Equinet training summary

Using equality data in legal casework: Capacity-building for Equality Bodies

27–28 October 2022

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Training summary

On 27-28 October 2022, Equinet held an in-person training in Brussels on utilising equality data for the purposes of building and adjudicating discrimination cases (see the Event webpage featuring the training agenda and materials, including speaker presentations). The training brought together 25 members of the Equinet Working Groups on Research and Data Collection and on Equality Law, reinforcing links between Equality Bodies' legal casework and their data collection and research activities. The main focus of the training was on developing the participants' understanding of the various ways, in which the two European courts – the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) – have been instrumentalising, in their case law, equality data, broadly defined to include any qualitative findings, as well as statistics, to contextually assess cases of discrimination on a spectrum of protected grounds. The goal was to demonstrate, for the participants, how supranational equality rights litigators (the applicants' representatives) and adjudicators have been able to derive legal consequences, in terms of findings, from information revealing broader pictures of inequality contextualising particular sets of facts. Thusly, it was projected, the participants would be led, by way of authoritative jurisprudential example, to actively seek out, identify and adopt research analyses and quantitative data as a form of evidence in assessing, arguing, deciding, and communicating discrimination cases to the public and other practitioners and authorities. The trainer leading the event presented content outlining the variety of possible sources of equality data accepted by the European courts, including but not limited to court findings, scholarship, civil society and institutional compliance monitoring reports, administrative data, complaints data, situational testing results, attitudinal and victimisation surveys, and other official and unofficial statistics.

Additionally, the training was important as a platform for peer-to-peer learning: several Equality Body practitioners shared with their colleagues experiences in using equality data in legal casework, highlighting promising practices and challenges alike. Whilst a general need for enhanced knowledge in this regard, i.e. limited prior experience, was identified prior to the training based on participants' self-assessments, nevertheless Equality Bodies demonstrated meaningful experiences: the Advocate of the Principle of Equality (SI), the Equality and Anti-discrimination Ombud (NO), and UNIA (BE). See their presentations here.

Case studies

Advocate of the Principle of Equality (Slovenia)

The Advocate of the Principle of Equality (Advocate) discussed a case of alleged gender (maternity)–based disadvantage in terms of performance evaluation, brought by an employee. To resolve this case, the Advocate required the respondent employer to produce workforce-wide comparative data on evaluations of employees who had benefitted from maternity leave as opposed to ones who had not. The data revealed a pattern of disadvantage affecting maternity leave-takers. Based on the data, the Advocate upheld the claim, the respondent has failed to provide a non-maternity-related explanation for the claimant's disadvantage.

Equality and Anti-discrimination Ombud (Norway)

The Equality and Anti-discrimination Ombud presented their work on a case regarding unequal prison conditions for female inmates. As a basis for their successful litigation, they utilised equality data from both officials and unofficial sources, including media reports and reports by authorities on the issues found. Based on these data, the court shifted the burden of proof onto the respondent's prison service.

UNIA (Belgium)

UNIA shared an outline of their project on improving equality data collection, which mapped equality data sources, among other outputs. Examples of data collection by UNIA were provided, including labour market and education monitoring reports. Importantly, the UNIA colleagues identified challenges around using equality data in litigation, including a lack of internal cooperation between UNIA lawyers and researchers. Other challenges referred to: insufficient staff capacity in terms of identifying cases that could use equality data and uses such data could be put to; lack of knowledge about possible requirements or expectations by judges regarding the quality of the equality data and relevant admissibility rules; a lack of institutionalization of equality data use in casework; difficulties using complaints data due to its lack of representativeness (the so-called "tip of the iceberg" effect).

Nevertheless, the UNIA colleagues reported various uses of equality data in casework, including for the purposes of investigating cases, advising complainants, litigating claims or negotiating outcomes for clients, and for positive action purposes. In a case of structural racism in the fire brigade, UNIA successfully used multiple witness statements to secure structural redress and compensation for the individual victim. In strategic litigation over public transportation inaccessibility, UNIA used complaints data to compensate for the lack of concrete evidence pertaining to the individual incident in question. They collected and produced 30 complaints addressed to UNIA over a period of four years. Similarly, UNIA litigators used complaints data and other statistics, as well as qualitative reports to substantiate "Muslim headscarf" cases, demonstrating the impact of the impugned regulations on minority groups in terms of social participation and other outcomes. UNIA complaints data concerning a four-year period enabled a judge to acknowledge that mostly

Muslim women were affected, thereby documenting the disadvantage as being intersectional. Additionally, government-produced statistics and NGO reports on the issue supported UNIA's case.

Key learnings from the training

Based on individual presentations and collective discussions, the following main lessons emerged:

- **Equality data is an inclusive concept**. Several participants reported being interested in the comprehensive [definition of equality data](#) comprising not only quantitative data (statistics) but equally, qualitative information that reveals overall contexts and patterns of inequality. Participants remarked on the value of such comprehensive conceptualisation of equality data in terms of the possibilities it opens up for arguments and reasoning in discrimination cases.

- **Equality Body general findings** in their reports amount to equality data and can be used in their own casework. Equality Bodies can encourage other advocates and adjudicators to use Equality Body reports as a source of equality data in litigation.

- Submissions by **third-party interveners** in (supra)national judicial and other legal proceedings are a form of equality data too. In a third-party intervener capacity, Equality Bodies may supply data, which applicants before the ECtHR, for example, may not be in a position to access or present in a structured manner. Similarly, Equality Bodies can benefit, in their own decision-making in cases, from the submissions of amici curiae actors, such as CSOs or academic institutions.

- Equality bodies should be strategic and comprehensive in identifying **diverse equality data sources**, including respondents' admissions of issues documented in contexts outside of a particular litigation.

- There are **no formal rules or fixed guidelines to assess equality data** in terms of their relevance to a case or of their evidentiary value. Assessments are to be conducted on a case-by-case basis, with no identifiable pattern variations according to the type of case under the case law of the European Courts. Criteria to appraise the quality or reliability of data are not specific, rigid or exhaustive, rather, they are broad – data should be significant and representative, spanning a sufficient period of time, covering a sufficient sample of individuals, producing no fortuitous outcomes – and adjudicators are tasked with deriving the concrete implications of the application of those criteria in particular cases. There is no *a priori* restriction on the kind and amount of equality data that could be used in a case.

- **Potential good practice by Equality Bodies**: Equality Bodies could consider issuing guidelines on the criteria to assess equality data in legal proceedings, for internal use, or for reference in court and other legal proceedings.

- **A lack of data itself can have legal implications** too, especially where data collection is to be expected from a particular respondent, triggering possible inferences of discrimination and corresponding respondent rebuttal duties. The burden of proof could shift onto respondents for maintaining non-transparent systems. If not, a respondent's refusal to disclose data could jeopardize the effectiveness of equality rights.

- **Respondents may try and use equality data** to defend themselves in court too. Equality advocates' litigation strategies should therefore include preparedness to critically analyse and expose flaws in such data or the alleged conclusions from them, as well as reliance on alternative data (more recent or more robust) to reverse conclusions.

- Equality Bodies may face **challenges,** such as difficulties in producing alternative data to override government data due to data inaccessibility and limited resources preventing extensive data collection. Similarly, Equality Bodies may encounter difficulties when respondents produce raw data in legal proceedings, requiring Equality Bodies to dedicate scarce staff resources to process and analyse the validity of, and conclusions from, such data.

- Equality Body researchers and lawyers should **collaborate in structured ways** to enhance data collection and assessment to support litigation, and to enhance litigation strategies taking full advantage of available or identifiable equality data. Equality bodies should collaborate with academic institutions and supranational organisations in order to compensate for any lack of capacity in terms of identifying, collecting, or processing relevant data.

- Equality Body practitioners may find it challenging to **differentiate between equality data**, which by definition describes a general situation, **and evidence pertaining specifically to an individual case**, even where such evidence may include numerical information or multiple pieces of proof.

- Importantly, adjudicators should keep in mind that **equality data is not required** to decide a discrimination case. Upholding a claim is possible without equality data too, and the latter should not be required from a claimant. Such data help compensate for lacking evidence of bias in a particular case but where such evidence is available, equality data is not necessary, although it could strengthen a case by elevating the instant act of discrimination to a symptom of structural disadvantage.

Conclusions from the training

Equality Bodies have yet to uncover the full potential of using equality data in their legal casework, be it as litigants, as third-party interveners, or as adjudicators. There is space for further capacity-building in that regard and for enhancing internal cooperation mechanisms to better coordinate data collection and data-based casework. Equality Bodies will benefit

from their peers sharing their experiences in terms of utilizing equality data, and from brainstorming collectively. The **participatory design** of the training, which made space for extensive group work and plenary discussions, was helpful in that regard. Hypothetical cases were processed, and results were compared, with engagement from all of the participants. The upcoming Equinet Handbook on using equality data in legal casework will meet a need for knowledge resources in that regard, including existing Equality Body practices, which will be examined more comprehensively and in more depth.

Impact of the training

Based on participant evaluation input, the vast majority of participants experienced a notable to reasonable knowledge increase as a result of the training.

In terms of future action, all the participants who provided evaluation inputs (44% of all participants) reported intentions to make practical use of the knowledge acquired: to share it with Equality Body colleagues, including lawyers, and with others, contributing in this way to further dissemination of the information; to engage their Equality Body colleagues in cross-team collaboration (lawyers, researchers, sociologists, policy officers) on equality data use in casework, setting up meetings and structural cooperation tools, ensuring both spread and sustainability of the impact of the training; to augment equality data use in Equality Body cases, including through promotion and enhancing its collection for such purposes. Some responders plan to use equality data in Equality Body public reporting; to strategise about the consistent legal use of such data, including storing them on accessible platforms; to train others on the scope of the concept of equality data with a view to promoting the use of witness statements provided by Equality Body staff; to initiate legislative reform to place equality data processing duties on respondents in cases, in order to alleviate the burden on the Equality Body in terms of analysing raw statistics provided by respondents.

Overall, the responders were inspired to spread their learning and to invest Equality Body staff time in making systems for the integration of equality data in Equality Body casework.