Just News

CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

Human Rights in Northern Ireland April 2013

Welfare reform and the s75 equality duty: is the enforcement body enforcing?

The Welfare Reform Bill and the cuts it will bring are the most pressing equality issue of the day and will clearly impact disproportionately on the most disadvantaged groups in our society, including persons livling with a disability. Unsurprisingly, for many months the Bill has dominated the agenda of the Equality Coalition, the network of equality NGOs co-convened by CAJ and UNISON, who have pressed for the full implementation of the 'section 75' equality duty. This duty obliges public authorities, in this case the Department for Social Development (DSD), to assess the equality impact (EQIA) of their proposed policies fully. As reported in February's Just News the DSD EQIA on the welfare reform bill was woefully deficient. Most notably, despite evidence of poverty disproportionately affecting several of them, the EQIA actually excluded analysis of data on four of the nine section 75 categories (religion, political opinion, ethnicity and sexual orientation). There's therefore an expectation the Equality Commission (ECNI) would use its enforcement powers, and do so promptly given the tight window of opportunity to meaningfully investigate or intervene before the Bill becomes law.

The enforcement powers in question are contained in paragraph 10 and paragraph 11 of Schedule 9 of the Northern Ireland Act 1998. They empower the Equality Commission to undertake an investigation into a public authority's failure to comply with its Equality Scheme (the document where its arrangements for impact assessment etc are set out). Under paragraph 10 investigations are in response to a complaint by a directly affected person. Under paragraph 11 the investigation can be at the Equality Commission's own initiative when it believes a public authority has not complied with its scheme. The Commission should then investigate and complete a Report. The Commission can make recommendations to a public authority to take remedial action, and if the Commission considers it has not done so in a reasonable time, it can refer the matter to the Secretary of State who can direct the public authority to do so. An internal policy document sets out the Commission's Investigation Procedure. The policy sets out that a decision to recommend authorisation of a paragraph 11 investigation is taken by an internal Committee of Commissioners (Statutory Duty Investigations Committee – SDIC). In essence it sets out two criteria which have to be met, firstly that the Commission has formed a 'required belief' a breach may have occurred and secondly that the issue in question is 'sufficiently strategic' to merit a Commission-initiated investigation.

In the case of the Welfare Reform Bill the Equality Commission itself publically identified considerable concerns about the DSD EQIA. The Commission recently confirmed during a meeting with the Equality Coalition that as well as meeting the 'required belief' criterion for an investigation the welfare reform EQIA had also, unsurprisingly, met the 'sufficiently strategic' criterion. The EQIA had been completed in May 2012. As 2012 drew to a close there was high-level engagement by both Trade Unions and equality NGOs with the Commission to seek clarity as to when an investigation would be likely to take place given the closing window of opportunity. As time slipped on correspondence again went to the Commission to seek an urgent meeting on behalf of the Equality

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Coalition, ICTU Welfare Reform Group and the NGO Welfare Reform Group. The Commission ultimately wrote back on the 4 March stating that the SDIC had 'deferred initiating' an investigation into the DSD EQIA. The stated reason for this was that DSD had agreed to 'update' its EQIA with a view to re-publishing it before the end of March. At the most recent meeting with the Equality Coalition (10 April) the Commission confirmed however, that no updated EQIA had been received from DSD by that time. Ultimately a 'Section 75 update paper' did appear on DSDs website the third week of April. Initial examination of this indicates that there is still little data on the four missing categories. At the time of writing the Equality Coalition was still awaiting clarification from the Equality Commission on its next move. It was confirmed that the deferral decision was not due to resourcing, indeed at the same time the Commission launched a separate investigation into equality scheme compliance by Newry and Mourne Council relating to the naming of the Raymond McCreesh play park. This investigation has been taken under paragraph 11, although a complaint from an elected representative under paragraph 10 had also been received.

The above approach to welfare raises significant procedural questions in relation to effective use of the powers not least as, beyond the general questions of timing, there is no provision in the SDIC procedures for deferral of an investigation when its criteria are met. There are also questions as to whether an EQIA should be considered a 'live document' with the risk that a public authority may be able to avoid enforcement by promising to 'update' the EQIA regardless of how substantive the holes within it are. There is also the question of how wary public bodies will be of the potential for enforcement against them should there be a perception that use of the powers can be negotiated. CAJ would call on the Equality Commission to ensure its investigation powers are used promptly, effectively and authoritatively, otherwise the force of the powers themselves, and the broader duties relating to the equality impact assessment process, will be undermined.

Given the above experience of the welfare reform it seems expedient to reflect on how the s75 enforcement powers have been operated since their inception. The issue of effective enforcement is given particular importance of the ongoing context that, despite undoubted good practice in some instances, many EQIAs are undertaken in a partial or flawed manner. CAJ has therefore examined a list of all the paragraph 10 and 11 complaints and investigations taken by the ECNI since its inception (these were provided by the ECNI through the Freedom of Information Act).

Since the commencement of the powers in the Northern Ireland Act the ECNI lists around 90 complaints it has received under paragraph 10. Fifteen paragraph 10 complaints have been investigated and reported on the ECNI website, the first in 2004. A further six paragraph 11 complaints have also been published. The ECNI lists that (until January 2012) a total of 14 requests for paragraph 11 investigations had been made.

As far as it can be determined from the published material, there are a number of observations in relation to the ten cases investigated up until 2006, three of which were under Paragraph 11. Remedial recommendations were made in four out of seven of the Paragraph 10 complaints, around half of which related to the equality impacts of particular personnel policies. Other subjects investigated included a concessionary fare scheme, ASBOs, the closure of a specialist education institution and DSD area funding allocation policy, the latter three areas being the subjects of Paragraph 11 investigations. Seven out of ten of the investigations related to government Departments, one relating to the flying of the union flag, in relation to a district Council.

Thereafter eleven further investigations have been completed. In 2007 the ECNI changed their guidance so that 'good relations' also had to be included in EQIAs. There is a slight increase in the number of investigations on matters which are primarily 'good relations' issues, albeit against a small base. Five of the eleven investigations are also now against local Councils, relating to subjects such as the use of land for republican memorials or GAA pitches, and the political party representation on council transitional committees. The latter was the subject of one out of three Paragraph 11 investigations along with the 2011 investigation into the Department for Regional Development's withdrawal of the 'Easibus' service and the

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2007 investigation into a Department of Finance and Personnell consultation on 'reasonable chastisement'. Other paragraph 10 complaints included personnel and planning issues as well as a complaint by Jim Allister MEP in relation to the Department of Culture, Arts and Leisure's consultation on the Irish language act. One notable investigation was published in October 2009 relating to a Sinn Féin Councillor Paul Butler's Paragraph 10 complaint against Lisburn City Council. Councillor Butler alleged the Council had not complied with its equality scheme after the Mayor had participated in the lighting of an 11th night bonfire beacon in Stoneyford with Councillor Butler's election posters placed on top of it. The Commission assessed whether events related to the burning of the posters in this way constituted a failure to fulfil s75 duties to pay due regard to equality and regard to good relations duties. In essence this is different from many other investigations that tend to relate to alleged consultation, screening or EQIA failures, and was the first time the ECNI had authorised a complaint relating to alleged infringement of the substantive equality and good relations duties themselves. The ECNI indicated this was appropriate if a public authority was potentially acting in "an extreme or clearly unacceptable manner, for example, if it acted in an overtly sexist, racist, homophobic or sectarian way." Whilst on the merits the Commission did not hold the Council had failed to comply with its equality scheme in this instance, the episode does however set out a threshold for when the ECNI is likely to initiate investigations on the back of paragraph 10 complaints against substantive breaches of the statutory duties.

Paragraph 10 subject matters are ultimately driven by complainants. The recent SDIC decision that the naming of the Raymond McCreesh play park does constitute a 'sufficiently strategic' issue to warrant a paragraph 11 investigation, may however encourage requests for investigations, across the community, into similar matters. This could potentially lead to a reorientation of the focus of investigations into issues which are primarily seen as 'good relations' matters. Earlier scoping research by CAJ, involving interviews with equality NGOs, did uncover a perception that the ECNI was less willing to take on macro equality issues with government departments. To date the recent experience of enforcement over a policy with such serious equality implications as the dismantling of key pillars of the welfare state, has not been good. CAJ hopes the enforcement of the duties in future will be more effective, otherwise the impact of the duties will be weakened. CAJ calls on the Equality Commission to reflect on its handling of the investigative process into the DSD EQIA and the welfare reform bill proposals, and on what lessons can be learned.

Tourism signs and the ban on the Irish language uncovered

A key principle of governance is that regardless of the views of an individual government Minister public authorities are to operate within the law. In the human rights context this can include duties of non-discrimination and legal certainty (i.e. that restrictions on rights be clearly set out in writing). The broader legal framework of international obligations on the Irish language includes duties to end unjustified distinctions, take resolute action to promote Irish and, in particular, encourage or allow the original forms of place names in the language.

Information released to CAJ under the Freedom of Information Act paints a contrasting picture as to how the Northern Ireland Tourist Board (NITB) came to implement a 'policy approach' in relation to the public funding it controls for signage for visitor attractions. The NITB funds third party signage and information panels placed at visitor attractions. The NITB has taken a position both are to be in English only, with the sole exception of when a visitor attraction is known in Irish (e.g. Culturlánn). As reported in *The Detail* the issue recently came to a head when Down District Council, seeking funding for six new signage projects including a Downpatrick walking trail, agreed to an English-only condition 'under duress' to secure the release of £200,000 funding. Later denials by the Department of Enterprise, Trade and Investment (DETI) Minister, Arlene Foster MLA, (AQW 19980/11-15) that the NITB had refused to provide multilingual signage for the project has prompted the Council to reopen the issue.

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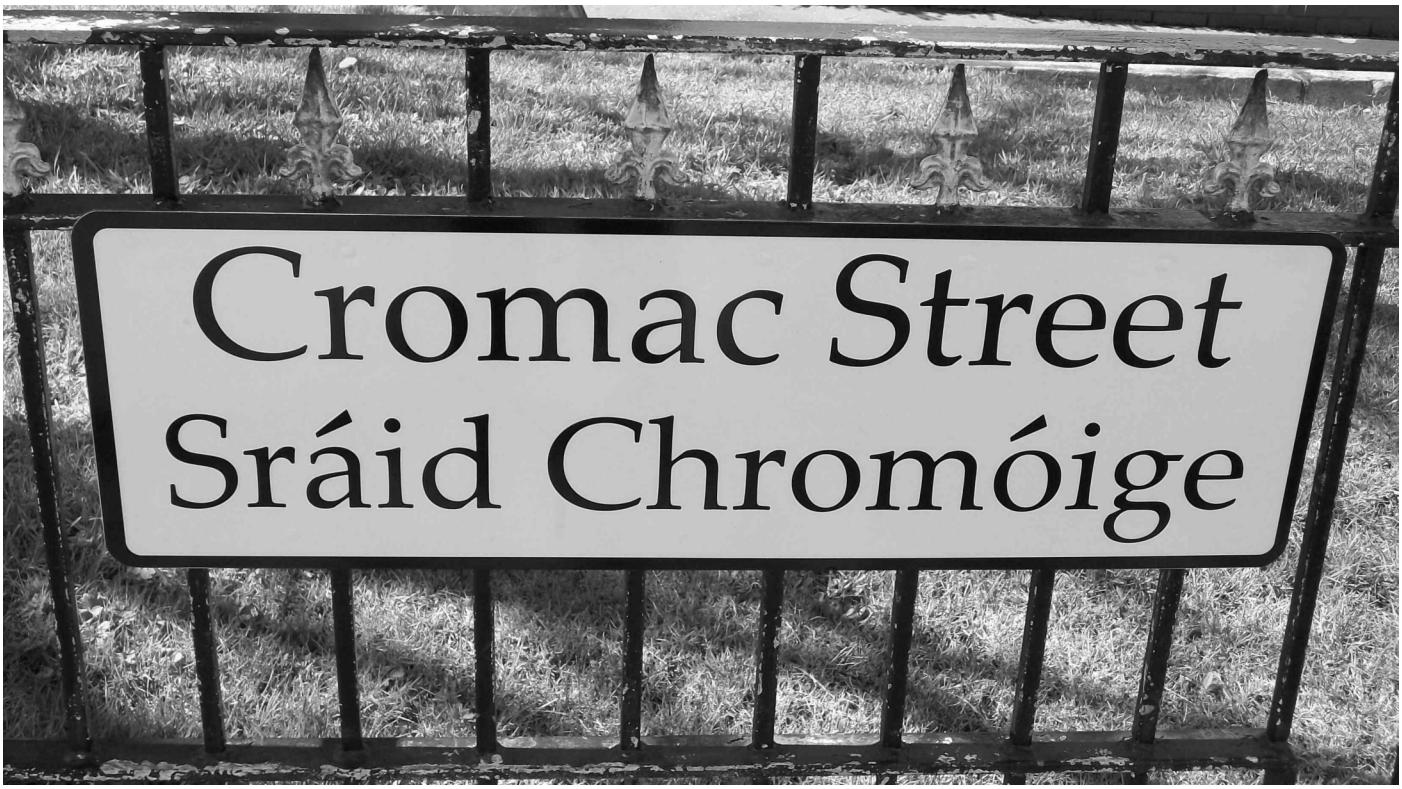
The information released, after considerable delay, to CAJ by NITB shines some light on the origins and extent of the NITB policy and the engagement with its parent department. E-mails from late 2010 on outline the 'policy approach' of only permitting funding for monolingual tourist signage. NITB documents also confirm this policy also applies to interpretation panels. It appears the policy criterion was only added in response to a funding applicant, in NITBs words, 'unilateral deciding' its signs for St Patricks Trail would be bilingual. In response to an NITB e-mail outlining its monolingualism policy DETI, on the 11 January 2011, 'instructs' the NITB to 'adhere to the policy' and that the 'NITB should not consider funding bilingual signage outside of it'. It was after this on the 26 January 2011, the NITB Board endorsed the policy 'approach', a paper given to the Board notes the 'NITB has informed [Down and Newry and Mourne] Councils that funding for the interpretation at each site is dependent upon their agreement to this approach.' NITB documents also allege that DETI subsequently advised the NITB to 'not formalise a policy, but [to] stand over the current approach'.

The correspondence also highlights the different takes of the two public bodies on the status of Departmental representations and the role of the Minister. In response to a letter from CAJ challenging the lawfulness of the policy the NITB wrote to DETI describing what it received from DETI on 11 January 2011 as a 'Ministerial Direction' and the DETI correspondence on not formalising a policy as a 'Departmental Direction'. *The Detail* reports that "Ministerial directions are always written and are requested by the most senior civil servant in a department when they disagree with a minister's decision so strongly that they refuse to be accountable for it. Such ministerial orders are rare and signify an irresolvable dispute between a minister and his or her most senior civil servant." Notably the response from the DETI to the NITB concedes that the Department gave 'advice' but denies they were formal 'Directions'. Such a matter may well go to the heart of legal liability for a policy that, if it reaches Court, could be found to be unlawfully discriminatory.

This is not yet the full picture. In addition to redactions NITB has withheld five documents, largely DETI Ministerial memos and correspondence. With no hint of irony they have been withheld on the grounds that their release may 'prejudice the effective conduct of public affairs'. CAJ, needless to say, has appealed.



Bilingual street signs have been permitted since 1995, under strict criteria,
but there is still no sign of bilingual tourist signs

Marriage Equality is the next step but not the end of the journey

It is a testament to the passion and strength of lesbian, gay, bisexual and transgender people that we are even considering this move. From the genesis of gay rights movements in the 1960s it has been a mere 50 years to where we are now: with Parliament poised to recognise same-sex marriages in law for the first time. Fifty years might seem a long time but considering the violence and oppression, experienced by LGB&T people over thousands of years, it is a blink of the eye.

The pace at which LGB&T people have largely been accepted as equal under the law has been much too fast for some people. Sex between two men has only been legal in Northern Ireland for 30 years. Before that, gay and bisexual men were viewed as criminals, deviants and a threat (no-one ever really gave much thought to lesbian, gay and bisexual women). People were brought up to believe that to be gay was a choice made by a sick person. This has coloured how they view gay people to this day.

As laws began to change, more and more LGB&T people felt safe enough to come out to their friends, family and co-workers. This meant that heterosexual people were being exposed to the diversity of LGB&T people and they learnt to find common experiences, values and aspirations.

The snowball effect of so many LGB&T people coming out cannot be overstated. It has forever changed the way that the vast majority of citizens view and treat LGB&T people and entirely changed the way the state treats LGB&T people.

In 2010, a Federal Judge in California was presented with a case dealing with the Californian ban on marriage between same-sex couples. California offered same-sex couples Domestic Partnerships which offered many of the same rights and responsibilities as married couples. In his ruling on the case, Judge Vaughn Walker held that

> ‘domestic partnerships do not fulfil California’s due process obligations to plaintiffs [...] The record reflects that marriage is a culturally superior status compared to a domestic partnership. California does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution that denies marriage to same-sex couples.’

The legal principle at stake is remarkably similar to arguments advanced in the UK, where opponents of marriage equality argue that there is no need to introduce marriage for same-sex as we already have civil partnerships and same-sex couples should be content with them.

If the state creates a separate but equal form of recognising relationships between two women or two men has it fulfilled its obligation to treat all citizens equally?

David Lammy, Labour MP for Tottenham answered this question expertly during Parliament’s debate on the equal marriage bill when he said:

> ‘“Separate but equal” is a fraud. […] “Separate but equal” is the motif that determined that black and white could not possibly drink from the same water fountain, eat at the same table or use the same toilets. […] It is the same naivety that made my dad a citizen in 1956 but refused to condemn the landlords that proclaimed “no blacks, no Irish, no dogs”. […] Separate is NOT equal, so let us be rid of it.’

The fallacy of separate but equal has real world impacts. Being viewed as less worthy and less deserving of respect has serious impacts on the mental health of LGB&T people, particularly young people, still coming to terms with their sexual orientation. Suicide, self-harm, alcohol and drug abuse, high-risk sexual activity can all be associated with the stress of being viewed as part of a maligned minority group. These

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will not automatically be taken care of by the introduction of equal marriage but every equality law, brought in to protect LGB&T people, gradually chips away at the notion that to be straight is morally superior to being gay.

Some commentators have suggested that equal marriage rights for same-sex couples is that last piece of the jigsaw and with the marriage bill passed, LGB&T advocacy organisations should shut up shop and bask in the finally-found equality. They could not be further from the truth.

Equal marriage is not the end of the journey, merely the next step along the way. Far too many LGB&T young people experience violence and abuse in their homes and schools. Too many older LGB&T people live in complete isolation, cut off from family, friends and community. Suicide and self-harm still affect LGB&T people with far more frequency and severity than their heterosexual counterparts.

The marriage bill, as it currently stands, will only affect England and Wales. Same-sex couples who are legally married in England or Wales will only be recognised as civil partners in Northern Ireland. This will create an unsustainable two-tier system of marriage within the UK and will inevitably lead to a court challenge unless the Assembly brings forward legislation.

When our elected representatives fail us in this manner, we must never be afraid to advance our cause through the courts. Northern Ireland was the last part of the UK to decriminalise sex between two men and that only came as the result of a case before the European Court of Human Rights in Dudgeon v UK. It may be that Northern Ireland will be the last part of the UK to introduce marriage equality and it may be that it will only come from a judgement from the European Court. However, just as the Dudgeon case has had such far-reaching consequences (it was used by the United States Supreme Court when striking down American sodomy laws in 2003), it is highly possible that an equal marriage case from Northern Ireland will have a similar impact on the global movement towards marriage equality.

While we should always stop and enjoy an important victory, like the passing of equal marriage, we must never let it distract us from constantly striving to improve the mental, physical and sexual health of LGB&T people.

Gavin Boyd, Education Equality Officer, The Rainbow Project

Irish Government fails to act on transgender Rights

Twenty years after transgender woman Lydia Foy first applied for a new birth certificate in her female gender, and five years after she won a case about it in the Irish High Court, she is still waiting for that certificate.

The High Court ruled in October 2007 that the Irish Government had violated Ms Foy's rights under Article 8 of the European Convention on Human Rights (ECHR). It also issued the first declaration of incompatibility with the Convention to be made under the ECHR Act, 2003, the Irish equivalent of the UK Human Rights Act. The judge who gave the decision, Mr Justice McKechnie, expressed considerable frustration that the Government had not acted earlier to protect the rights of transgender persons and said that Ireland was now very isolated in the Council of Europe on this issue. The European Court of Human Rights had ruled in 2002 that the UK was in breach of the ECHR by not recognising trans people in their preferred gender and the Strasbourg Court had repeated that position several times in the intervening period.

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Now, more than five years after Judge McKechnie's decision, Ireland is even more isolated. It is now the only state in the EU that has no legal provision at all for recognising trans persons and one of very few in the whole of Europe.

Frustrated with the lack of action by the Irish Government after the High Court decision, Lydia Foy began new legal proceedings in January last, seeking to compel the authorities to implement the decision. It is 16 years since she first went to court in April 1997, following the refusal to issue her with a new birth certificate and this will be her third set of legal proceedings, represented throughout by Free Legal Advice Centres (FLAC). It is shaping up to be one of the longest-running cases in recent legal history.

The previous Government had eventually responded to the High Court decision by setting up a committee of civil servants to make recommendations about gender recognition legislation. And the current Government promised in their 2011 Programme for Government to introduce legislation. The committee produced a disappointingly conservative report in mid-2011 and the relevant Department sought legal advice. Since then nothing has happened.

The former Council of Europe Commissioner for Human Rights, Thomas Hammarberg, raised the issue several times in reports on Ireland. His successor, Nils Muižnieks, met Lydia Foy in Ireland in October last and wrote to the Minister responsible, Joan Burton, expressing concern about the lack of action. He said: "I believe that five years of non-implementation of the High Court's judgment finding Ireland in breach of ECHR rights sends a very negative message to society at large".

Minister Burton replied in December that enacting gender recognition legislation was a priority for herself and for the Government – and she has been consistent in saying this – but four months later there is still no sign of a draft Bill to change the law. There is a blockage somewhere in the system.

The lack of progress since the Foy judgment has been deeply disappointing to the transgender community, whose hopes had been raised by the court's decision, but it also calls into question the Irish Government's commitment to the ECHR.

Like the UK, Ireland opted not to give the ECHR direct effect in domestic law, but to give the courts power to issue declarations of incompatibility with the Convention. But for that system to work, governments need to respect and act upon such declarations. However, whereas the UK authorities have in almost all cases – except votes for prisoners – responded to declarations of incompatibility by changing the law, Ireland has failed to act upon the very first declaration to be made.

If the Government does not act soon, the High Court in the Foy No. 3 case may have to declare that the ECHR Act itself is incompatible with the Convention because it cannot provide an effective remedy to people whose rights have been violated.

Michael Farrell is the senior solicitor with FLAC which represents Lydia Foy.

Civil Liberties Diary - March

1 March
The Department of Education research on school attendance has reported that absence levels are significantly higher in areas of high social deprivation. Irish Traveller children in primary school, for example, miss 28.8% of the time, compared to 4.6% for white children and 6.6% for children of other minority ethnic backgrounds.

4 March
Northern Ireland has the highest level of negative equity in the UK, with 35% of homes currently worth less than their mortgage. Low turnover in the property market, salary freezes and job losses have added to the large levels of debt, leaving many houseowners without a way out of the financial problems.

The PSNI instructed flag protestors as to how they can keep within the law. The PSNI explained that any number of people could walk lawfully along a footpath, if the circumstances and context are taken into consideration. White line protests constitute open air public meetings and do not need to be cleared with the PSNI or Parades Commission. However, obstructing the highway or endangering a life on the road is an offence. More than 200 protestors have been arrested to date.

5 March
The audit office has criticised the 'Agenda for Change' scheme, which was a multi-million pound plan to modernise the health service almost a decade ago. The report found that the scheme led to large additional costs while delivering few benefits for patients and staff.

6 March
The number of soldiers in Northern Ireland will reduce to pre-Troubles levels by 2016. This reduction, the result of substantial job cuts, means that only approximately 2,000 soldiers will remain in Northern Ireland. This Army presence is more than 10 times less than the number of troops stationed here during the Troubles.

11 March
The PSNI has opened an investigation into 100 women who, in an open letter published by Alliance for Choice, have admitted helping in the buying of abortion pills in Northern Ireland. Under the 1861 Offences against the Person Act, the procurement of drugs to cause an abortion is illegal and carries a life sentence.

A new report from the Centre for Social Justice has found that more than 1,000 adults and children were trafficked into or within the UK in 2011/2012. These individuals included both British nationals and foreign nationals.

13 March
A legislative attempt to outlaw private clinics from dealing with abortions was defeated in the Assembly. The Criminal Law Bill would have seen jail sentences of up to 10 years for those involved in terminations at clinics outside of NHS premises, such as the new Marie Stopes clinic in Belfast.

20 March
A report by the Assembly's Public Accounts Committee found a series of failures with the management and oversight of the Housing Executive. The failures identified include contracts which were inappropriate, out of date and not fit for purpose, inadequate oversight, a lack of accountability, manipulation of performance data, and a lack of transparency and overall culture of secrecy with attempts to identify whistleblowers.

The Stormont Executive has blocked the Defamation Bill from becoming law in Northern Ireland. The bill, aimed at reforming libel laws and strengthening free speech, was vetoed in the Assembly.

Compiled by Elizabeth Super from various newspapers

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Correspondence should be addressed to the Editor, **Fionnuala Ní Aoláin**,
CAJ Ltd.
2nd Floor, Sturgen Building
9-15 Queen Street
Belfast
BT1 6EA
Phone: (028) 9031 6000
Text Phone: 077 0348 6949
Fax: (028) 9031 4583
Email: info@caj.org.uk
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