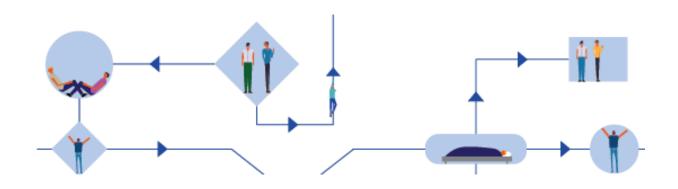# EQUINET AI LEGAL CLINIC

Litigating for Equality: An AI Legal Clinic for Equality Bodies

17-18/02/2022, 10.00-12.00 CET

The development of AI-enabled technology could present a new frontier for enhancing the protection of equality in Europe, including through clarifying, strengthening and expanding existing national equality law. This is because expanding and diversify the uses of AI systems across Europe has already led and will lead to more legislative developments at both European and national levels.

The provision of legal assistance to victims of discrimination, including through test and strategic litigation, is essential to give direction to these developments through 1) identifying how the **existing legal safeguards for non-discrimination** need to be enhanced to be effective in the context of AI technologies; and through 2) clarifying how **new AI-specific legislation** can further strengthen the protection of equality. Beyond that, like [Equinet's Report "Regulating for an Equal AI: a New Role for Equality Bodies](#)" has noted, the provision of legal assistance to victims of discrimination by equality bodies will have the added value of bringing awareness about the potential for the principle of non-discrimination to be infringed by emerging forms of AI-enabled technology.

The [second Equinet Training on AI](#) aims to equip equality bodies with the necessary knowledge to provide effective and timely legal support and advice to victims of AI-enabled discrimination. Building upon the capacity already created by the [first Equinet Training on AI](#), this training will have a more specific and practical focus, providing equality bodies with concrete know-how and tools on how to identify real-life cases of suspected AI-enabled discrimination. Importantly, the training will also focus on how to handle these cases using the different legal support capacities of equality bodies, whether it is through bringing cases to court, providing legal advice or otherwise supporting victims to themselves bring cases to court.

Access Information

Please join us using the following links:

17/02: https://us02web.zoom.us/j/4328437880?pwd=Ukt3WWpmVm41MlRTZnJYVmVza0pFZz09

18/02: https://us02web.zoom.us/j/4328437880?pwd=WG5LMUJIK1N2V0VFSTQyOEtrZmovQT09

Meeting ID: 432 843 7880

Passcode: LitigateAI

Case 1: UK Case

* Please note that the example used is fictional, but based on a composite of real cases.

Country: United Kingdom
Year: 2022

Summary

This case concerns a new integrated software system that local authorities in England and Wales have decided to implement for allocating school places, following a conference held by a prominent software company [Company X]. During this conference, local authorities were informed that the software would automate the school allocation process, and also provide predictions about the numbers of pupils needing school places in the future so that local authorities can plan for better educational provision in the future.

Company X is a UK-based technology company that provides bespoke solutions and systems for educational settings. While it provides and sells the software used, it contracted the company, 'Excelsior Data Solutions', which is based in St. Petersburg, Florida, to provide the test dataset that underpinned the software.

The software also claims that it can predict whether a child will have behavioural problems in later life, and/or be likely to be excluded from school. Each child is given a risk-score, which can change as they progress through education and the data is updated. For example, if a child changes address, or goes into care they might be allocated a higher or lower risk score. Absences are also fed into the risk score without distinction on the reason for those absences. The risk score has an impact on which school the child is allocated, although this is not made clear to local authorities when purchasing the software.

As the software is developed and maintained by Company X and licensed for use to participating local authorities, no one in the local authority can analyse or monitor the basis of the risk score. However, it is reported that a number of authorities continue to use the software.

Company X also promoted the system because of its data security policies, which including biometric data security measures requiring each parent(s) to provide a facial image for identity and child safeguarding purposes.

Five years after the conference presentation, a human rights NGO, working with a group of concerned parents, decides to probe into the issue for more information. This followed a statement made in the press from a whistle blower from a local authority on the outskirts of London who made public the use of Company X's technology. Reported in a local newspaper, this encouraged a number of parents to submit Subject Access requests, the results of which were also shared with the NGO.

One council indicated that because the software does not directly take into account protected characteristics apart from age, it does not require an Equality Impact Assessment (EIA) and cannot be discriminatory.

Great Britain's EHRC is considering how to potentially use its powers to see whether there are breaches of the Equality Act 2010. It has the power to fund a legal challenge such as a judicial review,

conduct an inquiry, investigate breaches of equality law, or to monitor and assess compliance with the Public Sector Equality Duty (PSED). This duty requires all public sector bodies to consider equality implications when making decisions and exercising its functions.

Equality Implications - Results of disclosures:

All children with behavioural problems have a higher risk score, and 90% of these children were allocated to poorer performing schools. There is a medium-high correlation between children who have behavioural problems and special educational needs- 70% have both. Children who live in care have the highest risk score overall. They have never been allocated a school with a rating of 'outstanding' throughout the five years.

All children of a black and ethnic minority background had an overall higher risk score. The requested information on country of birth may have functioned as a proxy for race and may be contributing to the higher risk score for children of a black or ethnic minority background as outlined above. Concerns have been raised that this has enabled local authorities to avoid completing EIAs as it is not an explicit reference to a protected characteristic.

Furthermore, one of the NGO involved suspects that the software uses facial recognition technology to profile children via the facial profile of the parent(s), but they are unsure how to prove what the facial recognition software recognises, and if it does discriminate based on skin colour and/or facial features (race).

Parents are also profiled and risk-assessed. Parents who apply for their children to go to some high performing faith schools are allocated a risk score, and those who are assessed as high risk are subject to heightened scrutiny and have to provide more evidence of links to their church than others who have a lower score. The system also recommends a series of spot checks on families to see if they continue to attend the church 6 months after allocation. Children and parents with specific inner city postcodes are always assessed as high risk when it comes to applications for faith based schools, and are subject to the heighted evidential requirements.

The parents of children are not aware of what the data is being used for and or how long it is retained by the local authorities and the software company. Parents have not always been asked for their consent.

Case 2: Dutch Childcare Allowance

Country: The Netherlands
Year: 2020

Summary

Netherlands Institute for Human Rights (College voor de Rechten van de Mens) aims to use its decision-making powers (quasi-judicial procedure) to issue a non-binding judgement on the well-publicized Dutch Tax Authorities childcare allowance scandal, which broke in 2019/2020 and resulted in the resignation of the government. Whereas the harsh and disproportionate manner in which the tax authorities pursued recipients of the benefits has since been well documented, the question remains whether this policy may also have been a discriminatory one.

In the wake of the scandal, a scheme was set up to provide financial compensations to the victims (basic compensation: €30 000). Crucially, the Dutch Junior Minister for Taxation informed victims of the possibility to submit a complaint to the College to determine whether or not there had been discrimination in their individual case. Since then, some 50 persons have made use of this possibility.

Even though through its quasi-judicial procedure, the College renders non-binding judgment, in the case of those 50 complainants, the decision will be de facto binding as the tax authorities have committed to respecting the outcome of the judgment. Because the College considered that the potential discrimination in these cases is likely to be institutional, rather than individual, it has decided to stay the proceedings and also use another part of its mandate, namely investigative powers, to conduct its own inquiry into the case and collect evidence.

In light of the above, the main investigative question that the College faces at this stage is whether the algorithmic system (rules + AI) of supervision, enforcement and repayment modalities employed by the Dutch Tax Authorities impacted persons with a foreign background disproportionately when compared to persons with a Dutch background. The goal is to establish whether there are sufficient facts from which we can presume that there has been indirect discrimination.

Background

The childcare benefit at the heart of the case is provided by the Dutch state through a special department of the tax authority. It is meant to allow parents to combine the care for their children with employment. The benefit is based on three crucial conditions:

1. Employment: person must be unable to care for the child due to employment.

2. Approved care: The child should receive care from a (registered/approved) childcare centre or childminder. Private operators provide the care; the state engages in quality control.

3. Co-payment: The government never completely covers the costs for childcare, rather there is an element of co-payment and income related adjustment.

The benefit was provided to recipients up front, after a relatively light touch investigation, after which various supervisory mechanisms were employed to counter fraud (and in practice: pursue mistakes). The College's legal team on the case suspects that the following algorithmic decision-making systems, which might be based on artificial intelligence (AI) or not, were involved in possible discriminatory treatment.

For example, one part of the automated decision-making is a 'calculation' algorithm which basically calculates how much benefit one is entitled to on the basis of information received from parents, childcare centres, etc. This results in an automatic adjustment of the amount received as the benefit is given in advance and on the basis of an estimate at the beginning of the year of childcare hours, price per hour, number of children in childcare, expected income, expected hours worked etc.. This amount is then readjusted at the end of the year. In that context, if information is missing/incomplete or otherwise problematic, there is an automatic 'fail' redflag at which point investigation and enforcement actions by the tax authorities are triggered. These actions range from sending a letter to having to appear before and give an explanation before the Tax Authorities.

A second system – the so-called 'risk classification algorithm' – has been much discussed in the media. This was a 'true' algorithm which ranked applications for the benefit that had been submitted according to a range of indicators, whereby the applications considered most risky were assigned for investigation by civil servants. One of the indicators it used in this respect was the nationality of the recipient, whereby a foreign nationality resulted in a higher risk.

Whereas 'treatment by civil servant' may seem innocuous enough, the operation of these algorithms should be seen against the overall background as indicated above: the Tax Authority's mandate was so strictly applied that it often did not distinguish between fraud or (relatively small) mistakes: in both situations recipients could suffer grave enforcement action. For example, suppose a parent received the child care support benefit to the amount of 9500 euros to pay a childcare centre bill of 12000 (due to co-payment rules parents were always obliged to cover some of the costs themselves). At the end of the year, the parent would have show that they actually paid the full 12 000. In case of a missing receipt, whereby for instance the parent could not prove that they paid €250 of this 12 000 the Tax Authorities would withdraw the full benefit (so not proportional to the undocumented amount, but rather simply the whole year).

So selection for investigation could generate significant consequences. One of the main issues that the College aims to investigate, therefore, is whether persons with a foreign background in practice were disproportionately selected for such investigative action.

AGENDA

Day I – 17 February *10:00 a.m. – 12:00 a.m.*

Case Study I: The Netherlands Institute for Human Rights

Automated decision-making systems used by the Dutch Tax Authorities to calculate the amount of childcare benefits

Moderator: **Milla Vidina,** *Policy Officer with AI focus, Equinet*

10.00-10.10	**Introduction** **Milla Vidina,** *Policy Officer with AI focus, Equinet*
10.10-10.35	**Setting the scene: overview of the life cycle of an equality legal case in the context of on-line recruitment discrimination** **Dee Masters**, *Barrister at Cloisters Chambers with specialist expertise in the areas of employment, discrimination and artificial intelligence.* *Adviser of Equinet's AI Legal Clinic and co-author of Equinet's Report "Regulating for an Equal AI: a New Role for Equality Bodies.* **Q&A**
10.35 – 10.55	**Case Study I: Automated decision-making systems used by the Dutch Tax Authorities to calculate the amount of child care benefits** **Alexander Hoogenboom**, *General legal counsel, The Netherlands Institute for Human Rights*
10.55- 11.40	**Q&A** *Moderator: Dee Masters*
11.40-12.00	**Closing first discussion day – *presentation of main conclusions through an interactive exercise*** *Milla Vidina, Equinet Secretariat, Policy Officer with focus on AI*

Day II – 18 February *Time: 10:00 a.m. – 12:00 p.m. (CET)*

Case Study II: Equality and Human Rights Commission, United Kingdom

Algorithmic allocation of school places by local authorities in England and Wales

* Note that the example used is fictional but based on a composite of real cases.

Moderator: **Therese Keil,** *Equinet Secretariat, Assistant on AI*

10.00-10.10	**Introduction**
10.10-10.20	**Recap of Day I, Case Study I: Automated decision-making systems used by the Dutch Tax Authorities to calculate the amount of child care benefits** ***Dee Masters***, *Barrister at Cloisters Chambers with specialist expertise in the areas of employment, discrimination and artificial intelligence.* *Adviser of Equinet's* [AI Legal Clinic](#) *and co-author of* [Equinet's Report "Regulating for an Equal AI: a New Role for Equality Bodies.](#)
10.20 – 10.40	**Case Study II: Algorithmic allocation of school places by local authorities in England and Wales** ***(tbd)**, Equality and Human Rights Commission, United Kingdom*
10.40- 11.25	**Q&A** *Moderator: Dee Masters*
11:25- 11.40	**A complementary source of learning: [Equinet's AI website](#)** **Relevant highlights from [Equinet's AI on-line forum discussions](#) on legal assistance in AI cases** *Presenter: Milla Vidina, Equinet Secretariat, Policy Officer with focus on AI*
11.40-12.00	**Closing of training "AI Legal Clinic for Equality Bodies"** **tbd**, *Equinet Secretariat*

Our Clinic Advisor

Dee Masters
Barrister at Cloister Chambers UK
Legal Areas: Artificial Intelligence & Machine Learning | Discrimination & Equality | Employment

Dee Masters is an employment, discrimination, artificial intelligence and whistleblowing specialist.

As a recognised expert in her field, her practice primarily consists of multi-week trials involving multiple and complex allegations. She is instructed by employers, employees and unions in high value or important claims. Due to her expertise, she regularly advises NGOs and government agencies on the development of discrimination law and she has delivered judicial training on discrimination law at ERA in Trier funded by the European Commission. She is also Head of Employment within Cloisters.

Dee is a leading practitioner in the technology space in relation to the interplay between artificial intelligence, equality law, human rights and data protection. She advises companies on auditing AI systems to ensure compliance with equality law as well as policy makers, NGOs and unions. Along with Robin Allen QC, she hosts www.ai-lawhub.com which contains information on how service providers can ensure that technology complies with the Equality Act 2010 as well as recent examples of her advisory work in this area. In 2020, she co-authored Equinet's Report Regulating for an equal AI – A new Role for Equality Bodies. The report maps and identifies the equality implications of AI systems, and the nature, scope and approach of Equinet's Members in the discussions on AI and algorithmic discriminationn

Further Reading

Finding cases

- [Equinet Report "Regulating for an Equal AI: A New Role for Equality Bodies"](#) (2020), written by Robin Allen QC & Dee Masters. *Specific excerpts of relevance*: p. 34-35 and Appendix 1.
- [Equinet Good Practice Guide on AI and Equality Bodies](#) (2020), developed to the support the promotion of Equinet AI Report (see above). *Specific excerpts of relevance:* p 7-8.
- [Equinet Handbook on Strategic Litigation](#) (2018). *Specific excerpts of relevance:* chapter 5 on sourcing cases.
- [Stanford AI Index Report 2021](#). For a global overview of where most private investment in AI goes by industry see Chapter 3.
- [Building an Evidence Base](#), Atlas Lab. *Specific excerpts of relevance*: focus on last sections of the article for a detailed catalogue of different sources of information for uncovering possible algorithmic discrimination.
- [EU Digital Economy and Society Index (DESI)](#), which tracks digital progress made in EU Member States in key areas, thus pointing you where [your respective member state](#) is developing AI capacities and focusing future investments.
- [Digital Public Administration factsheets Infographics per EU member states](#) (2021) – short and accessible summaries about the state of public services digitalization in your respective EU member state. Unlike the reports under the DESE index above, this only focuses on public services as one subset of state-driven digitalization areas.
- UN Report "[Digital technology, social protection and human rights"](#) (2019), Special Rapporteur for extreme poverty. For a critical analysis of the digitalization of public services across the world with recommendations that are relevant also for the effective enforcement of non-discrimination law.
- [Digital Public Administration factsheets Infographics per EU member states](#) – 2021, to find about the state of public services digitalization in your state thus where to look for cases
- [A Litigation Strategy on the Digital Welfare State,](#) (2020) Digital Freedom Fund.
- [Transformer States: A Series on Digital Government and Human Rights](#), New York University School of Law, The Center for Human Rights and Global Justice.
- [OECD.AI Policy Observatory](#) (2021) – helpful, among many things, to identify relevant public regulators in national AI policy documents in order to receive cases through them.
- "[Review into Bias in Algorithmic Decision-Making](#)" Summary (2020), UK Centre for Data Ethics and Innovation. *Specific excerpts of relevance*: see p. 23 for an example of mapping of relevant national public and private sector regulators, including their different tools for tackling AI discrimination.
- [Automating poverty](#) Investigative Journalism Series, The Guardian
- [Big Tech - Investigating how the government is gathering and using our data and the companies it is paying to do so,](#) The Bureau of Investigative Journalism.
- [AlgorithmWatch Automating Society Report](#), (2021). For specific case studies by country, see [here](#).

Assessing an AI case from a non-discrimination perspective

- [Equinet Report "Regulating for an Equal AI: A New Role for Equality Bodies"](#), (2020), written by Robin Allen QC & Dee Masters. *Specific excerpts of relevance:* Chapter 6,

which provides an assessment checklist for equality bodies on potential cases of algorithmic discrimination.

- Atlas Lab – an online educational resource for lawyers to learn about automated decision making technologies, cultivate collective legal strategy and collaboration for AI court cases across the globe.
- Algorithmic discrimination in Europe, (2021) European Network of Legal Experts in the non-discrimination field, European Commission, Directorate-General for Justice and Consumers, Gerards, J., Xenidis, R.
- In the Matter of Automated Data Processing in Government Decision Making, Robin Allen QC & Dee Masters, 7 September 2019. This opinion concerns similar Risk Based Verification systems discussed in the AI Clinic cases by the Netherlands and by the UK.
- UN Special Rapporteur on Disability's recent report on AI and disability – this report addresses the applicability of the UN human rights framework inter alia to cases of algorithmic discrimination.
- Algorithm-based discrimination at work, by Sylvaine Laulom (December 2021); Source: European Rights Academy.
- Price discrimination, algorithmic decision-making, and European non-discrimination law, Prof. Dr. Frederik Zuiderveen Borgesius, iHub, Radboud University, The Netherlands. Source: SSRN Database.
- Understanding the algorithmic black box: Discriminatory effects of pricing algorithms – what protection do data protection law and anti-discrimination law provide?, E-lecture by Juan Carlos Benito Sánchez, European Rights Academy (ERA).
- AI Now Institute, Algorithmic Accountability Policy Toolkit, October 2018 – specifically designed for public servants to help them evaluate algorithmic systems, their capabilities, and potential consequences from a human rights perspective.
- The recent equality and non-discrimination case law of the CJEU, Colm O'Cinneide (February 2021); Source: European Rights Academy.
- Enforcing EU equality law through collective redress: lagging behind? Sara Benedí Lahuerta (May 2020); Source: European Rights Academy.
- European Parliament, Library, Selected Online Reading on Artificial Intelligence and Law; N.B. As a staff member of a national equality institution of an EU member state, you can request access to EP Library resources by e-mailing library@europarl.europa.eu.
- The sharing economy and EU antidiscrimination law – Human control over reproducing inequalities, Luca Ratti (June 2019); Source: European Rights Academy.

Evidence

- Reversing the burden of proof: Practical dilemmas at the European and national levels, European Network of Legal Experts in the non-discrimination field, authors: Lilla Farkas and Orlagh O'Farrel.
- AI Discrimination and Algorithmic Fairness – Technical Solutions and Legal Constraints, E-lecture by Prof. Dr Philipp Hacker, European Rights Academy (2021).
- Proving Discrimination: the shift of the burden of proof and access to evidence, E-lecture by Rakesh Patel, European Rights Academy (2019).
- Wachter, S., Mittelstadt, B., & Floridi, L. (2017). Why a right to explanation of automated decision-making does not exist in the General Data Protection Regulation. International Data Privacy Law, 7(2), 76–99.
- Sandra Wachter, Brent Mittelstadt & Chris Russell, Counterfactual Explanations without Opening the Black Box: Automated Decisions and the GDPR, 3 HARV. J. LAW TECHNOL. 841–887 (2018);

- [Italian General Confederation of Labour v. Deliveroo](#) – example of a successful shifting of the burden of proof;
- [R (Edward Bridges) v. South Wales Police](#) (a UK challenge to police use of facial recognition technology) – example of effective use of expert to prove (among other things) that, without access to the training data for the technology, the police would not be able to sufficiently convince itself that the technology was not biased on the basis of race or gender.
- [Equality, artificial intelligence, algorithms and automated decisions: how to detect and address discrimination in the context of AI?](#), E-lecture by Prof. Frederik Zuiderveen Borgesius, European Rights Academy (2021).
- Atlas Lab, [Building an Evidence Base](#).
- Christian Sandvig et al., [Auditing algorithms: Research methods for detecting discrimination on internet platforms](#), (2014).
- Government of Canada, [Algorithmic Impact Assessment Tool](#) – mandatory assessment tool for all public agencies and departments, Last modified: 1 April 2021.
- Alessandro Mantelero, [AI and Big Data: A blueprint for a human rights, social and ethical impact assessment](#), 34 (4) Computer Law & Security Review 754–772 (2018).
- European Parliament, [Special Committee on Artificial Intelligence in a Digital Age](#), [Draft Report on Artificial Intelligence in the Digital Age](#)

Liability

- European Commission, [Inception impact assessment on adapting the EU liability rules to the digital age and circular economy](#), 30 June 2021.
- [EU Product Liability Directive](#), Consolidated text: Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.
- European Commission, Overview of [EU legislation on liability for defective products](#).
- European Commission, [Comparative law study on civil liability for artificial intelligence](#), November 2020.
- European Commission, [Report on safety and liability implications of AI, the Internet of Things and Robotics](#), 19 February 2020
- European Parliament, European Parliament Research Service, [Civil liability regime for artificial intelligence](#), September 2020
- European Parliament, commissioned by Directorate-General for Internal Policies of the Union, [Artificial intelligence and civil liability](#), 20 October 2020.
- European Parliament, [Resolution on a civil liability regime for artificial intelligence](#), (2020/2014(INL))
- European Law Institute, [Innovation Paper on Guiding Principles for Updating the Product Liability Directive for the Digital Age](#), 2021.
- European Law Institute, [Webinar on the need for updating the EU Product Liability Directive](#), 23 February 2021.
- European Law Blog, [Refusing to award legal personality to AI: Why the European Parliament got it wrong](#), Vagelis Papakonstantinou and Paul De Hert, 25 November 2020.

Equinet, European Network of Equality Bodies

Equinet is a membership organisation bringing together 47 equality bodies from 36 European countries including all EU Member States. Equinet promotes equality in Europe by supporting and enabling the work of national equality bodies. It supports equality bodies to be independent and effective as valuable catalysts for more equal societies.

Considering the rapidly evolving AI technologies and the potential risks they pose to equality and human rights, Equinet aims to support its members through AI-focused capacity building opportunities. Equality bodies, through their various competences, possess a unique insight into the state of equality and discrimination, that can be of utmost importance in the development, monitoring and impact assessment of algorithmic systems. National and European authorities therefore need to enable the full involvement of equality bodies in national and European expert bodies working on new strategies and legislation for AI. As such, equality bodies should also be a first point of reference about AI systems and their impact on equality and non-discrimination for all actors and stakeholders involved.

For more information, please see our AI website: ai.equineteurope.org/