REPORT

Independent Commission of Inquiry into Queensland Police Service responses to domestic and family violence

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Introduction

The evidence for this report is drawn largely from research (Nancarrow et al., 2020), funded by Australia's National Research Organisation for Women's Safety and led by the report's author. That research addressed Recommendation 16 of the Queensland Domestic and Family Violence Death Review and Advisory Board's (DFVDRAB) 2016-2017 annual report (Queensland Domestic and Family Violence Death Review and Advisory Board, 2017). As recommended by the DFVDRAB, the research aimed to "identify how best to respond to the person most in need of protection where there are mutual allegations of violence and abuse" (DFVDRAB, 2017, p. 13). Recommendation 16 responded to the DFVDRAB finding that almost half of the women, and nearly all the Aboriginal and Torres Strait Islander people, who died in a context of domestic and family violence, during the review period, had been identified as the perpetrator (sometimes as both victim/survivor and perpetrator in cross-orders under the *Domestic and Family Violence Protection Act 2012* (Qld).

That victims/survivors of domestic and family violence (particularly, intimate partner violence) are misidentified as perpetrators is a concern internationally in civil and criminal law jurisdictions. The peer-reviewed research (Nancarrow et al., 2020), which informs this report, incorporated a review of the international literature on this topic, as well as the following components of the overall study:

- A national comparison of Australian state and territory protection order and DFV-related offence data (2015-2018).
- A national comparison of police and court DFV policy and procedures.
- An in-depth qualitative analysis of Queensland police and courts' identification of the person most in need of protection.

The in-depth qualitative component was conducted in three sites—Brisbane, Southport, and Townsville—between January and February 2020. It involved interviews and focus groups with a total of 100 people, comprising: 39 police (including general duty officers, representatives of the Domestic and Family Violence and Vulnerable Persons Unit, domestic violence liaison officers (DVLOs), and police prosecutors; 39 specialist domestic and family violence service providers; 17 women with lived experience of being misidentified as perpetrators; and 5 magistrates.

Drawing on the evidence derived from this and other research, as referenced, this report addresses several topics as key considerations for the Commission of Inquiry. The report concludes with recommendations for addressing the problem of misidentification of victims of domestic and family violence as perpetrators: that is, how police can correctly identify the person most in need of protection.

The author is aware of, and has contributed to, some of the developments by the Queensland Police Service, in response to the report *Accurately identifying the "person most in need of protection" in domestic and family violence law.* This includes building capability by increasing developing officers' understanding of patterns of control and understanding perpetrator tactics and motives. QPS is to be commended on the introduction of the online training on coercive control and the more recent 3-day face-to-face training: DFV – The Holistic Approach.

Key considerations for the Commission of Inquiry

The importance of, and challenges related to, the police accurately identifying the person most of need in protection

Importance of accurately identifying the person most in need of protection

In Queensland, and other Australian jurisdictions, domestic and family violence legislation is "quasi-criminal" law (Nancarrow, 2021; Women's Policy Co-ordination Unit, 1985). It provides powers for police and courts that are exceptional in civil law and more akin to criminal law (e.g. the power to take action without the consent of the victim/survivor and to impose court ordered conditions on a perpetrator in their absence, in certain circumstances), applying a civil law standard of proof (balance of probabilities). These exceptional powers for police and courts were controversial when first proposed in the 1980s. They were justified by the exceptional nature of domestic violence and the need for state power to overcome the exertion of power and control (abuse of power) by one person over another person in an interpersonal relationship (see Nancarrow, 2016; 2019 for further details). Due to social norms; social and economic power structures, and male and female relationship role stereotypes, men typically hold more power to exploit in the abuse of others. This is reflected statistically in domestic and family violence data, including domestic homicide statistics.

Inappropriately applying the exceptional powers provided in the carefully crafted domestic and family violence law ignores the intent of legislation arising from international research and expert advocacy and endorsed by elected representatives in the Parliament.

The concepts "person most in need of protection", and that a protection order is "necessary and desirable" were incorporated into Queensland's *Domestic and Family Violence Protection Act 2012*, to overcome increasing use of cross-applications and cross-orders. The intention of the Act was to ensure that the person most in need of legal protection from domestic and family violence was identified, noting that cross-applications are "inconsistent with the notion that domestic violence is characterised by one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. Both people in a relationship cannot be a victim and perpetrator of this type of violence at the same time" (Queensland Government, 2011). This is discussed further below regarding factors contributing to misidentification.

Moreover, mis-identifying victims/survivors of DFV as perpetrators represents an injustice with serious, long-term consequences for victims/survivors and their children. It also inadvertently colludes with the actual perpetrator of DFV in controlling their victim and, thus, undermines victim/survivors' confidence in the police and the legal system more broadly.

The systemic consequences of misidentification are discussed in more detail below.

Challenges related to accurately identifying the person most in need of protection

A key challenge related to accurately identifying the person most in need of protection is that coercive control may be masked by "situationally ambiguous" (Durfee, 2012) circumstances, where each party may have used violence, resulting in injury, and each claims to be the real victim. Police attending such scenes are confronted with a "he said, she said" (Wangmann,

2009) scenario with little time and often insufficient skill or resources to make an informed and accurate assessment of the power dynamic operating in the circumstances.

A further challenge in identifying the person most in need of protection is the gap between the stated intention of the Queensland quasi-criminal law (focused on prevention of future abusive behaviour that is a pattern of power and control) and its representation in the Domestic and family violence Protection Act 2012. This is partially explained by the challenges of enunciating key concepts in legislation but is also a consequence of the way in which domestic violence is defined in the Act, as discussed further below.

In some cases, police arrive in response to a call from concerned neighbours, or other family members for example to find that neither party wants police intervention. Although police have the power to make an application without the consent of the victim, a lack of cooperation makes it difficult to determine the person most in need of protection. It may also trigger inappropriate responses from police through frustration and underlying values. Further details about potential police assumptions in these circumstances are provided below.

Factors leading to police misidentification of the perpetrator

A range of legislative factors and police organisational, procedural and cultural factors are contributing to the misidentification of victims/survivors of DFV as perpetrators.

Legislative factors

Hansard (6 September 2011, pp. 2775-2778) records that the objective of the Domestic and Family Violence Protection Bill 2011 "is to ensure that victims of domestic and family violence are provided with protection against future acts of domestic violence." Hansard also records that the Bill incorporated a contemporary understanding of domestic violence, which:

> *refers to a person being subjected to an ongoing pattern of abusive behaviour by an intimate partner or family member. This behaviour is motivated by a desire to dominate, control and oppress and to cause fear. Although any act of aggression in a relationship is unacceptable, domestic violence refers to this particular type of abuse. It is this type of abuse that is the focus of the bill.*

The Minister introducing the Bill explained that cross-applications and cross-orders are:

> *inconsistent with an understanding of domestic violence that comprises one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. It is not reasonable to accept, except in exceptional circumstances, that both people in a relationship can be a victim and perpetrator of this type of violence.*

In the Second Reading Speech (Hansard (Qld), 15 February 2012, p. 158) the Minister responsible for the legislation stated:

> *there is a pattern of power and control, and these orders are to stop the person who has power and control over others from causing further harm ... ensuring that we limit the extent of cross-applications.*

That is, the Bill explicitly sought to address an ongoing pattern of power and control through various abusive means, with a focus on preventing future acts of such abuse, and to curtail the use of cross-applications and cross-orders. However, the definition of domestic violence in the Bill, and subsequently in the *Domestic and Family Violence Protection Act 2012,* does not adequately capture this intention.

The Act defines domestic violence as behaviour that:

a. is physically or sexually abusive; or

b. is emotionally or psychologically abusive; or

c. is economically abusive; or

d. is threatening; or

e. is coercive; or

f. in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else. (*Domestic and Family Violence Protection Act 2012* [Qld] s 8[1])

Proscribing this list of behaviours, without defining "abusive" as a pattern of behaviour, or requiring "coercive control" as an overarching context, enables a formulaic, incident-based approach to policing domestic and family violence (Nancarrow, 2016, 2019). That is, police attending reported domestic violence look for a proscribed act of abuse and a relevant relationship: if both elements are present, they determine that domestic violence has occurred. Whether the proscribed act is motivated by coercive control or resistive violence is often not considered at all. Therefore, victims/survivors of abuse may be subjected to a police application for a protection order or a police protection notice because they have used force or verbal abuse, for example, in response to an ongoing pattern of abuse against them.

Notions of the 'ideal victim'

The international literature demonstrates that stereotypical assumptions about women subjected to violence contribute to misidentification of women as perpetrators of such violence (Nancarrow et al., 2020). Female victims/survivors of violence are often assumed to be submissive and powerless, although some women resist controlling abuse with physical and verbal aggression. Women who use resistive violence are also likely to use weapons to overcome a physical disadvantage and, consequently, cause injury.

Prior experience of police intervention contributes to the reaction of women to police when they attend reported domestic violence (calls for police intervention are often made by a third party). Where police are perceived as oppressors (this may be the case especially for First Nations and refugee women) their intervention may be effusively opposed by victims/survivors as well as perpetrators of domestic violence. A lack of cooperation with police and resistance to police intervention is likely to be interpreted as a lack of "victimhood" and may be seen by police as indicative of "mutual" domestic violence.

Systems abuse by perpetrators

Perpetrators of domestic and family violence may use a range of strategies ("image management") to portray themselves as the victim of domestic violence and portray their victim as the perpetrator. Image management may be used by perpetrators simply to avoid legal action against them. It may also be used to engage the legal system as a means to increase control of the actual victim/survivor. For example, once a domestic violence protection order is in place against a victim/survivor of abuse, the perpetrator can threaten to report a breach of the order, invoking fear about the impact of a criminal conviction (see further information below on systemic consequences of misidentification). Therefore, police, and other professionals in the legal and social services systems, may unintentionally collude with perpetrators.

Systems abuse strategies include perpetrators:

- calling police first, claiming they have been assaulted when the other party has used resistive force;
- being the one to calmly greet police on arrival at the scene, while the victim/survivor is distraught and appearing to be aggressive and out of control; and
- inviting police to empathise with the frustration of "emotional women" and relationship problems.

Police practice

The following practice issues contributing to the misidentification of victims/survivors of domestic violence as perpetrators were identified in focus groups and interviews conducted with police and service providers in Queensland in early 2020:

- a lack of effective investigation: Police research participants cited several barriers to effective investigation, including a lack of resources, onerous paperwork, the large volume of incidents to attend in a shift and the associated stress, inexperienced officers attending domestic violence incidents , and unhelpful policies, procedures and systems review;
- failure to use interpreters in cases where the victim/survivor is not proficient in English (noting that heightened stress can reduce language proficiency);
- Lack of insight about the dynamics of coercive control;
- Lack of awareness of the historical relationship between police and First Nations' peoples, leading to police frustration and judgement regarding a lack of victim/survivor cooperation with responding officers;
- Sexism: holding women to a higher standard than men (e.g. empathy for men upset about a relationship breakup while being intolerant of women "behaving badly"); and
- Racism: Aboriginal and Torres Strait Islander women spoke about their mistrust of police, based on the broader historical context as well as, in some cases, prior personal experience with police. Aboriginal and Torres Strait Islander women and service providers also reported that police often sided with a white man against a black woman in a relationship, particularly where the woman didn't fit the stereotype of

"victim" and the man employed image management strategies to engage police in systems abuse.

Organisational culture

A major contributor to the misidentification of domestic violence victims/survivors as perpetrators is the incident-based focus, reflecting a criminal law orientation in policing. There is a belief among some police that the civil law jurisdiction is "not normal police business", despite the domestic violence law being 'quasi-criminal" straddling both civil and criminal law elements. Police are both confused by, and somewhat resistant to, applying a future focussed lens to the law, as intended by the *Domestic and Family Violence Protection Act 2012*. It seems they revert to what they know and are comfortable with: applying the law to address an isolated offence.

There is also evidence of a risk averse culture contributing to police cross-applications. Specifically, some police believe they are compelled by law to make an application if an act of domestic and family violence has occurred and a relevant relationship has been established (see comments above on a formulaic approach to policing domestic and family violence, facilitated by the legislative definition of domestic violence).

Risk aversion is also evident in the concern expressed by police in focus groups and interviews about making the wrong decision on the "person most in need of protection", and consequently having costs awarded against the police service. Therefore, in "situationally ambiguous" cases, where it is unclear who is the victim/survivor and who is the perpetrator, police make applications for each party, leaving it to the court to determine who is most in need of protection. However, the courts generally rely on the evidence presented in the police reports to decide so cross-applications mostly result in cross-orders.

The role of risk assessment tools in identifying the person most in need of protection

Risk assessment tools are generally used to determine the risk of serious harm, based on multiple indicators, such as the presence of sexual assault, strangulation, and threats of homicide, for example. They assist in determining the level of police and social service intervention needed to keep family members safe from serious harm caused by a perpetrator of domestic and family violence.

Analysis of police policy and procedures nationally in 2019-2020 (Nancarrow et al., 2020) revealed that all Australian states and territories had established risk assessment tools, however, at the time there were no publicly available tools to assist in the identification of the "predominant aggressor" in situationally ambiguous cases of domestic violence. Risk assessment tools were applied following determination of the victim/survivor and the perpetrator, based on police investigation and knowledge of domestic and family violence dynamics. In a 2019 Discussion Paper, the Victorian based No To Violence advised it had commenced work on the development of a "predominant aggressor assessment tool" (No to Violence, 2019, p. 20), to address this gap in guidance for police.

The current Victoria Police Manual Family Violence (2021), incorporates the following set of indicators for identifying the primary aggressor:

- respective injuries
- likelihood or capacity of each party to inflict future injury
- whether either party has defensive injuries
- whether it is likely one party has acted in self-defence
- in predicting or anticipating violence, whether it is likely one party acted with violent resistance
- which party is more fearful
- patterns of coercion, intimidation and/or violence by either party. (Victoria Police (2021) in Family Violence Reform Implementation Monitor, 2021, p. 9)

These indicators address many of the concerns of advocates and legislators in seeking to overcome the misidentification of victims/survivors of domestic and family violence as perpetrators. Such guidance is also necessary for courts, however, because some cross-applications are made by individuals rather than police, and they may be made as a strategy of control over the actual victim/survivor.

Systemic consequences of misidentification

The negative consequences of misidentification are serious, varied, and often long-term. There is a domino effect of consequences for victims/survivors following an application for a protection order. As noted above, police applications mostly result in court orders, leveraging the perpetrator's control over the victim/survivor. Given the circumstances that led to the misidentification (see factors contributing to misidentification, above), it is likely that a "breach" of the order will be reported and the victim/survivor prosecuted and convicted of a summary criminal offence under the *Domestic and Family Violence Protection Act 2012*.

Criminalisation may result in a series of negative consequences, such as the following:

- loss of employment or access to government payments
- loss of housing and housing support
- loss of privacy, with information shared about the "perpetrator" across a range of government and non-government agencies
- removal of children by child protection services, or loss of residency for children through the Family Court (sometimes children are placed in the care of the actual perpetrator)
- alienation from family and community
- health impacts of trauma and post-traumatic stress disorder, untreated physical and/or psychological injuries
- Inability to access social services for victims/survivors.

Misidentified victims/survivors may be at increased risk of serious harm because the system has effectively colluded with the perpetrator in controlling the victim, who in turn mistrusts the system and is unlikely to call for help in future. As noted in Nancarrow et al (2020, p.86) the consequences of misidentification:

> contributed to a profound sense of injustice and distrust of the police and legal system, meaning victims/ survivors came to view the legal system as an extension of violence rather than a protective resource. For many women this trauma manifested in a range of poor mental health outcomes and

> substance use issues ... [it] also translated to deeply felt impacts of misidentification on their self-worth, with many women expressing shame, humiliation and social isolation ... often tied up with the trauma women experienced in being separated from their children as well as the undermining effects being treated as a perpetrator had had on their self-worth and identities as mothers and women.

Misidentification of victims/survivors also has negative consequences for the legal system due to the inflated number of protection order applications processed. This is an unnecessary burden on police (and court) resources with a consequent reduction in time to investigate and determine the person most in need of protection.

Links between misidentification of the perpetrator and the overrepresentation of First Nations people in the criminal justice system

Studies conducted in Queensland (Douglas & Fitzgerald, 2018; Nancarrow, 2016, 2019) show that the quasi-criminal *Domestic and Family Violence Protection Act 2012* is a significant pathway to the criminal justice system for First Nations people. In their analysis of Queensland courts administrative data, Douglas and Fitzgerald (2018) show the significant over-representation of First Nations people within the domestic violence protection order system:

> as both aggrieved and respondent, at the application stage, in contravention charges and in resulting imprisonment outcomes. The overrepresentation of ATSI women as compared to non-Indigenous women in this system, and especially with respect to imprisonment statistics, is particularly stark. (Douglas & Fitzgerald, 2018, p. 52)

These findings corroborate my earlier analysis of administrative police and court data (Nancarrow, 2016, 2019) regarding breaches of domestic violence orders processed in either one of two Magistrates Courts: Mount Isa and Cairns domestic violence cases, and the history of domestic violence proceedings related to each of the 185 respondents in those proceedings.[1] My statistical analysis found that, compared to the whole of Queensland, domestic violence is more aggressively policed in the research sites (which have a higher proportion of First Nations people in the population, compared to the whole of Queensland). Indigenous women were as likely as non-Indigenous men to be the subject of DVOs resulting from police applications. Further, First Nations women were more likely than any other group to have standard conditions only on their DVOs: this indicates that First Nations women were most likely coming to the attention of the police because of fights involving high levels of physical violence, rather than efforts to exercise power and control over the other party. Anthropological research (Burbank, 1994; Langton, 1988; MacDonald, 1988; Williams, 1987) conducted in Northern Australia identifies the role of aggression in complex, regulated dispute resolution processes. Disputes between people of the same sex or of the opposite sex may be resolved in this way.

Langton (1988) sets out the rules for contemporary forms of traditional dispute resolution which include that the dispute settlement process must take place in a public setting. It is

[1] It should be noted that this research analysed data collected prior to the introduction of the *Domestic and Family Violence Protection Act 2012*. However, the findings are corroborated by Douglas and Fitzgerald (2018) who analysed data collected after the introduction of the new legislation.

possible that some of these dispute resolutions processes are construed as domestic violence, noting the incidence-based, formulaic approach typically taken by police.

As with all groups (Indigenous and non-Indigenous men and women) in my study, Indigenous women were most often the subject of police cross-applications resulting in cross-orders. However, "Indigenous women were more often than Indigenous men and non-Indigenous women to have been identified by police as a victim of violence before police sought DVOs naming them the perpetrator" (Nancarrow, 2019, p. 113). That is, a history of victimisation appears not to have been considered in determining the appropriate course of action for Indigenous women, compared to Indigenous men and non-Indigenous women.

The historical and continuing neo-colonial context of the relationship between police and First Nations people, is consistently raised as a significant contributor to the over-representation of First Nations people in the criminal justice system (e.g. Blagg et al., 2018; Cunneen, 2006; Memmott et al., 2001; Nancarrow, 2016, 2019; Nancarrow et al., 2020). Police report frustration with the mistrust and lack of cooperation from First Nations people, and First Nations people report experiences of police racism leading to misidentification of Indigenous men and women as perpetrators of domestic and family violence.

The nature and impact of compounding vulnerabilities in how police respond to DFV

Nancarrow et al (2020) found that police often did not understand the complexity of legal intervention for women from culturally and linguistically diverse backgrounds. This frequently resulted in a failure to provide professional interpreters for women not proficient in English language, using family members to interpret instead, including the actual perpetrator in some instances. Contributing factors to the lack of use of interpreters are likely to be concerns about the associated costs and time required, as well as insufficient skill, or a lack of confidence, in acquiring and working with an interpreter. Without access to an interpreter for women from culturally and linguistically diverse backgrounds, perpetrators are better able to manipulate the legal system to increase control over their victim/survivor, including portraying them as the perpetrator, or that the abuse was mutual.

Situationally ambiguous scenarios, where it is unclear who is the perpetrator and who is the victim, are exacerbated where substance use and mental health factors either trigger or contribute to abuse and violence. Such abuse may occur in the absence of an ongoing pattern of coercive control. It may reflect "chaos context violence" (Nancarrow, 2016, 2019), in which a legal response is neither effective nor appropriate. Such violence, where both parties are affected by substance use and poor mental health, often results in cross-applications and cross-orders and respondents cycling in and out of the criminal justice system. However, a person affected by substance use, or compromised mental health, may also be coercively controlling another person with whom they are in a relationship. Indeed, substance use or poor mental health may be used as an excuse by the perpetrator for their behaviour, contributing to their maintenance of power and control in the relationship.

Circumstances in which police accurately identify DFV dynamics, and the factors that assisted accurate identification

The evidence-base for this report focussed on factors contributing to misidentification, so there is not an explicit evidence base for the circumstances in which police accurately identify

domestic and family violence dynamics. However, such circumstances can be extrapolated from what is known about the various factors contributing to misidentification, addressed above. There is some evidence in Nancarrow et (2020) that accurately identifying domestic and family violence dynamics is supported by an understanding of the nature of coercive control and systems abuse and taking an inquisitive approach in investigation. When a police officer is attuned to the gender-dynamics and manipulative behaviour of perpetrators they may be able to detect inconsistencies in the actual perpetrator's claim of victimhood and pursue a line of questioning that will reveal a more accurate picture. Further, some police reported the value of access to specialist expertise, especially personnel in the Vulnerable Persons Unit, to provide support and guidance in decision-making in situationally ambiguous circumstances. Nancarrow et al (2020) also found support for a co-responder model involving agencies external to police.

Access to such guidance is particularly relevant for inexperienced officers yet to undertake specialist training, but relevant for any officer unsure of the appropriate action to be taken when investigating domestic and family violence.

Recommendations

Considering the issues raised above, and the evidence base for this report, the following recommendations are made:

1. The Queensland Government should consider amending the current definition of "domestic violence" in the *Domestic and family violence Protection Act 2012* (Qld) to ensure consistency between the stated intention of the Act and the legislation. In particular, consideration should be given to either:
    a. defining "abuse" as an ongoing pattern of behaviour aimed at achieving control over the victim/survivor (denying them autonomy, liberty, and equality); or
    b. requiring that the list of abusive behaviours are expressions of coercive control, rather than isolated incidents (even if such incidents are repeated).
2. The Queensland Police Service should:
    a. Consider incorporating material such as Explanatory Notes and the Second Reading Speech, as recorded in Hansard, in its training programs if this is not already done, to provide context for the legislative provisions.
    b. Ensure training on domestic and family violence legislation, and related policies and procedures, emphasises the gravity of police using the exceptional powers provided under the quasi-criminal domestic and family violence legislation.
    c. Ensure police have access to clear guidelines on determining the person most in need of protection (i.e. who is being subjected to a pattern of coercive control and may be suing physical and verbal aggression in response).
    d. In respect to 2c, above, consider the model provided by the Victoria Police on identifying the "predominant aggressor".

e. Provide training and accountability measures regarding sexism and racism in policing, including a sound understanding of the historical and continuing relationship between statutory authorities, including police, and First Natins communities.

f. Ensure police have sufficient time to thoroughly investigate allegations of domestic and family violence: opportunities to streamline paperwork without loss of evidence or accountability should be considered in support of this objective.

g. Ensure police have access to training and resources to engage telephone interpreters as relevant to ensure people with low proficiency in English have equal opportunity to express their case in police investigations of domestic and family violence.

h. Ensure access to specialist expertise to support decision-making in situationally ambiguous, or otherwise complex cases, such as VPU personnel or co-responders external to QPS.

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