes for deciding to whom to offer employment; (b) as to the terms on which A offers B employment; (c) by not offering B employment. The provision goes on to prohibit an employer (A) from discriminating against an employee of A’s (B): (a) as to B’s terms of employment; (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or

training or for receiving any other benefit, facility or service; (c) by dismissing B; (d) by subjecting B to any other detriment. Schedule 9, Part 1, paragraph 4 provides an exception for the armed forces for s 39(1)(a) or (c) or (2)(b) “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”, where a “relevant requirement” is either to be a man or not to be a transsexual person. Furthermore, Part 5 on Work does not apply to service in the armed forces as far as relating to age or disability (Schedule 9 Part 1 paragraph 4(3)).

Part 11 entitled “Advancement of Equality” creates a public sector equality duty in Chapter 1 that attempts to further mainstream equality⁸². The main duty is set out in s 149(1) that requires a public authority to “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.” This is extended to persons exercising public functions but not a public authority. Public authorities are specified in Schedule 19 (s 150(1)) and include the armed forces.

A final point to note is the general exception provided by s 192 on national security: “[a] person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose.” Interestingly this is not a catch all exception as the principle of proportionality applies but the extent of the exclusion is uncertain as national security is not defined.

So the EA10 has introduced the principle of equal treatment into UK law and the debate on substantive equality can be fully entered. The standard underpinning

⁸² This has not been brought into force yet by the UK Government but has been put out for consultation. See Government Equalities Office, Equality Act 2010: The Public Sector Equality Duty – Promoting Equality Through Transparency, A Consultation, August 2010, accessed at http://www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf

substantive equality, it has been suggested, must be holistic in nature and must “apply to every person merely because he or she is a person”⁸³. There have been many suggestions of which I will merely mention three: equality of opportunity; equality of outcomes; and, equality based on human dignity⁸⁴, a concept that is becoming more academically fashionable⁸⁵. This would appear to have merit as it ascribes equality in terms of intrinsic worth and personhood⁸⁶. As Hepple⁸⁷ points out however, when discussing the EA06, a very wide range of standards are employed within the legislation none of which takes precedence.

c. Equality and the armed forces

As demonstrated above the new EA10 creates significant duties upon the military and has, it can be argued, continued the process of integrating the military as part of society rather than as a separate and different society within a society. The direction of travel for the armed forces was first indicated in the 1998 Strategic Defence Review (SDR). The White Paper emphasised that “the armed forces will offer a worthwhile and rewarding career for all ethnic groups, both for men and women”⁸⁸. Furthermore “[w]e need to recruit high quality adaptable people in a rapidly changing society. We will be putting additional emphasis on recruiting and adapting our approach to better reach all sections of the community. We are particularly anxious to recruit more from the ethnic minorities and more women, whose potential we have not fully tapped.”⁸⁹ Supporting Essay No 9 was more explicit as to the relationship between society and the military requiring the armed forces to “embrace all sections

⁸³ GP Fletcher, ‘In God’s Image: The Religious Imperative of Equality under Law’ (1999) 99 Columbia Law Rev 1608 at 1611

⁸⁴ W Darity, ‘Equal Opportunity, Equal results, and Social Hierarchy’ (1987) 7 Praxis International 174 at 181

⁸⁵ See D Feldman, ‘Human Dignity as a Legal Value – Part 1’ [1999] PL 682; D Beylveid, R Brownsword, ‘Human Dignity, Human Rights, and Human Genetics’ (1998) 61 MLR 661; G Moon, R Allen, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’ [2006] EHRLR 610

⁸⁶ A Gewirth, *Self-Fulfilment* (Princeton University Press, Princeton 1998) 159-174

⁸⁷ B Hepple, ‘The Aims of Equality Law’ (2008) 61 CLP 1 at 3

⁸⁸ Ministry of Defence, *Strategic Defence Review, Cm 3999 White Paper* (MoD, London 1998) para 121

⁸⁹ *Ibid.* para 127

of the community, irrespective of gender or race⁹⁰. For women the aim was to maximise opportunities in the armed forces⁹¹ whilst the aim for ethnic minorities was to increase numbers by 1% each year until eventually the composition of the armed forces reflected that of the population as a whole⁹². Finally the strategy was underlined by an overarching goal “to put in place modern and fair policies which ensure that the armed forces and the MOD attract and retain the right people and truly reflect the society they serve.”⁹³

To help achieve these goals the MoD set in place three year Equality Schemes first published in 2002 (only for race) for 2002-2005⁹⁴, then 2006-2009⁹⁵, that was superseded by the scheme for 2008-2011⁹⁶. Furthermore Annual Reports are published with policy aims and objectives and detailed statistics⁹⁷. In the Equality Schemes the MoD’s approach to equality and diversity is set out that reflects the aims of the SDR. In the 2002-2005 Race Equality Scheme determination to make the armed forces more representative of society was emphasised⁹⁸ and to harness the wealth of individuals’ talent and skills from different backgrounds across all ethnic groups⁹⁹. The diversity goal is “to achieve an environment free from harassment, intimidation and unlawful discrimination, in which all have equal opportunity and

⁹⁰ Ibid. Essay 9 para 18

⁹¹ Ibid. Essay 9 para 39

⁹² Ibid. Essay 9 para 41

⁹³ Ibid. Essay 9 para 80

⁹⁴ Ministry of Defence, *Race Equality Scheme 2002-2005 for the Ministry of Defence: Armed Forces, Civil Servants and Ministry of Defence Police* (MoD, London 2002) accessed at http://webarchive.nationalarchives.gov.uk/tna/+http://www.mod.uk/issues/racial_equality/index.html

⁹⁵ Ministry of Defence, *Equality and Diversity Scheme 2006-2009* (MoD, London 2002) accessed at http://www.mod.uk/NR/rdonlyres/6D31D11A-8764-4DD8-9788-D20B5B14CA6D/0/eqdiversity_scheme2006_2009_ver1april06.pdf

⁹⁶ Ministry of Defence, *Equality and Diversity Scheme 2008-2011* (MoD, London 2002) accessed at <http://www.mod.uk/NR/rdonlyres/98E4EAB6-CE02-4F39-9EF2-17DD054C5905/0/eqdivschemes20082011.p>

⁹⁷ Race Equality Scheme Progress Reports were published for 2003, 2004 and 2005. Equality and Diversity Scheme Reports have been published for 2006-2007 (accessed at http://www.mod.uk/NR/rdonlyres/190B0D7E-83AB-4EDF-B845-0C310EE070C0/0/annrpt_ed0607.pdf), 2007-2008 (accessed at http://www.mod.uk/NR/rdonlyres/190B0D7E-83AB-4EDF-B845-0C310EE070C0/0/annrpt_ed0607.pdf) and 2008-2009 (accessed at http://www.mod.uk/NR/rdonlyres/4C3078BC-DB83-4F88-AE68-4DE231C7003D/0/edsreport_200809.pdf)

⁹⁸ Op. Cit. n.94 paras 7 and 27

⁹⁹ Ibid. para 27

encouragement to realise their full potential.”¹⁰⁰ It went on to provide that the armed forces “respect and value every individual’s unique contribution, irrespective of his or her race, ethnic origin, religion, gender, social background or sexual orientation, and seek to enhance their operational capability by maximising that contribution.”¹⁰¹ By time of the 2006-2009 and 2008-2011 Equality and Diversity Schemes these aims had evolved into a Diversity Vision and a Diversity Mission¹⁰². The Diversity Mission stated that “[o]ur Vision is a workforce, uniformed and civilian, that: is drawn from the breadth of the society we defend; gains strength from that society’s range of knowledge, experience and talent; and, welcomes, respects and values the unique contribution of every individual.”¹⁰³ This Vision was expanded upon by the Mission such that: “Diversity is core business for the Ministry of Defence in order to encourage people throughout society to join us, remain with us, make their distinctive contributions and achieve their full potential. Also, operating in multinational environments, our success will be improved by being able to understand and respond to different types of situations and people. We will be inclusive and not tolerate discrimination, harassment, bullying or abuse. We will ensure each individual is treated fairly, with dignity and respect and that the diversity of our workforce increases operational effectiveness.”¹⁰⁴

GENDER AND THE ARMED FORCES

Women have served in the UK armed forces for many years but the “Women’s Services” only became permanently established after World War II¹⁰⁵. These services, as can be gathered by their name, meant that women served separately to men in highly limited and “safe” capacities. In the early 1990s a major change

¹⁰⁰ Ibid. Annex B para 1

¹⁰¹ Ibid.

¹⁰² The Diversity Vision and Mission were very similar in both Schemes with minor amendments that did not affect the meaning.

¹⁰³ Op. Cit. n.96 at 23

¹⁰⁴ Ibid.

¹⁰⁵ Women’s Royal Army Corps formed on 1 February 1949 (taking over from the Auxiliary Territorial Service that had been formed in 1938); Women’s Royal Naval Service formed in 1917, disbanded in 1919, reformed in 1939 and retained after the Second World War; Women’s Royal Air Force formed in 1918, disbanded in 1920 and reformed on 1 February 1949 (taking over from the Women’s Auxiliary Air Force that had been formed in 1939).

occurred with the Women's Services being disbanded in 1994 and women becoming fully integrated in the Navy, Army and RAF. In 1997 the Secretary of State for Defence announced the opening up of job opportunities for women so that today 73% of jobs are open to women in the Navy, 70% in the Army and 96% in the RAF. The most recent figures for the percentage of women serving in the military are 9.4% in 2008 and 9.5% in 2009, a long way from fairly 50-50 split of men and women in UK society in general.

This combat effectiveness exclusion has been utilised by the armed forces to continue to limit full integration of women in the military ensuring that women cannot serve in front line army units, the RAF Regiment, the Royal Marines and submarines¹⁰⁶. As Arnall¹⁰⁷ points out this combat effectiveness restriction is not included in Article 2(2) of the Equal Treatment Directive that excludes from the scope activities where the sex of the worker constitutes a determining factor, transposed into national law by the catalogue of situations in SDA75 s 7 and which is now applicable to the armed forces. He further notes¹⁰⁸ that the effect of the new s 85(4) was to create an exclusion of the armed forces on the basis of combat effectiveness where the sex of the worker is not a genuine occupational qualification for the job.

Another aspect of women serving in the armed forces that has raised concerns is that of sexual harassment. In 2002 the EU adopted Directive 2002/73¹⁰⁹ that amended the original Equal Treatment Directive. A new Article 2 was introduced that defined harassment as "where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment" and sexual harassment as "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a

¹⁰⁶ Ministry of Defence, 'Women in the Armed Forces', report by the Employment of Women in the Armed Forces Steering Group, May 2002, accessed at http://www.mod.uk/NR/rdonlyres/A9925990-82C2-420F-AB04-7003768CEC02/0/womenaf_fullreport.pdf

¹⁰⁷ Op. Cit. n.42 at 233

¹⁰⁸ Ibid.

¹⁰⁹ European Parliament and Council Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002 L269/15

person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment". Such harassment and sexual harassment was considered to be discriminatory and thus prohibited. Sexual harassment was transposed as SDA75 s 4A(1)(b) by the Employment Equality (Sex Discrimination) Regulations 2005¹¹⁰. In 2004 the EOC wrote to the Ministry of Defence expressing concern over the frequency and persistence of sexual harassment of servicewomen by their male colleagues. The EOC¹¹¹ began and then immediately suspended a formal investigation when negotiations were entered into between the MoD and EOC for an action plan to prevent and deal effectively with sexual harassment in the armed forces. This was signed on 23 June 2005¹¹². The action plan consisted of three phases: empirical research through surveys, focus groups and assessment of policy; a review of the findings; and, implementation of measures for leadership, complaint handling, and monitoring and research¹¹³. The result of the successful implementation of this action plan was for the EOC to permanently suspend any investigation unless the MoD and the armed forces materially failed to achieve the objectives and actions in the action plan¹¹⁴.

Since then the EU has recast and combined the Equal Treatment and Equal Pay Directive¹¹⁵ into the Equality Directive 2006/54¹¹⁶ but still does not include an exception for the armed forces on the basis of combat effectiveness. This year a further report on "Women in the Armed Forces" is due to be published with

¹¹⁰ SI 2005/2467, The Employment Equality (Sex Discrimination) Regulations 2005

¹¹¹ S Rutherford, R Schneider, A Walmsley, 'Quantitative & Qualitative Research into Sexual Harassment in the Armed Forces, Schneider-Ross Ltd report 22 March 2006, accessed at <http://www.mod.uk/NR/rdonlyres/538E55EE-9CA4-4177-9A0B-6853A431B283/0/20060522SRReport.pdf> at 5

¹¹² Agreement Between the Ministry of Defence and the Equal Opportunities Commission on an Action Plan to Prevent and Deal Effectively with Sexual Harassment in the Armed Forces, 22 June 2005, accessed at http://www.mod.uk/NR/rdonlyres/13856EA1-1D13-4872-A5EF-797D8EA3E025/0/mod_eoc_agreement.pdf

¹¹³ Agreement Between the Ministry of Defence and the Equal Opportunities Commission on an Action Plan to Prevent and Deal Effectively with Sexual Harassment in the Armed Forces: Progress Report and Phase Three Action Plan, accessed at <http://www.mod.uk/NR/rdonlyres/1B43BA95-6D58-4DA0-8E59-57C1B2734ABB/0/out.html> at Annex B

¹¹⁴ Ibid. 1

¹¹⁵ Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975 L45/19

¹¹⁶ European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L204/23

considerable media speculation at the start of the year that the submarine service of the Royal Navy would be opened up to women. The report is awaited with considerable anticipation with the possibility of the EA10 having a significant impact, especially if the claims by Basham¹¹⁷ that arguments of social cohesion behind the concept of combat effectiveness lead to situations of harassment for women and homosexuals are upheld.

GENDER ORIENTATION AND THE ARMED FORCES

The policy towards homosexuals serving in the armed forces undertook incremental changes before the ban was lifted in January 2000. After the civilian decriminalisation of homosexual acts by the Sexual Offence Act 1967, homosexuality was still a criminal offence in the military. This continued until 1992 when a statement was made by the responsible minister in the House of Commons to the effect that in future individuals who engaged in homosexual acts would not be prosecuted under military law. This was only given legal effect in 1994 with the passing of s 146(1) of the Criminal Justice and Public Order Act 1994. However, s 146(4) provided that a homosexual act could continue to constitute a ground for discharge from military service. This policy was challenged in a judicial review action by four ex-service personnel¹¹⁸ who had been discharged from the services for their homosexuality. In the Court of Appeal¹¹⁹ the challenge was rejected as the Ministry of Defence policy did not meet the high threshold requirement of irrationality, the only ground of judicial review available. Furthermore it was held that as the ECHR was not part of UK law then Article 8, the right to private life, was not applicable and that there was nothing in EU Law that could be used to overrule the policy. The four former service personnel continued with their legal action after their request for a House of Lords hearing was dismissed and took their cases to the ECtHR in 1999¹²⁰.

¹¹⁷ V Basham, 'Effecting Discrimination: Operational Effectiveness and Harassment in the British Armed Forces' (2009) 35 AF&S 728

¹¹⁸ The four were Jeanette Smith, Graeme Grady, Duncan Lustig-Prean and John Beckett

¹¹⁹ R v Ministry of Defence, ex parte Smith and others [1996] 1 All ER 257 (CA); see M Norris, 'Ex parte Smith: Irrationality and Human Rights' [1996] PL 590

¹²⁰ Lustig-Prean and Beckett v United Kingdom [1999] ECHR 71 (ECHR) and Smith and Grady v United Kingdom [1999] ECHR 72 (ECHR)

Here the judges ruled that the MoD policy was incompatible with the claimants' right to privacy and private life under Article 8 ECHR. The result was the lifting of the ban and the adoption of an Armed Forces Code of Social Conduct¹²¹ that applied generally across all personnel.

Since then there have been two reviews of the abolition of the ban on homosexuals serving in the military, first in October 2000¹²² and then in 2002¹²³. Neither reported significant problems with the application of the new rules. Unfortunately the military now consider homosexuality to be a non-issue and so no empirical research has been carried out since the lifting of the ban to determine the number of homosexuals serving or to investigate their experiences. This failure to monitor and evaluate this issue may possibly lead to a challenge being brought against the military under the public sector equality duty of the EA10 (s 149(1))¹²⁴, especially if the claims of Basham¹²⁵ that arguments of social cohesion behind the concept of combat effectiveness lead to situations of harassment for women and homosexuals are upheld.

The opportunities for homosexual ex-servicemen and women to obtain compensation for sex discrimination on the grounds of their dismissal on the basis of their homosexuality were severely curtailed in the case of MacDonald¹²⁶ before the House of Lords. The SDA75 required a real comparator to be used to determine discriminatory treatment. MacDonald was dismissed from the RAF because he was attracted to men and so it was argued that the comparator to be used should be a

¹²¹ Ministry of Defence, 'Armed Forces Code of Social Conduct: Policy Statement' accessed at <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/ArmedForcesCodeOfSocialConductPolicyStatement.htm>

¹²² Ministry of Defence, 'MOD Policy on Homosexuality; A Review on the Armed Forces Policy on Homosexuality' accessed at <http://www.proud2serve.net/military/2000modupdate.htm>

¹²³ Service Personnel Board, 'Tri-Service Review of the Armed Forces' Policy on Homosexuality and Code of Social Conduct Paper 12/02' accessed at http://www.mod.uk/NR/rdonlyres/ACED4F62-2C04-4B19-AC50-E49552732385/0/impact_studies_homosexuality.pdf

¹²⁴ Op. Cit. n.82 chapter 5

¹²⁵ Op. Cit. n.117

¹²⁶ MacDonald v Advocate General for Scotland and Pearce v Governing Body of Mayfield School [2003] ICR 937 (HL); see E Fry, S Buckley, 'Pearce, MacDonald and the New Legislation – Three Steps Forward, Two Steps Back?' (2003) 8 Journal of Civil Liberties 67; P Roberts, 'Case Note' (2003) 25 Journal of Social Welfare and Family Law 383; and, R Wintemute, 'Sex Discrimination in MacDonald and Pearce: Why the Law Lords Chose the Wrong Comparators' (2003) 14 KCLJ 267

woman who was attracted to men, i.e. a heterosexual woman. The Lords disagreed and concluded that the real comparator had to be a woman who was attracted to the same sex, i.e. a lesbian. As the armed forces had the same policy towards lesbians as they did to homosexual men then there was no discrimination. The EA10 has now removed the requirement of a real comparator for the determination of a sex discrimination case and as such the outcome could well be different now.

The final point to note on the development of the law on homosexuals and the armed forces is the effect of the Civil Partnership Act 2004¹²⁷. This opened the way to service personnel being able to register their civil partnerships and having access to the same welfare benefits and service allowances as married heterosexual personnel (e.g. access to Service Family Accommodation, pension rights, travel benefits etc.).

RACIAL MINORITIES AND THE ARMED FORCES

The position of racial minorities within the military has been curious with few complaints from within the armed forces and disquiet from the civilian world. This has centred round the number of racial minorities employed by the military and the ability to recruit and retain such personnel in numbers that reflect the racial make-up of the country, even though racial minorities have served for many years¹²⁸. Since the Race Relations Act 1976¹²⁹, the British military have been under a duty not to discriminate against individuals on the basis of their race. Concerns grew through the 1980s and 1990s over reports of racial bullying¹³⁰, evidenced by the Commission for Racial Equality's critical investigation into the Household Cavalry¹³¹ and a number

¹²⁷ See M Bell, 'Employment Law Consequences of the Civil Partnership Act 2004' (2006) 35 ILJ 179

¹²⁸ SW Crawford, 'Racial Integration in the Army – A Historical Perspective' (1995) 111 British Army Review 24

¹²⁹ AW Bradley, 'Racial Discrimination and the Public Sector' [1991] PL 317 – the Race Relations Act 1965 exempted any act by the Crown or on Crown premises

¹³⁰ JK Wither, 'Battling Bullying in the British Army 1987-2004' (2004) 1 Journal of Power Institutions in Post-Soviet Societies

¹³¹ Commission for Racial Equality, *Report of a Formal Investigation into the Ministry of Defence (Household Cavalry)* (CRE, London 1996)

of cases¹³². The result was an adoption first by the Defence Council of a Code of Practice on Race Relations in 1993, a partnership agreement between the MOD and the CRE in 1998 and the setting of ethnic minority recruitment goals for the first time in the Strategic Defence Review in 1998. By the turn of the 21st Century the policy had evolved from the Ministry of Defence from one of equal opportunities to one of diversity. In the early 2000s Dandeker and Mason¹³³ considered the situation of race and the military whilst Hussain and Ishaq¹³⁴ conducted empirical research into attitudes of civilian racial minorities towards the armed forces and found reasons against joining the military included: perceived racism in the armed forces; the nature of a military career; a tendency to prioritise further and higher education over a service career; and religious and cultural considerations. It should be noted that the latter research was conducted with a small statistical sample and before the 9/11 or 7/7 terrorist attacks.

The MoD reports on Equality and Diversity point out the increasing percentage of racial minority representation, from 1% in 1999 to 6.5% in 2009 (3.3% for the Royal Navy, 9.4% for the Army and 2.2% for the RAF). However, it should also be noted that much of this recruitment is made up of individuals from Commonwealth countries rather than recruitment from British racial minorities, with 6.3% of the Army's 9.4% coming from Foreign and Commonwealth countries. Therefore the actual percentage of UK racial minorities in the Army is 3.1%.

¹³² R v Army Board of the Defence Council ex parte Anderson [1991] ICR 537 (HC)

¹³³ C Dandeker, D Mason, 'The British Armed Services and the Participation of Minority Ethnic Communities: From Equal Opportunities to Diversity?' (2001) 49 *Sociological Review* 219; C Dandeker, D Mason, 'Diversifying the Uniform? The Participation of Minority Ethnic Personnel in the British Armed Service' (2003) 29 *AF&S* 481

¹³⁴ A Hussain, M Ishaq, 'Scottish Pakistani Muslims' Perceptions of the Armed Forces' (2002) 38 *Scottish Affairs*; A Hussain, M Ishaq, 'British Pakistani Muslims' Perceptions of the Armed Forces' (2002) 28 *AF&S* 601; M Ishaq, A Hussein, 'British Ethnic Minority Communities and the Armed Forces' (2002) 31 *Personnel Review* 722; A Hussain, M Ishaq, 'Promoting Equality of Opportunity in the British Armed Forces' (2003) 3 *Defence Studies* 87; A Hussein, 'Careers in the British Armed Forces: A Black African Caribbean Viewpoint' (2003) 33 *Journal of Black Studies* 312

It is submitted that all three services have a long way to go before they achieve the aim of 8% of UK racial minorities employed within the military as the recent case of DeBique¹³⁵ demonstrates.

AGE AND THE ARMED FORCES

The EU Framework Directive on Equal Treatment in Employment, Directive 2000/78¹³⁶ provides for the prohibition of discrimination on, *inter alia*, the grounds of age (Article 1). However, Article 3(4) enables Member States may 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 Mangold¹³⁷ the Court held that although the Directive could not apply 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 Kücükdeveci¹³⁸ where the ECJ held that this fundamental right could be enforced by an individual in a national court.

CONCLUSION

The armed forces have come a considerable way in a short space of time. The basis of the civil-military relationship in the UK was positively established in the Strategic Defence Review of 1998 and then clarified by the law. The aim of the military is now

¹³⁵ Ministry of Defence v DeBique [2010] IRLR 471 (EAT)

¹³⁶ Op. Cit. n.35

¹³⁷ 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; 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; E Muir, 'Enhancing the Effects of Community Law on National Employment Policies: The Mangold Case' (2006) 31 ELR 879; A Masson, C Micheau, 'The Werner Mangold Case: An Example of Legal Militancy' (2007) 13 EPL 587

¹³⁸ Case C-555/07 Kücükdeveci v Swedex, judgment of 19 January 2010, nyr (ECJ); noted T Roes, 'Case Note' (2010) 16 Columbia Journal of European Law 497; A Wiesbrock, 'Case Note' (2010) 11 German Law Journal 539; G Thüsing, S Horler, 'Case Note' (2010) 47 CMLRev 1161

recognised as attempting to reflect society as closely as possible and mainstreaming equality and diversity is part of the military set up, as evidenced by the Joint Equality and Diversity Training Centre attached to the Defence College at Shrivenham. This is readily seen in the development of non-discrimination and equality in what is traditionally seen as an unequal and hierarchical organisation. The result is a modern and forward thinking military, able to reach out to the societies it serves and offer examples of best practice to other countries' armed forces. However, there are challenges that remain for the military with the issue of combat effectiveness as an exclusion retained within the EA10 yet to be tested before the ECJ, the case of DeBique, the inability to recruit satisfactory numbers of racial minorities from the UK population and the possible problems with age discrimination protected by general principles in EU Law. As a consequence despite the best efforts of the MoD and the military, the UK armed forces continue to be a very white and male environment with aspirations for greater diversity.