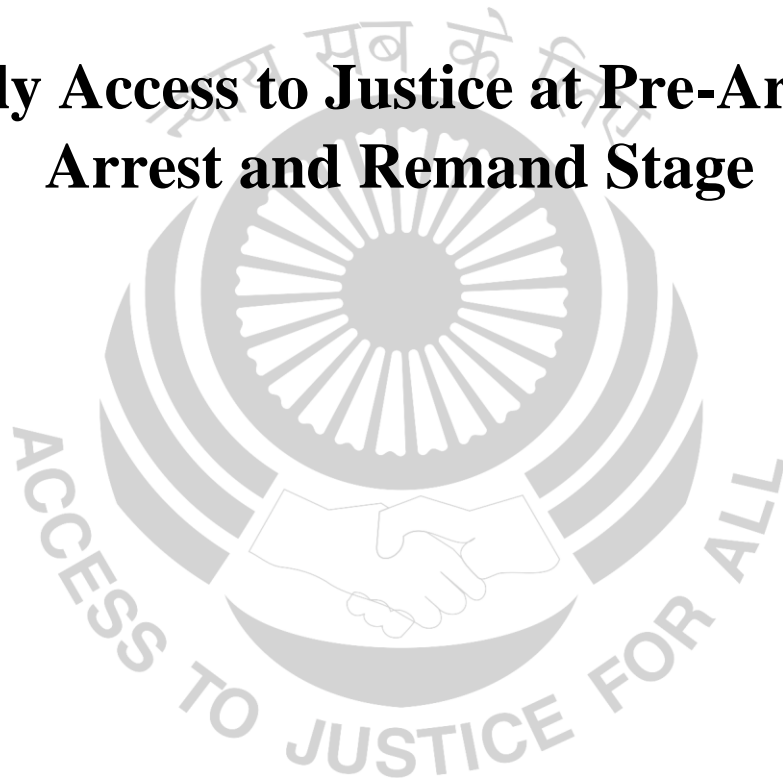




## **Early Access to Justice at Pre-Arrest, Arrest and Remand Stage**



**National Legal Services Authority**

12/11 Jam Nagar House, New Delhi,  
www.nalsa.gov.in , e-mail: [www.nalsa-dla@nic.in](mailto:www.nalsa-dla@nic.in)

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## **1. Introduction:-**

### **1.1. Background**

Right to free legal aid and assistance is an essential ingredient of reasonable, fair, and just procedure for a person accused of any offence. It is implicit in the guarantee of Article 21. It is, therefore, essential that Access to Justice is available at all stages of the criminal process. Access to Justice during the early stages of the criminal process has its importance. It ensures, amongst other things, protection of the rights of people when they are most vulnerable. It strengthens the criminal justice system.

While availability of services of a trained lawyer at the stage of trial in a criminal prosecution and inferentially, of free legal aid, for those who cannot afford a lawyer on their own, is the norm in most jurisdictions, legal aid during pre-trial stages has its importance. It ensures, amongst other things, protection of the rights of people when they are most vulnerable and thereby strengthens the criminal justice system.

United Nations Principles and Guidelines on Access to

Legal Aid in Criminal Justice Systems provides for the right to legal aid of any person who is "detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty" at all stages of the criminal justice process<sup>1</sup>.

In India, the framework of procedural law and the judgements of the Supreme Court of India provide for legal assistance at early stages of the criminal process.. The Supreme Court of India has in various judgements recognized the right to legal assistance to persons in custody and near custodial interrogation. The Hon'ble Supreme Court in *Nandini Sathpaty v P.L Dani*<sup>2</sup>, observed as follows concerning the need for providing legal assistance at early stages:

*The spirit and sense of Art. 22 (1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice*

In the year 2009, section 41D was introduced in the Code of Criminal Procedure in order to give statutory recognition to the right to legal assistance to a person arrested or interrogated.

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<sup>1</sup> Principle 3, Clause 20, Resolution No. 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012) available at [http://www.unodc.org/documents/justice-and-prisonreform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](http://www.unodc.org/documents/justice-and-prisonreform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

<sup>2</sup> AIR 1978 SC 1025

Further, with the introduction of Section 41(A) in Code of Criminal Procedure, a suspect can be called to the police station for questioning/interrogation. Thus, it is further required that suspects understand their rights at that stage, and do not suffer unnecessary arrests. The Hon'ble Supreme Court in *Nandini Sathpaty*<sup>3</sup> also observed as follows:-

“ It may not be sufficient merely to state the rules of jurisprudence in a branch like this. The man who has to work it is the average police head constable in the Indian countryside. The man who has to defend himself with the constitutional shield is the little individual, by and large. The place where these principles have to have play is the unpleasant police station, unused to constitutional nuances and habituated to other strategies.”..... Right at the beginning we must notice Art. 22(1) of the Constitution.....”

A person can be in police custody for questioning without being arrested. The terms 'custody' and 'arrest' have not been defined in the Code. However, it has been held by the Supreme Court that "in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms."<sup>4</sup> Moreover, "police custody" does not commence only when the accused is formally arrested but "would commence from the moment when his movements are restricted and he is kept in some sort of direct or

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<sup>3</sup> *Supra* 1

<sup>4</sup> *Directorate of Enforcement v Deepak Mahajan* (1994) 3 SCC 440. Also see *State of UP v Deoman Upadhyaya* AIR 1960 SC 1125;

indirect police surveillance<sup>5</sup>." Thus, it also covers an accused who is called for questioning pursuant to a notice of appearance. Therefore, right to a lawyer/legal aid lawyer of suspects arises before questioning, when they become aware that they are the subject of investigation, and are in custodial settings.

Although, a robust framework of rights of suspects and arrested persons exists in India, many of those arrested or detained being poor, ill-educated or disadvantaged for some other reasons, are unaware of such protection. In India, a study estimated that 80 percent of those in prison had only a primary school education or were illiterate.<sup>6</sup> They often lack the knowledge or experience needed to understand and navigate the criminal justice system. They have limited financial resources. On the absolute necessity of ensuring legal assistance to an indigent accused, P.N.Bhagwati, J observed in *Sheela Barse*<sup>7</sup>:

"It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and rule of law are merely slogans or

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<sup>5</sup> *Paramhansa Jadav v State* AIR 1964 Ori 144.

<sup>6</sup> See Open Society foundations and United Nations Development Programme, *The Socioeconomic Impact of Pretrial Detention*, p. 23

<sup>7</sup> *Sheela Barse vs State Of Maharashtra* , 1983 AIR 378

myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests."

The way in which suspects and accused persons are treated has a significant impact on the efficiency and effectiveness of the criminal justice system.<sup>8</sup> Legal assistance is therefore, as important at pre-arrest stage, during the period between arrest and production in the court and at the stage of Remand, as that at the stage of trial.

## 1.2 Early stages of legal assistance

***Pre-arrest Stage*** : The inclusion of Section 41A to the CrPC has created a pre-arrest stage, thereby, necessitating the enforcement of the right to legal aid even prior to arrest when a suspect can be issued a notice of appearance to appear before the police for questioning. In *Arnesh Kumar Vs State of Bihar*<sup>9</sup> the Hon'ble Supreme Court with regard to section 41A CrPC observed as follows:-

" Aforesaid provision makes it clear that in all cases where the arrest of a person is not required under [Section 41\(1\), Cr.PC](#), the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police office is of the opinion that the arrest is necessary."

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<sup>8</sup> UNDOC's " Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners" 2014.

<sup>9</sup> 2014) 8 SCC 273,

Most of the persons called for interrogation to the police station on suspicion of the criminal offence are inherently vulnerable to factors such as- the environment of the police station and the uncertainty of what may happen to them. Providing of legal assistance to such persons can entail following benefits:

- a. Making the suspect feel less isolated or intimidated
- b. Safeguarding his welfare and rights during interrogation.
- c. Providing a check on police aggression.
- d. Avoiding unnecessary arrests

**Arrest Stage:** The presence of a lawyer at the stage of arrest can make a huge difference to how the accused is treated in police custody. A lawyer at this stage can ensure that the police respect the rights of the accused and prevent harm to the accused. It reduces the possibility of beating, torture, coercion to disclosures, wrongful detention, fabrication, false implication and much more. A prompt legal assistance by lawyer at the time a person is arrested by the police may provide :-

- a. Assistance to understand why he has been arrested
- b. Protection against intimidation, ill-treatment and torture



- c. Assistance to understand and navigate the criminal justice process
- d. Actualization of procedural rights
- e. Ensuring bail in Bailable offences at the police station itself.

**Remand stage:** Similarly, at the remand stage, efficient representation to unrepresented arrestees is quite imperative to ensure that unnecessary arrests are challenged, bail applications are filed, unnecessary remands are resisted and procedural rights are protected.

## **2. Objectives :-**

Early access to justice framework is devised primarily with the following objectives:

- i. To provide legal assistance to needy suspects and arrestees during interrogation and other early stages of investigation.
- ii. To decrease the vulnerabilities of suspects and arrestees.
- iii. To assist in avoiding unnecessary arrests.
- iv. To assist the arrestees in filing bail applications and furnishing bail bonds.

### **3. Role of State Legal Services Authorities:-**

- All persons in custody, which would obviously include detention at pre-arrest stage and, between arrest and production in the Court, are entitled to free legal services by virtue of section 12 of the Legal Services Authorities Act, 1987. Since a large number of them do not have an opportunity or means to engage a lawyer on their own, Legal Services Authorities have an important role to play in reaching out to them.
- Effective implementation of early access to justice framework requires coordination between the police authorities and legal services authorities. In this regard, State Legal Services Authority shall take up the matter at the highest level with the State Department of Home and Director General of Police so that the right of legal representation at the early stages of criminal justice system is promoted and secured.
- It is also important that wide publicity is given to the rights of persons at pre-arrest, arrest and at remand stage including the right to avail free legal aid from Legal Services Institutions. In this regard, State Legal Services Authorities shall get prepared quality IEC material including the leaflets referred to in the present framework. Hoardings enumerating such rights and phone

numbers and addresses of Legal Services Authorities shall be put up by State Legal Services Authorities at public places, particularly at police stations, in coordination with local authorities.

- Panel Lawyers have a significant role to play in the entire process of early access to Justice. In such a scenario, capacity building programs for panel lawyers specifically touching upon essential aspects of law pertaining to Arrest, Remand and Bail be planned and implemented by State Legal Services Authorities.

#### **4. A framework of providing Legal Assistance at Pre-Arrest, Arrest and Remand Stage:-**

##### **4.1 Legal assistance at the pre-arrest stage:**

In *Sheela Barse v State of Maharashtra* AIR 1983 SC 378, the Hon'ble Supreme Court of India held:

*"..... whenever a person is arrested by the police and taken to the police lock up, the police will immediately give an intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance."*

In view of the fact that the pre-arrest stage has settings of custody, there is

no reason why the above mandate to the police to notify the Legal Aid Committee (Now, the DLSA ) should not be applicable at this stage also. The framework for providing legal assistance at this stage would therefore be as follows :

**4.1.1 Notifying the suspect of the right to a lawyer:-** In view of Satapathy case supra and section 41 D Cr.P.C, the police is to notify the suspect of his right to have legal assistance during interrogation. Moreover, the mandate of Sheela Barse will remain ineffective unless the suspect is appraised of this right. The police has ,therefore, to inform the suspect that free legal assistance can be availed from the Legal Services Authorities. It is essential to inform the suspect called for interrogation of the following rights which can be given in the form of leaflet of rights by the police so that the suspect can make informed decision of his right to avail legal assistance:-

#### **Your Rights**

1. You have the right to know why the police has called you for interrogation.
2. You have the right to know what the police think you have

done.

3. You have the right not to answer the questions which have the effect of self-incrimination. However, you have to give accurate details of your name, address and identity.
4. You have the right to have a lawyer present if the police interview you. You may avail free legal assistance from the nearest legal services authority.
5. You have the right to medical help if you are ill or injured.

All suspects shall be given a copy of a leaflet of rights upon arrival at the police station and shall be allowed to keep it with them for the duration of their stay. The person to be interrogated must be given adequate opportunity to read and understand the information. Legal Services Authorities shall provide enough leaflets to police stations.

**4.1.2 Deputing a lawyer to the police station:** Upon receiving the intimation of the request of the suspect to have free legal assistance during interrogation, the legal services authorities as per the duty roster prepared with regard to various police stations, shall inform the deputed lawyer. Since, duty rosters are expected to be given in advance to the police stations so that

police authorities may be able to directly intimate the lawyer. Upon intimation, the lawyer shall go to the concerned police station for providing legal assistance.

**4.1.3 Role of the lawyer:** The work of a lawyer in advising and assisting the suspect in the police station can often be difficult and demanding. A lawyer has the following role to play at the police station at pre arrest stage:

- a) The lawyer shall apprise himself of the allegations against the person called for interrogation.
- b) He shall explain the alleged offence and the matter for which the person has been called for interrogation.
- c) He shall provide legal advice and assistance as sought and required in the situation.
- d) He shall not interrupt or obstruct interrogation.
- e) He shall appropriately advise the police, if it proceeds to arrest the suspect unnecessarily and without any basis. In this regard, he shall put the position of law before police officials keeping in view the circumstance of the case.
- f) In case the suspect is a foreigner, the duty lawyer shall inform the police to intimate the High Commission,

Embassy/Consulate.

- g) In case, the suspect does not understand the language then arrangement be made for an interpreter, the expenses of which may be borne by the DLSA from Grant in Aid.
- h) He shall ensure that women are not called to the police station or to any place other than their place of residence for questioning.
- i) In case a child has been called to the Police Station, the lawyer shall take necessary steps to safeguard his rights as provided under Juvenile Justice( Care and Protection Act) 2015.

#### **4.2 Legal assistance at the arrest stage:**

**4.2.1 Notifying the suspect of his right to legal assistance:-** In view of *Nandini Sathpaty and Sheela Barse* cases supra and sections 41 A to 41 D Cr.P.C, police is to intimate the arrestee of his right to have legal assistance. A letter of rights in the form of a leaflet may be given to the arrestee. It may contain the following:-

#### **Rights of an Arrested Person**

1. The right to a lawyer on being arrested (Article 22 (1))

2. The right to have the arrest memo prepared as per Section 41B and scrutinized by the Magistrate
3. The right to be informed of the grounds of arrest and of the right to bail (Section 50)
4. The right of information to any friend, relative or any other person nominated by the arrested person about the arrest and the place of detention (Section 50 A)
5. The right to medical examination by a medical officer/registered medical practitioner soon after arrest – female medical practitioner in the case of a female accused ( Section 54)
6. The right to meet an advocate during interrogation (Section 41 D)
7. The right against self incrimination (Article 20 (3) )
8. The right to be produced before a competent Magistrate within 24 hours, excluding the time taken for the journey to the Magistrate (Section 56 read with Section 57)

In case the arrestee wants to avail the legal assistance, an



intimation of such requirement shall be given by the police to DLSA and the duty lawyer. In case of women and children in conflict with law, intimation in all cases be given to the DLSA and duty lawyer.

#### **4.2.2 Role of DLSA:-**

Upon receiving the intimation of request of the arrestee to have free legal assistance during interrogation or interview, the legal services authorities shall inform the deputed lawyer, as per the duty register. Since, duty rosters are expected to be given in advance to the police stations so police authorities shall also directly intimate the duty lawyer. Upon intimation, the lawyer shall go to the concerned police station for providing of legal assistance.

#### **4.2.3 Role of a Duty Lawyer:-**

A lawyer has an vital role to perform at this stage. His entire functions shall revolve around providing appropriate legal assistance within the permissible limits to the arrestee without disturbing the investigative process and functions of police officers. The role of Duty Lawyer at the police station is

enumerated below:

- a. He shall apprise himself of the allegations against the accused and the grounds of arrest.
- b. He shall explain to the Arrestee, the alleged offence and the grounds of arrest.
- c. He shall provide legal advice and assistance as sought and required in the situation.
- d. He shall not interrupt or obstruct interrogation.
- e. He shall take necessary steps for securing the bail of the arrestee at the police station itself, in bailable offences. Wherever necessary and feasible, family members or friends of the arrestee be contacted through PLVs for this purpose.
- f. In case the arrestee is a foreigner, the duty lawyer shall inform the police to intimate the High Commission, Embassy/Consulate.
- g. In case, the arrestee does not understand the language then arrangement be made for interpreter, the expenses of which may be borne by the DLSA from Grant in Aid.
- h. He shall ensure that the distinctive needs of women arrestees are met by seeking to ensure that procedures of criminal Justice are complied with. This may include ensuring that they are

detained separately from males and that female police officer remains present during interrogation.

- i. In case arrested persons apparently appears to be a child, the lawyer shall take necessary steps to safeguard his rights as provided under Juvenile Justice( Care and Protection Act) 2015.

#### **4.3 Legal Assistance at Remand Stage:-**

The Hon'ble Supreme Court of India in Mohd. Ajmal, Amir Kasab v. State of Maharashtra <sup>10</sup> held as follows:

“ The right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate.”

The Hon'ble Supreme Court further held

“We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the state. The right flows from Articles 21 and 22 (1) of the Constitution and needs to be strictly enforced.”

Thus, arrested person has a right to be represented during remand.

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<sup>10</sup> (2012) 9 SCC 1

#### 4.3.1 Role of DLSA :

- ✓ DLSA shall depute Remand Advocates in the Magisterial Courts, Sessions Court and also in the courts of Executive Magistrate as per the requirement. In other words, deputing of Remand Advocate should be proportionate to the actual requirement which should be periodically reviewed. One lawyer may be deputed for two or more courts keeping in view the workload.
- ✓ Duty rosters may be sent to the police stations and to the courts so as to give prior information of the Remand Advocates.
- ✓ DLSA shall ensure that duty lawyers attend to the remand work even during holidays and after court hours as and when unrepresented arrestee is produced for remand.

#### 4.3.2 Role of the Lawyer:-

- a) **Copy of application for remand:-** Before proceeding to represent an unrepresented arrestee, it is quite essential to obtain a copy of the application moved by the prosecution for seeking the remand of an accused. The contents of the application can indicate to the remand lawyer the gist of the allegations and the reasons which the prosecution is putting forth for seeking remand. If prosecution does not supply the

copy of an application, request be made to the concerned court for providing the copy of application for effective representation of the accused. After obtaining the copy of the remand application and even the copies of the documents which the prosecution may be relying upon, the remand lawyer shall go through the contents of the same.

- b) **Interaction with arrestee** : Remand Advocate shall in every case, before representing the arrestee, interact with the arrestee. This shall be done with an objective to inform an arrestee about the allegations against him and the grounds being put by the prosecution for seeking remand. It is also required for seeking any information regarding the allegations, date of arrest etc. Interaction can give inputs about many important aspects including the local roots of the arrested person.
- c) **Challenge arrest:** It may happen that the police has arrested a person unnecessarily in a routine manner. In such a scenario, keeping in view section 41 (A) of Code of Criminal Procedure read with important judgements of the Hon'ble Supreme Court such as *In Arnesh Kumar Vs State of Bihar(2014) 8 SCC 273*

, *Joginder Kumar v State of UP 1994 SCC (4) 260*, the arrest shall be challenged by a Remand Advocate before a court.

- d) **Bail application:-** Remand advocate shall file bail applications in appropriate cases. Arrestee be also apprised of the bail application and the next date if the matter is postponed by the court for hearing arguments. In case of grant of bail, the Remand Advocate shall also assist in furnishing of bail bonds. Wherever necessary, family members be also contacted through PLVs, for filing of bail bonds. In case of rejection of the bail, intimation be given to the office of DLSA. Arrestee be also informed about his right to move Higher courts. In case the arrestee takes informed decision for availing the said right, LSA shall provide legal services for filing matter in Higher courts.
- e) **Submission with regard to surety:-** If the arrestee is a resident of some other place and obtaining of local surety may be difficult for him, a submission may be made before the court not to order furnishing of local sureties. In this regard reference can be made to the observations of the Hon'ble Supreme Court in **Moti Ram & Ors vs State Of M.P , 1978 AIR 1594, 1979 SCR (1) 335.**

- f) **Translation of documents:** In case the arrestee or the lawyer does not understand the language in which the documents have been prepared by the police, submission be made before the court to provide the translated documents so that arrestee may understand the allegations and the case of the prosecution against him. This will also facilitate effective interaction with arrestee.
- g) **In the case of foreigner arrestee:** In case the arrestee is a foreigner, the remand lawyer shall request the court to direct the police to intimate the High Commission, Embassy/Consulate.
- h) **Non-production of accused on a subsequent remand** :- if a person in judicial custody is neither produced in person nor through video conferencing on a subsequent remand then the submission may be made before the court to give remand only on production. The submission be made before the court concerned to direct the concerned authorities to produce the accused.
- i) **In case of video conference:** During remand by way of video conferencing, Remand Advocate shall inform the accused through VC only that he is representing him. In case accused

wants to interact before the remand with a lawyer, permission be sought from the court for such interaction. In case remand is given by the court, the next date be intimated to the inmate. In this regard information be also given to the jail clinic.

j) **Representation during preventive detention proceedings:-**

Persons who are produced before Executive Magistrates for the purpose of detention be effectively represented, in case legal aid is required by any such person. In such a case, interaction with such persons, obtaining the copy of application and other documents, preparing a case for resisting preventive detention are some of the pre-requisite steps for effective representation. If the order for preventive detention is passed, the detainee be apprised of his rights to move higher authorities/courts. In case the legal aid is required for moving higher courts, the requisite steps be taken by Legal Services Authorities in this regard.

k) **Child arrestees** :- Remand Advocates shall be duly trained in Juvenile Justice Law. In case arrested person apparently appears to be child in conflict with law, submission be made before the Magistrate to take the steps as per Juvenile Justice Law. Application in this regard be moved before the court.



Efforts be also made in coordination with the family members of such person to collect the documents reflecting about his date of birth.

1) **Persons of unsound mind and mental retardation:**

Whenever a person of unsound mind is produced for a remand, the Remand Lawyer shall take steps in accordance with chapter XXV of Code of Criminal Procedure of 1973. Submission for his bail be made in accordance with section 330 CrPC. His rights provided under Mental Healthcare Act,2017 be also secured such as right to access Mental Healthcare, right to protection from cruel, inhuman and degrading treatment. In this regard office of DLSA shall be duly intimated so that the protections under Mental Healthcare Act,2017 be actualized.

**5. Other roles of Legal Services Authorities:-**

- (i) **Awareness:** Legal Services Authorities shall spread effective legal awareness amongst the public about the right to free legal assistance at prearrest, arrest and remand stage. Awareness shall also be spread about the rights of the arrestees and also about the framework envisaged under Sections 41(A) to 41(D) of Code of Criminal Procedure.

Leaflets, hoardings and any other tool may be used for spreading awareness. Hoardings in coordination with police authorities be affixed in the police stations at conspicuous places. Hoardings shall mention phone numbers and addresses of the nearest Legal Services Authorities. Leaflets as envisaged under the present framework be also provided at the police station.

(ii) **Training** : Legal Services Authorities shall impart specialized training to the duty lawyers engaged for providing legal assistance at pre arrest, arrest and remand stage. Refresher trainings be also organized periodically for the duty lawyers. Trainings may cover topics such as Right of arrested person, jurisprudence of section 41, 41 (A) to 41(D) , important judgments of the Hon'ble Supreme Court on Arrest Law, Juvenile Justice Act etc.

(iii) **Duty Roasters:** Legal Services Authorities have to frame fortnightly or monthly duty roasters of advocates and PLVs in such a manner that all the police stations are covered. It need to be ensured that engagement of duty lawyers shall be proportionate to the requirement. Duty Roasters may also spell out the duties at different periods of the day i.e. during

office hours and non-office hours.

- (iv) **Honorarium:** Honorarium to duty lawyers be paid timely.

The Executive Chairman, SLSA shall decide the amount of honorarium.

- (v) **Documentation :** It is quite imperative to document the services provided at investigative stage to needy. Accurate and effective documentation will not only help in making effective review but will also reflect about the impact made by such legal assistance.

- (vi) **Periodical review:** Legal Services Authorities shall periodically review the early access to justice framework so as to identify the gaps and taking timely and appropriate corrective measures for improving the structure.