



## WITNESS PROTECTION SCHEME, 2018: A BRIEF PRIMER

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### ABSTRACT

India has an adversarial system of justice in which the criminal courts decide cases on the basis of evidence produced before them by the parties. Such evidence may be documentary evidence or testimonial evidence of witnesses. Witnesses, as Jeremy Bentham, the English jurist, famously said are “the eyes and ears of justice”. Therefore, any criminal justice system in which witnesses are not able to depose freely, justice will be a casualty. Witnesses may not be able to depose freely, if they or their family members are threatened, intimidated or influenced through the use of money or muscle power. Witnesses may also be influenced psychologically, due to their relationship with the accused and/or the victim or other witnesses. Whatever be the reason, if witnesses are unable to speak the truth in a court of law, criminals may go scot-free and sometimes innocent persons may be convicted. This emboldens criminals and shakes the faith of the public in the criminal justice delivery system. The low conviction rates in India, even for heinous offences, are often attributed to witnesses not deposing or witnesses turning hostile. Therefore, it becomes imperative to have an effective witness protection programme in India, so that the witnesses feel safe enough to depose freely. India does not have a dedicated legislation for witness protection so far. But, the Supreme Court approved Witness Protection Scheme, 2018 is a significant step forward in the journey towards witness protection in India. This article gives a brief overview of the Witness Protection Scheme, 2018 and traces the judiciary’s contribution in emergence of this Scheme.

### I. INTRODUCTION

India does not have a dedicated legislation for witness protection so far. However, the inconveniences, challenges, threats and the apathy faced by witnesses in the criminal justice system in India, the myriad reasons for witnesses turning hostile and the required measures for protection of witnesses and their identity have often been highlighted by the Law Commission of India, in about half a dozen Reports since 1958. The Law Commission has highlighted issues like:

- (i) The importance of convenience and comfort of witnesses and adequate allowance for them.<sup>1</sup>

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<sup>1</sup>See Law Commission of India, “14<sup>th</sup> Report on Reform of Judicial Administration” (September, 1958) Vol. 2, pp.743-744, para 29.

(ii) The need to penalise attempts to dissuade witnesses from giving evidence, by use of threats, bribes or other corrupt means.<sup>2</sup>

(iii) Making bail provisions more stringent in order to ensure that the accused persons do not intimidate or influence witnesses after being released on bail,<sup>3</sup> the need to ensure adequate facilities, payment of realistic allowances and protection to the witnesses and their quick examination, without unnecessary adjournments,<sup>4</sup> and the need to check the delaying tactics, often resorted to by the accused persons, in order to dissuade witnesses from deposing against them.<sup>5</sup>

(iv) The use of a screen or other appropriate measures while recording the testimony of a minor victim of rape, so that she is “not confronted by the accused while at the same time ensuring the right of cross-examination of the accused”.<sup>6</sup>

(v) The problem of witnesses turning hostile due to inducements, threats or promises and the need to ensure a fair investigation.<sup>7</sup>

The constitutional courts have also recognised the need for protection of witnesses and their identity in various judgments for over two decades.<sup>8</sup> The concerns raised by the judiciary led to the Law Commission taking up the issue *suo moto* which resulted in circulation of a “Consultation Paper on Witness Identity Protection and Witness Protection Programmes” in August 2004 and culminated in the 198<sup>th</sup> Report on “Witness Identity Protection and Witness Protection Programmes” in which a Draft Bill for Witness Identity Protection was also annexed.<sup>9</sup> However, no Draft Bill for Witness Protection Programmes was provided in the Report.

<sup>2</sup>See Law Commission of India, “42<sup>nd</sup> Report on the Indian Penal Code” (June, 1971), p. 207, para 11.36.

<sup>3</sup>See Law Commission of India, “154<sup>th</sup> Report on the Code of Criminal Procedure, 1973 (Act No. 2 of 1974)” (August, 1996) Vol. I, para 11.

<sup>4</sup>See *Id.*, Chapter 10, paras 3,4,7, 27.

<sup>5</sup>See *Id.*, para 39.4.

<sup>6</sup>See Law Commission of India, “172<sup>nd</sup> Report on Reform of Rape Laws” (March, 2000), pp. 81-82, para 6.1.

<sup>7</sup>See Law Commission of India, “178<sup>th</sup> Report on Recommendations for Amending Various Enactments, Both Civil and Criminal Law” (December, 2001) pp.116-123.

<sup>8</sup> See *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14; *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384; *Swaran Singh v. State of Punjab*, (2000) 5 SCC 668; *State of U.P. v. Shambhu Nath Singh*, (2001) 4 SCC 667; *Krishna Mochi v. State of Bihar*, (2002) 6 SCC 81; *Mrs. Neelam Katara v. Union of India*, 2003 SCC Online Del 952; *Sakshi v. Union of India*, (2004) 5 SCC 518 ; *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580; *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158, (2006) 3 SCC 374; *National Human Rights Commission v. State of Gujarat*, (2008) 16 SCC 497, (2010) 4 SCC 315; *Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1; *State v. Sanjeev Nanda*, (2012) 8 SCC 450; *Ramesh v. State of Haryana*, (2017) 1 SCC 529.

<sup>9</sup> See Law Commission of India, “198<sup>th</sup> Report on Witness Identity Protection and Witness Protection Programmes” (August, 2006).

The Justice V.S. Malimath Committee Report<sup>10</sup> also referred to the problem of witnesses turning hostile and not deposing truthfully “due to threats, inducement or sympathy”.<sup>11</sup> The Report also noted the shabby treatment meted out to the witnesses<sup>12</sup> and the lack of proper facilities and adequate allowances for witnesses.<sup>13</sup> The Committee emphasised the need for a comprehensive law for protection of the witnesses and their families.<sup>14</sup> The National Police Commission also recommended various measures to alleviate the difficulties of the witnesses in 1980.<sup>15</sup>

Despite these repeated concerns and suggestions, the Legislature has refrained from passing a comprehensive law on witness protection in India. Although some Private Members’ Bills have been introduced in Parliament on the issue of witness protection, none of them have been passed, so far.<sup>16</sup> However, some specific provisions relating to witness protection have been added from time to time in some special laws. Such provisions for in-camera proceedings and for protection of the identity and address of witnesses have often been included in anti-terror laws.<sup>17</sup> Even laws dealing with offences by and against children prohibit direct or indirect disclosure of their identity.<sup>18</sup> The Whistle Blowers Protection Act, 2014 also included provisions on protection of witnesses and the “protection of identity of complainant”.<sup>19</sup> The general penal laws also contain some provisions dealing with witness protection and comfort.<sup>20</sup> In the year 2006, “threatening any person to give false evidence” was made a punishable offence under the

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<sup>10</sup>Government of India, “Report of the Committee on Reforms of Criminal Justice System” (Ministry of Home Affairs, March, 2003).

<sup>11</sup>*Id.*, p. 13, para 1.24.

<sup>12</sup>*Id.*, p. 20, para 1.37.

<sup>13</sup>*Id.*, pp. 151-154, paras 11.1 to 11.6.

<sup>14</sup>*Id.*, p. 152, para 11.3.

<sup>15</sup>Fourth Report of the National Police Commission (1980), p. 16, para 28.15.

<sup>16</sup>See The Witness Protection Bill, 2015 (Bill No. 341 of 2015); The Witnesses (Protection of Identity) Bill, 2015 (Bill No. 250 of 2015); The Witness Protection Program Bill, 2016; The Compulsory Protection of Witnesses and Victims of Crimes Bill, 2018 (Bill No. 131 of 2018).

<sup>17</sup>See The Terrorist and Disruptive Activities (Prevention) Act, 1985, s. 13; The Terrorist and Disruptive Activities (Prevention) Act, 1987, s. 16; The Prevention of Terrorism Act, 2002, s.30; The National Investigation Agency Act, 2008, s. 17; The Unlawful Activities (Prevention) Act, 1967, s. 44.

<sup>18</sup>See The Juvenile Justice (Care and Protection of Children) Act, 2015, s. 74; The Protection of Children from Sexual Offences Act, 2012, ss. 23,24,33.

<sup>19</sup>See The Whistle Blowers Protection Act, 2014, ss. 12, 13.

<sup>20</sup>See, for example, The Indian Evidence Act, 1872 (IEA), ss. 53A, 151, 152; The Code of Criminal Procedure, 1973 (CrPC)ss.160-163, 273, 309, 327, 406-408; The Indian Penal Code, 1872 (IPC) ss. 228A, 195A.

Indian Penal Code, 1872 (hereinafter, IPC).<sup>21</sup> The National Capital Territory of Delhi took a lead on the issue and notified the Delhi Witness Protection Scheme, 2015 in July, 2015. However, no Central legislation on the issue was enacted, despite the repeated concerns raised.

## II. THE EMERGENCE OF THE WITNESS PROTECTION SCHEME, 2018

In *Mahender Chawla v. Union of India*,<sup>22</sup> a writ petition was filed under Article 32 of the Constitution of India by four petitioners, who made specific allegations against a self-professed godman, Asaram Bapu and his son Narayan Sai, who were accused in rape cases. The petitioners included a witness who had survived a murder attempt on his life for daring to testify against the accused, the father of a murdered witness who was allegedly killed for daring to be a witness against accused, the father of a child rape victim and a journalist who had escaped a murder attempt by the henchmen of the accused and was still facing death threats for daring to write articles against the accused.<sup>23</sup> The petitioners alleged that witnesses in the rape cases against Asaram were being threatened and three witnesses had already been killed and ten others had been attacked. The petitioners prayed for “a court monitored SIT or a CBI probe”.<sup>24</sup>

Recognising that the condition of witnesses in the Indian Legal System has been “pathetic”, the two-judge bench, speaking through A.K. Sikri, J., referred to the threats faced by witnesses during investigation and trial and the fact that witnesses are not suitably treated and are taken for granted in the criminal justice system.<sup>25</sup> Identifying lack of witness protection measures as one of the main reasons for witnesses turning hostile in India, Sikri, J. observed:

“It is a harsh reality, particularly, in those cases where the accused persons/criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorise or intimidate the witnesses because of which these witnesses either avoid coming to courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any

<sup>21</sup>IPC, s. 195A, inserted by the Criminal Law (Amendment) Act, 2006 (Act 2 of 2006), s. 2.

<sup>22</sup>(2019) 14 SCC 615.

<sup>23</sup>*Id.*, at p.626, para 16.

<sup>24</sup>*Id.*, at p. 627, para 17.

<sup>25</sup>*Id.*, at p. 618, para 4.

protective measure to ensure the safety of these witnesses, commonly known as ‘witness protection’.<sup>26</sup>

The petitioners had initially impleaded the Union of India and the States of Haryana, Uttar Pradesh, Rajasthan, Gujarat and Madhya Pradesh and the Court directed the States of Uttar Pradesh and Haryana to ensure “full and proper protection to the petitioners by providing adequate security”.<sup>27</sup> However, since the issue of witness protection programme had pan India significance, other states were also impleaded and the coverage of the petition was extended to the entire country. The learned Attorney General was asked to submit a draft scheme. Understanding the significance of the issue, the Union Ministry of Home Affairs prepared a draft Witness Protection Scheme, 2018 and comments were invited from Governments of States and Union Territories, after which the Witness Protection Scheme, 2018(WPS) was finalised “based on the inputs received from 18 States/Union Territories, 5 States Legal Services Authorities and open sources including civil society, three High Courts as well as from police personnel” and in consultation with the National Legal Services Authority (NALSA).<sup>28</sup> Emphasising the need to have a statutory witness protection regime, the two-judge bench held that, till a suitable law is framed by the Central and/or State Legislatures, the WPS should be considered as “law” under Articles 141/142 of the Constitution.<sup>29</sup> The Union and State Governments were asked to enforce the WPS in letter and spirit.<sup>30</sup>

### III. OVERVIEW OF THE WPS

The WPS recognises that “in cases involving influential people, witnesses turn hostile because of threat to life and property”.<sup>31</sup> The WPS has a wide scope and it prescribes a slew of measures for affording physical as well as identity protection and even relocation, if required, to the witnesses. The WPS does not follow a one size fits all approach to witness protection. The protection needs of a witness have to be assessed on a case-to-case basis, depending upon their vulnerability and threat perception.

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<sup>26</sup>*Id.*, at p. 619, para 6.

<sup>27</sup>*Id.*, at p. 627, para 18.

<sup>28</sup>*Id.*, at p. 629, para24.

<sup>29</sup>*Id.*, at p. 639, paras35, 36.3.

<sup>30</sup>*Id.*, para 36.2.

<sup>31</sup>WPS, Need and Justification for the Scheme.

### Offences to which the WPS is Applicable

The WPS defines a witness as a “person, who possesses information or document about any offence”.<sup>32</sup> However, the application of the WPS is only applicable to the following offences:<sup>33</sup>

- i. Offences punishable with death or life imprisonment;
- ii. Offences punishable with imprisonment up to seven years and above; and
- iii. The gender specific offences of “assault or criminal force to woman with intent to outrage her modesty”,<sup>34</sup> sexual harassment,<sup>35</sup> disrobing,<sup>36</sup> voyeurism,<sup>37</sup> stalking<sup>38</sup> and “utterance of any word, or making of any sound or gesture with intent to insult the modesty of a woman under the IPC”.<sup>39</sup>

### Application for Protection Under the WPS

The WPS provides for setting up of a ‘Competent Authority’ (CA) for issuing witness protection orders, specifying the witness protection measures to be taken under the WPS in specific cases in the District.<sup>40</sup> The CA is “a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as member and Head of the Prosecution in the District as its Member Secretary”.<sup>41</sup>

An application seeking a witness protection order under the WPS, along with supporting documents, if any, can be filed before the CA of the District where the offence is committed, through the Member Secretary of the CA.<sup>42</sup> The application can be filed by “the witness, his family member or his duly engaged counsel or Investigating Officer/Station House Officer/Sub-divisional Police Officer/Prison Superintendent concerned” and it should preferably be forwarded by the Prosecutor concerned.<sup>43</sup> Family member under the WPS includes “parents/guardian, spouse, live-in partner, siblings,

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<sup>32</sup>WPS, cl. 2(k).

<sup>33</sup>*Id.*, cl. 2(i).

<sup>34</sup>IPC, s. 354.

<sup>35</sup>*Id.*, s. 354A.

<sup>36</sup>*Id.*, s. 354B.

<sup>37</sup>*Id.*, s.354C.

<sup>38</sup>*Id.*, s. 354D.

<sup>39</sup>*Id.*, s. 509.

<sup>40</sup>WPS, cl. 2(n).

<sup>41</sup>*Id.*, cl. 2(c).

<sup>42</sup>*Id.*, cl. 5 read with cl. 2(c).

<sup>43</sup>*Id.*, cl. 2(l).

children, grandchildren of the witness”.<sup>44</sup> The format for the witness protection application that has to be filed before the CA is also appended in the WPS.<sup>45</sup>

### **Categorisation of Witnesses According to Threat Perception**

The WPS divides witnesses into three categories as per the threat perception in decreasing order of severity. Category ‘A’ includes cases where “the threat extends to life of the witness or his family members”.<sup>46</sup> Category ‘B’ includes cases “where the threat extends to the safety, reputation or property of the witness or his family members”.<sup>47</sup> Category ‘C’ includes cases “where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property”.<sup>48</sup> All three categories cover threats during investigation, trial or thereafter.

### **Processing of the Witness Protection Application**

On receiving the application for witness protection, the Member Secretary of the CA should call for a “Threat Analysis Report from the Assistant Commissioner of Police(ACP) /Deputy Superintendent of Police(DSP)in charge of the concerned police sub-division”.<sup>49</sup> A Threat Analysis Report (TAR) is a detailed report about the “seriousness and credibility of the threat perception to the witness or his family members”.<sup>50</sup> The TAR should be expeditiously prepared by the concerned ACP/DSP and it should reach the CA within five working days of receipt of the order of the Member Secretary.<sup>51</sup> If there is any imminent threat, the CA can also pass interim protection orders during the pendency of the witness protection application.<sup>52</sup> Such a protection order may be for the witness and/or his family members. The TAR should contain “specific details about the nature of threats by the witness or his family to their life, reputation or property, apart from analysing the extent, the person or persons making the threat, have the intent, motive and resources to implement the threats”.<sup>53</sup> The TAR should also categorise the threat perception and suggest adequate protection measures required

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<sup>44</sup>*Id.*, cl. 2 (d).

<sup>45</sup>*Id.*, cl. 2(e).

<sup>46</sup>*Id.*, cl. 3.

<sup>47</sup>*Ibid.*

<sup>48</sup>*Ibid.*

<sup>49</sup>*Id.*, cl. 6(a).

<sup>50</sup>*Id.*, cl. 2(j).

<sup>51</sup>*Id.*, cl. 6(c).

<sup>52</sup>*Id.*, cl. 6(b).

<sup>53</sup>*Id.*, cl. 2(j).



for the witness or his family.<sup>54</sup> Full confidentiality has to be maintained during the preparation of the TAR.

In order to ascertain the witness' protection needs, the CA is required to interact with him and/or his family members/employers or any other suitable person, while processing the witness protection application.<sup>55</sup> Such interaction can be in person or through electronic means.<sup>56</sup> Witness protection applications have to be heard in-camera, that is, only those persons whose presence is essential for the decision on the witness protection application, should be allowed by the CA, and full confidentiality should be maintained.<sup>57</sup> The WPS provides for time bound disposal of witness protection applications. Such applications should be disposed within five working days of the receipt of the TAR from the police authorities.<sup>58</sup>

### **Implementation of Witness Protection Orders**

Once the CA passes a witness protection order, it has to be implemented by the "Witness Protection Cell of the concerned State/UT or the trial Court, as the case may be".<sup>59</sup> A Witness Protection Cell (WPC) under the WPS means a "dedicated Cell of State/UT Police or Central Police Agencies assigned the duty to implement the witness protection order".<sup>60</sup> Overall responsibility of implementation of all witness protection orders, except orders for change of identity and/or relocation lies on the Head of the Police in the State/UT. Witness Protection Orders for change of identity and/or relocation have to be implemented by the Department of Home of the concerned State/UT.<sup>61</sup> The WPC is required to file monthly follow-up reports before the CA.<sup>62</sup> If the CA feels the need to revise the Witness Protection Order or a witness applies for it, and when the trial is completed, a fresh TAR has to be called.<sup>63</sup>

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<sup>54</sup>*Id.*, cl. 2(j), cl. 6(d).

<sup>55</sup>*Id.*, cl. 6(e).

<sup>56</sup>*Ibid.*

<sup>57</sup>*Id.*, cl. 6(f) read with cl. 2(f).

<sup>58</sup>*Id.*, cl. 6(g).

<sup>59</sup>*Id.*, cl. 6(h).

<sup>60</sup>*Id.*, cl. 2(o).

<sup>61</sup>*Id.*, cl. 6(h).

<sup>62</sup>*Id.*, cl. 6(i).

<sup>63</sup>*Id.*, cl. 6(j).



### Protection Measures Under the WPS

The WPS provides for a slew of measures for the physical as well as identity protection of a witness.<sup>64</sup> It provides that the witness protection measures should be “proportionate to the threat” and they are for a specific duration, not exceeding three months at a time.<sup>65</sup> The CrPC provides that all evidence in a criminal trial should be taken in the presence of the accused.<sup>66</sup> However, under the WPS, the protection measures that can be ordered by the CA include ensuring that the witness does not come face to face with the accused during investigation or trial.<sup>67</sup> This can be ensured with the help of one-way mirrors, screens and video conferencing. The witness may also be afforded protection by monitoring his mails and telephone calls<sup>68</sup> or by arranging with the telephone company to “change the witness's telephone number or assign him an unlisted telephone number”.<sup>69</sup> Technology can be also used to protect the witness by providing for installation of security devices like “security doors, CCTVs, alarms, fencing etc.” in the witness' home.<sup>70</sup> The witness' identity may be concealed by referring to him with a changed name or an alphabet.<sup>71</sup> The concealment of identity of witnesses includes “prohibition of direct or indirect disclosure of identity of the witness during investigation, trial and post-trial stage”.<sup>72</sup> The witness should be provided details of emergency contact persons.<sup>73</sup>

Physical protection measures under the WPS include “close protection, regular patrolling around the witness's house”,<sup>74</sup> “temporary change of residence to a relative's house or a nearby town”,<sup>75</sup> escorting the witness to and from the court and providing a Government vehicle or a State funded conveyance for the date of hearing.<sup>76</sup> Protection measures like in-camera trials,<sup>77</sup> presence of support persons during recording of statement and deposition,<sup>78</sup> expeditious recording of the witness' testimony during trial on a day to day

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<sup>64</sup>See *Id.*, cl. 2(h), cl. 7 and Parts III, IV and V.

<sup>65</sup>*Id.*, cl. 7.

<sup>66</sup>CrPC, s. 273.

<sup>67</sup>*Id.*, cl. 7(a).

<sup>68</sup>*Id.*, cl. 7(b).

<sup>69</sup>*Id.*, cl. 7(c).

<sup>70</sup>*Id.*, cl. 7(d).

<sup>71</sup>*Id.*, cl. 7(e).

<sup>72</sup>*Id.*, cl. 2(b).

<sup>73</sup>*Id.*, cl. 7(f).

<sup>74</sup>*Id.*, cl. 7(g).

<sup>75</sup>*Id.*, cl. 7(h).

<sup>76</sup>*Id.*, cl. 7(i).

<sup>77</sup>*Id.*, cl. 7(j).

<sup>78</sup>*Id.*, cl. 7(k).

basis, without unnecessary adjournments<sup>79</sup> can also be ordered. An important development in the area of witness protection has been the provision for specially designed vulnerable witness court rooms. Such court rooms have special arrangements like “live video links,<sup>80</sup> one-way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable”.<sup>81</sup>

Apart from the specific measures mentioned above, the CA also has the power to order any other protection measures it considers necessary.<sup>82</sup> The CA also monitors the implementation of the protection order. The WPCs are required to submit monthly follow up reports to the CA, based on which the CA can review a protection order. The WPS provides for mandatory review by the CA on a quarterly basis, based on the monthly follow-up reports.<sup>83</sup>

### **Identity Protection Measures**

The WPS also provides for the protection of the witness' identity.<sup>84</sup> An application for witness identity protection can also be filed before the CA through its Member Secretary. It can be done during the pendency of the investigation or trial of any offence covered under the WPS. The Member Secretary is then required to call for a TAR and the CA is required to examine the witness or his family members or any other suitable persons, in order to ascertain the need for an identity protection order. The identity of the witness has to be protected during the hearing of the application for witness identity protection. The CA is required to dispose of the application after considering the material on record. If the CA passes an order for protection of the identity of the witness, the onus lies on the WPC “to ensure that identity of such witness/his or her family members including name/parentage/occupation/address/digital footprints are fully protected”.<sup>85</sup> The WPC is also required to provide details of emergency contact persons to the protected witness.<sup>86</sup>

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<sup>79</sup>*Id.*, cl. 7(m).

<sup>80</sup>*Id.*, cl. 2(g).

<sup>81</sup>*Id.*, cl. 7(l).

<sup>82</sup> *Id.*, cl. 7(o).

<sup>83</sup> *Id.*, cl. 8.

<sup>84</sup>*Id.*, cl. 9.

<sup>85</sup>*Ibid.*

<sup>86</sup>*Ibid.*

### **Change of Identity**

The CA can also make an order for conferring a new identity to the witness on the basis of a request made by the witness and the TAR.<sup>87</sup> Conferment of new identities includes “new name/profession/parentage and providing supporting documents acceptable by the Government Agencies”.<sup>88</sup> However, conferment of new identity does not deprive the witness of “existing educational/professional/property rights”.<sup>89</sup>

### **Relocation of Witness**

The CA can also order relocation of a witness in appropriate cases, on the basis of a request from the witness and the TAR. The witness may be relocated to a safer place within the State/UT or within the country, keeping in view the safety, welfare and well-being of the witness.<sup>90</sup> The expenses for relocation have to be borne from the Witness Protection Fund set up under the WPS.<sup>91</sup>

### **Other Key Features of the WPS**

The WPS also provides for the establishment of a State Witness Protection Fund(WPF) for meeting “the expenses incurred during the implementation of a Witness Protection Order passed by the CA and other related expenditure”.<sup>92</sup> The WPF has to be operated by the Department/Ministry of Home under the State/UT Government.<sup>93</sup> The WPF comprises of:

- “(i) Budgetary allocation made in the Annual Budget by the State Government;
- (ii) Receipt of amount of costs imposed/ordered to be deposited by the courts/tribunals in the WPF;
- (iii) Donations/contributions from philanthropist/charitable institutions/organisations and individuals permitted by Central/State Governments.
- (iv) Funds contributed under Corporate Social Responsibility.”<sup>94</sup>

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<sup>87</sup>*Id.*, cl. 10.

<sup>88</sup>*Ibid.*

<sup>89</sup>*Ibid.*

<sup>90</sup>*Id.*, cl. 11.

<sup>91</sup>*Id.*, cl. 4.

<sup>92</sup>*Ibid.*

<sup>93</sup>*Id.*, cl. 4 (c).

<sup>94</sup>*Id.*, cl. 4(b).

Financial aids/grants may be awarded to a witness from the WPF from time to time, if required for “re-location, sustenance or starting a new vocation/profession”.<sup>95</sup>In case of false complaints by witnesses, expenses incurred from the WPF can be recovered and proceedings for the same can be initiated by the Home Department of the concerned Government.<sup>96</sup>

The onus to give wide publicity to the WPS, in order to generate awareness about it, is placed on the States.<sup>97</sup> The investigating officers and the courts are also duty bound to inform the witnesses about the WPS.<sup>98</sup>

Strict confidentiality has to be maintained with respect to the records, documents or information relating to the proceedings under the WPS and they can only be shared with the trial court/appellate court on a written order. All the records pertaining to proceedings under the WPS have to be preserved during the pendency of the trial or appeal in the case.<sup>99</sup> Hard copies of the records can be weeded out by the CA after one year of disposal of the last court proceedings, after preserving the scanned soft copies of the same.<sup>100</sup>

If the witness or the police authorities are aggrieved by a decision of the CA, they can file a review application within 15 days of passing of the impugned order by the CA.<sup>101</sup>

#### IV. VULNERABLE WITNESS DEPOSITION CENTRES

An important development in the area of witness protection in the last decade has been the provision for specially designed vulnerable witness court rooms or centres. The Delhi High Court took the lead in this matter by setting up the first such “vulnerable witness deposition court” in Delhi in 2012 and by framing the “Guidelines for Recording Evidence of Vulnerable Witnesses in Criminal Matters” (hereinafter, Delhi High Court Guidelines). A Vulnerable Witness Deposition Complex/Centre (VWDC) provides facilities like:

“separate witness room, separate accused room, play area for the child witnesses, pantry, separate toilet and an exclusive and comfortable waiting area

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<sup>95</sup>*Id.*, cl. 7(n).

<sup>96</sup>*Id.*, cl. 14.

<sup>97</sup>*Id.*, cl. 12.

<sup>98</sup> *Ibid.*

<sup>99</sup>*Id.*, cl. 13.

<sup>100</sup>*Ibid.*

<sup>101</sup>*Id.*, cl. 15.

and is equipped with all facilities of audio-visual exchange for a free interface between the presiding Judge, the witness and the accused without witness facing the accused. The complex has a separate entry for vulnerable witnesses, so that they do not come in direct contact with accused at any point of time. There are provisions for support persons, pre-trial court visit and facilities for pick and drop of the witnesses from their residence.”<sup>102</sup>

The Supreme Court in *State of Maharashtra v. Bandu*,<sup>103</sup> referred to the Delhi High Court Guidelines and the VWDCs in the National Capital Territory, and recognised the role of such complexes in creating a conducive environment for vulnerable victims to depose in courts.<sup>104</sup> The Court directed that all such High Courts adopt such guidelines, with suitable modifications, if required. Recognising the need for setting up of one VWDC in almost every district in the country in the long run, the Court directed that “at least two such centres in the jurisdiction of each High Court may be set up within three months” from the date of the judgment”, that is, October 24, 2017.<sup>105</sup>

Referring to the above developments, in *Mahender Chawla v. Union of India*, the Supreme Court directed that VWDCs shall be set up in all the district courts in India, within a period of one year, that is, by the end of the year 2019.<sup>106</sup> The Central Government was also directed to render financial and other support to the States for this endeavour.<sup>107</sup>

On January 11, 2022, in *Smruti Tukaram Badade v. State of Maharashtra*,<sup>108</sup> a two-judge bench of the Supreme Court, speaking through D.Y. Chandrachud, J., reiterated the need for creating a safe and barrier free environment for recording the evidence of vulnerable witnesses. Referring to the link between a fair trial and the pursuit of substantive justice to the manner of recording of statements of vulnerable witnesses, the learned Judge observed that the dignity of vulnerable witness “cannot be left to the vagaries of insensitive procedures and a hostile environment”.<sup>109</sup> The Court emphasised the need to

<sup>102</sup> *Supra* note 22, at p. 638, para 32.

<sup>103</sup> (2018) 11 SCC 163.

<sup>104</sup> *Id.*, p. 165, para 10.

<sup>105</sup> *Id.*, p. 166, para 12.

<sup>106</sup> *Supra* note 22, at p. 639, para 36.4.

<sup>107</sup> *Ibid.*

<sup>108</sup> 2022 SCC OnLine SC 78.

<sup>109</sup> *Id.*, para 3.

create a “barrier free environment where depositions can be recorded freely without constraining limitations, both physical and emotional”.<sup>110</sup>

In this case, the Supreme Court had earlier sought details of the VWDCs in various High Courts as on 25 October, 2021. The record submitted by the *amicus curiae* revealed that at least one permanent VWDC had been established in 15 out of 25 High Courts. The maximum number of permanent VWDCs in District and Subordinate Courts were stated to be in Maharashtra. It was also submitted that at least one permanent VWDC had been established in all District Courts in Delhi and the Delhi High Court Guidelines had also been adopted by other High Courts.

In order to facilitate the implementation of the directions given in *Bandu’s* case, the Supreme Court issued the following directions under Article 142 of the Constitution in *Smruti Tukaram Badade’s* case:<sup>111</sup>

(i) In the Delhi High Court Guidelines, the definition of ‘vulnerable witness’ was limited to child witnesses under the age of 18 years.<sup>112</sup> In *Smruti Tukaram Badade’s* case, the Supreme Court expanded this definition of vulnerable witness to mean “any witness deemed to be vulnerable by the concerned court”, including age neutral victims of sexual assault; child victims of sexual assault, below 18 years of age, irrespective of their gender; age and gender neutral victims of unnatural offences under section 377 IPC; witnesses suffering from “mental illness”<sup>113</sup> or any speech or hearing impairment or any other disability, if the court finds them to be vulnerable; or any witness facing a threat perception under the WPS.<sup>114</sup>

(ii) All High Courts were directed to adopt and notify a VWDC Scheme within two months, with due regard to the Delhi High Court Scheme. The High Courts that had already adopted such Schemes, were directed to make suitable modifications, in conformity with the guidelines issued by the Supreme Court in the instant case.

(iii) All High Courts were directed to set up “an in-house permanent VWDC Committee for continuously supervising the implementation” of the Supreme Court’s directions in

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<sup>110</sup> *Ibid.*

<sup>111</sup> See *Id.*, para 5.

<sup>112</sup> Delhi High Court Guidelines, cl. 3(a).

<sup>113</sup> See The Mental Healthcare Act 2017, s. 2(s).

<sup>114</sup> *Supra* note 108, para 5, pt. (i)(a)-(g).

the instant case and for “making a periodic assessment of the number of VWDCs required in each district and to coordinate the conduct of periodic training programmes”.<sup>115</sup>

(iv) All High Courts were also directed to make a cost estimation for setting up of at least one permanent VWDC in every District Court and the estimate for the number of VWDCs required in their State within three months.

(v) Recognising the need for periodic training programmes for sensitising all stakeholders involved in managing the VWDCs, the Supreme Court also constituted a committee under the Chairpersonship of Hon’ble Justice Gita Mittal, former Chief Justice of the Jammu and Kashmir High Court, with an initial tenure of two years, to “devise and implement an All-India VWDC Programme, besides engaging with the High Courts on the creation of infrastructure for VWDCs”.<sup>116</sup> All High Courts were directed to facilitate and co-operate in conducting training programmes, according to the training modules prepared by the Committee.

(vi) State Governments were also directed to expeditiously sanction and disburse the funds to the High Courts, as per the cost estimates prepared by the VWDC Committee of each High Court and appoint a nodal officer of the Finance Department to facilitate the implementation of the directions.

(vii) All High Courts were directed “to ensure that at least one permanent VWDC is set up in every District Court or additional Sessions Court establishments” within four months and the Registrars General of the High Courts were asked to file compliance reports before the Supreme Court for the same.<sup>117</sup>

(viii) In States where ADR Centres have been set up by the High Courts in close proximity to the court establishments in the districts, High Courts were given the “liberty to ensure that the VWDC is made available within the premises of the ADR Centre so as to secure a safe, conducive and barrier free environment for recording the depositions of vulnerable witnesses”.<sup>118</sup>

(ix) The Chairperson of the Committee appointed by the Court was also requested to engage with the National Legal Services Authority (NALSA) and the State Legal Services Authorities (SLSAs) for effective implementation of the training schemes.

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<sup>115</sup>*Id.*, para 5, pt. (iii).

<sup>116</sup>*Id.*, para 5, pt. (v).

<sup>117</sup>*Id.*, para 5, pt. (vii).

<sup>118</sup>*Id.*, para 5, pt. (viii).



(x) The Chief Justices of the High Courts were asked to take all appropriate steps to implement the directions and to periodically monitor their compliance.

(xi) The Chief Justice of the High Court of Delhi was requested to make the necessary office space and experienced staff available to the Court appointed Committee. The Ministry of Women and Child Development (MWCD) of the Union Government was directed to defray the remuneration for the staff and the honorarium payable to the Chairperson, to the Director of the Delhi Judicial Academy. The Chairperson was given the liberty to seek any further directions, if necessary, from the Supreme Court.

(xii) The MWCD was also directed to “designate a nodal officer for coordinating the implementation” of the directions and for “providing all logistical support” to the Court appointed Committee.<sup>119</sup> The MWCD and all Ministries of Women and Child Development in the States were also directed to coordinate with the Chairperson and extend logistical support to her. The High Courts were directed to “enlist experts in the field to facilitate proper training and development of all stake holders” in consultation with the Chairperson of the Committee.<sup>120</sup>

## V. CONCLUSION

Although India does not have a specific law dealing with witness protection so far, the steps taken by the judiciary and the executive have led to significant progress in the field of witness protection in India, with the notification of the WPS. By supplementing it with an expansive definition of vulnerable witnesses and extensive directions for establishment of VWDCs in every district of India, the Supreme Court has taken a significant step forward towards the implementation of the WPS. The need for training and sensitisation of all stakeholders and the staff of the VWDCs has also been recognised and the constitution of a specific committee for fulfilment of this task is also a commendable step. However, the journey of implementation of the WPS is a long and arduous one. This journey will be more fruitful if the Legislature steps in to pass a comprehensive, dedicated legislation for witness protection at the Central level. The States can make suitable state amendments to such a law, if and wherever required. This will ensure uniformity of the witness protection programmes and policies, and strengthen the mandate of the agencies like WPCs constituted under the WPS for witness protection.

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<sup>119</sup> *Id.*, para 5, pt. (xii).

<sup>120</sup> *Ibid.*

Such a legislation should also resolve issues in the WPS, like the conflict of interest inherent in the fact that the Head of the Police in the District is a member of the CA and the TAR is also to be prepared by the ACP /DSP in charge of the concerned police subdivision. It should also address the fact that the WPS does not specify any penal provisions or other consequences for non-observance of its provisions. Such a law should also enlist specific measures for protecting victims from not just physical, but even emotional and psychological pressures that witnesses often face, especially in cases where the offender is family member, or a relative, or a known person. Victims and other witnesses often face such pressures in sexual offences, as according to the official data, in almost 95 percent of the cases, the offender is a person known to the victim <sup>121</sup>The State owes it to the witnesses, including the victims, to empower and protect them, so that they can testify in courts freely, as partners in the cherished goal of justice.

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<sup>121</sup> See National Crime Records Bureau, “Crime in India 2020”(Ministry of Home Affairs, Government of India) p. 217, Table 3A.4, *available at*: <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf> (last visited on January 15, 2022).