3.1 Overview

The issue of witness protection has been bothering the Indian criminal justice system for a long time. With the development of criminal jurisprudence, concepts like fair trial, human rights of accused, compensation to victims, speedy justice have been evolved. Yet, witnesses remain an ignored entity; consequently the concept of witness protection has also been neglected area. The Law Commission of India has highlighted the problem of threatening of witnesses, in its Forty Second Report in 1971. Since then the issues relating to witnesses have been debated in its various reports. However, no effort on the part of Government has been taken to enact law on it.

The present chapter examines reports of various commissions and committees, whereby the inconveniences and indignities suffered by the witnesses and the issue of providing protection to them have been discussed. The researcher has attempted to analyse and critically evaluate the observations and recommendations made in these reports. The purpose of the researcher is to highlight that the problem faced by the witnesses under the criminal justice system of India, has been discussed by various bodies from time to time, but anything concrete has never been achieved.

3.2 The Law Commission of India, Fourteenth Report

The Law Commission in its Fourteenth Report noticed that no provision is, as a rule, to be found in the court houses for the convenience of the witnesses when they come to court. In several states the witnesses have to wait under the trees in the grounds of the court houses or in the verandahs of the court houses. No protection is provided to them from the sun and the rain. No conveniences of any kind exist. In some courts, there is what is known as the witnesses shed, roofed but exposed on all sides. In many
places even this shed is made use of for other court purposes.\(^1\) The Commission observed that it is imperative that proper conveniences should be provided for the witnesses in court houses and they should not be herded together and treated, as they are in some places, as cattle.\(^2\)

### 3.3 The Law Commission of India, Forty Second Report

Far back in 1958, the Law Commission in its Fourteenth Report discussed the issue of harassment and inconvenience caused to witnesses. However, the issue of threatening the witnesses was discussed by it, for the first time, in its Forty Second Report. In chapter eleven of the report, the issue of threatening and bribing of witnesses has been mentioned. The Commission proposed three new sections\(^3\) in this chapter, penalising certain illegal acts which affect the proper administration of justice. The first section\(^4\) proposed by the Commission dealt with interference with witnesses. The proposed section provided\(^5\):

"Whoever, by threats, bribes or other corrupt means, dissuades or attempts to dissuade any person from giving evidence before a public servant, legally competent to examine him as a witness, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

It is submitted that the Law Commission of India has highlighted the problem of threatening and bribing witnesses in way back in 1971. However, the quantum of punishment proposed was not sufficient. Only punishing the person accused of threatening a witness is not enough, the threatened witness should also be provided with adequate relief, in form of identity or physical protection, as per the requirement of a particular case.

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4. *ibid.* Section 229-A.
3.4 The Law Commission of India, One Hundred and Fifty Fourth Report

The Law Commission of India observed that in the present system a poor witness is caught between the devil and deep sea. If he fails to attend the Court, he shall be penalty liable and if he attends, he undergoes an agonising experience resulting in great inconvenience and loss. In this situation, all the measures necessary to create good atmosphere, instilling confidence and faith in the system in the minds of the witnesses have to be immediately chalked out and implemented.⁶

The Law Commission was of the view that inconveniences meted out to the witnesses coming to courts, lack of facilities to the witnesses, frequent adjournments and inadequate allowances are the reasons behind the reluctance of the witnesses to co-operate with the law enforcement agencies.⁷ It was also observed by the Commission that the witnesses had to incur the wrath of the accused, which resulted in their life being at peril.⁸ This risk is greater when the accused is a hardened criminal. The main recommendations of the Law Commission are discussed as under:

(i) All the measures necessary to create good atmosphere instilling confidence in minds of the witnesses have to be immediately chalked out and implemented.⁹

(ii) All causes of aversion and reluctance on the part of the witnesses should be removed. Such an effort should be there even from the stage of their examination by the police by treating them in friendly manner and giving self-confidence by giving adequate protection for them.¹⁰

(iii) Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.

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⁷ These issues have been discussed in detail in chapter two of the present research.
⁸ The Law Commission of India, One Hundred and Fifty Fourth Report, p.61.
⁹ id., p.62.
¹⁰ ibid.
It is submitted that the Law Commission in this Report has touched the issue of providing protection to witnesses in a very brief manner. It has suggested that the witnesses should be ensured protection from the retaliation of the accused. Such protection, if required, can be provided at the stage of examination. Sometimes, protection may be required at the time of investigation and in some cases, even after the completion of the trial. However, the Law Commission has failed to explain the means to provide protection as well as the criteria for providing protection.

3.5 The Law Commission of India, One Hundred and Seventy Second Report

The genesis of the present report was in the writ petition filed in the Supreme Court in 1997 by an organisation known as *Sakshi*, which had interest in issues relating to women. The petitioner had prayed for certain amendments in legal provisions relating to the offence of rape. One of the suggestions put forth by the petitioner was that "there should be a provision either in the *Criminal Procedure Code* or in the *Evidence Act* to the effect that a minor who has been assaulted sexually should not be required to give his or her evidence in presence of the accused as it will certainly traumatise the minor. Again, steps should also be taken to provide an appropriate and safe environment in which the child can recover."  

In response to this suggestion, the Law Commission referred to section 273 of the *Code of Criminal Procedure*, 1973, which requires that "except as otherwise expressly provided, all evidence taken in the course of the trial or other proceedings, shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader." The Law Commission expressed its view that "this general principle whereby the evidence is taken in the presence of the accused is founded upon natural justice, should not be done away with altogether in trials and enquiries concerning sexual offences. In an appropriate case, it may be open to the prosecution to request the court to provide a screen in such a manner that the victim does not see the accused, while at the same time providing an opportunity to

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12 *id.*, p.12.
the accused to listen to the testimony of the victim and give appropriate instructions to his advocate for an effective cross-examination."\textsuperscript{13}

The Law Commission further suggested addition of a proviso to section 273 of the \textit{Code of Criminal Procedure}, 1973 to the following effect\textsuperscript{14}:

"Provided that where evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the court may, take appropriate measures to ensure that such person is not confronted by the accused, while at the same time ensuring the right of cross-examination of the accused."\textsuperscript{15}

It is submitted that the Law Commission has suggested the use of a screen so that a victim of sexual offence does not have to confront the accused while giving statement. This suggestion is helpful for the victim as he or she will not feel intimidated by the presence of accused. The observations of the Supreme Court on this suggestion are discussed in \textit{Sakshi v. Union of India}\textsuperscript{16} under the judicial response.

3.6 The Law Commission of India, One Hundred and Seventy Eighth Report

In this Report, the Law Commission observed that "the experience shows that where the accused happens to be rich and/or influential person or member of mafia gangs, the witnesses very often turn hostile either because of the inducements offered to them or because of the threats given to them or may be on account of promises that may be made to them."\textsuperscript{17} The Commission observed that appropriate measures should be devised to prevent such incidents.\textsuperscript{18}

It is submitted that the Commission has rightly discussed that in case of accused being rich, influential or member of mafia gangs, witnesses are more vulnerable to threats and inducements, and there is need to prevent such incidents. The Commission has recognised the problem but failed to suggest remedial measures.

\textsuperscript{13}\textit{id.}, p. 39.
\textsuperscript{14}\textit{ibid.}
\textsuperscript{15}\textit{ibid.}
\textsuperscript{16}(2004) 5 SCC 518.
\textsuperscript{17}The Law Commission of India, \textit{One Hundred and Seventy Eighth Report on 'Recommendations for Amending various Enactments, Both Civil and Criminal (2001)'}, p.62.
\textsuperscript{18}\textit{ibid.}

The Committee chaired by Justice V.S. Malimath has discussed various problems faced by the witnesses in the Chapter Eleven entitled "Witnesses and Perjury" of the Report. The observations and recommendations of the Committee relating to witnesses are discussed as follows:

(i) The Committee observed that witnesses and their family members have to face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times, crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is, still not amenable, he may even be murdered. In such situations the witness will not come forward to give evidence, unless he is assured of protection or is guaranteed anonymity or some form of physical disguise.  

(ii) The Committee recommended that sometimes holding of in-camera proceedings may be sufficient to protect the interest of the witness. If, however, the circumstances indicate that the life of any particular witness is in danger, the court must take such measures as are necessary to keep the identity of the witness secret and make arrangements to ensure protection to the witness without affecting the right of the accused to cross-examine him.

(iii) The Committee observed that many countries in the world have enacted laws for witnesses' protection. There is no such law in India. Time has come for a

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20 ibid.
After analysing the abovementioned report it is submitted that the Committee has devoted one chapter to the problems of witnesses. In the Chapter the sufferings of witnesses have been discussed in detail. The Committee has highlighted that witnesses have to face danger at the hands of the accused. It has highlighted various inconveniences suffered by the witnesses in the court premises. It is respectfully submitted that the committee has recommended for providing identity protection to the witnesses in the cases of serious threats and danger to the life of the witnesses. It has also recommended for in-camera proceedings to protect the interests of the witnesses. However, the Report has failed to discuss the need and relevance of physical protection to the witnesses in detail. It is submitted that the issue of physical protection of the witnesses has assumed great urgency in the present scenario.

3.8 The Law Commission of India, Consultation Paper on Witness Identity Protection and Witness Protection Programmes, 2004

The Law Commission took up the subject *suo motu*, after the Supreme Court's observations in cases like *National Human Rights Commission v. State of Gujarat and others*,\(^22\) *PUCL v. Union of India*\(^23\) and *Ms. Neelam Katara v. Union of India*.\(^24\) The Commission prepared a questionnaire which was divided into two parts Part A and B, the former dealing with Witness Identity Protection and the latter dealing with Witness Protection Programmes.\(^25\)

The purpose of the Consultation Paper was to invite responses from various sections of the society. After an analysis of the received responses, the Commission made final recommendations in the One Hundred and Ninety Eighth Report along with a Draft Bill on Witness Identity Protection.\(^26\) The Consultation Paper consists of eight

\(^{21}\) *ibid.*

\(^{22}\) 2003 (9) SCALE 329.

\(^{23}\) 2003 (10) SCALE 967.

\(^{24}\) Crl.W.No. 247 of 2002.

\(^{25}\) The Law Commission of India held two seminars one in New Delhi on 9th October, 2004 and the other at Hyderabad on 22nd January, 2005 where a number of Judges of the High Court, lawyers, police officers, public prosecutors, judicial officers (Magistrates and Session Judges) participated.

chapters. The brief scheme of chapters in the Consultation Paper is discussed as under:

In the first chapter, the Commission has observed that "the impunity with which persons facing charges of mass murders, rape and gruesome killings are able to frustrate the justice process through the tactics of intimidation, threats and even elimination of witnesses, has given cause for grave concern." The Commission has discussed two main aspects of the need for witness protection vis. the need for anonymity of witnesses as well as physical protection of the witnesses at all the stages of a criminal case till the final disposal of a case.27

In Chapter II entitled, Public trial and Cross examination of witnesses in Open Court: Indian Laws, the Commission has discussed that "the adversary system of trial adopted in India is founded on the basis of two principle, firstly, that the burden of proof lies on the prosecution to prove the guilt of the accused and secondly, that the accused is presumed to be innocent until the contrary is proved. These principles provide a level playing field to an accused as against the mighty power of the State and its instrumentalities."28 The Commission, in this Chapter, surveyed relevant sections of the Code of Criminal Procedure, 1973, the Indian Penal Code and the Indian Evidence Act and the Juvenile Justice (Care and Protection of Children) Act, 2000, revealing that "the rights of the accused to open trial and to cross-examine the prosecution witnesses in open court is not absolute. The Commission suggested that special provisions like in-camera proceedings and video-screening techniques can be used in cases where the witnesses are either won over or threatened, so that justice is done not only to the accused but also to victims."29

In Chapter III entitled," Protection of Identity of Witnesses; Special Statutes in India", the Commission explored the provisions relating to witness anonymity under special statutes like the West Bengal Act, 1932, the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1985, the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987 and the Prevention of Terrorist Activities Act (POTA), 2002.

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27 See, id., p. 15.
28 id., p. 19.

In Chapter V entitled, "Protection of Identity of Witnesses vs. Rights of Accused-Principles of law developed by the Supreme Court and the High Courts," the Commission has referred to the observations made by judiciary, on the issue of restrictions on the rights of the accused vis.-a-vis. witness identity protection, in various landmark cases.\(^{30}\) The Commission concluded that "the judgements of the Supreme Court have laid down various rules or guidelines for protection of witnesses but they cannot and are not complete and cannot be as effective as the provision of a special statute on the subject."\(^{31}\)

In Chapter VI entitled, "Witness Anonymity and Balancing of Rights of Accused-A Comparative Study of Case Law in Other Countries", the Commission dealt with "the principles laid down in the judgements of various countries, namely the United Kingdom, Australia, New Zealand, Canada, the United States of America and of the European Court of Human Rights as well as the decisions of United Nation's War Crime Tribunals for Yugoslavia and Rwanda, on the question of witness protection and anonymity. Analysis of the case law of these countries discloses the manner in which the courts and tribunals have tried to balance the rights of the accused for a fair trial (which includes right to an open public trial and right to cross-examine the prosecution witness) on the one hand, and the need to grant anonymity to witnesses on the other."\(^{32}\)

\(^{30}\) For details see Chapter V, \textit{id.}, pp.49-81.

\(^{31}\) \textit{ibid.}

\(^{32}\) See, \textit{ibid.}
In Chapter VII entitled, "Witness Protection Programmes-A Comparative Study of Programmes in various Countries", the Commission has referred to Witness Protection Programmes existing in countries like Australia, South Africa, Hong Kong, Canada, Portugal, Philippines, the United States of America, France, Czechoslovakia, Republic of Korea, Japan, Netherlands, Germany and Italy.

Chapter VIII consists of the Questionnaire. The questionnaire is divided into two parts: Part A and Part B. Part A deals with witness anonymity and Part B deals with witness protection programmes. The responses to the same have also been discussed in the present report. The purpose of the questionnaire was to initialise the discussion on the legislative scheme on witness anonymity and the structure of the witness protection programme.  

The key observations and recommendations of the Commission concerning witness protection are discussed as under:

(i) The Commission in this Consultation Paper observed that witness anonymity is necessitated by several factors, intimidation and threat to the personal safety of the witnesses or the peculiar vulnerability of the witness on account of age or other disadvantages. It further observed that there is an urgent need to have a comprehensive legislative scheme dealing with aspect of physical protection of the witness as well. The Commission emphasised that witness protection programmes are essential in order to bring into being a statutory right to a witness, who is in danger, to seek protection either physically or through other measures apart from being granted anonymity.

(ii) The Commission has stated that the need to provide protection to a witness and preserve his or her

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33 See, id., p. 199.
34 See, ibid.
35 id., p.16.
36 id., p.199.
anonymity in a criminal case has been universally recognised as being in the interests of the community and the administration of justice to ensure that serious offences like terrorist acts or organised crime are effectively prosecuted and punished. It is a notorious fact that a witness, who gives evidence which is unfavourable to an accused in a trial for (say), a terrorist offence, would expose himself to severe reprisals which can result in death or severe badly injury to him or his family members.\(^{37}\)

(iii) According to the Commission, in recent times, the cases where witnesses are turning hostile at trial due to threats is no longer confined to cases of terrorism. Even in other types of offences falling under the Indian Penal Code, 1860 or other special statutes, this phenomenon has reached at alarming proportion. There is, therefore, need, as in other countries, to generally empower the Court in such cases, where muscle power, political power, money power or other methods are employed against witnesses an victims, for the purpose of protecting the witnesses so that witnesses could give evidence without any fear of reprisal and they do not turn hostile on accounts of threats by the accused.\(^{38}\)

3.9 The Law Commission of India, One Hundred and Ninety Eighth Report

In 2006, the One Hundred and Ninety Eighth Report of the Law Commission of India on 'Witness Identity Protection' and 'Witness Protection Programme' came. In this report, the Commission has discussed the responses to the questionnaire given in the Consultation Paper and made several recommendations regarding 'Witness Identity Protection' and 'Witness Protection Programme'. It has also proposed a Draft Bill entitled 'The Witness (Identity) Protection Bill, 2006 with regard to Witness Identity

\(^{37}\) id., p.27.

\(^{38}\) id., pp. 30-31.
Protection. The Report consists of XII Chapters. The Report is divided into two parts. Part I deals with 'Witness Identity Protection'. Part II of the Report deals with 'Witness Protection Programmes'. In Part I, the Commission has discussed identity protection during investigation before police; and inquiry and trial in the court. In Part II, the Commission has discussed identity protection under the programme outside the courts in various situations. The scheme of chapters in the report is discussed as under:

Chapter I is an Introductory Chapter in which introduction of the remaining chapters is given in brief. A brief summary of the chapters given in the Consultation Paper of 2004 is also given.

Chapter II is entitled, 'Right to Fair Public Trial in Presence of the Accused not Absolute'. In this chapter, the Commission has surveyed the legal position in various countries regarding right to an open public trial of an accused. The Commission has referred to the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR), European Convention, United Kingdom and the United States of America. The Commission has also discussed position in India with the help of Article 21 of the Constitution, Sections 273 and 327 of the Code of Criminal Procedure, 1973, Sections 228A, 299, 173(5) (6), 317, 231(2) of the Indian Penal Code. Finally the Commission summed up that neither the right to an open public trial nor the right of examination of the prosecution witnesses in the immediate presence of the accused are absolute. There are number of exceptions to this rule under the abovementioned Sections. Besides, special laws like TADA and POTA also provide exception to the right of the accused for an open public trial as against the right of the victim for a fair trial. The Commission observed that the State has an interest in the fair administration of justice, which requires that victim and witnesses depose without fear or intimidation.39

Chapter III is entitled 'Certain Aspects of Victim and Witness Identity Protection under Special Statutes in India'. In this chapter the Commission has discussed relevant sections of special statutes dealing with protection of witness identity. It has referred to TADA, 198540, TADA, 198741, POTA, 200242, the Unlawful Activities (Prevention)

39 See, id., p.31.
40 Section 13.
41 Section 16.
Amendment Act, 2004\(^{43}\), and the Juvenile Justice (Care and Protection of Children) Act, 2000\(^{44}\). The Commission has also discussed the case of Sakshi v. Union of India\(^{45}\), where by the Supreme Court has held that while recording evidence of victims of sexual offences, especially children and minors the procedure of video-conferencing may be used. The Commission summed up that so far the witness identity protection is confined to special cases of terrorism and sexual offences. Such protection should be extended to cases of other serious offences also.

Chapter IV is entitled, 'Questionnaire in Chapter VIII of the Consultation Paper: Responses'. In this chapter, the Commission has analysed the Responses to Questionnaire (Consultation Paper) regarding identity protection of witnesses.\(^{46}\)

In Chapter V, entitled," Need for extension of Victim Identity Protection generally to cases of serious offences triable by Court of Sessions", the Commission discussed that identity protection to victims and witnesses can no longer be confined to special cases of terrorism or sexual offences against women and it should be extended to cases of grave offences like murder, dowry-deaths, rape, dacoity, kidnapping and abduction etc. which are triable by Court of Session where lives and property of victims and witnesses may be in danger. The Commission has noted that witnesses turning hostile on account of threats having increased in the cases of such crimes, protection appears to have become necessary. The Commission has also discussed various judgements\(^{47}\) where protection has been provided to witnesses in serious offences who suffer from threats.

Chapter VI is entitled 'Inherent Power of the Criminal Court to Protect Victim and Witnesses and Position in India'. In this Chapter, the Commission has analysed the power of the Criminal Courts to grant victim or witness identity protection. The Commission has referred to the relevant case law of various countries like United

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\(^{42}\) Section 30.

\(^{43}\) Section 44 (1)- (4).

\(^{44}\) Section 21.

\(^{45}\) 2004 (6) SCALE 15.


\(^{47}\) For details see, id., p.76-79.
Kingdom, Australia, New-Zealand, Canada, South Africa and the United States of America. After analysing the relevant case law, the Commission summed up that the court has 'inherent power' to pass orders of anonymity in the larger interests of administration of justice. The court has to balance the right of the accused for open public trial and rights of the accused for cross-examination, the interests of the victims or witnesses. The courts should not easily breach the rights of the accused unless it felt that the interests of the victim or witnesses required that identity or face-to-face confrontation needed to be protected.48

Chapter VII is entitled 'Procedure for Deciding Anonymity of Witnesses in India – (i) during investigation as well as at inquiry; and (ii) during trial'. In this Chapter, the Commission has referred to the existing procedure under some special statutes and the procedure in United Kingdom, Australia and New Zealand on the subject. The Commission has also discussed relevant case law of these countries dealing with the above mentioned procedural aspect.49

Chapter VIII is entitled, 'Stage at which Identity of Witness has to be protected – investigation, pre-trial or trial and post-trial'. The Commission has discussed the necessity of providing identity protection to a witness at the stage of investigation, inquiry, trial and post-trial.50

In Chapter IX entitled 'Two-way closed: circuit television for examining the victim and witnesses during trial in the Sessions Court', the Commission has referred to the procedure of closed circuit television or video-link. This procedure can be followed at the trial by Sessions Court in respect of witnesses or victims who have earlier obtained witness protection orders during investigation or inquiry or before commencement of recording of evidence at the trial.51 The Commission concluded that in Code of Criminal Procedure or in the special Acts referred earlier, there is so far no provision which permits screening or closed-circuit television.

Chapter X is entitled 'Consideration of Responses to the Questionnaire and Recommendations on the Question of Witness Anonymity'. In this chapter, the

48 See, Chapter VI, id., p.86-87.
49 For details see, Chapter VII, id., pp.98-100.
50 For details see, Chapter VIII, id., pp.107-116.
51 For details see, Chapter IX, id., pp.117-131.
Commission has made recommendations on the question of providing identity protection to witnesses, according to the questions posed in the Questionnaire of the Consultation Paper.

Chapter XI is entitled 'Witness Protection Programmes'. In the Chapter VII of the Consultation Paper, the Commission has referred to Witness Protection Programmes existing in Australia, South Africa, Hong Kong, Canada, Portugal, Philippines, the United States of America, France, Czechoslovakia, Republic of Korea, Japan, Netherlands, Germany and Italy.

In Chapter XI of this Report, the Commission have summarised that basic features common to the witness protection programmes available in these countries.\(^52\)

In Chapter XII entitled, 'Analysis of Responses to Questionnaire, the Commission has discussed and analysed all the responses to the Questionnaire of the Consultation Paper on the establishment of a Witness Protection Programme in India.

In Chapter XIII, 'Questionnaire Discussion of Responses – Recommendations', the Commission has proposed recommendations on the question of introduction of Witness Protection Programme in India.

After going through the Report the important observations and recommendations of the Law Commission can be summed up as follows:

(i) The Commission has highlighted the need for protection of identity of victims and witnesses in all the cases where offences are serious. As regards the meaning of the words 'serious offences', the Commission proposed them as offences triable by Court of Sessions.\(^53\) The Commission opined that witness protection should apply both to special offences falling under the special statutes as well general offences of serious nature

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\(^52\) See, id., pp.158-160.
\(^53\) See, Law Commission of India, *One Hundred and Ninety Eighth Report*, 2006, p.84. The Commission suggested that "all criminal cases relating to offences under the Indian Penal Code, 1860 or under special laws, if they are exclusively triable by a Court of Session, or by Courts equivalent in rank to Courts of Sessions, or by Special Courts trying serious offences, then they must be treated as 'serious' cases for purposes of victim and witnesses protection." Also see, Schedule I, the *Witness (Identity) Protection Bill*, 2006.
falling under the *Indian Penal Code*, as fear and danger to witnesses is common to both cases.\(^{54}\)

(ii) The Commission expressed its view that in all cases triable by Courts of Session and Courts of equal designation or Special Courts, wherever there is proof of danger to the life or property of the witness or of his relative, witness identity protection must be available. The Commission observed that it is not necessary that witness protection be confined only to cases of terrorism and sexual offences.\(^{55}\)

(iii) The Commission observed that the accused has a right to know the names and addresses of prosecution witnesses, so that he may inquire whether the witnesses were competent to give evidence with regard to the offence and to exercise his right of cross-examination, but it observed that the said right of the accused is not absolute. The Commission, therefore, suggested that it has to be balanced against the rights of the victims and other prosecution witnesses so that they can depose without any fear or danger to their lives or property or to the lives or property of their close relatives. No doubt, this procedure must be resorted to in exceptional circumstances and provided further if the Court is satisfied that the victim or witness's evidence is credible.\(^{56}\)

(iv) The Commission recommended that in such cases, the victim can be permitted to depose with an intervening screen or through video-link so that he need not face the accused; and the prosecution witnesses may depose by an arrangement under which the accused will not be able to see them and their identity will not be disclosed to the accused or his lawyer. In

\(^{54}\) See, *id.*, pp.79-80.  
\(^{55}\) *id.*, p.115.  
\(^{56}\) *id.* p.83.
either case, the judge will be enabled to see the victim or the prosecution witness, while they are deposing.\textsuperscript{57}

(v) The Commission also observed that the power of the Criminal Courts to grant victim or witness identity protection is based on the 'inherent power' of the Court. The Commission observed that according to Section 482 of the \textit{Code of Criminal Procedure}, 1973, the High Court has inherent jurisdiction in criminal matters like civil matters. It also referred to the decision of the Hon'ble Supreme Court in \textit{Bindeswari Prasad Singh v. Kali Singh}\textsuperscript{58}, whereby it held that Sessions Courts and Magistrates' Courts do not have inherent powers. The Commission observed that criminal courts at the trial stage, like the Magistrates Courts and Sessions Courts cannot pass orders as to anonymity of witnesses as they have no such inherent power. Therefore, it recommended that legislation is necessary to confer powers on these courts to pass anonymity orders.\textsuperscript{59}

(vi) The Commission emphasised that there should be a procedure for granting anonymity at the three stages, namely during investigation, inquiry and trial. Therefore, there is a need for a procedure by which witness anonymity can be granted at the three stages mentioned above, by the Sessions Court or other equivalent Special Courts.\textsuperscript{60} The Commission recommended that Indian legislature should adopt section 13B and 13C of the \textit{Evidence (Witness Anonymity) Amendment Act}, 1997 of New Zealand, for the purpose of deciding a procedure for granting anonymity to witness during investigation, inquiry and trial. According to the Commission, these provisions contain a fair

\textsuperscript{57} \textit{ibid.} p.83. The Commission suggested that "all criminal cases relating to offences under the \textit{Indian Penal Code}, 1860 or under Special Laws, if they are exclusively triable by a Court of Session, or Courts equivalent in rank to Courts of Sessions or by Special Courts trying serious offences, then they must be treated as 'serious' cases for purposes of victim and witness protection."

\textsuperscript{58} AIR 1977 SC 2432.

\textsuperscript{59} For details, see, Chapter VI, \textit{One Hundred and Ninety Eighth Report}, pp.86-97.

\textsuperscript{60} For details, see, \textit{id.}, p.98.
balancing of rights of the witnesses and victims on the one
hand, and the rights of the accused on the other.\textsuperscript{61}

Section 13B of the abovementioned Act relates to the pre-trial
anonymity while section 13C deals with the procedure for
granting anonymity during the trial. Otherwise, both the
sections are based on the same lines. The procedure provided
under the sections requires that an application for anonymity
can be filed by prosecutor or defendant to a judge for
exempting the witness from disclosing his name, address and
occupation or any other particulars likely to lead to the
witness's identification.\textsuperscript{62}

It is, further, provided that the judge must hear and determine
the application in chambers and must give each party an
opportunity of being heard.\textsuperscript{63} If the judge believes that there are
reasonable grounds that safety of the witness or of any other
person is likely to be endangered or there is likely to be serious
damage to the property, he can pass an order withholding the
witness's identity until the trial.\textsuperscript{64}

Once the order granting anonymity has been passed no oral
evidence may be given, and no question shall be put to
witnesses, if relates to disclosing of his identity. Further
publication any of particulars relating to witness's identification
is prohibited.\textsuperscript{65}

(vii) The Commission recommended that witness anonymity must
be maintained at the stages investigation, inquiry and even at

\begin{footnotesize}
\begin{enumerate}
\item See, \textit{id.}, p.102.
\item For details see, section 13B (2), the \textit{Evidence (Witness Anonymity) Amendment Act}, 1997, New Zealand, quoted in \textit{id.}, p.102.
\item For details see, section 13B (2), the \textit{Evidence (Witness Anonymity) Amendment Act}, 1997, New Zealand, quoted in \textit{id.}, p.103.
\item For details see, section 13B (2), the \textit{Evidence (Witness Anonymity) Amendment Act}, 1997, New Zealand, quoted in \textit{id.}, p.104.
\item For details see, section 13B (2), the \textit{Evidence (Witness Anonymity) Amendment Act}, 1997, New Zealand, quoted in \textit{id.}, p.105.
\end{enumerate}
\end{footnotesize}
the trial. For granting anonymity during various stages a 'preliminary inquiry' should be held by the Magistrate. The Commission recommended that:

Firstly, if a police officer before recording statements of witnesses, under Section 161 of the Code of Criminal Procedure, 1973, feels that witness identity has to be protected, he should apply before the Magistrate concerned seeking permission to record the statement under a pseudonym. However the identity should be made known to the Magistrate. The preliminary inquiry, at the stage of investigation, should be held in camera. There is no need to hear the accused at this stage.\(^{66}\)

Secondly, at the stage of inquiry a fresh 'preliminary inquiry' has to be conducted by the Magistrate or the Session Judge, for the purpose of granting anonymity to witnesses. The inquiry will be held in camera but the accused will have to be heard on the question of granting anonymity to the witness. The purpose of such inquiry is to decide whether the witness's life or property or that of his relatives is in danger.\(^{67}\)

Where Magistrate grants an anonymity order, during inquiry, it will continue for the subsequent stages including trial and thereafter.\(^{68}\) The Commission proposed that after the trial, in appeals and even after the conviction or acquittal the pseudonym should continue.\(^{69}\)

But where application is filed before recording of evidence at the trial the application will be filed before the Sessions Court

\(^{66}\) See, id, p.111. Also see, section 5, the Witness (Identity) Protection Bill, 2006.

\(^{67}\) See, id., p.113, Also see, sections 8-10, the Witness (Identity) Protection Bill, 2006

\(^{68}\) See, ibid.

\(^{69}\) id., p.115.
and will have to be decided before the recording of the regular evidence of the trial commences.\textsuperscript{70}

(viii) The Commission recommended that there need be no proof of actual danger to the life the witness or his relative or their property but proof of likelihood is sufficient. The material or evidence placed for the purpose must be reliable.\textsuperscript{71}

(ix) The Commission further recommended that at the stage of investigation or inquiry, if the Magistrate comes to the conclusion that witness anonymity order has to be passed, he shall have to direct that in all documents which contain references to identity, including section 161 statements or section 164 statements, the charge sheet of which a copy has to be given to the accused the name and address and other information that may lead to the identification of the witness should not be reflected.\textsuperscript{72} The Commission, further, recommended that the details relating to identity of witness should not be reflected in the court proceedings also.\textsuperscript{73}

(x) The Commission recommended that wherever anonymity is sought by the prosecution in respect of anonymity, the certificate by the Police Commissioner or other senior police officer is not sufficient. The matter requires an order of the Court by way of a judicial order. However, such certificate may be a piece of evidence which the Court shall have to consider while deciding whether to grant anonymity or not.\textsuperscript{74}

(xi) The Commission recommended that so far as, an order by the Magistrate at the stage of investigation is concerned, there need be no appeal by the prosecution or the witness if the application

\textsuperscript{70} id. p. 155.
\textsuperscript{71} See, p.184.
\textsuperscript{72} id., p.146.
\textsuperscript{73} id. p.148., Also see, section 7, 11, the Witness (Identity) Protection Bill, 2006.
\textsuperscript{74} id. pp. 139-140.
is refused by the Magistrate, because an appeal can delay the investigation which is time bound.⁷⁵

(xii) The Commission recommended that where the witness and victims who are not known to the accused have been granted anonymity by the session court, their evidence should be recorded with the help of a two way television or video-link and two way audio-link.⁷⁶ According to the Commission the arrangement must be that the victim or witness who seeks protection of identity, the public prosecutor and the judge, his court master and stenographer and technical personnel will be in the courtroom, while the accused and the defence lawyer will be in the another room. There will be a video-screen in each room. The camera in the room of the victim or witness, prosecutor and judge will not be focussed on the victim or witness whose identity is to be kept confidential. It will be focussed on the Judge and the prosecutor who are in the courtroom. The judge and the prosecutor over whom the camera is focussed will be seen on the screen which is kept in the room of the accused and the defence lawyer.⁷⁷ There will be a two way audio system also connecting both rooms.⁷⁸ The Commission also suggested that the voice of the witness can be distorted by an audio-device.⁷⁹

(xiii) The Commission also recommended that in the case of victims or witnesses not known to the accused, in as much as question of witness identity is involved, it is necessary to exclude the public and media from both the witness room as well as the court room. According to the Commission, such exclusion in

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⁷⁵ id. p.155. Also see, section 6, of the *Witness (Identity) Protection Bill*, 2006.
⁷⁶ For details, see Chapter IX, p. 117-131, Also see, section 12, the *Witness (Identity) Protection Bill*, 2006.
⁷⁷ id. pp.130-131.
⁷⁸ *ibid.* The Commission has provided these procedures in Schedule 1 and Schedule 2, of the Draft Bill.
⁷⁹ See, p.150, Also see, section 12, the *Witness (Identity) Protection Bill*, 2006.
the interests of administration of justice and preserving the privacy of witnesses and protecting them from danger to their life or property, will be valid and not hit by Article 14 or Article 19(1) of the Constitution of India.\(^80\)

(xiv) The Commission observed that where a victim is known to the accused, there is need to prevent the accused from seeing the victim. But the witness has to be permitted to give evidence without facing the accused, if he claims trauma. Here, the only need is to prevent trauma for the victim-witness, which he or she will suffer if there is face to face confrontation with accused and there is no need for victim or witness identity protection.\(^81\) The Commission recommended that in such cases, also the evidence should be recorded with the help of two way television or video link so that victim may depose without seeing the accused physically, so as to prevent trauma.\(^82\)

In such cases, there will be a video screen in the courtroom, so that the Judge and the accused can watch the victim-witnesses, the prosecutor and the defence lawyer examining the victim-witnesses. In the other room where the victim and the two lawyers are present, there can be another screen which will be used only at the initial stage, when the victim has to identify the accused. After that is done, that video camera in the room, where the accused is stationed will not be focussed on the accused. While the victim deposes thereafter, in chief or cross-examination, he will not be seeing the accused in the screen in his room any longer. The defence lawyer sees the victim directly in his room and can examine his or her demeanour. The judge and the accused can see the victim on the screen in their room and watch his or her demeanour. The court master and the

\(^{80}\) id. p.150.

\(^{81}\) id. p.126.

\(^{82}\) For details, see Chapter IX, p.126. Also see, section 13, the *Witness (Identity) Protection Bill*, 2006.
stenographer can also be in the room where the judge is sitting. There will be a two way audio mechanism by which the person in each room can talk to the others in another room.\(^{83}\)

(xv) The Commission expressed the view that Witness Protection Programmes are necessary in India. According to the Commission, they can be confined to cases triable by session courts or courts of equal rank and special courts, where witness protection outside the court is felt necessary. The Commission recommended that investigation agency or the public prosecutor can file an application for witness protection\(^{84}\) to the court.\(^{85}\)

(xvi) The Commission recommended that if the Union and State Governments want better conviction rates, they must come forward and allocate the necessary finances for Witness Protection Programmes.\(^{86}\)

(xvii) The Commission suggested that the magistrate while granting such identity protection under the programme, need not to give any notice to the accused. The magistrate may pass an order for keeping the identity of the witness confidential on the basis of relevant material produced by the police or the statement of the witness.\(^{87}\) The proceedings must take place in-camera.\(^{88}\)

(xviii) The Commission suggested that the witness may be granted new identity which would apply to all proceedings outside the

\(^{83}\) *id.*, p. 129.

\(^{84}\) Here Commission is discussing identity protection of the witness whereby witness moves in society under a different name or identity under the witness protection programme. The Commission has not discussed about measures of physical protection of the threatened witness.

\(^{85}\) See, *id.* p.178.

\(^{86}\) *id.* p.179

\(^{87}\) See, *id.*, p.181. Under section 14, the *Witness (Identity) Protection Bill, 2006,*" The technical personnel operating the two-way television or video link and the two-way audio system and the court-master or stenographer of the judge shall be administered an oath of secrecy in respect of the identity and other particulars of the threatened witnesses. It shall not be lawful for any of the persons to reveal the identity of the witnesses to any other person or body."

\(^{88}\) See, *id.*, p.185.
court. While recording the statement of the witness, his name and address should not be disclosed except to the investigation agency and the concerned Magistrate.\(^8^9\)

(xix) The Commission suggested that in extraordinary cases (triable by Court of Session), the witness protection programme must provide for other measures in addition to identity protection, if necessary. Such other measures may include police protection to witnesses' relatives or other persons in close contact with him, re-location to a place in India or abroad for a certain period, maintenance, providing accommodation, free transportation, survival allowance for a specific period of time etc.\(^9^0\) The magistrate must decide whether other measures apart from identity protection are necessary or not.\(^9^1\) The Commission further recommended that Union and State Governments must allocate adequate funds for these measures.\(^9^2\)

(xx) The Commission recommended that in the Witness Protection Programme, the police may decide which witness is required to be placed under the programme but only the Magistrate must decide whether he should be admitted to the programme or not.\(^9^3\)

First, the police must be satisfied that a victim or a witness's life is likely to be in serious danger. Such a decision must be taken by a senior police officer of the rank of Superintendent of Police or Commissioner of Police and he must, after recording his reasons for coming to such a conclusion, certify about his satisfaction.\(^9^4\) The police or public prosecutor must then move

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\(^8^9\) See, id., pp.180-181.
\(^9^0\) For details, see id. pp.179-180.
\(^9^1\) See, id. 185.
\(^9^2\) See, id., p.182.
\(^9^3\) See, id. 182.
\(^9^4\) id. 184.
the court of the concerned Magistrate who shall pass the order regarding the identity protection of the witness.95

(xxi) Another recommendation of the Law Commission was that the Chief Justice of the State High Court must be Patron-in-Chief of the Witness Protection Programme. He may administer the funds through the State Legal Aid Authority constituted for each High Court and headed by a High Court Judge. When a Magistrate passes an order admitting a witness to the programme, the order should be communicated to the State Legal Aid Authority which should issue appropriate directions to the District Legal Services Authority, for release of funds for the implementation of the order.96

(xxii) The Commission proposed that out of the amount allocated to the State Legal Aid Authority, a certain amount must be set apart for funding the Witness Protection Programme.97

(xxiii) The Commission further suggested that in several cases protection under the Programme should also be extended to the spouse, children or parents, brother or sister i.e. close relatives of the witness who are likely to be threatened.98

(xxiv) Further, if it is decided to relocate a witness or victim at a different place and he or she happens to be the breadwinner, the immediate family members of the witness may be deprived of all means of livelihood if the witness alone is relocated and in such cases, interest of justice certainly require that the immediate family members be also relocated.99

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95 See, id., p.185. Also see, section 10, the Witness (Identity) Protection Bill, 2006.
96 See, id., p.183.
97 id. p.183.
98 See, id. 185.
99 id., pp. 185-186.
The Commission advised that a Memorandum of Understanding (MOU) should be entered by the victim or witnesses with the District Superintendent of Police or the Commissioner of Police, as the case may be, and they would move the Magistrate for admitting the victim or witnesses to the programme. On such orders, funds will be released thereafter by the Legal Aid Authorities as stated earlier.\textsuperscript{100}

The MOU must contain broad obligations, rights and restrictions of the both parties which have to abide by them. The parties to MOU may approach the Magistrate for the purpose of enforcement of its terms. In case of breach of MOU the parties can move the Court for appropriate orders.\textsuperscript{101}

If the protected witness violates the MOU and fails or refuses to testify without justifiable cause, both action for contempt of Court (by concerned High Court) and cancellation of the order admitting the witness to the programme must follow.\textsuperscript{102}

Lastly, the Commission recommended that if a victim or witness is given physical protection outside Court or is relocated and given a different name, the accused has no right to appeal against the protection order. Such protection does not affect the rights of the accused. However, if the victim or witness is given witness identity protection the accused can appeal to the High Court as provided under section 15\textsuperscript{103} of the Draft Bill.\textsuperscript{104} Similarly, if a Magistrate refuses to admit victim

\textsuperscript{100} \textit{id.}, p.191.
\textsuperscript{101} For details, see, \textit{id.}, pp.191-192. The Commission has recommended that "obligations listed in the Canadian Witness Protection Act, 1996 and the South African Witness Protection Act, 1998 should be adopted." For details, see, \textit{id.}, pp.188-191.
\textsuperscript{102} See, \textit{id.}, p. 196 Under the Contempt of Courts Act, 1971, the judge will inform the concerned High to take action under the Act.
\textsuperscript{103} Section 15 provides that "any person who is aggrieved by an order passed by the Magistrate regarding identity protection may appeal against such order to the High Court within thirty days from the date of order."
\textsuperscript{104} See, \textit{id.}, p.197.
or witness to a witness protection programme, he or she must have a right of appeal to the High Court.

After analysing the report it is respectfully submitted that the Law Commission has taken a very important issue of witness protection in detail. The Law Commission has very rightly stressed the need for identity protection of threatened witnesses in criminal cases involving serious offences. The Commission has pertinently observed that there is a need to balance the rights of the accused to open public trial on the one hand and right of a witness to identity protection on the other. One of the noteworthy observations is that the identity protection should be provided during the investigation, inquiry as well as trial if required.

The Commission has emphasised that Witness Protection Programmes are necessary in India for achieving better conviction rates. However, it has failed to address the issue of providing physical protection to a threatened witness in detail. Any law covering only the identity protection and leaving the physical protection of a witness will be inadequate and insufficient to ensure the physical and psychological well-being of a witness. It has suggested that Witness Protection Programmes should be confined to cases of serious nature. It is to be noted that the Law Commission has failed to recognise the need for protection in cases, where offence is not serious, but the accused is rich, mighty and influential and has all chances to influence or intimidate the witness. In such cases also, the witness may require protection, if there is any threat to his life and property or to life and property of his close relatives.

3.10 **The Witness (Identity) Protection Bill, 2006**

In its One Hundred and Ninety Eighth Report, the Law Commission of India has discussed witness identity protection and witness protection programmes. In the report, the Commission has annexed a Draft Bill as Annexure I with regard to witness identity protection. The *Witness (Identity) Protection Bill, 2006* contains five chapters covering seventeen sections. It has also two schedules appended to it.
The Draft Bill seeks to provide for identity protection to threatened witnesses in criminal cases involving serious offences.\textsuperscript{105} It provides for procedure and mechanism for such protection.\textsuperscript{106} The main features of the Bill are discussed as follows:

(i) The Bill mainly deals with identity protection of the threatened witnesses. According to the Bill, the identity in relation to a person includes name, sex, names of parents, occupation and address of such person.\textsuperscript{107}

(ii) One of the important definitions provided under the Bill is \textit{threatened witness}. The Bill provides that \textit{threatened witness} means any witness in respect of whom, there is likelihood of danger to the safety of his life or life of his close relatives; or serious danger to his property or property of his close relatives, by reason of his being a witness.\textsuperscript{108} Close relatives, as given in the Bill includes spouse, parents, grandparents, sons, daughters, grand children, brothers and sisters.\textsuperscript{109}

It is submitted that the definition of \textit{threatened witness} includes actual danger as well likelihood of danger to the life and property of a witness as well as of his close relatives. Thus, protection is provided when witnesses' own or his close relative's life or property is in danger.

(iii) Another important definition provided under the Bill is that of \textit{witness}. Presently, the term witness has not been defined under the \textit{Indian Evidence Act}, 1872 or any other law. The Bill defines \textit{witness} as any person who is acquainted with the facts and circumstances, or is in possession of any information or has

\textsuperscript{105} Section 2 (d), the \textit{Witness (Identity) Protection Bill}, 2006, provides that "serious offence means an offence which is described as triable by a Court of Session in the First Schedule to the \textit{Code of Criminal Procedure}, 1973, and includes any offence which is required to be tried by a Court of Session or any other equivalent designated court or special court, by a special law."

\textsuperscript{106} See, the Law Commission of India, \textit{One Hundred and Ninety Eighth Report}, p. 199.

\textsuperscript{107} See, section 2 (a), the \textit{Witness (Identity) Protection Bill}, 2006.

\textsuperscript{108} Section 2 (e), the \textit{Witness (Identity) Protection Bill}, 2006.

\textsuperscript{109} Section 2 (b), the \textit{Witness (Identity) Protection Bill}, 2006.
knowledge, necessary for the purpose of investigation, inquiry or trial of any crime involving serious offence, and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case. The term witness includes a victim of such serious offence.\(^{110}\) The definition deals specifically with witnesses appearing in criminal cases involving serious offences.

(iv) An important concept discussed in the Bill is that of identity protection of threatened witnesses, which is provided at three stages. These three stages are discussed as under:

3.10.1 Identity Protection during Investigation

The provision of identity protection during investigation can be discussed under the following headings:

3.10.1.1 Application for Identity Protection

The Bill provides that "during the course of investigation of any serious offence, if the officer in-charge of investigating agency is satisfied that for the purpose of effective investigation of the case, it is necessary to protect the identity of any threatened witness, he may, through the Public Prosecutor or Assistant Public Prosecutor, as the case may be, apply in writing to the Judicial Magistrate First Class or Metropolitan Magistrate, seeking an identity protection order."\(^{111}\) It is provided that "such application, a pseudonym or a letter of English alphabet shall be used to represent the identity of a threatened witness."\(^{112}\) The relevant material and documents proving that the witness to be threatened as well as a certificate of an officer of the rank of Superintendent of Police or Commissioner of Police certifying that the witness is a threatened witness should be submitted with the application\(^{113}\)

It is submitted that the Bill fails to mention the criteria based upon which the Investigation officer should decide that a witness needs identity protection. A separate

\(^{110}\) Section 2 (g), the Witness (Identity) Protection Bill, 2006.

\(^{111}\) Section 4 (1), the Witness (Identity) Protection Bill, 2006.


\(^{113}\) Section 4 (3), the Witness (Identity) Protection Bill, 2006.
provision should be made where witnesses may directly apply before the Judicial Magistrate First Class for his identity protection.

3.10.1.2 Ex-parte Preliminary Inquiry by the Magistrate

It is provided that "when an application for identity protection order is made before the magistrate, he shall hold a preliminary inquiry in-camera, to determine whether the witness is threatened and whether there is a need to pass a protection order." During the course of the preliminary inquiry:

(a) No prosecutor, officer of the Court, or other person present or involved in the preliminary hearing shall disclose or reveal or leak out any information regarding the true identity of the witness, or any other particulars likely to lead to the witness’s identification;

(b) No oral evidence shall be given, and no question may be put to any person, if such evidence or question relates directly or indirectly to the true identity of the witness who is subject of the application.

It is further provided that while considering the application the Magistrate shall have regard to the follows factors:

(a) The general right of the accused to know the identity of witness;
(b) The principle that witness anonymity orders are justified only in exceptional circumstances;
(c) The gravity of the offence;
(d) The importance of the threatened witness’s evidence in the case;
(e) Whether the witness’s statement, if any, as to why he is

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115 See, Section 5 (4) and (5), the Witness (Identity) Protection Bill, 2006.
116 Section 5 (6), the Witness (Identity) Protection Bill, 2006.
a threatened witness and as to why there is necessity to pass a protection order, is reliable; and

(f) Whether there is other evidence, which corroborates the threatened witness’s evidence in respect of the offence.

It is submitted that while considering the application for identity protection, the gravity of threat perceived by the witness should also be considered.

3.10.1.3 Order by the Magistrate

The Bill provides that "the Magistrate may accept or dismiss the application for seeking identity protection. If the application is accepted, he shall, pass a reasoned judicial order that until the investigation is completed and the police report referred to in sub section (2) of section 173 of the Code of Criminal Procedure, 1973 or charge sheet under any other law is forwarded to the Magistrate or Judge, the identity of threatened witness shall not be reflected or mentioned in:"

(a) any document prepared or any statement recorded under sections 161 and 164 of the Code of Criminal Procedure, 1973 (Act 2 of 1974) or any other statement recorded during the course of investigation, including the case diary;

(b) the police report or charge sheet referred to above and documents forwarded along with the police report or charge sheet;

(c) any other document forwarded to the Magistrate or Judge in any proceeding in relation to such offence;

(d) any proceeding before the Magistrate or before any other Court, during investigation, in relation to such offence."

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117 Section 6 (1), the Witness (Identity) Protection Bill, 2006.
The Magistrate may dismiss the application, by a reasoned judicial order, if he is satisfied that:\(^{118}\)

(a) the witness who is the subject of the application is not a threatened witness, or

(b) withholding the identity of such a witness

(i) would be contrary to the interests of justice, or

(ii) would not outweigh the right of the accused to know the identity of the witness.

The Bill prohibits that "the true identity of witness who is subject of the application shall not be mentioned or reflected in any order sheet or proceeding. It shall not be lawful for any person to print or publish in any manner any matter in relation to any proceeding under the abovementioned provisions."\(^{119}\) If any person contravenes this provision he shall be punished with imprisonment of either description which may extend to two years and shall also be liable to fine which may extend upto rupees ten thousand.”\(^{120}\)

### 3.10.2 Identity Protection after completion of investigation

The granting of identity protection after completion of investigation can be discussed under the following headings:

#### 3.10.2.1 Application for Identity Protection

The Bill states that "once the investigation is completed, the Police Report referred to in sub section (2) of section 173 of the Code of Criminal Procedure, 1973 (2 of 1974) or charge sheet referred to in any other law is forwarded to the Magistrate or Judge. If, before the examination of witnesses begins to commence at the trial, including inquiry, the Assistant Public Prosecutor or the Public Prosecutor, as the case may be, is of opinion that it is necessary to protect the identity of a threatened witness, he may, move an application in writing to the Judicial Magistrate First Class or Judge, before whom the case is pending seeking an identity protection order. It does not matter

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\(^{118}\) Section 6 (2), the Witness (Identity) Protection Bill, 2006.

\(^{119}\) Section 7, the Witness (Identity) Protection Bill, 2006.

\(^{120}\) See, section 16, the Witness (Identity) Protection Bill, 2006.
whether or not, identity protection in respect of such threatened witness was sought or ordered at the stage of investigation.\textsuperscript{121} Such application can also be moved by the threatened witness.\textsuperscript{122} In case new circumstances arise, fresh application for identity protection can be filed later on.\textsuperscript{123}

3.10.2.2 Preliminary Inquiry by Magistrate or Judge

Once the application is filed, the Magistrate holds a preliminary inquiry to determine whether the witness is threatened witness and needs protection order. Such inquiry is held in camera.\textsuperscript{124} For the disposal of the application, the Magistrate may call for any relevant material or document from such witness.\textsuperscript{125} While the inquiry is being conducted, the prosecution as well as the accused is given an opportunity of being heard.\textsuperscript{126} However, while examining witness, the accused and his pleader are not allowed to be present.\textsuperscript{127}

The Bill provides that "the Magistrate or Judge, as the case may be, shall inform the accused or his pleader as to the apprehensions of the witness and as to why he is a threatened witness and the necessity for passing a protection order. It is further provided that the Magistrate or Judge shall not disclose the identity of the witness or any other particulars which may lead to the identification of the said witness. If the accused or his pleader wants to elicit further information from the prosecution of the threatened witness on the question of likelihood of danger to the life or property of the said witness or his close relatives, they may be permitted to furnish a list of questions to be answered by the prosecution or the said witness but no question or information which may lead directly or indirectly to the identification of the said witness shall be permitted."\textsuperscript{128} Other provisions are same as in the case of ex-parte preliminary inquiry held at the stage of investigation.\textsuperscript{129}

\textsuperscript{121} See, section 8 (1), the Witness (Identity) Protection Bill, 2006.
\textsuperscript{122} See, section 8 (2), the Witness (Identity) Protection Bill, 2006.
\textsuperscript{123} See, section 8 (4), the Witness (Identity) Protection Bill, 2006.
\textsuperscript{124} See, section 9 (1), the Witness (Identity) Protection Bill, 2006.
\textsuperscript{125} See, section 9 (2), the Witness (Identity) Protection Bill, 2006.
\textsuperscript{126} See, section 9 (3), the Witness (Identity) Protection Bill, 2006.
\textsuperscript{128} See, section 9 (4), the Witness (Identity) Protection Bill, 2006.
\textsuperscript{129} See, sub-sections (4) to (6) of section5, the Witness (Identity) Protection Bill, 2006.
3.10.2.3 Order by the Magistrate or Judge

The Bill provides that "after consideration of the application and all materials and documents submitted in support of the application by the parties; and the statements recorded" the Magistrate may order for the identity protection of the witness, if he is satisfied that:

(a) the witness who is subject of the application is a threatened witness;

(b) withholding the threatened witness’s identity until the judgment in trial is given and if any appeal or revision is presented against the judgment, until the decision in the appeal or revision, as the case may be, is given would not be contrary to the interests of justice; and

(c) the need for passing a protection order outweighs the general right of the accused to know the identity of the witness.

However, the Magistrate or Judge may, dismiss the application, if he is satisfied that the witness is not being threatened or providing identity protection to such witness will be against the interests of justice.

It is further, laid down that "the true identity of witness who is subject of the application shall not be mentioned or reflected in any order sheet or proceeding. It shall not be lawful for any person to print or publish in any manner any matter in relation to any proceeding under this part. If any person contravenes this provision he shall be punished with imprisonment of either description which may extend to

\[\text{Under sub-section (3) of section 9, the Witness (Identity) Protection Bill, 2006.}\]
\[\text{See section 10, the Witness (Identity) Protection Bill, 2006.}\]
\[\text{See, Section 10 (2), the Witness (Identity) Protection Bill, 2006.}\]
\[\text{See, Section 11, the Witness (Identity) Protection Bill, 2006.}\]
two years and shall also be liable to fine which may extend up to rupees ten thousand.\textsuperscript{134}

3.10.3 Identity Protection during the Trial

Chapter III of the Bill contains provisions with respect to protection of witnesses and victims at the stage of trial. It provides that "recording of statements of threatened witnesses should be done with the help of close circuit television. It is provided that when an order for identity protection has been passed in respect of a threatened witness, his statement in the court during trial shall be recorded by using two-way closed circuit television or video link in such a manner that the accused and his pleader shall not be able to see the face or body of the witness.\textsuperscript{135}

It is further, provided that "the accused and his pleader shall be entitled to hear the voice of the witness during recording of the statement. However, the Presiding Judge may, on his own or on an application made by the prosecution or the threatened witness, if he is so satisfied, direct that while recording the statement, the voice of the witness shall be distorted, and in that event, the accused or his pleader shall be entitled to hear the distorted voice. In such a case the undistorted voice-recording shall be kept in a sealed cover and the Presiding Judge shall have the exclusive right to access the undistorted voice.\textsuperscript{136} During the recording of the statement of the witness the general public and media are not allowed to be present in the court.

The Bill provides that "technical personnel operating the two-way television or video link and the two-way audio system and the court-master or stenographer of the Judge shall be administered an oath of secrecy in respect of the identity and other particulars of the threatened witnesses. It shall not be lawful for any of the persons to reveal the identity of the witnesses to any other person or body.\textsuperscript{137}

The provisions of this Bill are applicable to victims of serious offences and threatened witnesses in relation to serious offences. However, the Bill should be applicable to those witnesses also, who are appearing in criminal cases involving less serious

\textsuperscript{134} See, Section16, the Witness (Identity) Protection Bill, 2006.

\textsuperscript{135} See, Section 12 (1), the Witness (Identity) Protection Bill, 2006. The procedure for the same is provided in Schedule 1 of the Bill.

\textsuperscript{136} ibid.

\textsuperscript{137} See, section14, the Witness (Identity) Protection Bill, 2006.
offences but where the accused is rich and influential.\textsuperscript{138}

3.11 Sum-Up

After the foregoing discussion, it is submitted that there is no scarcity of reports discussing the problems faced by the witnesses under Indian criminal justice system. However, the reports of the Law Commission of India, prior to the One Hundred and Ninety Eighth Report, have not adequately dealt with the need and relevance of protection of witnesses. While the One Hundred and Ninety Eighth Report has taken up the issue in detail, yet its main emphasis is on providing identity protection of the witnesses and the issue of physical protection has been discussed in brief only. Yet, the efforts and contribution of the Law Commission are commendable, as it has not only identified the problem, but discussed the possible solutions also. It has given a model bill also. Earlier, the Report of Malimath Committee has contributed in highlighting the problems faced by the witnesses appearing in a criminal trial. Implementation of recommendations of the aforementioned Reports can play an important role in improving the conditions of the witnesses. As submitted earlier, a witness, along with a victim and accused, is a key actor in a criminal case. His needs and interests can no longer be ignored. It is high time that a witness's importance and safety be recognised in the criminal justice system of India. Today, the concepts like rights of accused, rights of victim, victim compensation have gained importance in Indian criminal jurisprudence. Now, it is essential that the rights of a witness and his safety also be acknowledged as an important concept of criminal jurisprudence.

It is submitted that in the earlier reports, the Law Commission has failed to address the issue of providing physical and identity protection of the witnesses. But in this Consultation Paper, the Law Commission has discussed the subject matter in detail. While the aspect of providing identity protection has received full attention, the issue of providing physical protection to witnesses has failed to receive adequate attention. Further, the Paper has not dealt with issues like payment of inadequate allowances, harassment by court officials, lawyers and inadequate facilities in court premises. It

\textsuperscript{138} See, section15, the \textit{Witness (Identity) Protection Bill, 2006}. 
has done a detailed research on the subject matter including research on the relevant case law and Witness Protection Programmes existing in other countries, which is of great relevance for policy makers, academicians and researchers.