

The Draft Bill for the Assistance and Protection of Victims of Crime and Witnesses:  
Critique and Recommendations  
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The provision of victim and witness protection is fundamental to the credibility of any justice system and to the battle against impunity. Asking victims and witnesses to come forward without the provision of protection may indeed be irresponsible in cases where they face the possibility of being re-victimised or becoming victims in their own right by reason of living up to their duty to provide their evidence. For this reason, the drafting of the *Draft Bill for the Assistance and Protection of Victims of Crime and Witnesses* (the "Draft Bill")<sup>2</sup> by the Law Commission of Sri Lanka is a welcome development in the sphere of rule of law in Sri Lanka. With the widespread impunity in Sri Lanka, Parliament must be urged to adopt the Draft Bill as expeditiously as possible. However, as the Draft Bill reads at the moment, there are serious concerns as whether it would indeed provide the protection required not only to encourage victims and witnesses to come forward, but also to ensure their safety should they choose to do so. With this concern in mind, this paper will consider some of the concerns with the current form of the Draft Bill and present recommendations for how these concerns could be addressed. While the Draft Bill provides both victim and witness assistance and protection measures, only the protection measures will be considered here as the assistance measures appear to be sufficient.

### Background of the Draft Bill

The initiative of the Draft Bill originally came from S.S. Wijeratne of the National Centre for Victims of Crime with the view of promoting victim rights. The Law Commission was asked in 2000 to prepare draft legislation on victim and witness assistance and protection which it did and forwarded to the Ministry of Justice. However, the draft became stalled due to its provisions for the establishment of a fund for victims. In 2005, with funding from the Asia Foundation, the Law Commission was again asked to prepare a draft bill. The Solicitor General C.R. de Silva, as he was then, took the lead in preparing the present draft bill with the input and amendments of the other members of the Law Commission. Once a draft was finalised by the Law Commission, a series of workshops were held with members of the Human Rights Commission, lawyers and other interested parties to provide recommendations. The final Draft Bill as it now stands was forwarded to the Ministry of Justice and Law Reform in late July 2007.

As the initiative for the Draft Bill came from the perspective of promoting victim rights rather than that of witness protection, the focus of the Draft Bill is also on victim rights and assistance. These sections are noticeably more comprehensive than those dealing with protection. While victim rights and assistance are important issues, they should not be allowed to overshadow the issue of witness protection. Although they are interrelated issues, they are not identical. Victim rights and assistance aim to ensure that victims are not re-traumatised in the course of investigations and prosecutions, to include them in the process as a means of assisting them to deal from their

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<sup>2</sup> Commentary based on the Law Commission's final version of the Draft Bill which was forwarded to the Ministry of Justice and Law reform on July 25, 2007.

ordeals and to provide them with compensation. While victim and witness protection also seeks to prevent the re-victimisation of witnesses or victimisation of witnesses, the focus is not on the restorative effect for the victim but rather on ensuring investigation and prosecution processes are successful and effective. Indeed in many countries such as Thailand, Canada and New Zealand, they are dealt with in separate pieces of legislation. There was reportedly a recommendation to address the two issues in separate legislation in Sri Lanka but in the final draft proposed by the Law Commission they are dealt with under the same bill. They do not have to be dealt with in separate legislation; however, strong victim rights and assistance are not acceptable substitutes for victim and witness protection.

## The Importance of Victim and Witness Protection

The proper functioning of a state's justice system depends on the willingness of victims to come forward and report crimes committed against them and the availability of witnesses to provide information and testify as to what they saw in a full and impartial manner. Thus where victims and witnesses feel threatened, undermining their willingness and ability to come forward, society as a whole is denied justice. Not only is the justice system undermined and justice in the particular case denied, but at an individual level, witnesses may themselves become victims of the investigation and judicial processes. In consideration of this, many countries have adopted victim and witness programmes in various forms to encourage the reporting of crimes, to maximise the likelihood that a witness will testify, and to protect vulnerable and intimidated witnesses.

It is well established that it is the duty of the state to provide protection for victims and witness. For example, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by the UN General Assembly in 1985 states that

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by...

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.<sup>3</sup>

The *International Covenant on Civil and Political Rights* ("ICCPR") builds on this principle by protecting certain rights including the right to life (article 6) and the right to security of the person (article 9) while article 2 requires that states adopt laws to give effect to such rights.

The adoption of victim and witness protection legislation would be an important step toward the realisation of the rights to life and security of the person in Sri Lanka. Although there are few reliable statistics on the prevalence of threats and attacks on victims and witnesses in Sri Lanka, anecdotal evidence suggests that is widespread and a serious concern. A few published allegations include:

- the killing of Gerald Perera, a witness in a trial of police on torture charges in 2005 the day before he was to testify in his case;<sup>4</sup>

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<sup>3</sup> UN General Assembly Resolution 40/34 of 29 November 1985, s. 6.

- threats against Dr. Kasippillai Manoharan, a prosecution witness in the killing of five Tamil youths in Trincomalee in January 2006 who was also the father of one of the victims;<sup>5</sup>
- the arrest, torture and intimidation of D. G. Premathilaka in Katugastota when he filed a fundamental rights case against police for having arrested and tortured him in January 2004, which continued into 2005;<sup>6</sup>
- the kidnapping and attempted killing of alleged torture victim Channa Prasanna Fernando, into whose case an inquiry was being conducted in 2004;<sup>7</sup>
- death threats to alleged torture victim J.V. Saman Priyankara from Matale to induce him to drop his case in 2004 and 2005;<sup>8</sup>
- threats against alleged torture victim Lalith Rajapakse to induce him to withdraw or settle his fundamental rights case against the police in Kandana;<sup>9</sup>
- threats and harassment by police in Puttalam against Saliya Pushpa Kumara, a 15-year-old alleged torture victim, including obstruction of medical attention;<sup>10</sup>
- threats and attempted abduction of Chamila Bandara, a 17-year-old who was allegedly tortured by officers of the Ankubura Police Station as well as threats against his family to induce him to withdraw his fundamental rights case. <sup>11</sup>

Indeed, although witness intimidation is not the only contributing factor, the very low conviction rate of only four percent similarly suggests that witness protection should be a priority in combating impunity in Sri Lanka. While the examples cited are cases against the police, the Draft Bill will have a wider significance than merely cases against the police. Victim and witness protection legislation is often also central to the prosecution of organised crime, sexual offences and cases involving child victims or witnesses.

Victim and witness protection is not only necessary with regards to criminal prosecution, but also for other semi-judicial processes as has been highlighted recently by the Presidential Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights. It has been reported that the Commission of Inquiry is facing difficulties gathering evidence due to witnesses not coming forward out of fear.<sup>12</sup> In its public statement of June 11, 2007, the International Independent Group of Eminent Persons which is observing the Commission of Inquiry expressed the following concerns:

We regret that the Commission still has no functioning victim and witness protection mechanism. In the absence of appropriate legislation, an effective scheme or functioning protection unit, we fail to understand how the Commission could have invited the public, as

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<sup>4</sup> "A Further Killing in Colombo and Possibility of Escalation of Violence", Asian Human Rights Commission, 31 May 2005.

<sup>5</sup> "Sri Lanka: Protect Witnesses in Trincomalee Killings" Human Rights Watch, June 28, 2006.

<sup>6</sup> "Threats and intimidation to those who seek justice in Sri Lanka" Asian Legal Resource Centre, April 4, 2005.

<sup>7</sup> Ibid.

<sup>8</sup> "UPDATE (Sri Lanka): Further intimidation faced by torture victim J.V. Saman Priyankara from Matale", Asia Human Rights Commission, June 23, 2006.

<sup>9</sup> "Statement on 'The need for a witness and torture victim protection scheme in Sri Lanka' received by Commission on Human Rights" Asian Legal Resource Centre, April 1, 2004.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ayesha Zuhair, "Probe on 15 HR violations: Fear keeps witnesses away", *Daily Mirror*, March 20, 2007.

it did as recently as 14 May 2007, to come forward and give evidence. As the Commission is operating without witness protection legislation, it is unable to guarantee the safety and security of witnesses. Summoning and examining potential victims and witnesses may create fear in their minds about safety and security, deterring them from coming forward to give evidence.<sup>13</sup>

## Foundational Principles

### Accessibility and Transparency

Victim and witness protection mechanisms are not only measures to provide actual protection, but also serve as confidence building measures. Victims and witnesses who have been threatened or attacked because of their evidence are unlikely to overcome their intimidation with only vague assurances of protection. They need to be assured that protection is accessible and will be effective. To provide that assurance, legislation must be clear and specific as to the conditions under which victims and witnesses will be able to benefit from protection, what kind of protection may be available and what the process will be. Similarly, the process through which a request for protective measures is made must not be unduly complicated such that it will discourage people from applying to the programme.

The principles of accessibility and transparency are serious concerns in the Draft Bill as it stands at present. Only three sections (sections 13 to 15) deal with victim and witness protection, while the rest focus on victim rights and assistance. The three sections that address victim and witness protection fail to provide essential details of what protection would be provided and how. Among the issues which are not addressed are the specific criteria under which protection is to be granted, how long protection will generally last, whether appeals to decisions are available. Similarly, it is not clear what exactly the process of application for protection is, and who will have access to the private information of the victims and witnesses. As it stands, the Draft Bill is unlikely to instil the necessary confidence in victims and witnesses to encourage them to come forward. It is hoped that if the recommendations set out in this paper are adopted these concerns will be remedied.

### Rights of the Accused

While victim and witness protection is fundamental to the proper functioning of a justice system, this protection must not be prejudicial to or inconsistent with the right of the accused to a fair trial. Article 14 of the ICCPR provides that all accused facing criminal charges have the right to “examine, or have examined, the witnesses against him”. This is based on the right to test the reliability and credibility of the witness’ testimony against him or her through cross-examination. In Sri Lanka, the rights of accused are provided for section 13(3) of the Constitution which provides for the right of an accused to be heard in person or by an attorney-at-law, at a fair trial by a competent court. This right is expanded upon in the *Code of Criminal Procedure* which among other rights provides for the right of the accused to cross-examine witnesses (section 184(2)), the right to make a defence and bring witnesses (section 201), the right to be represented (section 260) and the right to have evidence brought in the presence of the accused or his or her attorney (section 272). While not all witness protection measures such as expunging the names and

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<sup>13</sup> IIGEP public statement, June 11, 2007, <http://www.iigep.org/press-releases.htm>

addresses of witnesses from the public record will be prejudicial to these rights, a number of methods such as anonymity will call the respect of these rights into question and the use of these methods must be carefully considered.

### Right to Public Trial

Another integral component of a fair trial is that it be open to the public unless there is a compelling reason to the contrary. Article 14 of the ICCPR states in a criminal trial, everyone is entitled to “a fair and public hearing by a competent, independent and impartial tribunal established by law”. However, it also recognises that “the press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”. The rationale for public trials is based on a number of factors. These include maximising the opportunity for other witnesses to come forward with relevant information, preventing perjury and also wrongdoings by courts by allowing public scrutiny, promoting public discussion of courts’ processes and deterring other crimes by example. Public trials are therefore fundamental to the fair administration of justice and should not be lightly disposed of. As witness protection mechanisms will often entail excluding the public from the courtroom or not revealing details about victims and witnesses, these mechanisms must be weighed against the interests of the public to open trials.

Both the rights of the accused and the right to public trials may weigh against a number of witness protection mechanisms. The balance will be achieved when the safety and security of the witnesses is assured through the means which minimally affect the countervailing rights of public trials and the guarantees of defence for the accused. To assure this balance is achieved, victim and witness protection legislation must clearly set out the method by which the mode of protection will be determined and that it should minimally impact other rights which the Draft Bill does not currently do.

### **Institutional Structure Established by the Draft Bill**

#### Division of responsibilities

The Draft Bill provides for the establishment of a number of institutions to structure, oversee and implement the victim and witness protection programme. The National Authority for the Protection of Victims of Crime and Witnesses (the “Authority”) will consist of:

- a. four members appointed by the Minister of Justice who have academic or professional qualifications related to criminal justice,
- b. one member appointed by the Attorney General,
- c. the Secretary to the Minister responsible for Justice or an Additional Secretary,
- d. the Secretary of the Ministry in charge of Police or a nominee, and
- e. the Inspector General of Police or a nominee.<sup>14</sup>

Its general role is to promote the rights and entitlements of victims and witnesses, to develop and implement a compensation scheme for victims as well as an assistance and protection scheme for victims and witnesses, to make recommendations to the police and government departments for

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<sup>14</sup> *Draft Bill for the Assistance and Protection of Victims of Crime and Witnesses*, [hereinafter “Draft Bill”] s. 3(3).

the implementation of the programme, review legislation, policy and practices to ensure international standards are met, conduct research on the issues relating to victim and witness assistance and protection and to report to Parliament annually on its activities.<sup>15</sup> Additionally, the Authority is to cause the formulation of a protection programme for victims and witnesses which is to be implemented by an Implementation Unit of the Authority.<sup>16</sup> The Implementation Unit is to consist of peace officers with appropriate training.<sup>17</sup>

Above the Authority is an Advisory Commission on Victims of Crime and Witnesses (the "Advisory Commission") whose role is to advise the Authority on the policy and overall direction of the Authority.<sup>18</sup> The Advisory Commission is to consist of:

- a. the Chief Justice,
- b. the Attorney General,
- c. the President of the Bar Association,
- d. the Inspector General of Police,
- e. the Chairman of the Legal Aid Commission,
- f. five nominees of the Minister of Justice with professional backgrounds in areas such as medicine, human rights, and welfare, probation and the rehabilitation of victims of crime, and
- g. one nominee of the Minister of Justice from the voluntary sector to represent non-governmental organisations involved in victim assistance.

The inclusion of members with backgrounds relevant to witness protection such as human rights as well as a member from voluntary sector is welcome as it adds a level of expertise which the other members of the Advisory Commission might not have.

The last key institution created by the Draft Bill is a Victim and Witness Assistance and Protection Division of the Sri Lanka Police Department (the "Protection Division").<sup>19</sup> The Inspector General of Police is to establish and maintain a programme of protection for victims and witnesses based on the guidelines specified by the Authority.<sup>20</sup> Unlike with the other bodies created by the Draft Bill, there is no specification as to who will be members of the Protection Division or that the members of the Protection Division should have any particular qualifications such as expertise in witness protection issues. It can be deduced that the members will be law enforcement officers as the Prosecution Division falls under the Police Department but the Draft Bill should specify who will make up the Protection Division. At a minimum, members should have some training or background in victim or witness protection and should be screened to ensure they have not themselves been implicated in threats to or attacks on victims or witnesses.

The division of responsibilities set out in the Draft Bill is not clear. Both the Authority and the Inspector General of Police are charged with the formulation of the protection programme while at the same time, the Inspector General of Police is to give effect to the recommendations of the Authority. Similarly, both the Implementation Unit of the Authority and the Protection Unit of the Police Department are charged with the implementation of the programme. The division of

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<sup>15</sup> Draft Bill s. 6.

<sup>16</sup> Draft Bill s. 13(4)(a) and (b).

<sup>17</sup> Draft Bill s. 13(4)(b) and (c).

<sup>18</sup> Draft Bill s. 8.

<sup>19</sup> Draft Bill s. 14(2).

<sup>20</sup> Draft Bill s. 14(1) and (3).

responsibilities needs to be clarified and if it is the intention to have multiple bodies responsible for the same function, provision should be made for their cooperation. The clear division of responsibilities is always important for efficient functioning of the bureaucracy, but it is particularly important in the case of victim and witness protection because, as discussed earlier, victim and witness protection programmes are in part confidence building measures and if the lines of responsibility are not transparent and understandable to victims and witnesses, they will be less likely to place their safety and security in the programme.

### Authority to grant protection

The Draft Bill provides that a request for protection can be made to the Authority, the Protection Division or to the officer in charge of any police station.<sup>21</sup> Where an officer in charge of a police station receives a request for protection, the Draft Bill provides that he or she is to investigate and inquire into the request and if he or she deems it appropriate, provide the appropriate protection.<sup>22</sup> It is important that it be possible to request protection at any police station so as to ensure accessibility to the programme. However, leaving the responsibility to investigate the circumstances of the request and make the determination of the nature and necessity of protection to whichever police officer happens to be in charge which is only reported after the fact to the Authority and the Protection Division creates the opportunity for abuse of the system where the complaint is against police officers based in the same police station. Rather, there should be a designated member of the Protection Division posted at every police station available to step in. Not only would this allow specially trained officers to deal with the immediate practicalities request but it would reduce the risk of sensitive information provided by the victim or witness being accidentally or intentionally divulged.

While a request for protection made to a police station is one method of requesting protection, there are a number of other methods by which a request for protection may be made and granted according to the Draft Bill. For each of these different methods, it appears that a different body is responsible for granting protection. The Draft Bill needs to clarify who has responsibility for granting the protection. As the Draft Bill currently reads, where the request is made to the police, the police make the determination.<sup>23</sup> However, where a request for protection is made to the Authority, the Authority makes the determination and directs the Implementation Unit to provide the necessary protection. Similarly where the Authority receives a communication from a court of law, commission of inquiry or law enforcement officer under section 15 of the Draft Bill, it may also make the decision to grant protection.<sup>24</sup> Meanwhile, the Protection Division may admit a victim or witness to the protection programme, after a threat assessment, on the recommendation of the Authority, a request by a victim or witness or a communication from a court of law, commission of inquiry or law enforcement officer under section 15 of the Draft Bill.<sup>25</sup>

There is therefore some confusion as to who has the final say in granting protection to victims and witnesses. At one level the police is may make the decision, at another the Authority does, at

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<sup>21</sup> Draft Bill s. 13(2)

<sup>22</sup> Draft Bill s. 13(3)

<sup>23</sup> Draft Bill s. 13(3).

<sup>24</sup> Draft Bill s. 13(4)(e).

<sup>25</sup> Draft Bill s. 14(4).

another the Protection Division appears to and at another a court or commission does. Section 13(e) suggests that the Authority may make decisions grant protection and that it is the one that receives communications from courts, commissions and law enforcement officers under section 15; however, section 14 refers to recommendations of the Authority, suggesting that the Authority does not make final decisions. This is compounded by the fact that section 14(4) states that the Protection Division will admit victims and witnesses to the programme “after the conduct of a threat assessment” which further strengthens the notion that a recommendation by the Authority is not final but reliant on the determination of the Protection Division. It is further unclear whether the risk assessment is the same as the inquiries made by the police station if the request is made to at a police station. Additionally, section 14(4) refers to communications under section 15 so it is not clear whether communications from courts, commissions and law enforcement officers are to be forwarded to the Authority or the Protection Division or are final decisions on their own.

The process through which a decision to grant protection is made must be clarified to ensure that one body does not grant protection only to have it removed by another and to ensure that victims and witnesses have confidence in the process. Streamlining the process is also crucial to minimize the number of hands through which the private and sensitive information of victims and witnesses is passed to minimize to opportunity for leaks.

In many jurisdictions, the determination to grant protection is made by application to the court. This approach would be advisable in Sri Lanka as well. The relevant actors, including the victim or witness, the police or investigator, the Authority, member of the official or unofficial bar or the accused should make an application to the magistrate or judge for protective measures. The application should be heard *in camera* and present the circumstances necessitating the protection. Should the protection be granted, the application would sealed only to be unsealed only upon the order of that same judge or magistrate.

#### Independence of the Protection Division

Because some of the cases in which protection will be sought will be cases involving protection from members of the police, the provision of victim and witness protection needs have independence from the general police force. A victim or witness will, with good reason, be hesitant to ask for protection from the same police station and officers from whom they are seeking protection. As the Draft Bill currently reads, there is little to provide victims and witnesses with assurance that their request for protection will not end up in the hands of those from whom they are seeking protection.

As noted above, there are no set criteria for who may become a member of Protection Division; however, a further concern is that Draft Bill does not specify who is responsible for the appointment of members of the Protection Division. Presumably the National Police Commission which is responsible for appointments in the Police Department would choose the members, but this should be specified. Furthermore, appointments by the National Police Commission may themselves be problematic. The National Police Commission was appointed in 2002 pursuant to the 17<sup>th</sup> Amendment to the Constitution to depoliticise the police. This was a welcome development, however, members of the National Police Commission have been unilaterally appointed by the President in violation of the 17<sup>th</sup> Amendment which undermines the neutrality of the National Police



Commission, which in turn undermines the prospects for appointments to the Protection Division on terms of qualification, merit and neutrality.

While a certain level of coordination and cooperation is necessary between those responsible for investigation, prosecution and protection, the Draft Bill does not state that the Protection Division is to be an autonomous body. The Draft Bill should clearly specify that the Protection Division is a separate division which is independent of the functions of investigation and prosecution. This would allow the Protection Division to make unbiased assessments of the need for protection such that it can represent the safety and security interests of the victim or witness as a separate consideration from the concerns of investigation and prosecution. Similarly independence of the Protection Division it will limit the flow of private and sensitive information of the victim or witness to parties who could leak it. Indeed at a fundamental level, it should be questioned whether the Protection Division should even come within the purview of the Police Department as autonomy may be difficult to achieve in practice.

### Criteria for the Grant of Protection

The current Draft Bill does not provide clear criteria according to which a victim or witness may be granted protection. The criteria should be clearly set out in the legislation. The Draft Bill states that admission will be made upon the submission of a recommendation made by the Authority, a request made by a victim or witness, a report by a law enforcement agency or a communication from a court or commission of inquiry to the Protection Division. The Protection Division will then conduct a threat assessment and grant protection if warranted.<sup>26</sup> Beyond this, the only criteria provided is that in deciding to issue a communication to the Protection Division, a court or commission of inquiry must have "reasonable grounds" to believe that the victim or witness is at risk.<sup>27</sup> However, it does not specify what factors will be considered in the threat assessment or what will be considered reasonable grounds.

The criteria for granting protection measures for victims and witnesses is an important consideration because it curtails the discretion of decision makers who may be swayed by extraneous considerations and ensures neutral determination upon the relevant facts. For many witnesses, giving evidence is an unpleasant experience; however, mere unpleasantness should not be sufficient for the extension of protective measures both because of the restrictive effect it has on fair trials, but also because it could easily overburden the victim and witness protection programme. Conversely, having clear criteria provides grounds for review should a victim or witness be wrongly denied protection. In granting protective measures, consideration should be given to whether on the balance of probabilities the measures are necessary, weighing the importance of the objectives of the measures against the impact on the trial. The measures must be necessary to avoid substantial risk of psychological or physical harm to the victim or witness and the beneficial effects must outweigh any negative ones.

The Model Witness Protection Bill, 2000 published by the United Nations Office on Drugs and Crime sets out factors to be considered in the decision to extend witness protection. These factors have been adopted in the witness protection legislation of a number of countries, including Hong

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<sup>26</sup> Draft Bill s. 14(4).

<sup>27</sup> Draft Bill s. 15.

Kong, and could easily be incorporated into the Draft Bill as factors to be taken into account in the conduct of the threat assessment by the Protection Division. The factors include:

- a. the seriousness of the offence to which the statement or evidence of the witness relates;
- b. the nature and importance of that statement or evidence;
- c. the nature of the perceived danger to the witness;
- d. the nature of the witness's relationship to any other witness being assessed for inclusion in the programme;
- e. the results of any psychological or psychiatric examination or evaluation of the witness conducted to determine his or her suitability for inclusion in the programme;
- f. whether there are viable alternative methods of protecting the witness; and
- g. whether the witness has a criminal record, particularly in respect of violent crime, which indicates a risk to the public if he or she is included in the programme.

### Removal or Variation of Protection

The Draft Bill provides no guidance regarding how long protective measures will generally remain in force, under what circumstances they may be suspended or terminated or whether an appeal of the decision to impose or remove the protection may be filed. While such provisions may be quite simple, they provide clarity and certainty to the process. For example, the Canadian *Witness Protection Programme Act*, provides that protection will be terminated if there has been a material misrepresentation or a failure to disclose information relevant to the admission to the programme or a deliberate and material contravention of the obligations of the protected person under the protection agreement. The Australian *Witness Protection Act, 1994* provides a more detailed set of circumstances in which protection may be terminated which are broadly similar to the Canadian ones, with the addition of termination upon request of the protected person.

Additionally, the Draft Bill should include provisions for the variation of protections as well as an appeal mechanism. There should be provision that the body granting protection, be it the Protection Division or a court or commission, is the same body that grants the variation or termination.

### Definition of Protections Available

The Draft Bill does not define what protective measures are available to victims and witnesses. Section 14(1) provides that the Sri Lanka Police Department, in consultation with the Authority shall set in place a programme a protection programme that addresses risks to victims and witnesses during and after the conduct of investigations, and before, during and after judicial proceedings. While the recognition that protection may be required at all the different stages of investigation and prosecution is important, the specific protections available should be set out.

The only specific protections set out are those that a court or commission may order which are *in camera* hearings and the adoption of measures to prevent the disclosure of identity or testimony of a witness other than to the accused and his attorney-at-law.<sup>28</sup> Other protection mechanisms that could be included in the Draft Bill are:

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<sup>28</sup> Draft Bill s. 15(1).

- the use of pseudonyms;
- the use of screens or voice or visual distortion;
- allowing testimony by video conferencing from another location or by CCTV;
- the relocation and issuance of new identities to witnesses, whether nationally or internationally; and
- the provision of safe houses and transportation to and from the proceedings.

While the use of video conferencing and CCTV technologies may appear to be prohibitively expensive in Sri Lanka, it should be noted that the use of video evidence is already provided for in the case of child abuse cases in *Act No. 32 of 1999, Amendment to the Evidence Ordinance*.<sup>29</sup>

Not all these mechanisms will be necessary in each case and indeed the least intrusive mechanism that will achieve protection for the victim or witness should be used so as to minimally impact the public nature of the trial. However, the enumeration of mechanisms is important to the clarity of the act and the availability of the mechanisms. For greater certainty, the Draft Bill could include the requirement that the least intrusive mechanism that will ensure the safety and security of the victim or witness should be used.

One option that could be included in the Draft Bill is the broader availability of protection mechanisms for victims and witnesses in commissions of inquiry than in criminal prosecutions. For example, witness anonymity might be an acceptable measure in commissions of inquiry while it is unlikely to be deemed acceptable in the criminal prosecution context. The central focus of commissions of inquiry is a truth seeking function without the accompanying retributive function of criminal trials. Because an accused's liberty is not at stake in a commission of inquiry, they may have more relaxed rules of evidence and thus the protection mechanisms may be broader than those in a criminal proceeding.

### Definition of a Witness

The definition of a witness provided in the Draft Bill is fairly inclusive and rightly includes family members of the victim who are often also the targets of threats and attacks. There are however, two concerns with the definition. First, only family members of victims are included in the definition of a witness; however the family members of witnesses should also be included as they are often also targets.

Second, the definition as it currently reads only includes people who have already provided information in the course of an investigation or to a law enforcement officer. Because part of the purpose of the law is to induce people to come forward and report crimes and provide evidence, protection should also be available to those who are may reasonably be expected to provide information. This inclusion would mean that victims and prospective witnesses could be apprised of the protection available before putting their safety at risk by providing information. Certainly some minimal information would have to be provided in advance of the provision of protection in order to assess the need for protection; however, it need not be sufficient information upon which to commence an investigation or with regards to an ongoing investigation as is currently the case in the Draft Bill.

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<sup>29</sup> S. 163(A).

## Offence for the Disclosure of Information

The Draft Bill creates a number of offences specific to the protection of victims and witnesses. This is an important component of the Draft Bill as it sends the message that threats and attacks aimed at obstructing justice by preventing victims and witnesses from coming forward are taken seriously. Similarly, the Draft Bill creates an offence for disclosure that an individual is receiving or has received protection which is important to maintaining the integrity of the protection programme. However, the prohibition should be expanded to prevent not only revealing that a person is in the protection programme, but also to revealing any other information about the protected person such as names and addresses of family members and so on. For example, the UN Model Witness Protection Bill, 2000 makes it an offence to reveal any information which could compromise the security of the protected person. The Canadian *Witness Protection Programme Act* makes it an offence to, directly or indirectly, disclose information about the location or a change of identity of a protected person or former protected person, not just the fact that a person has participated in the programme. One of the strengths of the Canadian legislation is that it specifies that the leak is prohibited whether it happens directly or indirectly. Similarly, the offence should not require intent to disclose the information because even an unintentional leak can have serious ramifications for victim or witness' safety.

## Recommendations

The initiative for the Draft Bill is a welcome development in the strengthening of rule of law in Sri Lanka and victim and witness protection can play an important role in ensuring that more crimes are reported and successfully prosecuted while at the same time as reducing threats and attacks on victims and witnesses. However, as it currently stands it is unlikely to provide the required protection to victims or witnesses. Given this, the following recommendations should be considered for inclusion in the Draft Bill. The Draft Bill should:

- clearly define which body is responsible for the formulation of the protection programme;
- clearly define which body is responsible for the implementation of the programme, and if there are multiple implementing bodies, what the division of responsibilities is;
- specify who will be members of the Protection Division, who chooses the members of the division and what the qualifications for membership in division are;
- entrench the independence and autonomy of the Protection Division as separate from the investigation and prosecution authorities;
- specify who is responsible for the decision of who will be admitted into the protection programme, preferably a court or commission;
- specify who will have access to the private information of the victims and witnesses to minimize possibility of information leaks;
- define the specific criteria under which protection will be granted;
- define what protection mechanisms are available;
- set out how long protection will generally continue, under what conditions it will be removed and whether appeals to decisions are available and who makes those decisions;
- include in the definition of "witness" those who can reasonably be expected to provide evidence as well as those who have already provided evidence; and

- broaden the offence of disclosure that someone is a protected person to include the disclosure of other relevant information about the protected person and information which could compromise the security of the protected person disclosed by reason of the protected person's participation in the protection programme.

The inclusion of these recommendations is important to ensure that the victim and witness protection programme is built on a solid legal basis. Having a piece of legislation that puts in place a weak, ineffective protection programme may in fact be worse than having no protection programme at all as witnesses may falsely place their trust in a system that cannot protect them while at the same time allowing politicians to trumpet their adherence to human rights. Even a strong piece of legislation on paper will not provide the required protection to victims and witnesses if it is not comprehensively implemented and developed in practice. Sri Lanka has a number of institutions, such as the Human Rights Commission, which were hailed as important developments for promoting human rights and rule of law in Sri Lanka when they were created but have not flourished as effective institutions. Therefore, while the *Draft Bill for the Assistance and Protection of Victims of Crime and Witnesses* is a welcome initiative, it must first be strengthened on paper and then given the space and resources to develop into a strong programme in its implementation.