

JUSTICE COMMITTEE

DEFAMATION AND MALICIOUS PUBLICATIONS (SCOTLAND) BILL

SUBMISSION FROM DR STEPHEN BOGLE AND DR BOBBY LINDSAY,
UNIVERSITY OF GLASGOW**1. Do you think the Bill strikes the right balance between freedom of expression and the protection of individual reputation?**

At the outset it is important to stress that this is as much as a political question as it is legal. Countries across the world diverge in their approach to defamation, some leaning more towards protection of an individual's reputation - such as England and Wales - whereas others favour greater freedom of expression, such as the US. Hence, it is as much for the Scottish Parliament to answer as it is for lawyers, policy makers and interest groups whether the Bill and the existing law of Scotland strikes "the right" balance.

From a legal perspective, however, the European Convention of Human Rights does introduce a question which can be answered legally. **In short, the Bill does "strike the right balance" from the point of view of the ECHR.** It evidently complies with Article 8 and 10 and the jurisprudence of the ECHR. Overall, the ECHR allows for reasonable divergence in approach (often described as the "margin of appreciation") while nonetheless requiring legal mechanisms and rules of defamation that provide for a fair balance to be struck between the right of free speech and the right to a private life, including protection of reputation.

It is clear, in our opinion, that the present law of defamation in Scotland provides various legal tests and rules which allow a court to balance the right of free speech against the right to reputation. Although not always expressed in the language of free speech and protection of reputation the various defences to defamation actions gives the opportunity for the court to consider and balance these respective rights. It may be that by expressly including in the Bill a threshold test, as per cl 1, there is some refinement in the legal position raising the bar which needs to be surmounted by pursuers. That is, it could be said that the Bill ensures the law of Scotland is explicitly more aligned with the approach of the Strasbourg court, which stresses that Article 8 is only engaged, in terms of reputation, when it can be shown that there has been a 'serious interference' with one's private life and integrity. However, that being said, the approach of **the Bill goes far beyond the minimal requirements of the ECHR when it comes to the protection of reputation** (see also Lord Phillips MR's discussion to similar effect in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946).

As was described in *Jameel*, what the ECHR meant in practice for the law of England and Wales was that the action could be struck out where no loss was suffered, or minimal actual damage was experienced. In *Ewing v Times Newspapers Limited* [2008] CSOH 169 the defenders took a different course of action, but both the Outer House and Inner House accepted that the court could consider the merits of the case against the value likely to be recovered when ordering the pursuer to find caution (i.e. pay a sum of money into court to cover the defender's potential expenses). **In both**

English law and Scots law, the courts have demonstrated that when it comes to defamation their respective approaches are in keeping with the broad and light touch expectations of the ECHR to protect reputation whilst being reasonably robust in protecting the right of free speech, for which the ECHR does have higher expectations. And the Bill does nothing to change this position. How this ECHR threshold compares to the Supreme Court's interpretation of s 1 of the Defamation Act 2013 (*Lachaux v Independent Print Ltd and others* [2019] UKSC 27) is discussed below but it is evident that it sets the bar higher than is required.

To be clear, from a comparative and legal perspective, at present there is very little in the Bill to suggest that there will be any fundamental alteration in the balance already struck in Scotland, which is found in the existing common law. **There are, however, some reasonably minor – but not insignificant - steps within the Bill which suggest a modest rebalancing in favour of defenders rather than pursuers;** in other words, in favour of free speech, which moderates the position in Scotland and bringing its approach more in line with other modern legal systems.

2. Do you think the Bill clarifies the law and improves its accessibility?

To the extent that general statutory provisions can improve the accessibility of the law, yes. Although it should be realised that the introduction of a Bill does not immediately lead to a sense of certainty and clarity as to how an individual case will be decided.

At the end of the day, you still need a court to decide whether the statement was defamatory or whether a defence should apply. When you have a Bill, such as this one, which is seeking to balance free speech and reputation there will inevitably be a period of uncertainty but also continued uncertainty as each case will be different. When and how the defences operate can be a fine-grained question when requires careful consideration and argument. **Ultimately, uncertainty and a lack of clarity within the law of defamation is unavoidable as each case depends on the particular facts of that case and eventually needs a court to adjudicate on the matter.** No matter how crisp the drafting, when you introduce a Bill such as this one, judgments need to be made on the basis of the facts. You will always have, with the exception of vexatious or speculative actions, a lack of lucidity until a decision is made.

Arguably the present problems we have with the supposed uncertainty of the law of defamation of Scotland stem from the fact that we have very little litigation on the subject. Additionally, in England & Wales there has always been a large volume of defamation litigation and indeed that has continued following the introduction of the Defamation Act 2013; lawyers, claimants and defendants in recent litigation down south are now seeking to understand the parameters and meaning of the new Defamation Act 2013.

Thus, we should be mindful that this Bill, if passed, will be a positive step forward, but it will not fully solve the problem of clarity, which is quite difficult to avoid in an area such as defamation.

3. Do you have any views on the proposed definition of defamation and should this be defined in statute?

Unfortunately, it could be said that the Bill's definition could be improved in five different ways.

First, it could be said that using the phrase 'ordinary person' is unfamiliar to this area of law where phrases like 'right-thinking members of society generally' (*Sim v Stretch* [1936] 2 All ER 1237) and 'ordinary reasonable reader' (*Stocker v Stocker* [2019] UKSC 17) have been used by Commonwealth courts around the world. **There is a potential therefore for some interpretative difficulty and unintended problems.** It could be that in subsequent litigation a party may argue that the Scottish Parliament altered the definition of defamation in the Bill to determine defamation according to popular opinion rather than reasonable opinion. That would be a disappointing consequence of the Bill rending the Scots approach out of step with most jurisdictions.

It could be improved by including or substituting the phrase 'reasonable' for 'ordinary' in the definition to ensure that the courts are certain that cl 1 (4) does not amend the present law. Indeed, the present law includes important safeguards and tests to ensure that the definition of defamation is not skewed by errant popular opinion (see the case of *Cowan v Bennett* 2012 GWD 37-738 where the pursuer claimed the implication of homosexuality was defamatory, which the sheriff rightly rejected). Sometimes an ordinary person's views are contrary to the ideals of a progressive and inclusive society. Amending the definition to include an evaluative qualifier would prevent this: 'tends to lower the person's reputation in the estimation of reasonable persons.'

Second, the familiar *Sim* definition makes reference to the opinions of 'right thinking members of society *generally*' [Emphasises added]. The proposed definition simply makes reference to 'ordinary persons', with no qualifier equivalent to 'generally'. **It is important to include such a qualifier to emphasise that what matters is the statement has affected the reputation of the subject across all reasonable members of society.** The present formulation raises the issue of whether the lowering of the subject in the view of one particular group of ordinary persons only is sufficient for defamation; presently the law is that it is not: see e.g. *Crow v Johnston* [2012] EWHC 1982 (QB).

Third, the requirement that the statement be 'about a person' (see also cl 1(1)) is insufficiently specific. The law currently uses the touchstones of identifiability or referability: can the statement reasonably be taken to refer to the subject, or, is the statement identifiably about the subject? The 'about a person' formulation in the Bill suggest a more subjective and looser test than presently operates within the well-established case law. **In adopting the present formulation, the Bill may be unwittingly widening the scope of statements which could be classified as defamatory.** The existing law is strict and clear that the statement should be identifiable with the subject. **A statement in cl 1 (4) (a) to the effect that 'about a person' is replaced with 'which identifiably refers to the subject' would more readily reflect the present law and avoid an unintended loosening of the present definition.**

Fourth, it is also unclear why use the term 'publication' is used, only to then state that this means communication to the recipient? The notion of communication is well

known to the law, and the only alteration of the Bill in this regard is to provide that third-party communication is necessary. **The use of ‘publication’ is less clear than ‘communication’: the average person who does not read cl 1(4)(b) would believe ‘publication’ to be limited to defamatory statements which are (i) written down and (ii) made available to the world at large.** That does not appear to be the intention of the SLC or the Scottish Government. ‘Communication’ more readily makes it clear that verbal statements made to a single party in private still satisfy the test. The present formulation obscures, rather than clarifies, the present legal position.

Fifth, we also would query whether it is necessary to introduce the need for third party communication (cl 1(2)(a)) at the same time as introducing a serious harm requirement. If the subject of a statement objectively suffers serious harm as a result of something said to them by the putative defender, then why should this not be actionable? **There is no need for both filters: the serious harm filter would by itself negate the actionability of many statements which solely are communicated to the recipient.**

These questions need to be considered carefully and should be addressed in a future draft of the Bill to avoid unnecessary and accidental alteration of the present position.

4. What are your views on the proposed ‘serious harm test’? Should this follow the meaning applied by the UK Supreme Court to the equivalent provision in English law (section 1 of the Defamation Act 2013)?

In previous responses to the Scottish Law Commission, and in a published note (B Lindsay, ‘The Reform of Defamation Law in Scotland’ (2019) 23 *Media and Arts Law Review* 109), both of us have expressed reservations about the need or effectiveness of the ‘serious harm test’ and whether Scottish courts are in fact troubled by trivial cases, so called ‘libel tourism’ and whether it will address the mischief of speculative defamation actions being threatened. For one, if one’s feelings are injured to the degree that they pursue litigation, then, from their perspective, they have subjectively suffered serious harm, and it will take a judgment of the court to dissuade them that this objectively is not the case. **If the Scottish Parliament was minded deleting this clause from the Bill, we would approve and suggest the law would be more coherent from a juristic and practical point of view.** It was introduced in England and Wales to address particular problems experienced by English courts, which Scotland does not share, i.e. libel tourism, the unhelpful distinction between slander and libel, and ensure fair use of the court’s resources. **Others have taken a different approach during discussions with the SLC, such as Scottish PEN, and we do not wish to reopen the debate again.** The SLC decided to press ahead with its recommendations to replicate the approach of English law for reasons stated in its Report and the Scottish Government has clearly followed those recommendations for policy reasons.

If this is to be the case and we are to have the serious harm test, then our simple answer to this question is, yes. **We would, however, caution against hard-wiring the adoption of the English requirement into the statute or Explanatory Notes. Scottish judges will naturally look to the English position if a question as to interpretation arises, but they always should remain free to depart from the English interpretation if necessary, in particular circumstances.** Moreover, the Supreme Court’s approach in *Lachaux v Independent Print Ltd* [2019] UKSC 27 is far from straightforward. In that case, it was dealing with specific questions of how the

existing common law of England and Wales interacts with s 1 of the Defamation Act 2013. Some of the questions addressed in *Lachaux* are specific to that jurisdiction. Nonetheless, several points can be taken from it which could helpfully inform any future interpretation of cl 1 of the Bill.

First, the position in Scotland at present (and in England and Wales prior to 2013) is that saying something which on the court's interpretation tends to cause harm to reputation is enough to give rise to an actionable case of defamation. If it can be shown from the words alone, without any enquiry into their wider or future consequences, but merely due to an inherent tendency of those words to lower the reputation of a pursuer in the eyes of reasonable people, this is sufficient. Note also that this, from the perspective of the ECHR may not always be considered a serious interference with someone's reputation.

In other words, the threshold for what is a serious interference is low in Scotland (as it was in England and Wales before 2013). Putting aside procedural methods to evaluate an action's merits, at present, in Scotland, it can be inferred from the publication or the statement itself rather than from an enquiry into the actual real-world effects. **What the serious harm test does, in contrast, according to the Supreme Court in *Lachaux*, is to turn this into a factual question and one where harm needs to have actually occurred or is likely to occur.** You must be able to demonstrate to the court that the statement has or will cause serious harm. It is concerned with the consequences of publication or circulation and not mere defamatory statement itself taken in isolation.

Second, for the Supreme Court in *Lachaux*, the same interpretation accordingly applies to the phrase 'likely to cause' financial loss found in s 1 (2) of the 2013, which cl 1 (2) (b) of the Bill mirrors. That means that **a non-natural person must not only articulate their harm in terms of financial loss but if loss has yet to occur, they must show that it will probably lead to financial loss.** Again, it is not enough, according to the Supreme Court, to demonstrate that the statement would tend to cause loss to reputation but rather that it needs to be factually demonstrated that it probably will. This appears to be a consistent and sensible approach, albeit something which was not entirely clear until the decision in *Lachaux*.

Third, that the **repetition of the statement is relevant when considering whether the factual statement passes the serious harm threshold.** In *Lachaux* the defenders argued that two specific rules of English law, when taken in conjunction with s 1 of the 2013 Act, unfairly bolsters the opportunity for a claimant to demonstrate serious harm in spite of the fact that the original utterance is the only statement which should be considered; namely, the repetition rule, which holds that 'repeating someone else's libellous statement is just as bad a making the statement directly' (*Lewis v Daily Telegraph Ltd* [1964] AC 234, 260) and the *Dingle* rule, that says damages for defamation cannot be mitigated because others have also uttered similar statements rather 'the court should shut its ears and close its eye to other publications and concentrate on the libel in question' (*Dingle v Associated Newspapers Ltd* [1964] AC 371).

The Supreme Court disagreed with these objections stressing that these rules of English law were not abolished by the introduction of s 1 of the 2013 Act and that they

are unrelated to the questions a court should ask when considering if the statement has or is likely to cause serious harm. The Supreme Court appeared to endorse the approach taken by Warby J in the High Court who considered when determining the seriousness of the harm caused by the statement, repetition of the statement by others was relevant; the scale of the original publication; that it was read by at least one person in the UK who knew the claimant; that it was likely to be read by others who knew the claimant or, importantly, those who might come to know the claimant in the future; and the gravity of the statements.

This approach needs careful consideration by the Scottish Parliament as cl 3 of the Bill expressly states that there are restrictions on proceedings against secondary publishers meaning that under Scots law repetition is not considered to fall within the ambit of defamation. The question then to be considered is whether subsequent repetition of the statement should be considered by the court when evaluating the seriousness of the harm suffered. Clause 3 says repetition is not defamation but does the Scottish Parliament wish it to be relevant to the serious harm threshold? It would appear that this would be the plain interpretation of what cl 1 of the Bill is trying to achieve but it is something which could be considered. Or it may again suggest that such things can be handled suitably by Scots judges without a direct request for them to consider the approach of English law, which they invariably will do when considering any future Act.

Lastly, an important point of consistency needs to be addressed and altered in the Bill. That is, **the serious harm limitation is not placed on any of the restated malicious falsehood delicts in c 21-23.** While these depend on the pursuer ultimately proving (i) the falsity of the statement and (ii) that it was made maliciously, the same chilling effect that attends the possibility of a defamation action also is present under these delicts: baseless accusations as to (i) and (ii) may be just as prohibitive to the exercise of freedom of speech as has justified the introduction of the threshold for defamation. **The ‘serious financial loss’ requirement in cl 1(3) should be added to cl 21(1)(b); 22(1)(b); and 23(1)(b); otherwise there is a risk that businesses could use the verbal injury delicts to sidestep the threshold placed on defamation claims.**

5. Do you have views on the Bill in relation to the restrictions on raising defamation actions by public authorities and the Bill’s provisions relating to businesses?

No, the approach appears sensible as it is an important aspect of liberal democracies that public bodies are subject to robust examination. **However, careful consideration needs to be given to the definition of public authorities, which could be improved, and further guidance offered to the court.**

Clause 2 (2) of the Bill uses the phrase ‘functions of a public nature’, which is broad and could in theory capture bodies which may be at the very edges of what would generally be considered public authorities, such as universities, private contractors operating on behalf of public authorities, or even charities.

If a broad definition is the desire of the Scottish Parliament, it would be helpful (and avoid uncertainty) if the eventual Act specified them as such, possibly in a schedule and made it clear if the list is indicative of what the Bill considers to

be a public authority of definitive (we would suggest the later would be desirable). One option might be to emulate cl 4 and give the Scottish Ministers power to make regulations identifying particular public authorities, although that is subject to what is said below.

6. Do you have views on the Bills provisions covering a single publication rule and secondary publishers?

The single publication rule is a sensible modernisation of the present law. For the reasons covered at para 7.7 of the SLC Report, it is clear that the present position is undesirable. Strictly speaking, under the multiple publication rule, repetition of a statement on various social media platforms gives rise, in theory, to multiple defamation actions but rarely are such actions raised. Irregularities like this can undermine the legal system's claim to be relevant and its role in society. **Such a rule comes from an older period and cl 3 of the Bill is a simple fix of what is in reality an undesirable anomaly within the law of defamation in Scotland.** What has been proposed in the Bill is workable.

The rules relating to secondary publishers is a difficult issue and preferably solved by a coordinated UK approach. **There is a danger that clauses 3 and 4 in Bill will need to be updated regularly or reviewed frequently to ensure that it is working in tandem with other jurisdictions, such as England and Wales, and keeps pace with technological developments.** When it comes to holding online platforms accountable for statements made using such media, this can be difficult. It is clear that such flexibility has been incorporated into the Bill to allow for updating in what is a fast-moving area of technology, but **it might be important for the Parliament to instigate a regular review of this area to ensure that the ministerial power to introduce amendments and updates** is actually used and that the law of Scotland does not, following the passage of the Bill, quickly become out of step with other jurisdictions.

7. What are your views on the proposed reduction of the limitation period for actions from three years to one year, and the other provisions covering limitation periods?

If there is a desire to alleviate the otherwise chilling effects of the present law of defamation, **this is a very useful and possibly effective improvement.** In reality, it will mean that parties will have to raise their actions sooner thus ensuring that cases come before a court and are not threatened over a long period but without any serious intention to raise an action. This may go some way to deal with the mischief which this Bill is seeking to address. Or at least deal with what Scottish PEN and others have said are the difficulties with the present law and how it operates in practice.

That is, part of the problem appears to be, at least according to various contributors to the SLC's Discussion Paper and Report, that potential pursuers who have resources and access to legal advice instruct letters or communication to be made to potential defenders who do not have the same resources and advice available to them. Yet this is done in an attempt to intimidate and stifle the circulation of unfavourable information – which is not necessarily defamatory – but not raise event actions. Often this happens when actions would not hold much chance of success or are speculative, but the unrepresented party or risk adverse publisher is somewhat unaware of this or unable

to fund even the start of proceedings and therefore capitulates with requests to withdraw statements or make apologies.

Clause 32 (3) is a sensible approach ensuring that the date from which the limitation clock starts ticking is the date of publication rather than the date from which the pursuer becomes aware of the potential of a defamation action. This approach avoids the problems which the Scottish Parliament has recently sought to fix through the Prescription (Scotland) Act 2018.

Of course, this does not affect the 20 year prescription period – the wrong may still survive but the court is merely unwilling to hear the case due to the limitation period passing – but so long as there is a limitation period as framed in the Bill, this is fine and does not undermine what the Bill is seeking to achieve. It is also worth bearing in mind that the court will retain under the Prescription and Limitation (Scotland) Act 1973 the power to dispense with the limitation period if it is equitable to do so. This is desirable ensuring that the court can address any unforeseen injustices which may arise from cl 32 (2).

8. Do you think the range of remedies suggested in the Bill for defamation and malicious publication are sufficient or should they be improved?

Yes, they are sufficient.

9. What are your views on the proposed defences (truth, honest opinion etc.) in relation to actions on defamation and malicious publication?

It might be considered unnecessary to define malice, which is a difficult concept to pin down at times and best left to the court to determine. Notably, it is not defined in the 2013 Act.

Guidance with regard to clause 8 is important. The Explanatory Notes should be clearer as to what should guide the courts use of pre-existing case law. Additionally, the Bill itself and not the Explanatory Notes should make express that the Parliament intends previous case law to be a source of guidance.

Arguably, there is a great deal of sage, wise and well-tested case law, which the courts should still be able to draw from and use in its application of the various defences. On the face of it, cl 8 bluntly abolishes this invaluable resource and source of guidance for the court, judges and potential litigants. It could be useful following the passage of the Bill because it is unlikely that there will be much litigation in Scotland which will illuminate the workings of the Bill in practice.

Although this is addressed in the Explanatory Notes - saying that the prior case law can still be used (albeit it is no longer binding) - its inclusion in the Notes instead of within the Bill is disappointing. It is very important that it is made expressly clear in the Bill that the existing case law can still be used rather than submerged in the Notes.

Yet the Bill's Explanatory Notes could be clearer as to the principles which should guide a court use of case law. Should it be guided towards a greater

protection of free speech or protection of reputation? At present, the Supreme Court is considering this very question with regard to the interaction between s 4 of the 2013 Act and the Reynolds defence in the case of *Serafin v Malkiewicz* UKSC 2019/0156. The Bill's Explanatory Notes use the same wording as is used in the Explanatory Notes of the Defamation Act 2013.

The Scottish Parliament should therefore consider an express provision which allows courts to draw from pre-existing case law and clearer guidance in the Explanatory Notes as to what principles should guide a court's use of pre-existing case law. Unfortunately, it is unlikely that a decision in *Serafin* will be available before the Committee considers this Bill but the Court of Appeal has on two occasions made clear that there is no significant difference between s 4 of the 2013 Act and the Reynolds defence, drawing upon the case law to illuminate the application of s 4 (*Economou v De Freitas* [2018] EWCA Civ 259; *Serafin v Malkiewicz* [2019] EWCA Civ 852). That is, they had continued to use the pre-existing case law, albeit bearing in mind that the 2013 Act wished to strengthen freedom of speech. Is this the desire of the Scottish Parliament?

10. Do you have views on the provision in the Bill relating to absolute and qualified privilege?

No, these changes are minor and sensible.

11. What is your opinion on the proposal that there will be a presumption against a jury trial in defamation actions?

Juries are unreliable, expensive and difficult to arrange. They should not be used in civil cases, such as defamation. A presumption against their use is prudent and we should consider abolishing their role in defamation actions.

12. The Bill does not deal specifically with issues created by the ease of internet publication (although a lot of its provisions will be relevant to such cases). Are you content with this approach?

Yes, this is the only way we can deal with this in a relative swift and effective manner.

13. Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on defamation and malicious publication?

Clause 19 of the bill, proposing (cl 19) to enact a rule of jurisdiction identical to s9(2) of the Defamation Act 2013, is unnecessary in Scotland. Libel tourism is not a problem in Scotland; and the exclusion of clause 19 would not create a rush over the border for litigants. Scotland does not have an established media law bar; nor does it have the concentrated specialist media law judges list which exists in England. Those factors, combined with the sheer number of cases in England, perhaps justify a rule such as s9(2) in that context, especially in light of the specific interpretation English courts have adopted for English rules of jurisdiction. This is to overlook that in cross-border defamation claims it is the archaic rules of choice of law, rather than rules of jurisdiction, which are most oppressive to the defender. But, in any event, there is no reason for a jurisdictional rule modelled on s9(2) in Scotland.

The Scottish courts presently will have jurisdiction over a defamation action in the following circumstances:

- (i) Where the defender is domiciled in Scotland.
- (ii) Where the statement is published in Scotland, albeit that the court will effectively only have jurisdiction to afford a remedy for the loss suffered as a result of publication in *Scotland* alone.
- (ii) If the defender is domiciled in the United Kingdom or another EU Member State, and the statement is published online, then the Scottish courts will have jurisdiction if the pursuer has its 'centre of main interests' there (which may broadly be equated to its domiciled).

In situation (ii), if the defender is not domiciled in an EU Member State, then the Scottish court retain discretion to sist (that is, stay the Scottish proceedings so that they proceed elsewhere) the action in favour of a more closely connected forum under the *forum non conveniens* doctrine. At present, cl19 is only directed to situation (ii) in these circumstances – it cannot (at least as long as the transition period under the Withdrawal Agreement is extant) affect the position under (i) or (iii), where the rules are furnished by the Brussels I Recast Regulation. However, once the transition period elapses, the carve-outs in cl19 for the EU/EEA mandatory scheme of jurisdiction will be unnecessary, and the court will have the discretion to stay its proceedings in all circumstances.

As such, a **strict rule such as cl19 is unnecessary in the circumstances, as the same aim can be secured through the discretionary mechanism of *forum non conveniens***. Compared to this, cl19 is a disproportionate measure. The effect of cl 19 is that the Scottish courts will only have jurisdiction over a non-EU or EEA domiciled defender if the court is satisfied that, out of all of the places of publication of the statement, Scotland clearly is the most appropriate place to bring defamation proceedings in respect of this. The effect of this is to create a limit on the subject matter jurisdiction of the Scottish court, which may (depending on the interpretation to be accorded to what is "appropriate") result in a denial of justice in extreme cases. It may be that the bulk of publication has occurred in a foreign state, rendering it a clearly more appropriate place to bring defamation proceedings. As a result, the jurisdiction of the Scottish courts to hear any action would be stripped by cl19. However, it may be that the pursuer could not reasonably expect a fair trial before the foreign state, and Scotland may be the only place which, but for cl 19, the pursuer could secure justice. **In these circumstances, it has been observed that s9(2) - the progenitor of cl19 – could violate Article 6 and Article 8 of the ECHR.**

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