SOUTH AFRICAN SERVICE CHARTER FOR VICTIMS OF CRIME

CONCEPTUAL FRAMEWORK: UNDERSTANDING THE VICTIMS CHARTER

1. Introduction

The Service Charter for Victims of Crime (hereafter referred to as the Victims Charter) is an inter-departmental project that aims to afford victims with rights. Approved by Cabinet on 1 December 2004, the Victims Charter is currently at the stage of implementation. In order to facilitate implementation, the inter-departmental project committee (hereafter referred to as project partners), was tasked with drafting five – year implementation plans in line with the MTEF budgeting cycle.

In order to ensure effective implementation, it is essential for all project partners to have an understanding of the conceptual framework of the Victims Charter.

The Gender Directorate (of the Department of Justice and Constitutional Development, as lead agency) was tasked with developing an understanding of the conceptual framework.

In order to develop an understanding of the Victims Charter it is useful to consider wording and intent of the Charter. This is done by reviewing current wording in the charter and making comparisons with national and international legislation and policy documents. In addition, an understanding of the conceptual framework will assist project partners in the implementation of the Victims Charter.

Wording and intent

The charter aims to
- a) eliminate secondary victimization in the criminal justice process
- b) ensure that victims remain central to the criminal justice process
- c) clarify the service standards that can be expected by and are to be accorded to victims whenever they come into contact with the criminal justice system; and
- d) make provision for victims’ recourse when standards are not met.

Secondary victimization and victims are two key concepts in understanding the Victims Charter.

2. Understanding ‘Secondary Victimization’

Both the Victims charter and the Minimum Standards on Services for Victims of Crime (minimum standards document) do not define secondary victimization. However, one can assume that the minimum standards document is framed on an exploration of secondary victimization in different government departments so as to present what standards are required to realise rights. However, it is imperative for all
government departments to have a common understanding of secondary victimization and to consider different forms it can take in specific departments. We have gathered several definitions from the broad thesis on secondary victimization. It is our intention to show some of the strengths and limitations of the definitions in an attempt to provide greater clarity to departments as they implement services to victims.

The concept of *secondary victimization* was first used during the 1980’s by non-governmental organizations working with victims of gender-based violence. This was a time when the word *victim* was replaced by survivor, in an attempt to affirm experiences of those who had been abused and raped by perpetrators. Research considered women’s experiences after rape and explained why women were reluctant to report cases to the police. This experience was defined as *secondary victimization*.

The mental health profession, in developing responses to rape victims, defined secondary victimization as ‘the re-traumatization of the sexual assault, abuse or rape victim. It is an indirect result of assault which occurs through the responses of individuals and institutions to the victim. The types of secondary victimization include victim blaming, inappropriate behavior or language by medical personnel and by other organizations with access to the victim post assault.\(^\text{i}\)’

In the guide prepared for use of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse, 1985, secondary victimization is defined as ‘the victimization that occurs not as a direct result of criminal act, but through response of institutions and individuals to the victim’.\(^\text{ii}\) The definition is further expanded to include institutionalized secondary victimization which is most apparent in the criminal justice system, is the ‘complete denial of human rights to victims of particular cultural groups, classes or a particular gender, through the refusal to recognise their experiences as criminal victimization’.

Interestingly, the Draft UN Convention Justice for Victims of Crime and Abuse, 2006, does not define secondary victimization, but makes reference to victimization. The Convention notes that training should be provided to personnel so as to eliminate ‘secondary victimization’.

Secondary victimization refers to the processes, actions and omissions that may intentionally or unintentionally contribute to the re-victimization of a person who has experienced a traumatic incident as a victim through:

- Disbelief of the person’s account
- Blaming the victim
- Lack of (or insufficient) support services to assist the victim at
  - Interpersonal
  - Institutional, and
  - Broad social level\(^\text{iii}\)

This definition highlights the ‘overt and covert processes that undermine the legitimacy of a person’s status, claims and consequential experiences as a victim of a traumatic incident.’\(^\text{iv}\) However, it is limited in that it does not explicitly raise the issue of attitudes. For example, a service provider who appears disinterested and apathetic may re-victimize the victim.

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\(^\text{i}\) Draft UN Convention Justice for Victims of Crime and Abuse, 2006

\(^\text{ii}\) In the guide prepared for use of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse, 1985

\(^\text{iii}\) Gender Directorate – Department of Justice and Constitutional Development

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September 2006
Secondary victimization can also be defined as the ‘unsympathetic, disbelieving, and inappropriate responses (exacerbating the effects of gender-based violence) that women experience at the hands of society in general and at each stage of the criminal justice process.’

This definition is gendered, which is problematic, but it does include an important aspect of victimization at the hands of society, thus broadening the scope and form that victimization can take. The use of inappropriate response is problematic as it is subjective. Is it inappropriate to ask an elderly rape victim from a rural community about recent sexual intercourse, where this is a standard question during medical examination?

Another definition of secondary victimization provided by the National Prosecuting Authority (NPA),

‘secondary victimization can result from the failure to treat victims with dignity, respect and understanding of the dynamics of offences.’

This definition presupposes that service providers have knowledge and understanding of the dynamics of offences. It would be necessary to qualify what the dynamics are.

The United Nations Centre for International Crime Prevention defines secondary victimization as the ‘victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim’. They also provide an explanation as to why secondary victimization takes place:

Institutionalized secondary victimization is most apparent within the criminal justice system. At times it may amount to a complete denial of human rights to victims from particular cultural groups, classes or a particular gender, through a refusal to recognize their experience as criminal victimization.

Secondary victimization through the process of criminal justice may occur because of difficulties in balancing the rights of the victim against the rights of the accused or the offender. More normally, however, it occurs because those responsible for ordering criminal justice processes and procedures do so without taking into account the perspective of the victim.

It may result from intrusive or inappropriate conduct by police or other criminal justice personnel. More subtly, the whole process of criminal investigation and trial may cause secondary victimization, from investigation, through decisions on whether or not to prosecute, the trial itself and the sentencing of the offender, to his or her eventual release.

A useful definition provided by
Given the difference ways in which victims will respond to and deal with crime, it is important to provide an understanding of secondary victimization that is broad and allows scope for appropriate and correct interpretations.

Examples of secondary victimization, within the criminal justice system include:
<table>
<thead>
<tr>
<th>Government Department</th>
<th>Secondary victimization of victims</th>
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<tbody>
<tr>
<td>Department of Justice</td>
<td>• Delay in court dates</td>
</tr>
<tr>
<td></td>
<td>• Court personnel not sympathetic to victims – not being patient when victims make mistakes due to unfamiliarity with court proceedings: for example speaking out during proceedings</td>
</tr>
<tr>
<td>Board of Sheriffs</td>
<td>• Implementation of Domestic Violence Act - Not serving interdicts</td>
</tr>
<tr>
<td></td>
<td>• Sheriffs attaching and removing items such as food, beds, clothing</td>
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<tr>
<td>Department of Health</td>
<td>• Doctors, District surgeon and Nurses examining victim without introductions and explaining procedure</td>
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<td></td>
<td>• Conducting examination in cold and brash manner</td>
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<tr>
<td></td>
<td>• Complaining to victim about being called out late at night to do examination</td>
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<td></td>
<td>• Not wanting to conduct examination because the victim appears intoxicated</td>
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<td></td>
<td>(is the Primary Health Care package for SA – a set of norms and standards; specifically the section on services for Victims of sexual and domestic violence – being implemented and monitored)</td>
</tr>
<tr>
<td>South African Police Services</td>
<td>• ‘Loyalty’ among police officers in dealing with colleagues where there is domestic violence – not wanting to get involved</td>
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<td></td>
<td>• Police not responding on time to call to attend to scene of crime</td>
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<td></td>
<td>• Limited assistance by police in assisting with completion of J88 forms</td>
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<tr>
<td></td>
<td>(is there compliance with Duties of police as set out in the Domestic Violence Act 1999)</td>
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Secondary victimization can also be present where victims because of their status or vulnerability in society can be victimized:

<table>
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<tr>
<th>‘Special’ victims</th>
<th>New project partner</th>
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<tbody>
<tr>
<td>Where victim is a high profile personality</td>
<td>the media, in reporting on the abuse, can further victimize the victim</td>
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<td></td>
<td>The Commission on Gender Equality (CGE) could assist in monitoring the media Further the CGE can take action against the media</td>
</tr>
<tr>
<td>Where the victim is an illegal immigrant</td>
<td>the police may not be as sympathetic</td>
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<td></td>
<td>The Human Rights Commission could assist by educating immigrants about their rights in the Victim Charter</td>
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</table>
The Department of Home Affairs could be a distribution channel for Victims Rights Charter to immigrants where the victim lives in rural areas, where there are scarce resources. Lack of information would undermine enforcement of rights. The Department of Provincial and Local Government (DPLG) could assist with the distribution of the Victims Charter in municipalities, particularly local municipalities.

Given the inclusion of non-discriminatory clause in the definition of victims (see section 2 below), it may be necessary to consider how different categories of victims (children, the elderly etc), are subject to secondary victimization.

The UN has developed Guidelines for ‘Child victims’, in recognition of their special needs, to assist in the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abusevii.

It is recommended that project partners, in consideration of implementation of the Victims Charter, develop a definition of secondary victimization that provides examples specific to the partner. This would assist in reinforcing victims’ rights.

A proposed working definition of secondary victimization:

Secondary victimization refers to the attitudes, processes, actions and omissions that may intentionally or unintentionally contribute to the re-victimization of a person who has experienced a traumatic incident as a victim through:

- Failure to treat the victim with respect and dignity
- Disbelief of the person’s account
- Unsympathetic treatment
- Blaming the victim
- Lack of (or insufficient) support services to assist the victim at points
  - Interpersonal
  - Institutional, and
  - Broad social level

3. **Understanding Victims**

An analysis of various definitions of *victim* is useful in considering who is protected by the Victims Charter. The analysis considers definitions in:

- the Victims Charter,
- different national legislation and policies
- international charters and legislation
A victim of crime is defined as a person who has suffered harm, including physical or mental injury, emotional suffering; economic loss; or substantial impairment of his or her fundamental rights, through acts or omissions that are in violation of our criminal law.

Victim also includes, where appropriate, the immediate family or dependent of the direct victim.

A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between perpetrator and the victim.

Victims are inclusive of all without prejudice of any kind on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Draft UN Convention on Justice for Victims of Crime and Abuse, 2006, defines a victim as a ‘natural persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering or economic loss or violations of fundamental rights in relation to victimizations identified under ‘scope’.

A person is a victim regardless of whether the crime is reported to the police, regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term ‘victims’ also includes, where appropriate, the immediate family or dependants of the direct victims and persons who have suffered in intervening to assist victims in distress or to prevent victimization.

a. Definition of victim in national legislation and policy:

A review of all South African legislation reveals a paucity of conceptual framework for victims. Legislation includes ‘victim’ but with limited or no definition of the term. Specific review of current project partners also revealed a limitation in terms of defining victim, although the term is used in several legislation and policy documents. For example, legislation such as the

- Constitution Act 108 of 1996
- Criminal Procedure Act 51 of 1977
- Witness Protection and Services Act 112 of 1998
- Sexual Offences Bill 2003,

do not mention ‘victim’. We can assume that the use of ‘complainant’ is the equivalent to victim. Complainant is defined in the Criminal Procedure Act as
‘the alleged victim of a sexual offence’

i. Legislation with definition of victim include:

- **Promotion of National Unity and Reconciliation Act 34 of 1995**
  - Victims includes (a) persons who individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights – as a result of a gross violation of human rights; or as a result of an act associated with a political objective for which amnesty has been granted; (b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization of such persons; and (c) such relatives or dependants of victims as may be prescribed.

- **Domestic Violence Act 116 of 1998**
  - Victim means any person who alleges to have been subjected to an act of domestic violence.

- **Compulsory HIV Testing of Alleged Sexual Offenders Bill, February 2003**
  - Victim means any person alleging that a sexual offence has been committed against him or her.

ii. Policy and Reports with definitions of victims

- **The South African Law Commission** defined victim ‘as a biological person who has suffered harm at the hands of another person in the course of a crime of violence. Harm or suffering, which can be physical or psychological or both, must have resulted in a material loss for the victim and / or had a negative, quantifiable impact on her or his current and or future capacity to earn an income.

A person may be considered a victim regardless of whether the offender has been identified, apprehended, charged, prosecuted or convicted. People can be deemed to be victims regardless of the familial relationship between the offender and themselves, and the category can include people who were injured whilst intervening or assisting other victims, or the police during activities aimed at law enforcement.

- **The Department of Social Development’s Victims Empowerment Programme** defines victims as ‘as a person who, individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their rights, through acts or
omissions that are violations of national criminal laws or of internationally recognised norms relating to human rights.

- The Department of Health – from National Policy Guidelines forVictims of Sexual Offences, 1998: a victim is defined as ‘a victim or survivor of rape or sexual assault may be: a female or male of any age who claims to be a victim of rape or sexual abuse.

- The National Prosecuting Authority of South Africa Uniform Protocols for Management of Victims, Survivors and Witnesses of Domestic and Sexual Offences defines victim in line with the definition as contained in the Minimum Standards on Services for Victims of Crime, with two additions (highlighted in bold). ‘A victim of crime is defined as a person who has suffered harm, including physical or mental injury, emotional suffering; economic loss; or substantial impairment of his or her fundamental rights, through acts or omissions that are in violation of our criminal law relating to sexual offences and domestic violence. Victim also includes, where appropriate, the immediate family or dependent of the direct victim. A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between perpetrator and the victim. Where appropriate it also refers to witnesses.

- The Department of Correctional Services uses the definition of victims interchangeably with complaint. Complainants are defined in the following cases, have the right to make representations when the placement of the offender on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the Parole Board:
  - murder or any other offence which involves the intentional killing of a person;
  - rape;
  - robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved;
  - assault of a sexual nature;
  - kidnapping; or any conspiracy, incitement or attempt to commit any of the offences mentioned above.
  - In the case of murder or the intentional killing of a victim, any immediate relative of the deceased will be regarded as the complainant.

Directives: Complainant Participation In Correctional Supervision And Parole Boards, October 2005

b. Definition of victim in international legislation and policy:


Gender Directorate – Department of Justice and Constitutional Development
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September 2006
Does not define a ‘victim’ but makes reference to those who can receive compensation: ‘those who have sustained serious bodily injury or impairment of health directly attributable to an international crime of violence and the dependents of persons who have died as a result of a crime’.

- **The Council of the European Union, 2001**
  - victim’ shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State

- **Australian Victim Rights Charter and Victims Rights Act 1996**
  - Charter: A victim includes a person who, as a direct result of a criminal offence suffers physical or emotional harm or loss or damage to property where the criminal offence results in the death of the person, a member of that person’s immediate family will also be included as a victim of crime.
  - Act: Victim of crime is a person, who suffers harm as a direct result of an act committed or apparently committed, by another person in the course of a criminal offence.
    A person suffers “harm” if, as a result of such an act: (a) the person suffers actual physical bodily harm, mental illness or nervous shock, or (b) the person’s property is deliberately taken or destroyed or damaged.
    If the person dies as a result of the act concerned, a member of the person’s immediate family is also a victim of crime for the purposes of the Act.

- **Australian Community Law Reform Commission**
  - defines victims to include ‘persons who have suffered harm, including physical or mental injury; emotional suffering including grief; economic loss and or substantial impairment of rights accorded them by law through acts or omissions that are in violation of the criminal law. The definition includes people who have suffered such harm as a result of death of a person upon whom they are financially or psychologically dependent and or to whom they are closely related. The definition includes people dependent on the harmed person if they see or hear the harm being done to the person directly affected in circumstances where it is probable that they will themselves suffer harm.

- **United States – Justice For All Act 2004**
  - defines a victim as ‘a person directly and proximately harmed as a result of the commission of a federal offence or an offence in the District of Columbia.’ This definition is supposed to expand the definition contained in the Crime Victim’s Rights Act, 18 U.S.C which provided services to those who ‘suffered direct physical, emotional or pecuniary harm’.

- **Canada – The Victims Bill of Rights**
o Victim means an individual, or a corporation, organization or other entity against whom offence is committed or is alleged to have been committed, and (a) where the victim is an individual who is deceased means an individual – other than alleged offenders who, at the time of the offence was
a) Married to or living with the victim
b) Cohabiting with the victim and together with the victim has registered the common-law relationship
c) Cohabiting with the victim in a relationship for not less than one year, or
  • Where no person qualifies under a) – c) is the victim’s nearest relative or
  • Where the victim is an individual who is a minor or is incapable of handling his or her affairs, means the person, other than the alleged offender, who is the victim’s parent guardian, committee or substitute decision maker.

- **United Kingdom Victims Rights Charter**
  o Victim includes the victim, parents and guardians of the victim and in the event of murder, the victim’s close friends.

- **Hong Kong Victims Charter**
  o A victim is a person who suffers physical or emotional harm, or loss or damage to property because of a criminal offence. This covers not only person against whom the offence was committed but also anyone who has suffered directly from the commission of offence. The definition of victim may include for example the parent of a child who has been sexually abused or the immediate family of a murder victim.
  o The definition includes people who have suffered such harm as a result of the death of a person upon whom they are financially or psychologically dependent and or to whom they are closely related.
  o The definition also includes people who are not financially and or psychologically dependent on the harmed person if they see or hear the harm being done to the person directly affected in circumstances where it is probable that they will themselves suffer harm.

i. **Analysis and proposal**

Common themes that emerge from the definitions are:
  o Victims include those who intervene to assist
  o Witnesses to a crime (provided it is probable that they would have suffered the harm)
  o In case of death of victim, the following are also included as victim:
    - Immediate family
    - Close relatives
    - Close friends
- Parent or guardian if the deceased victim is a minor

An interesting feature from the definition is that a victim is defined as a ‘person’. Although singular, it can be collective if one considers the inclusion of witnesses to the crime or those intervening or assisting the victim.

Person is qualified as biological and an assumption that can be made is that person is a natural and juristic person. A contrary view is given by the Canadian Charter that includes corporation, organization or other entity. In this case, even companies can be regarded as victims of crime.

In the South African context, the inclusion of organizations could assist those working at shelters (non-governmental organizations under the Department of Social Welfare). In cases of domestic violence, shelter workers are often exposed to violence from abusers who enter the shelters and assault workers. In this regard, the non-governmental organization (NGO) could be regarded as a victim. This could further the work of the NGO as a partner with government departments in dealing with violent crimes. However, the inclusion of organizations and entities would need to be further explored as it could also have a negative impact on victims.

The inclusion of family and friends of the deceased victim is particularly relevant in the South African context. Although there is a reported decrease in crime of murder, it is suggested that murder against women by intimate partners is a threat to making South Africa the worst country with regard to crimes against women. Family and friends often have to ensure the tragic loss of loved one and they are often excluded out of the criminal proceedings if they are not witnesses. This often results in secondary victimization of family members and friends. If we are to include family and friends as victims we should qualify this by taking into account the different forms of family in South Africa.

A proposed working definition of victim:

A victim of crime is defined as a person who has suffered harm, including physical or mental injury, emotional suffering; economic loss; or substantial impairment of his or her fundamental rights, through acts or omissions that are in violation of our criminal law. Victim also includes those who assist or intervene to assist the victim or the police.

Victim also includes, where appropriate, the immediate family or dependent of the direct victim. Where the victim dies as a result of a crime, those financially and psychologically (family and friends) dependent on the victim shall be regarded as victims as well.

A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between perpetrator and the victim.

Victim are inclusive of all without prejudice of any kind on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

ii UN, New York, 1999

iii G Stevens and F Mohamed, ‘Beating the battered: The psychology of secondary victimization’ ISS March 2001

iv Ibid

v S Stanton and M Locrenberg, Justice for Sexual Assault Survivors, 1995


vii Guidelines on justice for child victims and witnesses of crime, 2004

viii GA/Res/40/30


x Report No 6, 1993

xi SA Law Commission Report


xiii POWA (People Opposing Woman Abuse – a NGO) Report that one woman is killed every six days by partner