



**Accurately identifying the “person most in need of protection” in domestic and family violence law**  
*Key findings and future directions*

ANROWS

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ANROWS Research to policy and practice papers are concise papers that summarise key findings of research on violence against women and their children, including research produced under ANROWS's research program, and provide advice on the implications for policy and practice.

This is an edited summary of key findings from ANROWS research "Misidentification of domestic and family violence aggrieved/respondents in Australia". Please consult the ANROWS website for more information on this project and the full project report: Nancarrow, H., Thomas, K., Ringland, V., & Modini, T. (2020). *Accurately identifying the "person most in need of protection" in domestic and family violence law* (Research report, 23/2020). Sydney: ANROWS.

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ANROWS research contributes to the six National Outcomes of the *National Plan to Reduce Violence against Women and their Children 2010-2022*. This research addresses National Plan Outcome 5—Justice responses are effective.

### **Acknowledgement of Country**

ANROWS acknowledges the Traditional Owners of the land across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and future, and we value Aboriginal and Torres Strait Islander histories, cultures, and knowledge. We are committed to standing and working with Aboriginal and Torres Strait Islander peoples, honouring the truths set out in the [Warawarni-gu Guma Statement](#).

### **Acknowledgement of lived experiences of violence**

ANROWS acknowledges the lives and experiences of the women and children affected by domestic, family and sexual violence who are represented in this report. We recognise the individual stories of courage, hope and resilience that form the basis of ANROWS research.

Caution: Some people may find parts of this content confronting or distressing. Recommended support services include 1800 RESPECT—1800 737 732 and Lifeline—13 11 14.

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# Accurately identifying the “person most in need of protection” in domestic and family violence law

## BACKGROUND

- Domestic and family violence (DFV) is gendered: most victims/survivors of DFV are women and are more likely than men to experience harms associated with DFV (Australian Bureau of Statistics [ABS], 2017; ANROWS, 2019a; Australian Institute of Health and Welfare, 2019). Men are more likely to commit DFV than women (ABS, 2017).
- When police are called to an incident of DFV, one of their tasks under DFV law is to determine whether a party is in need of protection from future harm.
- A concern that has arisen out of the application of DFV law is the inappropriate use of legal sanctions, in particular protection orders, against women who use violence in response to violence perpetrated against them. This often occurs where there are conflicting claims of abuse and can result in cross-applications and cross-orders for protection.
- A recent development in efforts to curtail cross-applications and cross-orders is using the concept of the “person most in need of protection” to guide decisions around applications or orders for protection.
- In 2017, the Queensland Domestic and Family Violence Death Review and Advisory Board recommended research to identify how best to respond to the person most in need of protection when there are mutual allegations of violence and abuse. The resulting research project focused on identifying areas of improvement in police and court practice in relation to identifying the person most in need of protection.

## KEY FINDINGS

- Women—especially Aboriginal and Torres Strait Islander women—are being misidentified as perpetrators on protection orders and the effects of this are far-reaching.
- Police practice is guided by a focus on single incidents of visible or physical violence. This focus does not always support the appropriate application of DFV legislation, where violence would be considered in context in order to assess the need for protection from *future* harm.
- Police sometimes err on the side of caution in making applications, deferring to the magistrate to determine if an order is warranted. However, magistrates in turn may rely on the initial assessments made by police, as may prosecutors. This can create a pinball effect where each decision-maker defers to another’s assessment of the appropriateness of an order. Accordingly, this means that accountability for that assessment is unclear.

## KEY RECOMMENDATIONS

- Create guidance for police on identifying patterns of coercive control.
- Improve processes of decision-making and accountability between police and courts.
- Create guidance for magistrates on how and when they can dismiss inappropriate applications and/or orders.

# Understanding intimate partner violence and women’s use of violence

Domestic and family violence (DFV) is gendered: most victims/survivors of DFV are women and are more likely than men to experience harms associated with DFV, such as homelessness, injury and death (Australian Bureau of Statistics [ABS], 2017; ANROWS, 2019a; Australian Institute of Health and Welfare, 2019). Men are more likely to perpetrate DFV than women (ABS, 2017).

In the 1980s, advocates and legislators began to move away from an understanding of DFV as discrete incidents of violence to a framing that saw “power and control” as central to DFV (see Dobash & Dobash, 1979; Pence & Paymar, 1986). In more recent years, the idea of “coercive control” has helped to more clearly communicate the perpetration of DFV as a pattern of harmful behaviour aimed at controlling or regulating a partner’s life and restricting their freedom and autonomy (see for example Stark, 2007; Tarrant, Tolmie, & Giudice, 2019). That is, DFV does not comprise isolated incidents of violence. Rather, it exists when a perpetrator employs a range of coercive controlling tactics that can be physical or non-physical, are tailored to a specific victim and are responsive to the victim’s behaviour. Coercive control is not simply an action within a list of other actions that may constitute DFV, but is the *context* in which DFV occurs.

Women’s use of violence has been gaining attention in recent years. Current evidence suggests that women are more likely than men to use violence in self-defence or resistance, or in response to current or past trauma (Boxall, Dowling, & Morgan, 2020). Women’s use of violence can be helpfully understood through a lens of coercive control. A victim/survivor experiences tactics of DFV cumulatively: women’s use of violence, if not seen as a response to ongoing coercive control, can appear as an “overreaction”, or the woman herself can appear as—or can be made out to be—an instigator of violence. Further, coercive controlling behaviours can sometimes be less visible due to gender role expectations. For example, values around marriage or motherhood can be exploited by an abuser, where expectations or demands around housework, employment or reproduction can be constructed as “reasonable”.<sup>1</sup>

This is compounded by gendered stereotypes about “real” victims. A “real” victim is seen to be one who is submissive and passive, doesn’t fight back and cooperates with law enforcement. Many victims do not present this way, and have extremely varied responses. These may include being unwilling to talk to the police (or leaving the scene); appearing to be “emotional”, angry, aggressive or unafraid; being confused or unable to convey a “straight” account or story; or expressing a desire to not act against, or leave, the other person (see for example Salter 2020; see also Segrave, Wilson, & Fitz-Gibbon, 2018).



Coercive control is not simply an action within a list of other actions that may constitute DFV, but is the *context* in which DFV occurs.

<sup>1</sup> Accordingly, a particularly hidden aspect of DFV is sexual violence. Sexual violence is one of the most under-reported tactics of DFV (State of Victoria, 2016) and is a significant indicator of escalating frequency and severity of DFV (see ANROWS, 2019b). As Tarrant et al. (2019) argue, “It is not surprising, therefore, that intimate partner sexual violence ... plays a significant part in the violence against which primary victims/survivors sometimes act in self-defence.”

# Identifying the “person most in need of protection”

All states and territories in Australia have civil laws in place to address the harms of DFV. These laws were introduced, on the whole, to ensure that victims/survivors of DFV could seek protection from *future* harm. A concern that has arisen out of the application of civil DFV law, however, is the inappropriate use of legal sanctions, in particular protection orders, against women who use violence in response to violence perpetrated against them. When police are called to an incident of DFV, one of their tasks under civil DFV law is to determine whether a party is in need of protection from future violence. However, it is not easy in the moment for police to determine if the violence they have been called to attend to is violence that has been used in response to DFV. This can lead to women who use violence in response to abuse being identified as a respondent<sup>2</sup> on applications for protection orders, rather than as an aggrieved party.<sup>3</sup>

Prior focus on this issue has mainly centred on cross-applications or cross-orders for protection under DFV laws (where both parties are seeking protection as an aggrieved party, or police have sought protection for both parties, with or without their consent). This most often occurs when there are mutual allegations of violence. Cross-applications and cross-orders can be a mechanism for systems abuse by a perpetrator of DFV. That is, they use the legal system itself to perpetrate abuse, for example, through false allegations of violence or retaliatory applications for protection orders.

A recent development in efforts to curtail cross-applications and cross-orders is the concept of the “person most in need of protection”. This concept was proposed by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) in their joint report (2010, p. 410) as a useful concept to distinguish between aggrieved and respondent. It has subsequently been incorporated in principles and provisions of the *Domestic and Family Violence Protection Act 2012* (Qld), and was included in principles set out in the *Restraining Orders Act 1997* (WA) in 2016.

However, a recent review of DFV-related deaths found that in just under half (44.4%) of all cases of female deaths subject to the review, the woman had been identified as a respondent to a DFV protection order on at least one occasion (Queensland Domestic and Family Violence Death Review and Advisory Board [QDFVDR&AB], 2017, p. 82). Further, in nearly all of the DFV-related deaths of Aboriginal people, the deceased had been recorded as both respondent and aggrieved prior to their death (QDFVDR&AB, 2017, p. 82). These numbers indicate that a concerning amount of DFV victims are being recorded as perpetrators. Consequently, the Queensland Domestic and Family Violence Death Review and Advisory Board recommended research to identify how best to respond to the person most in need of protection when there are mutual allegations of violence and abuse (2017, p. 83).

<sup>2</sup> Specific terminology differs across jurisdictions, but a “respondent” is the subject of a protection order made for the protection of another person.

<sup>3</sup> Specific terminology differs across jurisdictions, but an “aggrieved” is the person named on the court order as the person for whose protection the order is made.

# “Misidentification of domestic and family violence aggrieved/respondents in Australia” by Heather Nancarrow, Kate Thomas, Valerie Ringland and Tanya Modini

This research focused on identifying areas of improvement in police and court practice in relation to identifying the person most in need of protection. This is because police and courts are pivotal points of contact—with considerable powers—in the Australian legal system.

The research team conducted a national analysis of statistical data (domestic violence order applications, police-issued orders and related criminal charges) for the years 2015–2018, with a breakdown by gender and Indigeneity. The team also conducted a national desktop review of existing legislative and police requirements and guidance on identifying the DFV victim or perpetrator.

The project involved an in-depth case study of Queensland as a state that has already incorporated the concept of the person most in need of protection into legislation. Using court observation as well as semi-structured interviews and focus groups with Queensland Police Service (QPS) personnel, support service workers, magistrates and women with lived experience, the case study further investigated:

- where and in what circumstances police and courts in Queensland struggle to identify the DFV victim/survivor where there are mutual allegations of violence
- what legislative, policy and practical factors enable or hinder Queensland police and courts in correctly identifying victims/survivors
- what improvements could be made to better assist police and courts to identify and support victims/survivors.

The themes identified in the qualitative component conducted in Queensland were consistent with the themes discussed in the national and international literature. Therefore, many of the results will resonate in other Australian jurisdictions.

Quotes appearing in this paper come from the interviews that were carried out as part of the study, and also appear in the full report.

See [anrows.org.au](http://anrows.org.au) for the full report.

# Key findings

## Women are being misidentified as perpetrators of DFV and named as respondents on protection orders

While national comparisons are difficult to draw due to differences and inconsistencies in recording data, it is apparent that in most jurisdictions a significant minority (between one fifth and one quarter) of respondents on protection orders are female. Given what is known about the gendered nature of DFV and women's use of violence, this proportion of female respondents suggests a likelihood of victims/survivors being misidentified as perpetrators of DFV.

In most jurisdictions, Aboriginal and Torres Strait Islander peoples are over-represented as respondents on DFV protection orders. They are also over-represented in charges for breaching DFV protection orders. This disproportionality is consistent with the literature on the over-representation of Aboriginal and Torres Strait Islander people in the legal system overall.

## The impacts of being misidentified are far-reaching and can increase vulnerability to violence and risk of associated harms

The findings of this research echo previous literature that shows that being subject to a DFV protection order can have lifelong impacts. It can impact on housing, contact with or residence of children, employment, immigration and safety, or result in a criminal record (as a consequence of breaching the protection order) or entrenchment in the legal system. If someone experiencing DFV is identified as a respondent, they may also miss out on risk-screening because they are not seen as a victim. They may be unable to access critical support services (such as shelter, social services or counselling) because they have been labelled a perpetrator. Therefore, women who are misidentified—or criminalised—experience compounding harm. In addition to this, their own victimisation becomes invisible once they are labelled a perpetrator.

Misidentification can also contribute to distrust of the police and legal system. A service provider explained how clients can fear calling the police for help if they have had a previous experience of being misidentified:

I agree about that reluctance to contact the police because we talk about safety planning and what to do in an emergency and we will sometimes have those responses where you say, "Please, if it's an emergency, call the police, ring 000" and they'll say, "What good it did me last time?" and you can tell that that's not going to be part of their own safety plan. (Service provider focus group 1)

A number of service providers and women discussed how the consequences of misidentification are often amplified for Aboriginal women. This is due to a historic distrust of policing responses, and because misidentification can trigger social isolation from their communities. At a personal level, misidentification also impacts self-worth, with many women expressing shame and humiliation. This is often tied up with trauma that women have experienced from being separated from their children, and the effects being treated as a perpetrator has on their identities as mothers.

## Policing focuses on isolated incidents of violence

Civil DFV law is about protection from future harm and was developed to address *patterns* of violence in a context of coercive control. However, policing is also heavily focused on criminal law, which tends to focus on *incidents* of violence. Balancing these approaches when responding to a call can mean a tendency to consider only single acts of violence in isolation from a history of coercive control.

Interviews with general duties officers (GDOs) highlighted an overriding focus on making the scene safe, rather than assessing who was most in need of protection overall. Police prosecutors and women spoke about responses that focused on physical injury. They stressed that sometimes orders were taken out without speaking to both parties, particularly if the woman appeared to be uninjured. Police prosecutors offered examples:

[Participant 1:] She's making allegations of prolonged domestic violence but actually in their wording they've got, "We can see scratches and bite marks on him therefore we have determined he is in most need of protection. She presents with no injuries. He is in most need of protection."

[Participant 2:] When officers ... look at injuries and determine causation and whatever, they're looking based on ... that incident alone, instead of looking at the entire relationship and the dynamics of that relationship and other allegations of DV and anything like that. (QPS focus group 6 [police prosecutors])

Time and resource constraints make it difficult for officers to move beyond the immediate incident. It is particularly difficult for first responders to consider the context—the history and dynamics of a relationship—when they have limited time and information available to them:

It's very difficult when you're going to a job to get that whole picture of the relationship in a 10-second radio transmission ... So, really when we're going to an incident in that critical moment, we focus probably more on what's happening now as opposed to the entire relationship. (QPS focus group 9 [GDOs])

Some women identified that a reliance on the parties' records, often the most accessible information available to police to establish background, was a critical factor in their being misidentified as a respondent:

He had no history, he worked full time, he was a good person in their eyes, so they'd just stand there and talk to him about fishing for an hour and then just leave and not even listen to me. (Women's focus group 1)



Balancing [civil and criminal legal] approaches when responding to a call can mean a tendency [for police] to consider only single acts of violence in isolation from a history of coercive control.

A focus on incidents is concerning given reports from women and service providers of the context of women's use of violence, for example:

He didn't so much bash me every day but he did things like he would stop me from ringing people, he'd eat my SIM cards and lock me inside my house and turn my electricity off. So I couldn't leave, I couldn't ring anyone, little things like that. Over the course of him doing that constantly to me I kind of lost it and went insane. (Women's focus group 1)

Without knowledge of the history of the relationship, use of violence against someone who is perpetrating DFV may be misread, and the law will be inappropriately applied.

## Assumptions about behaviours of victims affect policing practice

Despite decades of research on women's resistance to violence perpetrated against them, stereotypical assumptions about women who are subjected to violence persist. Police and courts are confused by women who do not fit the stereotypical image of a victim. That is, they are confused by women who fight back, particularly if they use weapons, and those who are uncooperative. Participants in this study observed the tendency for investigating police to hold women to a higher standard than men in their need to appear composed and cooperate with police.

How a party presents at the scene contributes to police perceptions of whether they are in need of protection. As one police officer said:

Yeah, if they're willing to carry on when you're there, then you certainly get a bias that whatever happened before, they could well be the instigator. So that's definitely something that stands out. (QPS focus group 2 [GDOs])

However, stories from survivors show how these presentations can be misleading:

He was all calm and collected by the time they got there; I was the one that was going off smashing everything and all the rest of it and that's why I had the orders put on me because that's what they walked into, but I had marks all over me ... [but] they came into me being the one that was screaming and me—yeah. (Women's focus group 1)

A lack of cooperation with police was sometimes used against women, as it does not align with the idea of an ideal or "real" victim (who would desire police assistance):

I was flogged to a point where I couldn't even brush my own hair. Couldn't ... lift my arm up. The female officer ... tried to talk to me but because I wouldn't talk to her ... she went and spoke to him. I was sent to the hospital too because of my injuries ... But because I didn't talk, that order went out against me. (Women's focus group 2)

However, reluctance to cooperate with police stems from prior negative experiences, feelings of intimidation and mistrust of police. This was acutely felt by Aboriginal women in this research. Service providers and women described how racism and biased attitudes inform police conceptions of a "victim", which in turn contributes to both misidentification and women's reluctance to seek police help. Two Aboriginal women explained:

Years later now I'm in another predicament. I'm in a current relationship right now

where I wasn't there again, I fled before the police can come. And sadly, admittedly, it's a thing that we think about, we don't want to be around the police. I'm very intimidated by them. Very intimidated by them. (Women's focus group 2)

I was already convicted in their eyes I know because that's how they treated me, and as a black woman against the white man too they—nobody wants to hear your story, they're going to believe the white man. (Women's focus group 1)

## Systems abuse contributes to misidentification

Systems abuse can result in misidentification, and was raised by all participant groups. Women and service providers described a number of sophisticated strategies successfully used by perpetrators of DFV, such as making false allegations with little or no evidence and having these accepted by police. Additionally, women and service providers explained that perpetrators of DFV deliberately manipulate the system by employing a range of “image management” strategies such as being the first to call police or, as described above, presenting as calm when police arrive. Image management is a key way that perpetrators of DFV can continue the abuse, and is further exacerbated if services (inadvertently) collude in abuse by accepting the false image or story.

Service providers were particularly concerned about false allegations and image management being used successfully against people with limited English in the absence of interpreters:

[A] trend that's been happening for quite some time last year and continuing into this year is that CALD [culturally and linguistically diverse] women, so police attending, interpreters not used, they appear to be heightened or unable to communicate, he can communicate perfectly, speaks English, they speak to him, they get his version of events, she then becomes the respondent without her version of events being heard. (Service provider focus group 3)

Misidentification can also itself enable further systems abuse by perpetrators of DFV. For example, a recurring theme in focus groups was perpetrators of DFV using protection orders against victims/survivors who have been misidentified as respondents. This can include, for example, threats to call the police and allege a breach of an order, pressuring victims/survivors to withdraw their own protection order applications or threats to call child safety. Victims/survivors who have been misidentified are entitled to free legal advice but may not know this or not be supported to access it, so may not be aware of their rights. A victim/survivor being misidentified as a respondent means a perpetrator of DFV has another tool of control they can use:

[Participant 1:] See, I've got a current order out now where I'm the perpetrator. And that's fearful for me because—and it's his house. All he's got to do is ring the police and he threatens me all the time with it.

[Participant 2:] You're walking on eggshells.



A recurring theme in focus groups was perpetrators of DFV using protection orders against victims/survivors who have been misidentified as respondents ... for example, threats to call the police and allege a breach of an order, pressuring victims/survivors to withdraw their own protection order applications or threats to call child safety.

[Participant 3:] So, you're kind of sitting on the fence of knowing you can go to jail, just stick around with it or ...

[Participant 2:] Like you were saying, you'll get locked up.

[Participant 1:] I can't stand up for myself in fear that his retaliation is make a phone call to the cops and he could have me removed just like that. (Women's focus group 2)

## A lack of role clarity and accountability between police and courts results in deferred responsibility for decision-making

Disjointed processes between police and courts mean that cross-applications are being inappropriately made. Misidentification is then not picked up by magistrates once an application proceeds to court.

Responses from police participants reflected a preference to leave a determination to the courts when they are unsure about whether an application would be appropriate. The phrase "cover your arse" was mentioned in almost every police focus group, and reflected a fear of liability that manifested in orders being taken out "just in case it does go pear-shaped later on" (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel]):

So now when they go into DVs they're not thinking about, "Okay, this is the policy and this is what I would normally do", they're thinking about, "Well I just got in trouble for not doing enough so I'm going to be extra cautious and take out a DV order when I really don't think it needs it, because if I don't do it and something happens I'm going to get in trouble". So, we're very reactive. (QPS focus group 9 [GDOs])

Many prosecutors were confident that they operated as a critical point where inappropriate applications were filtered out. However, participants from those same focus groups described processes that meant prosecutors deferred back to the original police officer's decision when an application was queried.

Magistrates were seen by many participants as best positioned to decide who was in most need of protection. However, the magistrates interviewed explained they had to rely on the evidence put before them in court, and were equally as resource-constrained as police, sometimes hearing as many as 115 cases in a day. Therefore, similarly to prosecutors, magistrates often relied on the initial police assessment when making decisions about orders. Magistrates also reported that the law is unclear about whether and at what point they have the power to strike out an application when they assess that it has been made inappropriately. According to some participants this uncertainty results in orders being made against each party or matters being adjourned for a further hearing. This subjects victims/survivors to prolonged involvement with the legal system.

The combination of these approaches by police, prosecutors and magistrates creates a situation where there is no shared understanding of who is accountable for decisions including determining the person most in need of protection or whether an order is appropriate, or correcting misidentification once it occurs. Currently there are limited systemic safeguards to address misidentification; instead, the system relies upon individuals, namely:

- victims/survivors having resources to contest inappropriate applications or defend charges brought against them
- individual magistrates and prosecutors proactively making further enquiries
- for police applications, applicant police officers (with support of their superiors) being receptive to changing their decisions when further information is available.

# Recommendations for policymakers and practitioners

## Guidance on identifying patterns of coercive control

Police (especially GDOs) are faced with multiple and competing pressures when responding to DFV matters. Consequently, some have difficulty shifting from the incident-based focus of police investigations in general to the pattern-based focus of civil law. Thus, police need clearer guidance and training to assist them to distinguish between coercive controlling violence (physical and non-physical) and violence used in response to ongoing abuse. Explicit guidance on identifying patterns of coercive control would assist police in identifying the person most in need of protection in ambiguous circumstances, and in determining whether a protection order is necessary or desirable.

## Police response: Consider alternative models

The changes to policing and investigation models most widely supported by participants were specialist DFV police units or co-responder models. These models see specialists with expertise in coercive control accompany police at investigations, or otherwise support police assessments. Co-responders were widely seen as potential enablers of good police practice in identifying the aggrieved and respondent, and the appropriate action to be taken. Police participants in particular expressed support for specialist and co-responder models as strategies to improve policing responses. Some QPS participants supported a specialist DFV police unit. They felt this would allow GDOs to concentrate on making the scene safe and allow those with DFV expertise to make assessments about what response was required.

There was widespread recognition that this would require significant resourcing. However, there may be other ways to achieve some of the benefits of a co-responder model. Police in this research suggested, for example, consultation with a specialist unit to support investigation and decision-making on whether an application is necessary or desirable.

## Provide training for police and legal professionals

Police in this study expressed a desire for more training to keep up with quickly changing policies and procedures.

Areas of focus for training and education for police and legal professionals (for example, prosecutors, lawyers and magistrates) include clarity about the rationale for police and court powers in civil law; guidance on key concepts that are relied on in the relevant legislation; and development of trauma-informed and culturally and gender-sensitive understandings of the dynamics of DFV. Trauma-informed responses can have flow-on effects: for example, supporting victims to report violence, and sexual violence in particular, will facilitate responses based on the entirety of a victim's/survivor's experience.

Effective training on the appropriate application of the law would result in:

- trauma-informed and culturally and gender-sensitive understandings of DFV

- an understanding of Aboriginal and Torres Strait Islander peoples' resistance to police intervention and strategies to support victim/survivor cooperation
- an ability to detect image management and systems abuse, and therefore reduce collusion with perpetrators of DFV
- skills to investigate and present evidence of coercive control
- an ability to determine when action other than an application for a protection order is appropriate.

Training should also include a focus on the intersections of disadvantage, for example, being aware of specific issues facing women with disability, women in LGBTQ communities and women from culturally and linguistically diverse backgrounds. The concerning evidence from women's and service provider focus groups indicates that there is a continuing need for education to address sexist and racist attitudes held by some police. This could include education about the context in which Aboriginal and Torres Strait Islander violence takes place, by paying attention to structural racism and intergenerational harm and trauma. This is particularly important in relation to Aboriginal and Torres Strait Islander women's resistive violence and reluctance to cooperate with police during investigations.

## Improve court-police processes

The different roles and mechanisms for decision-making in applications/orders for protection require clarification. This would address the current ambiguity surrounding responsibility and accountability for the determination of the person most in need of protection. Improvements to how and by whom decisions are reviewed within and beyond the responding police officer's unit are necessary. Where inappropriate applications for protection orders are made, either by police or privately, the processes and roles for prosecutors and magistrates in remedying this must be clear.

Further research should explore ways to improve the disjointedness between police and court processes in dealing with DFV matters where there are allegations of mutual violence or applications have been inappropriately brought.

## Create guidance for magistrates on dismissing inappropriate applications

Courts, including police prosecutors and magistrates, need clarity about when it is appropriate to withdraw or dismiss inappropriate applications. Guidance for courts on dismissing applications or withdrawing orders is also extremely important given participants' reports of women consenting to inappropriate orders. Participants described the way women may consent due to exhaustion from systems abuse (for example, endless applications for protection orders by perpetrators), legal and other financial costs resulting from systems abuse, or pressure from the abuser.

Jurisdictions should also consider incorporating principles for determining the person most in need of protection in relevant bench books and supporting materials.

# Further reading

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# ANROWS

AUSTRALIA'S NATIONAL RESEARCH ORGANISATION FOR WOMEN'S SAFETY

*to Reduce Violence against Women & their Children*





# Accurately identifying the “person most in need of protection” in domestic and family violence law

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ANROWS

AUSTRALIA'S NATIONAL RESEARCH  
ORGANISATION FOR WOMEN'S SAFETY  
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ANROWS acknowledges the Traditional Owners of the land across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and future, and we value Aboriginal and Torres Strait Islander histories, cultures, and knowledge. We are committed to standing and working with Aboriginal and Torres Strait Islander peoples, honouring the truths set out in the Warawarni-gu Guma Statement.

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# Accurately identifying the “person most in need of protection” in domestic and family violence law

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This report addresses work covered in the ANROWS research project "Misidentification of domestic and family violence aggrieved/respondents in Australia". Please consult the ANROWS website for more information on this project.

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Caution: Some people may find parts of this content confronting or distressing. Recommended support services include 1800 RESPECT –1800 737 732 and Lifeline–13 11 14.

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# Notes on terminology

- Indigenous/Indigeneity** The authors acknowledge that the term “Indigenous” in reference to Aboriginal and Torres Strait Islander peoples masks distinct cultural identities, and is rejected by many Aboriginal and Torres Strait Islander peoples as offensive. The term has been avoided where possible in this report. However, data related to Aboriginal and Torres Strait Islander peoples are often aggregated as “Indigenous” and prior literature using the term prevents its total exclusion from the report.
- Domestic and family violence** While some jurisdictions use the term “family and domestic violence” or simply “family violence”, this report generally uses the term “domestic and family violence”. This is the term used in Queensland, where the research on “person most in need of protection” was instigated.

# Key abbreviations

ABS	Australian Bureau of Statistics
ADVO	Apprehended domestic violence order
ALRC	Australian Law Reform Commission
ANROWS	Australia's National Research Organisation for Women's Safety Limited
CFDR	Coordinated family dispute resolution
DFV	Domestic and family violence
DVO	Domestic violence order
DVLO	Domestic violence liaison officer
GDO	General duties officer
IPH	Intimate partner homicide
IPV	Intimate partner violence
JCCD	Judicial Council on Cultural Diversity
TPM	Tasmania Police Manual
TPO	Temporary protection order
MBCP	Men's behaviour change program
NSW DVDRT	New South Wales Domestic Violence Death Review Team
NSWLRC	New South Wales Law Reform Commission
NSWPF	New South Wales Police Force
NTV	No To Violence
PPN	Police protection notice
QDFVDR&AB	Queensland Domestic and Family Violence Death Review and Advisory Board
QGSO	Queensland Government Statistician's Office
QPRIME	Queensland Police Records and Information Management Exchange
QPS	Queensland Police Service
RCFV	Royal Commission into Family Violence
VPU	Vulnerable Persons Unit

# Key terms

<b>Aggrieved</b>	A person named on a court order as the person for whose protection the order is made. The term “victim” is not used because allegations in civil hearings are not required to be proven “beyond reasonable doubt”. Referred to in some jurisdictions as the “affected person”, “affected family member” or “protected person”.
<b>Court order</b>	An order made by the court. In this report a court order includes a temporary order, permitted in particular circumstances, as well as a final order, resulting from the consent of the respondent (see definition below) or a determination of the court after a hearing.
<b>Cross-application</b>	Occurs when Person A in a relevant relationship is named the aggrieved (see definition above) on an application for a protection order to protect them from Person B, the respondent (see definition below), and another application (a cross-application) is made naming Person B the aggrieved and Person A the respondent. The cross-applications may be made simultaneously, or one subsequent to the other.
<b>Cross-order</b>	A court order made as a result of a cross-application (see definition above).
<b>Domestic violence order</b>	A court order made for the protection of a person from another person with whom they are in a relationship covered under the relevant domestic violence legislation.
<b>Domestic and family violence (DFV)</b>	This term is used in the Northern Territory and Queensland legislation and policy and is the term generally used in this report, although some jurisdictions use the term “family violence” (e.g. Victoria and Tasmania), and others (e.g. Western Australia) use “family and domestic violence”. DFV is defined variously within states and territories of Australia but it includes physical and sexual violence, and non-physical forms of abuse within intimate partner relationships and (except for Tasmania) other familial relationships, broadly defined.
<b>Dual arrest</b>	Occurs when both parties involved in DFV are arrested for a DFV-related offence.
<b>Misidentification</b>	This term is used broadly in this report to capture circumstances where the person perpetrating DFV is wrongly identified as a person experiencing DFV or as being most in need of protection, or where the person experiencing DFV or most in need of protection is wrongly identified as a person perpetrating DFV.
<b>Mutual allegation</b>	Where allegations of DFV are made against both or multiple parties. Allegations may be made by the parties themselves, or by witnesses or other parties.
<b>Mutual violence</b>	Violence used by both parties in a relationship. Also referred to as “bilateral” or “situational” violence (Babcock, Snead, Bennett, & Almenti, 2019).
<b>Offender</b>	A person who has been charged with a criminal offence.
<b>Perpetrator</b>	A person undertaking acts of DFV against another person.

<b>Person most in need of protection</b>	A term used in Queensland and Western Australian legislation to assist police and courts, respectively, in deciding which party should be considered the aggrieved when making an application for a protection order, or making a protection order.
<b>Police application</b>	An application made by police for a court order. A police application may be initiated by the aggrieved or by the police.
<b>Police-issued order</b>	An order made by police, for example, a police protection notice (Queensland) or a family violence safety notice (Victoria). Operates in some jurisdictions as a temporary protection order until a court order is made.
<b>Predominant aggressor</b>	Used in some jurisdictions instead of “primary aggressor” (see definition below) to refer to the person who is the predominant user of DFV where multiple parties may be using violence or there are conflicting allegations.
<b>Primary aggressor</b>	Used in some jurisdictions to refer to the person who is primarily using DFV where multiple parties may be using violence or there are conflicting allegations.
<b>Primary victim</b>	Used in some jurisdictions to refer to the person who is primarily experiencing DFV, where multiple parties may be using violence or there are conflicting allegations.
<b>Private application</b>	An application made by an aggrieved directly to a court for a court order.
<b>Protection order</b>	A civil order made for the protection of one party from another party’s use of DFV. Referred to as a domestic violence and/or family violence protection order, intervention order, or restraining order in different jurisdictions. It is used in this report as a broad term to refer to any civil order available across jurisdictions to protect a person from DFV, including court and police-issued orders.
<b>Respondent</b>	The person who is the subject of a protection order made for the protection of another person. The term “offender” or “perpetrator” is not used because allegations in civil hearings are not required to be proven “beyond reasonable doubt”.
<b>Retaliatory violence</b>	Violence used by a person in retaliation, to “get back” at a partner for their previous violence (Leisring & Grigorian, 2016).
<b>Self-defensive violence</b>	Violence used by a person in self-defence, to protect themselves from harm (Leisring & Grigorian, 2016).
<b>Systems abuse</b>	Abuse or manipulation of legal systems and processes by perpetrators to exert power and control over the victim/survivor (Douglas & Chapple, 2019). Systems abuse can happen in multiple legal contexts (child protection, family law, migration law) but the focus of this report is on civil domestic violence law and associated offences (Douglas, in press).
<b>Victim and victim/survivor</b>	This report uses “victim/survivor” when referring to people who have experienced DFV, and “victim” when referring to those who have died in DFV-related circumstances (including homicides and suicides).
<b>Violent resistance</b>	A term coined by Johnson (2008) to describe violence used by a victim in resistance and reaction to a perpetrator’s power and control (Babcock et al., 2019).

# Executive summary

## Background

The inappropriate use of legal sanctions against victims of domestic and family violence (DFV; predominantly women) who use violence in response to violence perpetrated against them has been of concern to advocates and legislators nationally and internationally for decades. This often, but not always, occurs where there are conflicting claims of abuse or apparent mutual violence resulting in police intervention. In Australia the problem manifests predominantly in cross-applications and cross-orders under state and territory civil domestic violence laws, which provide exceptional powers to police and courts. It also manifests in criminal charges in some contexts.<sup>1</sup> Treating victims of violence as perpetrators undermines confidence in the legal system, denies victims/survivors appropriate support, may inadvertently collude with perpetrators in exerting further control over their (ex-)partners through systems abuse and has significant, potentially life-long, harmful impacts.

A recent development in efforts to curtail cross-applications and cross-orders is the concept of the “person most in need of protection”. It has been incorporated in principles and provisions of the *Domestic and Family Violence Protection Act 2012* (Qld), and was included in principles set out in the *Restraining Orders Act 1997* (WA) in 2016. Nevertheless, police and courts continue to make cross-applications and cross-orders.

There is a substantial body of literature on the problem of cross-applications and cross-orders, and attempts to address it. There has been very little research, however, on the concept of the person most in need of protection to guide decision-makers in the application of the principle as intended. The Queensland Domestic and Family Violence Death Review and Advisory Board (QDFVDR&AB; 2017) recommended such research, noting the substantial proportion of women and Aboriginal people whose domestic violence-related deaths followed their treatment as perpetrators of DFV.

<sup>1</sup> A breach of a civil court order is a summary offence, meaning an offence that is not considered serious enough to require a judge and jury: the matter can be determined by a magistrate alone. In Tasmania, “family violence” is itself an offence and in some jurisdictions, such as the Australian Capital Territory, police adopt a pro-arrest stance (i.e. pursue criminal charges in the first instance), where there is sufficient evidence a crime, such as assault, has occurred.

## Research aims and questions

The primary aim of the research was to identify strategies to improve police and court practice in regard to identifying the person most in need of protection, to avoid the making of cross-applications and cross-orders in civil DFV law. The study also aimed to provide a statistical sketch of the application of DFV-related law, with particular reference to gender and Indigeneity; and examples of good practice in policy, procedures and guidelines, nationally.

The research addressed the following specific questions:

1. What legislative and policy requirements and guidance exist in Australian states and territories for police and courts to identify the DFV victim/survivor?
2. Where and in what circumstances do police and courts in Queensland currently appear to struggle to identify the DFV victim/survivor where there are mutual allegations of violence?
3. What legislative, policy and practical factors enable or hinder Queensland police (as first responders) and courts (as the next point of contact) in correctly identifying victims/survivors where there are mutual allegations of violence?
4. What improvements could be made to better assist police and courts to identify and support victims/survivors in Queensland?
5. What improvements could be made to broader legal system structures and processes in each Australian state and territory to ensure the victim/survivor is identified and supported where there are mutual allegations of violence?

Based on prior research (Boxall, Dowling, & Morgan, 2020; Douglas & Fitzgerald, 2018; Nancarrow, 2019), the experiences of Aboriginal and Torres Strait Islander women were of particular interest in this research. However, for ethical reasons, they were not explicitly recruited as research participants: incidental recruitment of Aboriginal and Torres Strait Islander women was anticipated and occurred.

## Method

A repeatable search strategy was used to identify relevant national and international academic and grey literature for the period 2000–2020. A mixed, multi-method design was employed for the primary research. The research team conducted a national comparative analysis of statistical data<sup>2</sup> (domestic violence order applications, police-issued orders and related criminal charges) for the years 2015–2018, with a breakdown by gender and Indigeneity; and a desktop review of DFV legislation, policies and procedures current as at March 10, 2020. The team also conducted interviews and focus groups with four broad groups of research participants (police, DFV service providers, women with lived experience of being identified as both victim/survivor and perpetrator of DFV, and magistrates) across three research sites in Queensland (Brisbane, Southport and Townsville) over three weeks in January and February 2020. One full-day court observation was also conducted in each of the three research sites, with the consent of the sitting magistrate in each court.

Ethics clearance for the research was provided by Griffith University (GU ref no. 2019/897). The Western Australia Police Force also required, and granted, approval for the use of statistical data and the Queensland Police Service Research Committee approved an application to proceed with interviews and focus groups with members of the Queensland Police Service (QPS). The Queensland Government Statistician's Office (QGSO) facilitated access to data under the *Statistical Returns Act 1896* (Qld).

## Key findings

The findings of this research, detailed in Chapters 5 and 6 and summarised below, are consistent with findings of prior research reviewed in Chapter 1.

### Australian legislative and policy requirements and guidance for police and courts

Only two jurisdictions, Queensland and Western Australia,

have legislative provisions for the identification of the person most in need of protection, but others have policies and procedures aimed at supporting the identification of the primary aggressor.

The comparability of national data is limited due to inconsistent recording; however, it is apparent that in most jurisdictions a significant minority (between one fifth and one quarter) of respondents on protection orders are female. Given what is known about the gendered nature of coercive controlling violence and violent resistance, this proportion of female respondents suggests a likelihood of victims/survivors being misidentified as perpetrators of DFV.

Aboriginal and Torres Strait Islander peoples are also over-represented as respondents, and being subject to charges for breaching DFV protection orders, in most jurisdictions. Although South Australia had a smaller proportion of female respondents overall, Indigenous women in that jurisdiction were over-represented in breach charges.

Quantitative data that linked DFV protection order pairs (respondent and aggrieved) to allow for analysis of cross-applications and cross-orders was only available for Queensland. Analysis of data for three financial years (2015–16 to 2017–18) showed that of all dyads with applications (n=75,330), about 12 percent (n=8779) had cross-applications, and of all dyads with orders (n=67,409), approximately 9 percent (n=6257) had cross-orders.<sup>3</sup> It appears that a small percentage of cross-applications are being identified, and the person most in need of protection then considered in court.

### Factors that enable or hinder Queensland police and courts

A range of legislative factors and police organisational, procedural and cultural factors are contributing to the inappropriate use of cross-applications and cross-orders in Queensland.

<sup>2</sup> See "Author acknowledgment" on p. iv for a list of agencies that coordinated the provision of aggregated quantitative data on behalf of their respective jurisdictions.

<sup>3</sup> These percentages are derived by counting one application or order from a dyad, which is a linked pair: a DFV protection order respondent and aggrieved. See list of key terms for definitions of cross-application, cross-order, respondent and aggrieved.

There is a gap between the stated intention of the Queensland civil law (focused on prevention of future coercive controlling violence) and its application. This is partially explained by the challenges of enunciating key concepts including coercive control, person most in need of protection and "necessary or desirable". Training on key legislative concepts is needed but is not sufficient to achieve the intent of the law.

In Queensland and elsewhere, organisational culture, combined with lack of clarity in guidelines, results in police reverting to incident-based investigations. These are consistent with a retrospective criminal law focus, while the civil law is future-focused and intended to address patterns of coercive control. The research found that assumptions about the behaviour of victims of abuse (and women in general) contribute to inappropriate police applications against women who do not fit the stereotypes. Aboriginal and Torres Strait Islander women are particularly vulnerable in this regard due to the ongoing societal and systemic racism faced by Aboriginal and Torres Strait Islander peoples, including in conceptualisations of the use of violence and stereotypes of the "ideal victim".

Queensland police perceive an organisational requirement to take action (apply for a DFV protection order) and are frustrated by some victims/survivors' lack of cooperation with police. Guidance in relation to cases involving a psychotic episode, for example, is also needed to support police in determining appropriate action. Courts, including police prosecutors and magistrates, need clarity about when it is appropriate to withdraw or dismiss inappropriate applications. There appears to be value in access to advice for police where there is uncertainty about the person most in need of the protection of DFV law. Also, systems for identifying an application before the court as a cross-application need improvement.

### **Challenges in identifying the victim/survivor and improvements to be made**

Police and courts can be confused by women who do not fit the stereotypical image of a victim: women who fight back, particularly if they use weapons, and those who are

uncooperative with police and other legal actors. Reluctance to cooperate results from prior negative experiences, feelings of intimidation and mistrust of police.

Other factors contributing to the making of cross-applications include incident-based policing, "image management" by perpetrators masquerading as victims and other means of systems abuse, the risk-averse organisational culture in policing, and inadequate time and resources to investigate sufficiently to distinguish the person most in need of legal protection. Areas of focus for training, education and guidelines for police and courts include clarity about the rationale for exceptional police and court powers in civil law; guidance on key legislative concepts (person most in need of protection and necessary or desirable); development of trauma-informed, culturally and gender-sensitive understandings of the dynamics of DFV; guidance and organisational leadership to support police decision-making; and streamlining paperwork and increasing resources for general duties officers (GDOs).

### **Areas for improvement to broader legal system structures and processes**

A major finding in this research is that disjointed processes between police and courts in responding to DFV are resulting in cross-applications being made and not picked up in court processes. This is particularly problematic where victims/survivors consent to the making of an order. Clarity about the different roles of GDOs, prosecutors and magistrates, and mechanisms for accountable decision-making are needed. For police this includes effective supervision, and accountability for poor practice and negative police culture. Magistrates require clarity about the circumstances in which orders can be struck out, dismissed or revoked. Both magistrates and police need guidelines and processes to ensure the history of DFV offending is considered in their decision-making, cognisant of the potential for the victim/survivor to have previously been misidentified as a perpetrator of DFV.

## Conclusion

Police and courts are provided exceptional powers in civil DFV law, with serious consequences for people subjected to those powers. Therefore, police and judicial officers must have a sound understanding of the gravity of their decisions. Further, they must be supported to make decisions reflective of the legislative intent.

Despite decades of legislative, policy and procedural reform to address unintended consequences of DFV law in Australia, the problem of women being wrongly treated as perpetrators persists. The gap between intention and application is largely due to a lack of comprehension of key concepts, uncertainty about procedural expectations, and organisational practices and culture.

Based on the available data, it appears that no Australian jurisdiction is currently well-placed to provide a model of police and court practice to effectively address misidentification of victims/survivors as perpetrators of DFV. While all jurisdictions have risk assessment tools, no jurisdiction currently has tools for police to assess patterns of coercive control that would detect which party is the perpetrator and which is acting in self-defence or violent resistance. Risk assessment is, therefore, applied to the person determined to be the perpetrator, often based on visible injury and devoid of context.

The themes identified in the qualitative component conducted in Queensland were consistent with the themes discussed in the international and national literature. Therefore, many of the results will resonate in other Australian jurisdictions.

## Implications for policy and practice

Explicit guidance on identifying patterns of coercive control would assist police and courts in distinguishing the perpetrator and the victim/survivor in ambiguous circumstances, and in determining whether a protection order is necessary or desirable.

The rationale for exceptional police and court powers should be highlighted in relevant legislation, policy and procedures to:

- assist understanding of the central role of coercive control in the legislative intent
- improve investigation
- ensure accurate identification of victims/survivors and perpetrators of DFV.

Policy, procedures and guidelines for police and courts could usefully draw on the supporting policy documents (e.g. explanatory notes, Second Reading Speeches, and parliamentary committee minutes) to provide clarity and direction for those responsible for applying the law.

Effective training on the appropriate application of the law would result in:

- trauma-informed and culturally and gender-sensitive understandings of DFV
- an understanding of Aboriginal and Torres Strait Islander peoples' resistance to police intervention and strategies to support victim/survivor cooperation
- an ability to detect image management and systems abuse by perpetrators of DFV
- skills to investigate and present evidence of coercive control and violent resistance
- an ability to determine when action other than an application for a protection order is appropriate.

Given the general organisational culture of compliance and accountability within policing, guidelines for police to determine when an application for a protection order may not be appropriate, or should be deferred (e.g. for medical reasons, to seek advice or allow further investigation), need to be clear.

Police are faced with complex and ambiguous situations and they are, and should be, accountable for their decisions on making a DFV protection order application or not. Therefore,

they must be supported with clear policies and efficient procedures that emphasise the importance of identifying the person most in need of legal protection in the context of a pattern of coercive control.

Magistrates require further guidance to ensure they have consistent understandings of when and how they may strike out or dismiss inappropriate applications. Jurisdictions should also consider incorporating principles for determining the primary aggressor or person most in need of protection in relevant bench books and supporting materials.

# Introduction

The purpose of the introduction is to provide the rationale for the research and an overview of the report's structure. The rationale includes important background information about the context of the research and its instigation. It also situates the research in a broader, national policy context and it identifies the specific evidence gap addressed by this investigation. The introduction concludes with a brief overview of each of the report's six chapters.

## Background

The legal system, predominantly a civil court order scheme, has been a central feature in responding to domestic and family violence (DFV) in Australia for more than 30 years. Each state and territory has its own laws and associated policies and practices. Over the years, there have been numerous reviews and inquiries that have led to successive legislative amendments in these jurisdictions to respond to emergent knowledge and identified problems with the application of the law (Australian Law Reform Commission [ALRC], 2010; Special Taskforce on Domestic and Family Violence in Queensland, 2015; State of Victoria, 2016). A key continuing concern has been the use of cross-applications and cross-orders<sup>1</sup> to address conflicting claims of victimisation and perpetration of DFV and allegations of mutual DFV, particularly in cases of intimate partner violence, resulting in victims being treated as perpetrators of DFV.

Continuing problems with Queensland's *Domestic and Family Violence Protection Act 1989*, despite successive amendments, resulted in it being repealed and replaced with the *Domestic and Family Violence Protection Act 2012* (Qld). In addition to the inclusion of a preamble that positions the legislation within a human rights framework and a gendered analysis of DFV, the Act now requires that police and courts are to identify the "person most in need of protection" in cases where there are conflicting claims about who perpetrated DFV (ss 4[1] and 41C[2]). The (then) Minister for Women and Minister for Communities, with responsibility for the administration of the DFV legislation, explained its intent and the reason for the focus on the person most in need of protection as follows:

These orders are ... to protect the person most at risk of future harm, not as a punishment for a current behaviour. It is to get both the courts and the police to understand the dynamics of what is happening here and certainly, where possible, avoid cross-applications and have a pro-investigative approach. (Evidence to Community Affairs Committee, Legislative Assembly of Queensland, Brisbane, 11 October 2011, p. 3 [Karen Struthers])

Based on the evidence available, these reforms did not necessarily address the inappropriate use of cross-applications and cross-orders as was intended (Douglas & Fitzgerald, 2018; Queensland Domestic Violence Services Network [QDVSN], 2014). Further, the Queensland Domestic and Family Violence Death Review and Advisory Board (QDFVDR&AB) identified that, of domestic violence-related deaths reviewed for the period 2015–17, in just under half (44.4%) of the female adult cases the woman had been identified by police as a *respondent* on at least one occasion, and "in the Aboriginal family violence homicide meeting, nearly all of the victims had a prior history of being recorded as both respondents and aggrieved parties, in both their current and historical relationships" (2017, p. 82). That is, a substantial proportion of DFV victims had been constructed as perpetrators, prior to their domestic violence-related death.

Consequently, the QDFVDR&AB recommended research to identify how best to respond to the person most in need of protection where there are mutual allegations of violence and abuse. This research should take into account the identification of potential training or education needs for service providers across applicable sectors to better assist in the early identification of, and response to, victims who may use violence particularly where they come to the attention of services during relevant civil proceedings for DFV protection orders. (QDFVDR&AB, 2017, p. 83)

## Policy context

This research is focused on the identification of the person most in need of protection where both (or several) parties are alleged to have used violence and are in a relationship covered by applicable DFV legislation. It is relevant to the

<sup>1</sup> See list of key terms for definitions.

goals of the *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan), specifically:

- National Outcome 3—Indigenous communities are strengthened (Council of Australian Governments [COAG], 2011, p. 24)
- National Outcome 5—Justice responses are effective (COAG, 2011, p. 30).

It is also relevant to three of five national priorities in the fourth and final action plan of the National Plan, as follows:

- National Priority Two: Support Aboriginal and Torres Strait Islander women and their children
- National Priority Three: Respect, listen and respond to the diverse lived experience and knowledge of women and their children affected by violence
- National Priority Five: Improve support and service system responses.<sup>2</sup> (COAG, 2019, pp. 35–38)

Policy-owners, specifically the Queensland Police Service (QPS) and the Queensland Department of Justice and Attorney-General, were consulted on the research design to ensure it would meet their needs for evidence to guide policy and practice. The support of the Chief Magistrate of Queensland was also sought and granted. The Chair of the QPS Research Committee approved this research (reference number QPSRC-0120-1.01), with the expectation that it will produce “tangible recommendations that will assist the development of guides or training materials” (CI Harsley APM, personal communication, 15 January 2020).

While the QDFVDR&AB’s recommendation provided the impetus for this research, and Queensland is the site of an in-depth qualitative component of the study, the problem it intends to address is relevant nationally and internationally, as shown in the review of the literature. Apart from the DFV-related deaths reviewed in the QDFVDR&AB’s report that occurred subsequent to women and Aboriginal people, particularly, being identified as perpetrators, there are numerous negative consequences associated with legal intervention. That is the case in general, but when people are inappropriately sanctioned in the legal system it represents an injustice with potentially life-long repercussions. Avoiding

inappropriate legal sanctions against victims of violence is critical to serving justice and upholding civil liberties.

## Evidence gap

The concept of the person most in need of protection was proposed by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) in their joint report (2010, p. 410) as a useful concept in police training, codes of practice and guidelines to distinguish between the aggrieved and respondents. It has subsequently been incorporated into DFV legislation in Queensland and Western Australia. There has been some research related to the inclusion of this concept in the Queensland legislation (Nancarrow, 2016, 2019) and some research related to similar concepts in other jurisdictions (e.g. No To Violence [NTV], 2019; Ulbrick & Jago, 2018). There has been no research, however, that has explicitly sought to understand how police and magistrates interpret and apply the concept of person most in need of protection, the constraints on them in doing so, and how policy and practice can be improved to support the application of the concept as intended by the legislature.

## Research aims

Police and courts, as pivotal points of contact in the Australian legal system, are the focus of this research, although misidentification of victims/survivors as perpetrators of DFV can occur in other settings. The primary aim was to identify strategies to improve police and court practice in regard to identifying the person most in need of protection, to avoid the making of cross-applications and cross-orders. Although evidence of good practice has been included where it was identified in the research, the study necessarily focused on areas needing improvement and this is reflected in the focus of the report’s discussion. It is intended that clearer guidelines and training will prevent the legal system from criminalising victims/survivors and inadvertently colluding with perpetrators where there are mutual allegations of DFV.

Although instigated by the QDFVDR&AB (2017), this is an issue of national concern and a national perspective is

<sup>2</sup> Including legal services and police (COAG, 2019, p. 38).

relevant, within the limitations of the project timeframe and available data. In particular, the research team hypothesised that comparative rates of females named as respondents on protection orders (including police protection notices and similar) could indicate where DFV legislation, policy or practice may be resulting in unintended consequences for women, given the gendered nature of DFV (Australian Bureau of Statistics [ABS], 2017; ANROWS, 2018). Therefore, the research also aimed to provide a statistical sketch of the application of DFV-related law, with particular reference to gender and Indigeneity; and examples of good practice in policy, procedures and guidelines, nationally.

## Structure of the report

Six chapters follow this introduction. An outline of each chapter is presented below.

### Chapter 1: Literature review

The review of the national and international literature is divided into five sections, beginning with a description of the repeatable method used to conduct the review, and its scope and limitations. The material reviewed is organised into four themes: conceptualising use of violence, factors affecting identification of the “primary aggressor” and victim, impacts of misidentification, and good practice in responding to “situationally ambiguous” (Durfee, 2012, p. 65) cases where the distinction between the aggrieved and the respondent is not immediately obvious.

The review highlights a substantial body of relevant literature, yet an absence of research on the specific concept of interest to this research: the person most in need of protection.

### Chapter 2: Research methodology

This chapter explains in some detail the methods used for the quantitative and qualitative components of the data collection and analysis. It expands on the research aims and discusses the research questions. Importantly, this chapter explains the theoretical framework used, which draws from critical criminology, and its relevance to the research approach and the analysis of results. It also explains in some detail the approach to sampling for the in-depth qualitative

data collection in Queensland, and the primary ethical considerations and the management of these in the research design and implementation.

### Chapter 3: Results of comparative policy and statistical analysis—national

Chapter 3 begins with an overview of the historical development of civil domestic violence laws throughout Australia in the 1980s, the concerns expressed about civil liberties and the exceptional police powers provided by the laws, and the justification for these—that is, the need of state power to overcome the abuse of power and control in personal relationships. This provides a backdrop for the results of the national desktop review of current DFV legislation, followed by the results of the comparative statistical analysis, focused on gender and Indigeneity. The chapter then turns to the analysis of cross-applications and cross-orders, specifically, and police and court policy documents by jurisdiction.

### Chapter 4: Results of in-depth qualitative component—Queensland

The results of the in-depth qualitative component conducted in Queensland are presented in Chapter 4. The results of interviews and focus groups with the four participant groups are presented in five sections, each addressing a specific theme from the literature, followed by a case study of an interviewed participant. The chapter concludes with a summary of the court observations, which were conducted to assist the research team in understanding the environment experienced by victims/survivors subject to cross-applications and cross-orders, and in which police prosecutors and magistrates are exercising their powers under the *Domestic and Family Violence Protection Act 2012* (Qld).

### Chapter 5: Discussion

The findings of the research are discussed in Chapter 5, explicitly addressing the research questions. The questions are paraphrased and ordered as section headings to ensure the flow of discussion and avoid repetition across the areas of investigation. The chapter highlights the consistency between the findings of this research and the prior literature and adds analysis of new legislative concepts, including the person most in need of protection. It highlights challenges

and opportunities for improvements in policy and practice to avoid misidentification of the aggrieved/respondent in civil DFV law.

### **Chapter 6: Conclusion**

The concluding chapter summarises the key findings, notes the strengths and limitations of the research and focuses on the implications for policy and practice design. The latter respond to areas identified for improvement in responding to the person most in need of protection where there are mutual allegations of violence and abuse, including training, education, policy and procedures.

# Review of the literature

This chapter begins with an explanation of the search strategy and scope of the literature review. The discussion is organised under four major themes identified in the literature: conceptualisations of violence, factors affecting identification of the primary aggressor, impacts of misidentification and best practice approaches. It draws out the unintended impacts of policies designed to enhance legal protection for women subjected to DFV and the evidence that Aboriginal and Torres Strait Islander women are disproportionately impacted negatively. The chapter concludes with evidence from the literature on best practice approaches to overcome the unintended negative impacts of DFV law and policy.

## Methodology

The research team undertook a scoping review. Scoping reviews map available evidence and analytically interpret it to establish the nature and extent of the relevant academic and grey literature (Levac, Colquhoun, & O'Brien, 2010), research gaps and “innovative approaches” (Ehrich et al., 2002 as cited in Levac et al., 2010, p. 2; see also Peterson, Pearce, Ferguson, & Langford, 2017). This approach was selected due to the broad range of academic and grey literature and complex issues that were relevant to the study (Peterson et al., 2017). More recent publications were prioritised, noting that the DFV field is dynamic and evolving, but some earlier, seminal studies have also been included.

## Search strategy

The following legal, criminological and sociological journal databases and publicly accessible search engines were used to identify literature: Australian Criminology Database (via Informit), Criminal Justice Abstracts (via EBSCOhost), HeinOnline Criminal Justice Journals, NCJRS Abstracts Database (via National Criminal Justice Reference Service), Criminal Justice Database (ProQuest), CaseBase Journal Articles (via LexisNexis), Scopus, SAGE Journals Online, Sociological Abstracts (via ProQuest), Google Scholar, and Google. Literature published before 2000 and publications in languages other than English were excluded.

Combinations of the following key search terms were used (employing Boolean operators for academic journal databases): domestic or family or intimate partner and violence or abuse; primary or \*dominant and aggressor or perpetrator; “need of protect\*”; retaliat\* or defen\* or resistan\* or mutual; identif\*; mutual or cross; and protection or intervention or restraining and order. A review of reference lists, searching for additional relevant papers, followed.

Additional grey literature was identified by targeted searches of public websites and online resources published by applicable government and non-government agencies. This material was supplemented by literature and policy documents already known to the researchers.

## Scope

International and Australian literature published in English from 2000–2020 has been included. In line with the research aims, the review focused on police and court responses to mutual allegations of violence. Most of the literature addresses policing, with fewer analyses of court responses. The literature encompasses both civil and criminal law responses. While the criminal law is the predominant legal mechanism internationally, civil protection orders are the primary legal response to DFV in most Australian states and territories (Taylor, Ibrahim, Wakefield, & Finn, 2015). Arrests and charges for criminal offences are also common, however, particularly in jurisdictions such as the Australian Capital Territory where a pro-arrest criminal law approach is prioritised, and Tasmania where family violence has been an offence since 2004. Consequently, many of the studies reviewed concern dual arrests and cross-applications for protection orders, enabling consideration of women’s and men’s use of violence, and the potential for misidentification of the aggrieved/respondents. However, misidentification may also occur where only one party (the victim/survivor) is inaccurately treated in the legal system as a perpetrator of DFV (NTV, 2019). Studies on broader factors influencing arrest, prosecution and judicial decisions in DFV contexts have, therefore, also been included.

## Conceptualising the use of violence

Accurately identifying the primary aggressor and person in need of protection is an emergent area of research in Australia. However, concerns with cross-applications and cross-orders, dual arrests and assessments of the primary or predominant aggressor have been raised in the literature over the past two decades. Some reports provide a national perspective while others relate to a particular state or territory.<sup>3</sup> Much of the Australian work, and consequent policy shifts, have been informed by developments internationally, predominantly in the United States. This section presents an overview of the international and Australian literature on women's use of violence and unintended policy impacts.

### Women's use of violence and unintended policy impacts

Concerns about inappropriate legal responses to women's use of violence followed the introduction of mandatory arrest and pro-prosecution DFV policies adopted in the United States in the early 1980s. These policies sought to ensure that men's violence against intimate female partners was treated seriously in the criminal legal system, and were "largely supported by law enforcement, feminists, and victim advocates alike" (Muftić, Finn, & Marsh, 2015, pp. 919–920). However, studies observed substantial increases in the number of women being arrested (Burgess-Proctor, 2012; Hirschel, Buzawa, Pattavina, & Faggiani, 2007; Hirschel & Buzawa, 2012; Hovmand, Ford, Flom, & Kyriakakis, 2009; Muftić, Bouffard, & Bouffard, 2007; Muftić et al., 2015), either solely or along with the other party (Chesney-Lind, 2002; Durfee, 2012; Erwin, 2004; Hirschel, Buzawa, Pattavina, & Faggiani, 2007; Hirschel & Buzawa, 2012; Hovmand et al., 2009; Leisenring, 2011; Miller, 2001; Muftić et al., 2007). Consequently, legislation requiring legal actors to determine a primary or predominant aggressor when responding to DFV matters was introduced in many US states (Hirschel & Deveau, 2017) in the 1980s.

Documented increases in female arrests, however, intensified debates about gender symmetry/asymmetry in DFV: that is, whether women and men use violence equally (see Nancarrow, 2019, pp. 34–37 for details of the competing claims). These

debates emerged in the late 1970s following research that counted acts of violence to resolve conflict in families (e.g. Steinmetz, 1977–78; Straus, 1979), and found that women were as likely as men to use violence. Counting instances of physical violence without establishing context has been widely criticised (Dragiewicz & DeKeseredy, 2012; Kimmel, 2002; Miller & Becker, 2019; Myhill, 2017; Nancarrow, 2019), but the method persists (e.g. McKeown, 2014). Downs, Rindels, and Atkinson (2007, p. 29) argue:

In failing to examine the context ... quantitative research has failed to address the basic research question of women's ... self-protection strategies. It is as if women's use of domestic violence has been assumed to have the same reasons and motives as men's use of domestic violence.

The failure of arrest policies to accommodate victims'/ survivors' use of self-defensive or resistant violence was found to be driving the increase in women's arrests, rather than equal use of violence (Durfee, 2012; Gerstenberger & Williams, 2013; Hovmand et al., 2009; Larance, Goodmark, Miller, & Dasgupta, 2019; Muftić et al., 2007; Rizo, Reynolds, Macy, & Ermentrout, 2016). There is now a substantial evidence base from contextual research that women arrested for DFV frequently express different motivations and use violence in different contexts. These differences are not accounted for in a "gender-neutral" application of DFV policies (Durfee, 2012; Gerstenberger & Williams, 2013; Larance et al., 2019; Li, Levick, Eichman, & Chang, 2015; Miller & Becker, 2019; Muftić et al., 2015; Swan, Gambone, Caldwell, Sullivan, & Snow, 2008). Larance et al. (2019, p. 57) summarise the evidence, which

indicates that (a) most women who use force against their male intimate partners are themselves battered ... (b) there are multiple motivations for using such violence, including self-defense, escaping abuse, and reclaiming a sense of self ... and (c) women who use force often suffer punishing consequences for their conduct meted out by their partners and various systems in society. (2019, p. 57)

A systematic review of 39 Australian quantitative studies concerned with "domestic violence offending and reoffending" (Hulme, Morgan, & Boxall, 2019, p. 1) found evidence of

<sup>3</sup> None related to the Northern Territory or South Australia.

differences between female and male perpetration of domestic violence, including higher rates of female perpetrators also having been victims of domestic violence compared to male perpetrators. Further, an evaluation of an Australian Government-funded coordinated family dispute resolution (CFDR) model found “the party assessed [by professionals] as the ‘predominant aggressor’ was male in 89% of cases and female in 5%; the determination was missing or uncertain in 6% of cases” (Kaspiew, De Maio, Deblaquiere, & Horsfall, 2012, p. ix, fn. a). Moreover, women are more commonly injured, subjected to coercive controlling behaviours, motivated by fear, and experience negative effects in “mutually violent” relationships than men (Hester, 2013; Swan et al., 2008).

Increases in female arrests (both sole and dual arrests) have thus been identified as an “unintended consequence” (Gerstenberger & Williams, 2013, pp. 1563–1564) of mandatory arrest policies for DFV offending that fail to account for the different contexts and factors that influence women’s use of violence, including defensive and retaliatory violence. Much of the US literature has called for research and policy responses to incorporate understandings “that help explain victims’ use of force, the organizational dynamics driving the rise in victim arrest, and distinguishing between the primary aggressor and primary victim in a domestic violence relationship” (Hovmand et al., 2009, p. 165).

In the Australian context, Nancarrow (2016, 2019) has argued for reconceptualisations of violence, including typologies that distinguish between coercive controlling violence, violent resistance and fights. Doing so, she argues, would take into account race<sup>4</sup> and class as well as gender contexts and respond to the over-representation of Aboriginal and Torres Strait Islander women inappropriately dealt with as perpetrators of DFV. Her thematic analysis of police reports of domestic violence order (DVO) breaches showed that coercive controlling violence was rare in breach events for which women were charged, but coercive control was present in the majority of breach events for which men were charged (and more so for non-Indigenous men). Women were significantly more often than men involved in violent

resistance and fights, including contemporary forms of traditional Aboriginal dispute resolution (Nancarrow, 2016, p. 113; 2019, p. 110).

A recent analysis of police narratives of domestic violence incidents involving a female person of interest in New South Wales (Boxall et al., 2020) found that 48 percent of the 153 incidents they reviewed involved violent resistance (p. 1) and that “Indigenous women were more likely than non-Indigenous women to use violence for violent resistance purposes (57% vs 40%)” (Boxall et al., 2020, p. 12).

### Consequent policy shifts and proposals

Accepting that women’s use of violence in relationships generally occurs in contexts that are different to men’s use of DFV, and women may, therefore, be unjustly impacted by mandatory arrest laws (Hovmand et al., 2009), a number of US states subsequently introduced “primary aggressor” policies. These required police and other legal actors such as prosecutors and courts to determine the primary aggressor of DFV (Muftić et al., 2015), recognising that

continuing to use arrest policies that do not ascertain the primary aggressor or the contextual dimensions of the domestic violence essentially increase[s] a woman’s victimization: the original abuse she endured coupled with the victimization by a system that does not understand her circumstances. (Miller, 2005, p. 130)

Primary aggressor policies were intended to encourage police to consider self-defence and any history of violence before arresting a party for DFV (Muftić et al., 2015). Implementation of these policies, however, resulted in further problems and further proposed solutions, as Hirschel and Buzawa (2012, p. 177) explain:

The language of “primary” in primary aggressor ... led police to focus on “who started it” ... As a result, many statutes now instruct officers to identify the “predominant physical aggressor,” “principal physical aggressor,” or “dominant aggressor,” with the expectation that the police consider not only the violence used in a specific incident but also the context in which it occurred.<sup>5</sup>

<sup>4</sup> Since there is only one “race”, referring to “others” as a separate race is an act in which people are “race-d”, or “racialised”. In other words, race “operates as a verb before it assumes significance as a noun” (Powell, 1997, p. 104 citing Thomas, 1993).

<sup>5</sup> The US focus on physical violence in its solutions to dual arrests is notable. In the Australian context, the bigger problem appears to

The adoption of similar policies in Australia has been varied. Noting that there may be no secondary victim or aggressor, the Australian and New South Wales Law Reform Commissions (ALRC & NSWLRC, 2010) advised against “primary victim” and “primary aggressor” terminology. They recommended instead that police receive training and that their policies include guidance on accurately identifying “persons who need to be protected from family violence” (p. 410). They also recommended “having skilled counsellors attend family violence incidents together with police” (ALRC & NSWLRC, 2010, p. 410) be considered. Nancarrow (2016, 2019) also recommended specialist co-responders at the first point of contact to assist police in distinguishing between coercive control, violent resistance and fights. She argued it was not reasonable to expect police to have the necessary expertise to assess tactics of coercive control.

While Victoria continues to use primary aggressor language (State of Victoria, 2016), Queensland and Western Australia have incorporated the concept of person most in need of protection into their respective DFV legislation (see Appendix A for details). Regardless of the terminology used, findings are mixed as to whether the adoption of these policies solves the problem of inappropriate legal responses when there are mutual allegations of violence.

Some studies have found evidence that primary aggressor policies decreased dual arrests, although not necessarily sole arrests of women (Fraehlich & Ursel, 2014; Hester, 2013). Others (Reeves, 2019; Rizo et al., 2016) have found that in Australia, misidentification of a DFV victim/survivor as a perpetrator or other inappropriate legal responses to victims’ use of violence occurs despite primary or predominant aggressor policies.

## Dual arrests and cross-applications in Australia

Reflecting the predominance of a civil law response to DFV in Australia, there have been few studies here that address dual arrests. An exception is a review of the Safe at Home

response in Tasmania<sup>6</sup> (Success Works, 2009), where DFV is an offence. The review found that:

Dual arrest (the arrest of both parties) accounted for around 25% of cases (N = 740) in which women were offenders (and around 8% of cases in which men were offenders). Another 15% (n = 444) of women offenders had been registered as a victim on at least one occasion during the four years of Safe At Home with another partner. (Success Works, 2009, p. 62)

Multiple Australian studies have addressed civil DFV cross-applications. The first to include a gender analysis of cross-applications and cross-orders used south-east Queensland Magistrates Court records for 674 respondents of DFV protection order applications between March 1990 and August 1996 (Stewart, 2000). Women made up 15.7 percent of respondents when cross-applications were included, but only 8 percent of respondents when cross-applications were excluded (Stewart, 2000). Female respondents were less likely to have a criminal history or be subject to multiple protection order applications, leading the author to conclude that “it appears that these women are not exhibiting the same type of violence as the male perpetrators” (Stewart, 2000, p. 87). Further, Stewart observed that police were involved in 22 percent of cases of cross-applications and for almost half of those the cross-applications were made simultaneously. Stewart noted that simultaneous cross-applications “are presumably taken out when the police cannot, or will not identify who is the victim and who is the perpetrator” (Stewart, 2000, pp. 85–86).

In the following years, various government bodies and researchers investigated cross-applications and cross-orders in New South Wales, Queensland, Western Australia and Victoria. The problems they identified included cross-applications being made in retaliation or to “intimidate the other party” (NSWLRC, 2003, p. 217; Wangmann, 2009, 2010, 2012), misidentification of the primary aggressor (Government of Western Australia, Department of the Attorney General, 2008; Jillard & Mansour, 2014; Mansour, 2014; NSW Ombudsman, 2006; Wangmann, 2012), lack of police investigation of competing claims, and incident-based policing (Douglas & Fitzgerald, 2013, 2018; Nancarrow, 2016,

<sup>6</sup> be difficulty for police and courts in discerning a pattern of coercive control.

<sup>6</sup> Tasmania now has a pro-intervention policy.

2019; Wangmann, 2012). These are discussed, generally in chronological order, below.

*Continuing difficulties for Western Australia police in accurately identifying DFV aggressors and victims* were noted in a review of that state's DFV legislation: *it recommended that* "consideration should be given to having skilled counsellors attend family violence incidents together with police" (*Government of Western Australia*. Department of the Attorney General as cited in ALRC & NSWLRC, 2010, pp. 406, 410). Larsen and Guggisberg (2009, p. 14) similarly recommended "policies to protect women from arrest and charges associated with perpetrating IPV as well as departmental scrutiny relating to IPV". They argued such policies were necessary in Western Australia, particularly in the context of the 2008 review's findings and legislative and policy reform around policing responses at the time.

Wangmann's (2009, 2010, 2012) research into cross-applications in New South Wales found that about 5–11 percent of the court files sampled were cross-applications (Wangmann, 2010), and that the first application was more likely to have been made by police, and to protect the female party (Wangmann, 2012). She noted that police were mandated to apply for an apprehended domestic violence order (ADVO) when certain acts or behaviours have taken place or are likely, whereas "a magistrate ... is required to consider whether such acts/behaviours have caused the victim/complainant to fear and that those fears are reasonable" (Wangmann, 2012, p. 711). Although the police she interviewed indicated that dual applications were used when there was difficulty assessing the primary aggressor, Wangmann's case file analysis suggested there was a lack of police investigation into the context of violence (Wangmann, 2012), and that "an alleged incident of physical violence by both parties was sufficient to generate police action" (Wangmann, 2009, p. 205). Wangmann also found evidence of systems abuse by the perpetrator (Wangmann, 2010) and that administrative factors in courts restricted further exploration or resolution of competing claims of DFV (Wangmann, 2009). Wangmann (2012, p. 711) argued that the obligation on police to apply for an ADVO, combined with the absence of any explicit direction to consider "fear or ... future protection", resulted in police retaining an incident-based focus that defines responses to criminal offences.

Two further investigations in New South Wales (NSW Ombudsman, 2011; NSW Standing Committee on Social Issues, 2012) were relevant to the topic but inconclusive. The NSW Ombudsman investigated 47 complaints about police handling of DFV involving female "offenders" to ascertain whether police may have misidentified the primary aggressor. Based on the files available, and an evidently incident-based assessment of police action, the Ombudsman "found no evidence to indicate that police may have failed to correctly identify the primary aggressor in any matter" (2011, p. iii). The broader inquiry undertaken by the NSW Standing Committee on Social Issues considered the "increase in police proceedings against women" (2012, p. 205). Some submissions to the inquiry claimed the increase in arrests of women for DFV assaults reflected a rise in women's perpetration of DFV, while others argued it was a result of police policy and practice. The inquiry concluded that more data and research were needed "to identify appropriate actions in respect of legislation, policy, practice and training" for police to assess the primary aggressor (NSW Standing Committee on Social Issues, 2012, p. 218).

An exploratory study of 95 female apprehended violence order defendants represented by Women's Legal Service New South Wales in 2010 established misidentification of a substantial proportion of women as perpetrators. More than two thirds of the women defendants reported that they were victims of IPV and, when their matters went to court, "fewer than 40% of these clients had a final AVO [apprehended violence order] made against them when the case came before the court" (Mansour, 2014, p. 4).

Jillard and Mansour (2014) found that police made the majority of ADVO applications against women defendants. They also found that the NSW Police Force (NSWPF) DFV Policy is supported by "clear Standard Operating Procedures detailing the manner in which officers are required to determine the primary victim in any case of domestic violence" (Mansour, 2014, p. 20), which included a change from a "pro-arrest" to a "pro-investigation" policy. However, there remained gaps in its implementation and officer training on the dynamics of DFV (Mansour, 2014). In a 2012 report for the NSW Department of the Attorney General, the NSWPF stated that standard operating procedures are confidential to police and include

consideration of whether there is a history of domestic violence between the parties, the relative degree of injury inflicted on each person, and the extent to which each person present appears to fear any party. (NTV & Red Tree Consulting, 2012)

Despite the NSWPF's change in policy, Women's Legal Service New South Wales noted that "our clients' experiences since 2010 are not consistent with the position of NSW Police" (Jillard & Mansour, 2014, p. 236). They called for further research in different states and territories and by the NSW Bureau of Crime Statistics and Research to build a more comprehensive evidence base (Mansour, 2014).

Only a few studies (Cunneen, 2009; Douglas & Fitzgerald, 2018; Nancarrow, 2016, 2019; Stewart, 2000) have explicitly analysed cross-application and cross-order data for Aboriginal and Torres Strait Islander people. All of these studies were conducted in Queensland. Regarding cross-applications, Stewart (2000) and Cunneen (2009) found no significant differences in the data for the Indigenous and non-Indigenous cohorts. With access to better data, the later studies (Douglas & Fitzgerald, 2013, 2018; Nancarrow, 2016, 2019) found significant and concerning differences, particularly for Aboriginal and Torres Strait Islander women. Boxall et al. (2020) also found over-representation of Indigenous women who had used violent resistance being treated as perpetrators in their NSW study.

Douglas and Fitzgerald (2013) analysed 328 paired court files (i.e. cross-applications for DFV protection orders) lodged in the Beenleigh and Brisbane Magistrates Courts in the 2008–09 and 2009–10 financial years. They found that police were involved in applications for one or both parties in the majority (80%) of the cross-applications, and in the majority of those (80%, n = 210) "police lodged the DVPO [domestic violence protection order] application on behalf of both partners" (p. 77). Further, they found that "police involvement in the application also considerably increased the chances that the application would be successful rather than dismissed or withdrawn" (Douglas & Fitzgerald, 2013, p. 81). Douglas and Fitzgerald (2013) raised concerns that increasing use of cross-applications and orders reflect police and courts' difficulties in navigating the complexities of DFV

where there are mutual allegations of violence, as well as concerns about the implications of using cross-applications and cross-orders when "both parties are not equally at risk" (Douglas & Fitzgerald, 2013, pp. 81–82, 86–87).

Nancarrow's (2016, 2019) study (referred to above) analysed court files for 185 people charged with at least one breach of a domestic violence protection order before 2012. She found that Indigenous women were over-represented in police applications and were "more often than Indigenous men and non-Indigenous women to have been identified by the police as a victim of violence before the police sought DVOs naming them the perpetrator" (Nancarrow, 2016, p. 113; 2019, p. 110). Analysis of interview data and police reports of breaches and offences for which the 185 people were charged found a formulaic approach to policing domestic violence (Nancarrow, 2016, 2019), without regard to context. Time constraints and the lack of a legislative requirement to consider context also resulted in a formulaic response from magistrates struggling to manage the volume of cases brought to them (Nancarrow, 2016, 2019). Nancarrow (2016, p. 136) concluded:

The analysis suggests that domestic violence legislation ... is used inappropriately ... by roping in cases of Indigenous and non-Indigenous women's violent resistance; and by not distinguishing fights from coercive control.

Similarly, in their Queensland-wide analysis of administrative data, Douglas and Fitzgerald (2018, p. 41) found that

a disproportionate number of Aboriginal and Torres Strait Islander (ATSI) people are named on DVOs, charged with contraventions of DVOs and significantly more likely than non-Indigenous people to receive a sentence of imprisonment for a contravention of a DVO, compared to non-Indigenous people ... ATSI women are particularly over-represented in this system.

These studies were based on protection order data that preceded Queensland's 2012 legislation requiring the identification of the person most in need of protection (see Appendix A). However, the subsequent Queensland Special Taskforce on Domestic and Family Violence (the Special Taskforce) corroborated their findings. The Special Taskforce reported that "hearings of cross-applications in Queensland courts, in direct contradiction of the principles to be applied in

administering the Act” (2015, p. 301) continued to be observed in statistics and by stakeholders who made submissions to it.

In the same year, the QPS Public Safety Business Agency’s mixed methods study included a review of statistical records and interviews with community stakeholders and police from March–July 2015 in Doomadgee, Pormpuraaw and Palm Island.<sup>7</sup> It found:

The proportion of females who were identified as the respondent in a DV application or in a breach of DV offence was higher in the discrete communities than in the general Queensland population. (QPS Public Safety Business Agency, 2016, pp. 71–72)

However, the participants’ views were mixed about whether this increased use of violence reflected an increase in women’s perpetration of domestic violence, or reflected retaliatory or defensive violence (QPS Public Safety Business Agency, 2016).

In 2015, the Western Australia Ombudsman reviewed 30 DFV fatalities during a period of 18 months (Ombudsman WA, 2015). In six cases, a violence restraining order had been issued against one of the parties prior to the death: four against the offender and two against the person who had been killed (Ombudsman WA, 2015).

Concerns about police misidentification of primary aggressors were also evident in multiple submissions to the 2016 Victorian Royal Commission into Family Violence (State of Victoria, 2016). The RCFV found that misidentification by police “can have adverse consequences for the administration of justice and it can give rise to lost opportunities for family violence services to engage with victims” (State of Victoria, 2016, p. 17). These findings resulted in the RCFV’s Recommendation 14, that “Victoria Police amend the Victoria Police Code of Practice for the Investigation of Family Violence to ensure that it provides suitable guidance on identifying family violence primary aggressors” (State of Victoria, 2016, p. 38).

In the same year, the Victorian Sentencing Advisory Council reported:

The Supervising Magistrates of the Family Violence and Family Law portfolio of the Victorian Magistrates’ Court (whom the Council consulted for this study) noted that in intimate partner cases involving female offenders, it is not uncommon for there to be mutual intervention orders. (Sentencing Advisory Council, 2016, p. 14)

Based on its review of 11 DFV-related cases resulting in a death that it reviewed from 2000–2012, the Australian Capital Territory’s Domestic Violence Prevention Council reported:

In all but one case, the persons who killed were either family violence perpetrators or both family violence victims and family violence perpetrators ... Three individuals in the review were both perpetrators and victims of family violence. (Domestic Violence Prevention Council, 2016, p. 18)

Four of the deaths involved an intimate partner relationship and five of the deaths involved a family relationship (Domestic Violence Prevention Council, 2016). Although the report identified the need to improve support for male victims of family violence, it noted that “none of the male family violence victims appear to have been scared of the family violence perpetrator” (Domestic Violence Prevention Council, 2016, p. 37), and that legal records relating to some of the female victims contained victim-blaming or negative gendered stereotypes (Domestic Violence Prevention Council, 2016).

In 2017, the New South Wales Domestic Violence Death Review Team (NSW DVDRT) found significant gender disparities in characteristics of female and male victims of homicide in the 204 intimate partner homicides reviewed between 1 July 2000 and 30 June 2014. In particular, female victims had overwhelmingly been the primary victim of DFV in their relationship with a male offender prior to their death (98%), while male victims had overwhelmingly been the primary abuser in their relationship with the female offender (89%; NSW DVDRT, 2017). There were only three cases where the NSW DVDRT was unable to establish who had been the primary abuser, and none that involved a female primary aggressor killing or being killed by a male primary victim (NSW DVDRT, 2017). As with national studies, research relying on in-depth analysis of case files in

<sup>7</sup> These, among others in Queensland, are recognised as “discrete” Aboriginal and/or Torres Strait Islander communities.

New South Wales suggests victims of the most serious DFV continue to be women.

As reported by the Australian Domestic and Family Violence Death Review Network (2018) there were 152 intimate partner (current or former) homicides in Australia between 1 July 2010 and 30 June 2014 which followed an identifiable history of domestic violence. The majority (79%) involved a male killing a female, and the majority (92.6%) of those men had been the primary aggressor in the relationship. All but two of the 28 women who killed a male partner had been the primary victim of abuse in the relationship. That is, women were significantly more likely than men to have killed an abusive partner.

As reported in its 2016–17 Annual Report, the QDFVDR&AB (2017) conducted an in-depth analysis of 27 homicide incidents that resulted in 29 deaths between 2011 and 2016. They found that for nearly half (44.4%) of the DFV-related deaths of females the deceased had been listed as a respondent on a protection order by police in a current or former relationship prior to their death. For Aboriginal victims, “nearly all of the victims had a prior history of being recorded as both respondents and aggrieved parties, in both their current and historical relationships” (QDFVDR&AB, 2017, p. 82). These findings led to the recommendation for research “which aims to identify how best to respond to the person most in need of protection, where there are mutual allegations of violence and abuse” (p. 83), prompting the research reported here.

Women’s Legal Service Victoria manually reviewed 600 client intake forms between January and May 2018 (Ulbrick & Jago, 2018). Their preliminary review of the case files estimated one in 10 women had been “misidentified as respondents in police applications for family violence intervention orders” (Ulbrick & Jago, 2018, p. 1). Identified factors contributing to misidentification included “aggressors gaming the system”, “police seeing mutual and equal violence between the parties, without seeing the context of family violence”, an “incident-specific focus”, and “failure to interview both parties and/or interview parties separately” (Ulbrick & Jago, 2018, pp. 2–4). In relation to police policy and practice, the authors noted that, although the Victorian Police Code of Practice for the Investigation of Family Violence contained “fairly

sensible guidance” (Ulbrick & Jago, 2018, p. 1), many police were not familiar with it, and that failure of police duty correlated with misidentification of the primary aggressor. In relation to court policy and practice, they noted anecdotal evidence that there was some good practice demonstrated by magistrates in correcting police misidentification, but

there are many more instances where police misidentification of the “primary aggressor” has not been corrected by the time it reaches the final stage of proceedings. This is particularly so where the FVIO is resolved by consent without admissions. (Ulbrick & Jago, 2018, p. 4)

Douglas and Fitzgerald (2018) reviewed protection order application data for 23,492 unique respondents made during 2013–14 from Queensland courts, adding to concerning data about the over-representation of Aboriginal and Torres Strait Islander women listed as respondents on protection orders. They found that, compared to non-Indigenous women, Aboriginal and Torres Strait Islander women were over-represented as both aggrieved and respondents on DFV protection orders, particularly in applications made by police. Further, they were over-represented in charges for breaches of protection orders and sentences to imprisonment (Douglas & Fitzgerald, 2018).

Drawing on case study data provided by specialist services in Victoria, No To Violence (NTV) found that in contrast to international findings on cross-orders and dual arrests, misidentification most commonly occurred in cases where single protection orders were issued (NTV, 2019). These findings may be explained by a shift in Victorian policing policies that discourages the use of cross-orders (NTV, 2019). The issuing of a single protection order against the wrong party is an important avenue to explore in further research on misidentification of DFV perpetrators (NTV, 2019; see also Fraehlich & Ursel, 2014).

Reeves’ (2019) qualitative study of eight legal practitioners in Melbourne in 2017 reported that participants perceived that inconsistent practices by magistrates were an issue in the court system, and that police training was vital to ensure victims/survivors are accurately identified early on. Most recently, Voce and Bricknell (2020) reviewed 10 years of data (2004–2014) on female intimate partner homicide

(IPH) offenders mainly sourced from the National Homicide Monitoring Program. In examining the factors associated with women's IPH offending, they found:

Among the 15 incidents where the direction of the violence was stated, women were either the primary victims of male perpetrated abuse (n=8, 53%) or the simultaneous perpetrators and victims of reciprocal violence (n=7, 47%). In no relationship was the violence described as perpetrated only by the female against their male partner. (Voce & Bricknell, 2020, p. ix)

Voce and Bricknell also found that Indigenous female IPH offenders were more likely to have been identified as both a perpetrator and victim of violent crime than non-Indigenous women, suggesting they existed in "hostile social environments, in which violence may be seen as necessary for survival or an acceptable way to resolve conflict" (Voce & Bricknell, 2020, p. 26). The "directionality of violence" in this study was based on whether a party was "specifically described as being the primary perpetrator of violence or when they were the subject of intervention orders taken out by their partner" (Voce & Bricknell, 2020, p. 36).

Other Australian literature with a national focus has made relevant findings regarding women's use of violence and policy responses in specific contexts, including that there are:

- "stronger relationship[s] between victimisation and recidivism for Indigenous than non-Indigenous females—which highlights the long-term implications of not dealing with victimisation adequately" (Bartels, 2012, p. 20), and a lack of evidence or programs for addressing violence for Indigenous women (Bartels, 2012)
- implications for risk assessment and screening in family law contexts (Braaf & Sneddon, 2007)
- impacts of victim versus perpetrator behaviour, and police officers' levels of experience, on officers' responses to DFV (Dowling, Morgan, Boyd, & Voce, 2018).

These Australian investigations raise many issues concerning legal responses to women's use of violence, and evidence about the efficacy of different policy approaches is still emergent in Australia. There is a more established international evidence base, but evidence on the prevalence of misidentification and

the role that gender and race play in arrest decision-making remains mixed (Dawson & Hotton, 2014; Dichter, Marcus, Morabito, & Rhodes, 2011; Durfee, 2012; McCormack & Hirschel, 2018), and the impact of policy contexts on arrest and legal response decision-making continues to be an important yet under-researched area (Dawson & Hotton, 2014; Durfee 2012; Hirschel & Buzawa, 2012; Hirschel, McCormack, & Buzawa, 2017).

There is a growing body of research exploring the factors affecting arrest decision-making and how primary aggressors are determined, primarily in relation to the role of gender and race, informed by different conceptualisations of women's use of defensive, resistant or retaliatory violence and women's conformity to notions of an ideal victim (e.g. Boxall et al., 2020; Goodmark, 2008; Hirschel, Buzawa, Pattavina, & Faggiani, 2007; Mansour, 2014; Miller, 2005; Nancarrow, 2016, 2019; Reeves, 2019; Ulbrick & Jago, 2018). The next section reviews the state of this research.

## Factors affecting identification of the primary aggressor and victim

As challenges continue in identifying the person most in need of protection in diverse policy and practice environments, current research is exploring factors that contribute to misidentification or support accurate identification of the DFV perpetrator and person most in need of protection in legal responses.

Major factors emerging from the literature centre on the difficulties that decision-makers have in determining who is the predominant perpetrator of DFV when responding to "situationally ambiguous [cases where] both parties may have injuries, both parties may have committed acts of violence, and both parties may claim that they are the 'true' victim" (Durfee, 2012, p. 65; see Muftić et al., 2007, also). These situations may arise where victims/survivors use resistant or self-defensive violence but it is not recognised as such by the responding police officers (Miller, 2001; Muftić et al., 2007), where there is a lack of evidence as to who has perpetrated DFV (Taylor et al., 2015), or where the perpetrator intentionally misrepresents the actual victim/survivor as the

primary aggressor (NTV, 2019; Reeves, 2019). As such, police practices in responding to DFV, organisational environments and broader system processes (including courts) have all been identified as interrelated factors to consider, in addition to systems abuse perpetrated by the actual perpetrator.

For Aboriginal and Torres Strait Islander people, these factors must be also understood in the context of their experiences of colonisation and systemic racism, which impact negatively on their interactions with non-Indigenous systems and authority, particularly police (Cunneen, 2001, 2009; Douglas & Fitzgerald, 2018; Nancarrow, 2016, 2019). Successive assimilation and protection policies denied traditional lands, language and culture, and freedom of movement and marriage; and resulted in forced removal of Aboriginal and Torres Strait Islander children from their families. The consequences of the systemic racism inherent in these policies, along with under- or over-policing, lack of cultural awareness and bias in policing responses, are community mistrust and suspicion of police and law enforcement (Cunneen, 2009; Douglas & Fitzgerald, 2018; Nancarrow, 2016, 2019). These impact on a range of factors informing police decision-making when responding to DFV discussed in the literature, particularly prior history, substance use, who contacted the police, offender and witnesses present at the scene, organisational factors and systems factors.

## Police practice and factors influencing decision-making

### Incident-based approaches

Police practice in responding to DFV has featured in the literature regarding accurate identification of the primary aggressor to date. Multiple studies have found that police and courts' continued reliance on incident-based approaches to DFV, rather than gender-sensitive assessment of the context of violence, is a significant factor in inappropriate legal responses (Hester, 2012, 2013; Miller, 2001; Nancarrow, 2019; Pollack, Green, & Allspach, 2005; Wangmann, 2012). Approaches that fail to consider the different contexts in which women may use and resist violence are problematic (NTV, 2019) because they fail to respond appropriately to that use of violence, and fail to capture coercive controlling violence, leaving victims without protection (Poon, Dawson,

& Morton, 2014; Stark, 2012). As Poon et al. note, "practices that emphasize incident-specific injuries will continue to result in women being charged for acting in self-defense and, therefore, will do little to tackle the larger problem of coercive control" (2014, pp. 1465–1466). Nancarrow (2016, 2019) characterised the incident-based approach to policing DFV as formulaic, where the combination of two factors (a relevant relationship and an act proscribed in legislation) is sufficient to constitute DFV: "from the police perspective, the domestic violence legislation provides a tool to manage violent situations" (Nancarrow, 2019, p. 148), regardless of context.

### Use of a weapon

Multiple studies have found that use of a weapon heightens the likelihood of DFV arrest (Hirschel & Deveau, 2017), and more so for women compared to men (Hamilton & Worthen, 2011; Poon et al., 2014). This is a salient factor, noting that women

often utilize nearby household items in self-defense against their male partner. As such, the use of a household item by a woman may not only result in the assumption that they acted as the primary aggressor rather than in self-defense but may also be used to justify more severe charges of assault with a weapon. (Poon et al., 2014, p. 1450)

### Visible injury

Physical injuries increase the likelihood of police arresting one or both of the parties; however, this may differ by gender and whether there is an injury to the victim or offender, or both. For example, Hirschel and Deveau found both perpetrator and victim injury were associated with increased likelihood of arrest, but victim injury more so (Hirschel & Deveau, 2017, p. 1170). Hamilton and Worthen (2011, p. 1573) concluded:

By far, the most important factor was a visible physical injury to the victim. Yet there was an appreciably greater likelihood of arrest in the presence of a clear victim injury when the suspect was female (14.1 times) as compared to the male (9.5 times) ... women who injure their male partners, net of other factors, were treated far more strictly than men who cause injuries to their female partners.

The severity of violence or injury is also relevant. A number of US studies have found different impacts between situations

involving no injuries, minor injuries, serious injuries or other offenses such as “intimidation” on rates of female and/or dual arrests (Dichter et al., 2011; Hirschel & Deveau, 2017; Poon et al., 2014, p. 1072). In a review of 96 case studies of arrests, Hester (2012) found:

Incidents where the police recorded women as perpetrators mainly involved verbal abuse, some physical violence, with only small proportions involving threats or harassment ... The violence used by men against female partners was much more severe than that used by women against men. Violence by men was most likely to involve fear by and control of female victims, and alcohol misuse by men had a greater impact on severity of outcomes.

As with use of a weapon, these findings are concerning when they suggest that first responders may not be accurately assessing self-defence in these cases, suggesting the need for improved training on recognising “defensive markings” (which may take longer to appear) compared to “offensive injuries” (Poon et al., 2014, p. 1450; also see Hirschel & Deveau, 2017; Muftić et al., 2007). As Wangmann (2009) concluded, “emphasis on injury as an indicator of who should be arrested in a given situation” (pp. 216–217) without considering whether the injury was inflicted in self-defence, or that the other party’s injuries take longer to become visible, is particularly problematic in DFV contexts.

### Prior history

In their Canadian study of crown attorney data on charging decisions, Poon et al. (2014) reported gendered differences, noting that females who were the accused were less likely than males accused to have a prior criminal record. However, dual arrests have been found to be less likely in the United States where the offender has a documented prior history of violence (Hirschel & Hutchison, 2011). This is also the case where the victim has a documented prior history of DFV victimisation (Hirschel & Deveau, 2017). These findings suggest there are particularly damaging impacts for victims/survivors who are misidentified and consequently recorded as perpetrators and responded to as such in subsequent interactions with police and courts.

### Substance use

A victim/survivor being under the influence of alcohol or other substances has been associated with increased likelihood of a dual arrest (Hirschel & Hutchison, 2011) or female arrest (Poon et al., 2014), and a lower likelihood of the offender being arrested (Hirschel & Hutchison, 2011). Reasons for this may be that a female victim under the influence of alcohol is viewed as “uncooperative, unreliable, and bearing some responsibility for the incident” (Poon et al., 2014, p. 1464) and treated with less credibility than a male victim (Poon et al., 2014). Hirschel and Deveau found different impacts of substance use:

If the offender was under the influence, dual arrest was half as likely. However, if it was the victim who was under the influence, dual arrest was 2.8 times more likely. Thus, officers appear to be unwilling to accept use of alcohol as an excuse for actions, being instead more likely to hold those under the influence to be more culpable. (Hirschel & Deveau, 2017, pp. 1170–1171)

### Who contacted the police

There is some evidence that who contacts the police influences arrest decisions. Hirschel and Hutchison found that police are “40% less likely to arrest both when it was the victim who called the police” (Hirschel & Hutchison, 2011, p. 3069). However, Hamilton and Worthen (2011) found that a male suspect contacting the police *decreased* the likelihood of the male suspect’s arrest, whereas a female suspect contacting the police *increased* the likelihood of the female suspect’s arrest. This led them to conclude that the “finding implies that women are being punished for engaging the police in their quarrels” (Hamilton & Worthen, 2011, p. 1574).

### Offender and witnesses present at the scene

Both the offender and adult witnesses being present at the scene of an incident have been associated with a higher likelihood of dual arrests (Hirschel & Deveau, 2017; Hirschel & Hutchison, 2011). Adult witnesses being present increased the likelihood of an arrest more so for women than men alleged to be the DFV perpetrator (Hamilton & Worthen, 2011).

Although not exhaustive, these incident-based factors identified in the literature on police decision-making reviewed here indicate that incident-based, formulaic legal responses to DFV are inappropriate and heighten the risk of misidentifying the actual victims/survivors and consequently responding inappropriately to the person most in need of protection.

### Organisational factors

Noting the problems resulting from incident-based and gender-neutral assessments established in the literature above, training for police officers to distinguish between abusive and defensive violence and understand coercive control is frequently recommended for improving policing responses (see e.g. Hirschel & Deveau, 2017; Reeves, 2019). However, where policies, guidance and tools have been created to assist police to identify the predominant aggressor in DFV matters, their implementation has been challenging when already time-poor police perceive them as “over-burdensome” (Erwin, 2004, p. 16).

Some studies have found that, despite having predominant aggressor policies in place, other practical and organisational factors may inhibit their efficacy. For example:

In situations where there is no injury, prior criminal history, witnesses, or evidence, police may feel unable to determine the primary aggressor, especially given the time constraints under which they operate. These time constraints make it difficult for officers to access information in the field, including criminal history data and data from other outside sources that may provide pertinent information about the context in which the violence has occurred. (Hirschel & Buzawa, 2012, p. 177)

In another study, Dichter et al. (2011) found that female arrests and dual arrests were more likely where agencies had smaller budgets and proportionately fewer female officers (Dichter et al., 2011). Further, organisational culture remains an important consideration, with some evidence from US literature indicating that police officers may not make an arrest or may arrest both parties even where primary aggressor policies are in place, if they “fear liability if they arrest the wrong party or if they fail to arrest” (Dichter, 2013, p. 84; also see Hirschel & Buzawa, 2012). Similarly, “police cultures

that value enforcement over problem solving” (NTV, 2019, p. 10) may hinder the effective implementation of good practice responses to mutual allegations of DFV.

In these contexts, police may feel unable to determine the primary aggressor, and defer decision-making to other stages of the legal system (Larance & Miller, 2017; Reeves, 2019). Understanding these organisational and practical factors underpinning police responses is therefore a necessary consideration in identifying training needs. Establishing how police and courts operate as a system is also critically important as an interrelated but distinct issue influencing police responses at the scene and defining victims’/survivors’ experiences of being misidentified as a perpetrator.

### System factors

Underlying organisational and practice factors are broader systemic issues relating to the misidentification of predominant aggressors or victims/survivors. A key theme emerging from the literature is that police may fail to determine the predominant aggressor when they think other points in the system, such as prosecutors or courts, are better placed to make that assessment (Finn & Bettis, 2006; Hirschel & Buzawa, 2012; Nancarrow, 2016, 2019; Reeves, 2019). This may reflect other organisational factors, but also suggests a bigger systemic issue in legal responses to the person most in need of protection.

There is some evidence that prosecutors do act as a screening point, filtering out inappropriate applications. For example, some studies have found lower prosecution rates of women dually arrested compared to sole arrests (Fraehlich & Ursel, 2014), prosecutors dismissing more cases in mandatory arrest jurisdictions (Hirschel, Buzawa, Pattavina, Faggiani, & Reuland, 2007) and courts rejecting inappropriate applications (Miller, 2005).

Research has also found, however, that prosecutors and judicial officers are subject to similar limitations in being adequately informed about the full context of abuse (Osthoff, 2002), raising questions about which decision-makers are accountable for ensuring the accurate identification of who is most in need of protection.

Osthoff (2002) argues that all legal actors, from police through to prosecutors, judges and lawyers, should understand the context of violence to ensure they are appropriately responding to women arrested for DFV. Dichter (2013, p. 96) similarly argues that there should be “more advocacy, analysis, and evaluation in the criminal system in IPV cases” to ensure appropriate responses are applied to victims/survivors who use violence (see also Miller & Meloy, 2006). This remains critically important from the initial point of police intervention, as a range of negative consequences flow for victims/survivors having to defend themselves in the court system even if they are not ultimately criminalised as a result (Dichter, 2013; Larance & Miller, 2017; Reeves, 2019). However, police need support from other legal roles, including prosecutors and judicial officers, to ensure the legal system responds appropriately to DFV victims/survivors as a whole (Erwin, 2004).

Underpinning systemic problems in legal responses to women’s use of violence has been the gender-neutral application of primary aggressor policies. Erwin (2004, pp. 14–15) has argued:

Predominant physical aggressor language is, in some ways, trying to make the law do what it does not want to do: it is designed to remedy power differentials in the use of violence within intimate relationships, but it is at odds with the goal of the law in providing a neutral legal standard upon which to determine a legal action.

Practices that fail to determine who is most in need of protection have been attributed to gender-neutral approaches by police (Larance et al., 2019), prosecutors and judicial officers (Dichter, 2013). These findings suggest that even where predominant aggressor policies exist, their effective implementation will be undermined if it conflicts with “the goal of the legal system to find probable cause” (Hirschel & Buzawa, 2012, pp. 177–178). This has led some to argue that continued reliance on incident-based responses in the protection order system reflects weaknesses in both legal actors’ understandings of DFV and the operation of the legal system itself:

These weaknesses are: the way in which traditional criminal legal responses continue to underscore the civil legal response, the continuing attraction of dichotomies of victim and offender and associated notions about what a

“true” and “genuine” victim is and how they are expected to respond to the violence and abuse used against them. (Wangmann, 2012, p. 717–718)

Together, the deference of police to prosecutors and judicial officers to decide who is the primary aggressor, coupled with the gender-neutral operation of the legal system, creates a risk of misidentification occurring and failing to be detected at multiple points in the system. This is particularly the case where courts are as time-constrained as police in dealing with DFV matters (Nancarrow, 2016, 2019; Reeves, 2019). In these contexts, systems-based reforms may be necessary in ensuring early and accurate identification of the person most in need of protection, such as using specialised DFV policing units or more integrated systems to ensure thorough investigations are conducted (NTV, 2019).

## Systems abuse

Misidentification of DFV victims/survivors as perpetrators may also occur where the actual perpetrator uses legal processes as a tactic of further control and abuse (Douglas & Chapple, 2019; Mansour, 2014; Reeves, 2019; Ulbrick & Jago, 2018). This can happen at multiple points of contact with police and courts, including applications for protection orders in retaliation, and to make false allegations of DFV in family law matters. It can also be a perpetrator tactic to pressure withdrawal of the victim’s/survivor’s legitimate protection order and escape accountability, or a strategy to deplete the victim’s/survivor’s financial and emotional resources (Douglas, in press; Douglas & Chapple, 2019; Douglas & Fitzgerald, 2013; Kaspiew et al., 2017; Miller & Smolter, 2011; Reeves, 2019; Wangmann, 2010). The QDFVDR&AB found several of the DFV-related deaths reviewed included evidence of men calling the police “as a pre-emptive strike against their aggrieved partner particularly where cross protection orders are in place ... including the perpetrator threatening to report false allegations against the victim to police in an attempt to get her in trouble” (2017, p. 83).

Other studies have found evidence of perpetrators claiming that female victims were the primary aggressors by minimising their role in the incident, injuring themselves, calling the police first, and projecting a calm appearance when police

attended the scene (Hester, 2013; Laing, 2013; Leisenring, 2011; Miller, 2001; Reeves, 2019). These behaviours can be particularly effective when they exploit or coincide with problematic gendered and racialised conceptualisations of violence and victimhood by police and legal responders. Victims/survivors may be at higher risk of systems abuse if they are from culturally or linguistically diverse backgrounds (Douglas & Chapple, 2019; Judicial Council on Cultural Diversity, 2016). The Judicial Council on Cultural Diversity (JCCD) notes that “migrant and refugee women may be particularly vulnerable ... given their unfamiliarity with the legal system and limited English skills” (2016, p. 47).

Intentional manipulation of victims, police and the legal system by perpetrators can complicate decision-makers’ ability to determine the primary aggressor (Douglas & Chapple, 2019; Reeves, 2019), emphasising the need for all service contacts to examine the history and patterns of DFV in a relationship:

While, theoretically, it is still possible that a knowledgeable perpetrator could attempt to cast him or herself as the victim, this becomes difficult with careful consideration of the long-term history of the relationship. It is unlikely that perpetrators will be able to present evidence of a history of having been dominated and controlled. (Neilson, 2004, p. 427)

## Impacts of misidentification

A number of significant negative impacts result when a person is misidentified as a perpetrator of DFV, including being unjustly subject to sanctions designed to hold perpetrators accountable. For example, they may be mandated to attend behaviour change programs (Miller & Becker, 2019); these are usually designed for male perpetrators, and are not appropriately adapted to the different contexts in which women may have used or experienced violence (Bair-Merritt et al., 2010; Bouffard, Wright, Muftić, & Bouffard, 2008; Keller, Bertoldo, & Dudley, 1999; Laskey, 2016; Rizo et al., 2016; Sherman & Harris, 2013).

In Australia, people misidentified as a perpetrator of DFV are also likely to be subject to DFV protection orders. While civil protection orders may be perceived to be less onerous

than criminal sanctions, Douglas and Fitzgerald note that “a cross-order ... has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety” (2013, pp. 86–87). Protection orders can result in temporary homelessness and losing contact with children (Reeves, 2019). Cross-orders may also undermine the safety of the person most in need of protection:

Police are more likely to see her as an aggressor or as “equally violent” rather than as someone in need of protection, and she is vulnerable to further harassment by means of allegations that she has breached the order. (Hunter & De Simone, 2009, pp. 389–390)

Further, criminalisation (e.g. as a consequence of breaching a protection order or being charged with DFV-related criminal offences) in itself has significant flow-on effects: criminal records have implications for employment (Bouffard et al., 2008; Larance & Miller, 2017; Wangmann, 2009), increase the likelihood of further charges or legal sanctions in subsequent incidents based on a history of “offending” (Poon et al., 2014), and can have significant repercussions for parenting and immigration determinations (Bouffard et al., 2008; Larance & Miller, 2017; Wangmann, 2009). As Dichter argues: “even in cases in which a victim’s actions warrant arrest, the impacts of the arrest may extend far beyond that which is intended as punishment, treatment, or retribution” (2013, p. 84).

Conversely, those in need of protection may also miss out on important risk-screening tools usually applied to victims/survivors (Miller & Becker, 2019), and be unable to access critical services that support protective responses, but are frequently unavailable to those who have been designated as a DFV offender, such as shelters and accommodation, advocacy services, counselling, and other welfare or social services (Dichter, 2013, pp. 84–5; Larance & Miller, 2017, p. 1538; Miller & Becker, 2019; Muftić et al., 2015).

Importantly, negative experiences of the legal system can discourage victims/survivors from seeking further assistance from police or other legal actors (Burgess-Proctor, 2012; Feder & Henning, 2005; Miller & Becker, 2019; Pollack et al., 2005; Wangmann, 2009). As Feder and Henning (2005, p. 167) explain:

If women are truly the victims rather than the offenders, then arresting them when they refuse to submit to additional physical abuse is victimizing them a second time. This policy may also have the unintended consequence of teaching these women that they cannot rely on the criminal justice system to fairly respond to their victimization. The outcome may be fewer calls to the police for assistance and more incidents of women feeling the necessity of taking the law into their own hands.

Burgess-Proctor highlights that, “if this occurs, these women are cut off from a potentially valuable avenue of support, which in turn may increase their personal safety risk” (Burgess-Proctor, 2012, p. 87). Studies in the United States suggest that these risks may be heightened for women of colour, who are already “less likely to report their victimization to law enforcement [and] find social agencies to be less responsive to their needs than those of other groups” (McCormack & Hirschel, 2018, p. 14).

This risk arises not only from the lack of appropriate supports and legal responses for the person most in need of protection, but also in allowing the actual perpetrator to escape accountability (State of Victoria, 2016; Reeves, 2019). For example:

Without the police as a resource, partners may be less deterred by the threat of arrest and victims may be forced to rely on alternative methods of self-protection, including fighting back or using violence in self-defense. (Dichter, 2013, p. 84-5)

In the context of systems abuse, ensuring the person most in need of protection is identified early in legal responses and experiences positive engagement with legal system actors is critical to ensuring their safety, and that appropriate responses are applied to support the person most in need of protection and hold the perpetrator accountable (Burgess-Proctor, 2012). Failing to address systems abuse can have significant implications for the primary victim, not only due to inappropriate legal responses being applied to them as a perpetrator, but also because of its capacity to undermine the legitimacy of legal processes, by trivialising the actual victims'/survivors' experiences of DFV (Reeves, 2019).

The critical importance of ensuring that correct identification of the DFV victim/survivor and perpetrator occurs as early as possible is salient where first responders may consider it outside the scope of their role to determine “culpability”. For example, police may consider the courts better placed to ascertain the primary aggressor or person most in need of protection, as discussed in the section on system factors, above. There is substantial evidence that misidentification at the point of police contact can have important repercussions for the victim/survivor, regardless of whether the misidentification is ultimately corrected by prosecutors or the courts (Larance & Miller, 2017; Reeves, 2019). These may include the negative impacts already highlighted (e.g. lack of referrals or access to victim support services, or discouraging victims'/survivors' further engagement with police and legal systems) in addition to unnecessarily exposing women to legal processes where they may be at a disadvantage and imperilled by continuing contact with the actual perpetrator (Reeves, 2019).

In the United States, Larance and Miller (2017) argue that, even though prosecutors may ascertain that the woman charged may have used defensive violence, the social and gendered dynamics of how women interact with the legal system can expose them to unsuitable criminal responses. For example, women may plead guilty to a DFV-related charge in the hope of securing a lesser sentence that will enable them to avoid a trial and jail, particularly where they have child-caring responsibilities (Larance & Miller, 2017).

In Australia, victims/survivors subjected to DFV protection order applications may similarly be disadvantaged by existing legal processes. A Queensland study of 322 cases of Legal Aid refusals of women's applications in Cairns, Southport, Toowoomba and Townsville between 1 July 2001 and 30 June 2003 found that 69 percent of refusals to provide legal aid to women responding to DFV protection order applications were based on the application of the “benefit/detriment refusal clause” (Hunter & De Simone, 2009, pp. 389–390). Hunter and De Simone found that the “general attitude was that having a protection order made against her would do the woman no harm and therefore it was not worth funding her to defend the application” (2009, pp. 389–390). They also found that 62 percent of the women they interviewed whose applications had been refused “went on to handle their matter alone [or]

did not pursue the matter” (Hunter & De Simone, 2009, pp. 390–391). Compared to other target groups in the study (including women from non-English speaking backgrounds, older women and women with disability), “Indigenous women were least likely to pay for a lawyer ... and most likely not to pursue their matter further” (Hunter & De Simone, 2009, pp. 390–391). These findings are worrying: inappropriate DFV orders and/or criminal sanctions represent unwarranted negative impacts on victims/survivors as outlined above, and emphasise the critical importance of accurately identifying the person most in need of protection as early as possible.

## Best practice approaches

The findings from the literature reviewed here establish that primary aggressor legislation and policy may improve policing responses where there are mutual allegations of violence or victims/survivors have used violence. However, the evidence about the effectiveness of these legislative and policy mechanisms is mixed. Further, there are many variables influencing decision-making so a number of other conditions are necessary to ensure legal actors appropriately determine and respond to the person perpetrating DFV.

In terms of policing responses, policies and guidance need to be specific (Hirschel & Buzawa, 2012). Providing criteria to consider, such as “severity of injury, prior violence, risk of future violence, acts of self-defense” (Hirschel & Buzawa, 2012, p. 178), may offer a starting point, but has been found to be too vague and therefore insufficient to assist officers when mutual allegations are made (Finn & Bettis, 2006). Police may rely on other criteria when they do not observe the actual violence (Hirschel, McCormack, & Buzawa, 2017), including sociodemographic information that results in inconsistent policing (Poon et al., 2014). Police need to know how to interpret the information they obtain and understand the gendered dynamics of DFV (Finn & Bettis, 2006). Further, these criteria are not enough to assist police in their responses to victims/survivors who are using violence and require intervention (Muftić et al., 2015).

Training police in understanding and applying primary aggressor policies has been found to decrease dual arrests

in some jurisdictions (Hirschel & Buzawa, 2012). However, training needs to specifically address understandings of the predominant aggressor and different motivations and impacts of DFV on women (Poon et al., 2014), and it is not sufficient by itself. Organisations also need to encourage good police practice by supervising police officers’ adherence to policy and sanctioning poor practice, including inadequate investigations (Finn & Bettis, 2006). Cultures of risk aversion and fear of liability need to be addressed to minimise police taking action against both parties out of caution where it is initially unclear who is the predominant aggressor (Finn & Bettis, 2006). System reforms such as specialised units, co-responders or other integrated systems (discussed above) may also support appropriate legal responses in these circumstances.

Tailored interventions and legal responses are needed where it is clear that a victim/survivor is using violence and requires intervention. Further research is needed to guide the development of these tailored responses (Mackay, Bowen, Walker, & O’Doherty, 2018; Muftić et al., 2015); possible approaches, however, include referral to support services or programs tailored to women’s offending where available (Caldwell, Swan, Allen, Sullivan, & Snow, 2009; Rizo et al., 2016), instead of automatically arresting or prosecuting people who use minor violence when experiencing ongoing DFV (Larance & Miller, 2017). There is a growing body of literature on women’s use of violence in Australia and elsewhere, and recognition that further research differentiating between defensive, retaliatory and other forms of women’s violence is needed (Babcock, Snead, Bennett, & Almenti, 2019; Boxall et al., 2020; Mackay et al., 2018; Nancarrow, 2016, 2019).

At a broader systems level, it is critical that policies and practices reflect the gendered nature of DFV (an expression of structural inequality) to ensure they are realising the objectives that DFV legislation and legal responses were originally designed to achieve (Poon et al., 2014). Without this,

the use of primary aggressor policies might also result in more female victims experiencing the negative consequences of the criminal justice system as an offender, rather than the potential benefits that ought to be available as a victim. (Poon et al., 2014, p. 1467)

## Summary

Despite decades of incremental law and policy reform to stop misidentification of DFV victims/survivors, the problem persists. Factors contributing to misidentification are multiple and include misperceptions of victim behaviour, perpetrator manipulation of police and legal systems, and incident-based policing in a civil law context that requires investigation of a pattern of coercive control.

The impacts of misidentification are wide-ranging, harmful (even life-threatening) and long-term: victims/survivors are re-victimised by the system designed to protect them. There is a substantial and growing body of evidence, however, on strategies to significantly reduce misidentification.

## CHAPTER 2:

# Research methodology

The research aims and questions and the theoretical framework guiding the approach and analysis are presented at the beginning of this chapter. This is followed by a discussion on the methods used for data collection and analysis: first for the quantitative data, then the qualitative data, and the involvement of the project reference group. Details of the sample for the quantitative and qualitative components of the study and ethical considerations are provided. The chapter concludes with a discussion of the research limitations.

## Research aims

The primary aim of the research was to identify strategies to improve police and court practice in regard to identifying the person most in need of protection, to avoid the making of cross-applications and cross-orders.

This research was instigated by Recommendation 16 of the QDFVDR&AB's *2016–17 Annual Report*:

That the Queensland Government commission research which aims to identify how best to respond to the person most in need of protection, where there are mutual allegations of violence and abuse. This research should take into account the identification of potential training or education needs for service providers, across applicable sectors to better assist in the early identification of, and response to, victims who may use violence, particularly where they come to the attention of services during relevant civil proceedings for DFV protection orders. (QDFVDR&AB, 2017, p. 83)

Although the research responds to this recommendation, concerns about victims/survivors being treated as perpetrators of DFV are relevant to multiple Australian jurisdictions. Consequently, the research also aimed to provide a statistical sketch of the application of related law, with particular reference to gender and Indigeneity, and examples of good practice in policy, procedures and guidelines, nationally.

Multiple services and systems have a role to play in responding to DFV, and misidentification of the primary abuser and the person most in need of support may occur within any of those services, with negative consequences for victims/survivors.

This research focuses on the legal system, where police and courts are the services most commonly in contact with victims/survivors and perpetrators (QDFVDR&AB, 2017), and have been given exceptional powers under civil legislation, with potentially far-reaching and long-term consequences for those deemed to have perpetrated DFV. Various legislative and policy strategies have been initiated to avoid misidentification of the person most in need of protection, or the primary aggressor, but concerns remain about the number of female victims/survivors of DFV who are the subject of police and court action against them (Boxall et al., 2020; NTV, 2019; QDFVDR&AB, 2017; Ulbrick & Jago, 2018). Consequently, police and courts have been identified as the main points of contact where misidentification of the person most in need of protection may occur (QDFVDR&AB, 2017).

## Research questions

The research responds to the following questions:

1. What legislative and policy requirements and guidance exist in Australian states and territories for police and courts to identify the DFV victim/survivor?
2. Where and in what circumstances do police and courts in Queensland currently appear to struggle to identify the DFV victim/survivor where there are mutual allegations of violence?
3. What legislative, policy and practical factors enable or hinder Queensland police (as first responders) and courts (as the next point of contact) in correctly identifying victims/survivors where there are mutual allegations of violence?
4. What improvements could be made to better assist police and courts to identify and support the victim/survivor in Queensland?
5. What improvements could be made to broader legal system structures and processes in each Australian state and territory to ensure the victim/survivor is identified and supported where there are mutual allegations of violence?

## Theoretical framework

The approach and analysis for this mixed multi-methods study draws from critical criminology: specifically, feminist legal theory (MacKinnon, 1991; Smart, 1989) and critical race theory (Fredericks, 2010; Wing, 2003). Critical theory locates analysis of problems within social structures of power and seeks solutions that confront those social structures. Feminist and critical race frames of reference are important in this research because it is concerned with highly gendered phenomena (DFV), while the experience of and responses to the phenomena play out differently according to race-d contexts (Huggins, 1994; Lucashenko, 1994, 1997; Nancarrow, 2016, 2019). The following discussion briefly expands on the relevance of each frame of reference.

Early feminist legal scholars (e.g. MacKinnon, 1991; Smart, 1989; West, 1987) identified the fraught relationship between the legal system and women's interests. Their concerns included formal and substantive equality in the law: that is, whether or not women and men should be treated equally before the law. Douglas and Godden (2002) argued for substantive equality in the application of the law for domestic violence (intimate partner violence) matters, observing its highly gendered nature. Important gender differences are evident in both the prevalence and the nature of domestic violence matters coming before the courts (Nancarrow, 2019; Wangmann, 2010). Women are much more likely to be victims than perpetrators of violence (ABS, 2016), and when women do use violence it is most likely to be resistive violence or otherwise unrelated to coercive control (Australian Domestic and Family Violence Death Review Network, 2018; Nancarrow, 2016, 2019; Stark, 2007; Wangmann, 2010). As Nancarrow (2016, 2019) demonstrated through a content analysis of policy documents and parliamentary debates in Queensland, civil domestic violence laws were instigated to address men's coercive control of female intimate partners.

Recognition of structural power in favour of men provided a lens for analysing statistical data (a disproportionate number of women as respondents), conceptualisations of violence, and interactions between women who have used violent resistance and police. The analysis and recommendations emphasise the importance of power (coercive control as a means to deny

women autonomy and equality in relationships) as context for the appropriate use of specialised DFV laws.

Critical race theory emerged in the 1990s in response to concerns that the experiences of women were inadequately represented in critical race discourse (Wing, 2003). Critical race feminist scholars (e.g. Crenshaw, 1989; Fredericks, 2010; Harris, 1990; Ladson-Billings, 2000; Moreton-Robinson, 2000; Razack, 1998; Richie, 2012) recognised that women's experiences of power are not confined to their experiences of gender inequality. They rejected the essentialism of feminist perspectives, in which the construct of woman was white and middle-class. Critical race theory highlights that the world is experienced differently according to racialised contexts, as well as gendered contexts, but the experience is more than the sum of its parts: lived experience is shaped simultaneously by the combined and ubiquitous dimensions of identity. It confronts racism and unconscious bias (racialised stereotypes), which operate at individual and systemic levels, including within legal systems. A critical race lens has been used in this research to analyse the interaction between Aboriginal and Torres Strait Islander women and the legal system, and to consider strategies to improve the response of police and courts faced with uncooperative Aboriginal and Torres Strait Islander women who do not fit the the ideal victim stereotype. However, the application of critical race theory is partial: it informs the analysis of the data but, given the aims of the research, the recommendations reflect a perseverance with the current legal system (Ladson-Billings, 2000), rather than proposing alternatives that might provide a more effective response for Aboriginal and Torres Strait Islander women (Nancarrow, 2006, 2010, 2019).

## Research methods

The project used a mixed methods research design, including quantitative and qualitative components. The quantitative data analysis involved secondary police and court data from states and territories. Multiple methods were used in the qualitative design including:

- a national desktop review of legislation and policy<sup>8</sup>
- court observations in Queensland
- semi-structured interviews and focus groups with QPS personnel, support service workers, magistrates and women with lived experience in Queensland.

Using mixed multiple methods allows for more comprehensive data to be collected and analysed than singular methods (Ivankova & Kawamura, 2010). The methods were used concurrently (Ivankova & Kawamura, 2010). A mixed methods design also sits well within a critical criminology theoretical framework, because it allows for analysis that draws out the “tensions and ambiguities” of the data, allowing “marginalised knowledge [to be] brought to the foreground” (Hesse-Biber, 2010, p. 187).

## Quantitative data

### Data collection

The research team requested state-/territory-level aggregate quantitative data from each Australian state and territory<sup>9</sup> on the numbers or rates of:

- a. DFV protection orders, including:
  - i. applications
  - ii. court orders
  - iii. police-issued orders such as police protection notices
  - iv. cross-applications/orders
- b. charges for DFV-related offences
- c. proportions of a) and b) made:

- i. by gender of the respondent and aggrieved
- ii. by cultural identity (Indigenous or not) of the respondent and aggrieved
- iii. for intimate partner versus other family relationships
- iv. by police versus private application.

Due to the variations in DFV protection order and criminal offence legislation and different data collection practices throughout Australian jurisdictions (see e.g. ABS, 2018), the research team anticipated the absence of data variables in some jurisdictions, and that different or additional data may need to be sought following consultation with relevant stakeholders.

State and territory government officials assisted the research team to access quantitative data where relevant contacts for data requests were not publicly available. Requests were then submitted to relevant agencies in each jurisdiction.<sup>10</sup> Only aggregate administrative data were sought, to be used as secondary data to inform the qualitative components of the project. The research team negotiated and complied with any additional conditions or procedures required by those agencies in accessing the data.

As requested, the QGSO provided a more comprehensive data set. This was to support investigation for any regional differences in Queensland that might be attributed to one or more of a range of factors including district police policy, court specialisation, or population profile.

Access to data was highly dependent on its availability within each jurisdiction, and the ability for the research team to successfully negotiate access within the short project timeframe, allowing a period of only three months (December 2019–February 2020) for data collection after ethics approval.<sup>11</sup> Consequently, the Australian Capital Territory was unable to provide any data with a breakdown for gender and Indigeneity<sup>12</sup> for this research, due to the time

<sup>8</sup> Drawing from a scoping review and content analysis approach, DFV legislation and publicly available policy guidance for police and courts were identified, then content was scanned for terminology relevant to misidentification, including “primary victim”, “primary aggressor”, “person most in need of protection”, “person in need of protection”, “cross-application”, “cross-order”, “mutual application” and “mutual order”.

<sup>9</sup> The following agencies coordinated the provision of aggregated quantitative data for the study, on behalf of their respective jurisdictions: Australian Capital Territory–Justice and Community Safety Directorate (JACS); New South Wales–Bureau of Crime Statistics and Research (BOCSAR); Northern Territory–Department of Attorney General and Justice; Queensland–Queensland Government Statistician’s Office (QGSO); South Australia–South Australia Police; Tasmania–Department of Police, Fire & Emergency Management; Victoria–Crime Statistics Agency, and Court Services Victoria; Western Australia–Western Australia Police.

<sup>10</sup> See fn. 9, above.

<sup>11</sup> The project commenced in September 2019 and funding for the project, including the research team, was available until 30 June 2020.

<sup>12</sup> See note on terminology in front matter. Disaggregated data for Aboriginal and Torres Strait Islander peoples are not available for any jurisdiction.

constraints. Further, not all of the quantitative data requested were available and the high-level administrative data obtained are subject to a number of significant limitations. These limit comparisons between jurisdictions.

### Data analysis

Seven jurisdictions provided data on respondents to protection order applications and most jurisdictions provided data on DFV protection order breaches and DFV-related offences, subject to the limitations detailed in the findings section. Queensland was the only jurisdiction able to provide data on cross-applications. The requested breakdown of the data by gender and cultural identity (Indigenous) enabled the application of the critical theory (feminist and critical race) lens. The availability of data addressing the variables requested for the proportions of DFV protection orders and offences (listed under [c], above) differed in each jurisdiction. For example, two jurisdictions (South Australia and Victoria)<sup>13</sup> did not have reliable data on Indigeneity for DFV protection orders to report. Taking into account the complexities in comparing this type of data across jurisdictions, manipulation of the data obtained was restricted to reformatting and compiling tables of comparable variables across multiple jurisdictions. For Queensland data, the proportions of Indigenous respondents and the counts of respondents by gender were combined to estimate counts of respondents by Indigeneity and gender and, to aid comparison between study sites, the Australian Bureau of Statistics' (ABS) statistical areas of Brisbane were combined. The 2016 ABS census<sup>14</sup> data on the proportion of Indigenous people in the population of each state and territory were added to enable proportionate comparisons across states and territories. In addition, the 2016 ABS census data for study site population in Queensland were added for comparing regional differences between sites. Data visualisations were done with MS Excel, and resulting graphics were integrated into the desktop review of legislation and policy to provide further context for policy and practice similarities and differences across jurisdictions.

## Qualitative data

### Desktop review (national)

A desktop review of relevant legislation and policies was undertaken for each Australian state and territory, and for the Commonwealth where relevant. The review involved content analysis of current DFV protection order legislation and publicly available police and court policies relevant to identifying the DFV victim/survivor or perpetrator or otherwise responding to mutual allegations of violence (Bowen, 2009; Liamputtong, 2019).

Relevant police and court policies were identified by conducting online searches on Google between September 2019 and March 2020 using key terms, and snowballing references in the literature to identify publicly available policy and procedure documents. State and territory police and court websites were also browsed directly to identify material that did not appear in Google search results.

### Data analysis

Documents were then reviewed for content that related to identifying the primary aggressor/person most in need of protection, or otherwise responding to mutual allegations of violence (Bowen, 2009). This provided background context to understand the legislative and policy environments that police and court actors currently operate within, and to help identify where best practice or gaps in policy approaches to supporting DFV victims/survivors may be evident in the legal systems operating across Australia when supplemented with other research methods (Bowen, 2009). Findings from the desktop review were then triangulated with quantitative administrative data and ABS data on Indigeneity to build a comparative picture of legislative, policy and practice settings across jurisdictions and enable the application of the critical theory (feminist and critical race) lens.

### Police and court practices (Queensland)

Three qualitative methods were used to study the accurate identification of the person most in need of protection in Queensland: a) focus groups; b) interviews; and c) court observations. Focus groups and interviews were conducted with all four participant groups: QPS personnel ("police"),

13 South Australia Police advised that they do not routinely collect Indigeneity data, and Victoria's Crime Statistics Agency advised that Indigeneity data was of insufficient accuracy to publicly report.

14 See <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>

specialist support service workers (“service providers”), women with lived experience and magistrates.

### Sites

Court observations, interviews and focus groups were undertaken in three sites in Queensland: Brisbane, Southport and Townsville.<sup>15</sup> The number and location of sites reflected the time and resources available for the project. Sites were selected based on scoping and stakeholder consultations to ensure the inclusion of diverse contexts (including different models of police operational units, specialist versus non-specialist DFV courts, and geographical and demographic factors) to ensure rich data were available across different regional settings. Rural and remote locations were not able to be included within the timeframe of the project. Focus groups and interviews with women were based in Brisbane and Townsville only, and interviews with magistrates were not confined to the three sites due to recruitment considerations detailed further below.

### Court observations

Members of the research team observed court mentions of DFV applications to gain insights into the interactions and behaviours of courtroom actors when dealing with DFV protection order matters (Anleu, Bergman Blix, Mack, & Wettergren, 2016). Court lists dealing with police applications were targeted for observation because these matters represent two particular aspects of the legal system where misidentification of the person most in need of protection may occur. They also provided an opportunity to understand the environment in which decisions on DFV protection orders are made, and in which policies and legislative requirements need to operate. Data from these observations were used to provide “narrative descriptions of complex interactions” (Hartmann & Wood, 1990, p. 107) observable in courts dealing with DFV matters.

Researchers, singly or in pairs, observed DFV call-over lists for one day in a local Magistrates Court in each site, with the permission of the sitting magistrate. Researchers

recorded on a template (Appendix D) their impressions of the environment in which DFV matters were considered, including the volume, pace and timing of matters and interactions between courtroom actors (Anleu et al., 2016). Field notes were then reviewed for evidence of processes and practices being used by courtroom actors to determine the person most in need of protection. These observational data were interpreted alongside findings from interview and focus group data on the contexts in which misidentification may play out in the legal system.

### Interviews and focus groups

Participants were recruited from four groups.

#### 1. QPS personnel (“police”)

The QDFVDR&AB report identified police as the most prevalent type of service contact for both victims/survivors and perpetrators, and as playing a critical role in DFV responses (2017). The literature also consistently identifies police practice as a significant factor in the misidentification of the primary aggressor (Mansour, 2014; Reeves, 2019; Ulbrick & Jago, 2018). As such, examining Queensland police perspectives on this issue was vital to the research findings.

As multiple organisational roles in the QPS are involved in policing and legal responses to DFV, from frontline responders through to prosecution, and appreciating the considerable burdens on frontline operational units to participate in the study, current QPS personnel were recruited from a variety of operational units in Brisbane, Southport and Townsville with the assistance of the QPS Domestic, Family Violence and Vulnerable Persons Unit. Participants were purposively sampled from three roles:

- general duties and DFV co-ordinators/Vulnerable Persons Unit (VPU)
- police prosecutors
- High-Risk Team members.

This enabled a comparison of multiple police perspectives in different settings within the legal process.

<sup>15</sup> The research sites refer to court locations, while some research participants came from a wider geographic area within the region of the research site (e.g. the Gold Coast more broadly than Southport).

2. Specialist support service workers (“service providers”) Due to their specialist understanding of the dynamics of DFV and visibility over the legal processes that DFV victims/survivors and perpetrators have to navigate, service providers provide important insights into the impacts and implications of different policing and court policies and practices on their clients (see Mansour, 2014).

Workers were recruited from various service providers that were purposively sampled in each site based on their provision of specialist support to DFV victims/survivors or perpetrators in contact with the legal system. Participants were recruited via key support services identified in the scoping phase of the project. Eligibility criteria included workers currently providing specialist support to DFV victims/survivors or perpetrators in contact with the legal system. This included workers in legal and specialist DFV support services.

3. Women with lived experience of both victimisation and being labelled a perpetrator of DFV (“women with lived experience”)

Capturing women’s views was critical to the research project, based on findings from the Australian Domestic and Family Violence Death Review Network (2018) that “most male homicide offenders had been the primary user of domestic violence behaviours against the homicide victim prior to her death” (p. 10), yet “most of the female homicide offenders were primary victims of violence who killed a male abuser” (p. 28). Further, the project responds to the QDFVDR&AB’s findings that 44.4 percent of all female adult victims of DFV-related deaths had been identified by police as a respondent on at least one occasion, and in regard to the Aboriginal family violence cases reviewed, “nearly all of the victims had a prior history of being recorded as both respondents and aggrieved parties, in both their current and historical relationships” (2017, p. 82).

In the context of these findings and reflecting the feminist theoretical framework adopted by the project, centring the views of women with lived experienced on the adequacy of current legal responses to mutual allegations of DFV was essential (Hesse-Biber, 2010; McHugh, 2014). As the project is concerned with better identification of patterns of coercive control, and evidence establishes that coercive control is almost

exclusively perpetrated by men against women (Stark, 2006, 2007), only women were invited to participate.

Women were eligible to participate if they were over 18 years old and had previously been listed as a respondent on a protection order or charged with a DFV-related offence and had experienced DFV. Invitations were only given to women who were assessed through the professional judgement of Sisters Inside representatives as not in crisis, and as having the capacity to consent and participate in the research. Women were offered the option to participate in focus groups based at Sisters Inside office locations in Brisbane and Townsville, or in individual interviews, including by phone.

4. Magistrates

The QDFVDR&AB (2017) identified the court system as a pivotal actor in addressing DFV. After police involvement, the court system is the next mechanism through which protection orders move. As the final decision-makers in regards to issuing protection orders and a service victims/survivors and perpetrators commonly come into contact with (QDFVDR&AB, 2017), magistrates in Queensland were identified as a key group to inform examination of the court processes that govern DFV legal responses. The project aimed to obtain perspectives and views from magistrates involved in dealing with DFV matters in a variety of magistrates courts in Queensland. This was intended to allow comparison of magistrates’ perspectives in different settings within Queensland, and to identify factors that they considered to be enabling or hindering their ability to effectively distinguish DFV victims/survivors from perpetrators.

### Data collection

Interviews and focus group methods provided valuable data, enabling participants to describe their experiences and communicate nuanced perspectives on the research topic (Liamputtong, 2019; McHugh, 2014). Focus groups offered a number of methodological strengths as they allow for more spontaneous and nuanced discussion driven by the participants, and maximise the breadth and diversity of experiences that can be explored within a relatively short project timeframe (Cyr, 2017). Considering the complexity of issues under investigation, focus groups enabled the

researchers to privilege the participants' views and analyse shared and contested perspectives of legal responses to DFV both within and between participant groups (Cyr, 2017; Gill, Stewart, Treasure, & Chadwick, 2008; Liamputtong, 2019; McHugh, 2014).

Researchers used a set of questions (Appendix B) to prompt discussion. This semi-structured approach examined where and how misidentification may occur, the implications and impacts of misidentification, what existing gaps and/or best practice may be qualitatively similar or different in police and court settings, and how to improve legal responses in these settings. Interview questions were adapted to reflect the different roles of each participant group. Tailoring the questions to the participants' diverse roles allowed the researchers to build a detailed picture of a complex issue, informed by multiple perspectives.

A minimum of two focus groups for each participant group were offered in each of the three sites. Five magistrates were interviewed in person, due to the small number of participants and practical constraints of arranging a focus group. A further two participants (one QPS officer and one woman with lived experience) were interviewed because they were unable to attend a focus group. The duration of the focus groups was between 1 and 2 hours, and interviews were approximately 1 hour. The number of focus groups and interviews allowed for saturation of data (Liamputtong, 2019) to be achieved for each of the research questions and within most of the four participant groups. Although there was little new evidence emerging after the third interview with magistrates, this was a small sample of five magistrates who had substantial experience. Further, the diversity of roles among the broad group of police resulted in divergent views for different cohorts, such as views expressed by GDOs compared to the views of representatives from a VPU based in the same site. While saturation was achieved for GDOs and police prosecutors, new evidence may have emerged if a larger number of DFV police policy specialists had been included.

Recruitment strategies differed for each group, as detailed in the following discussion. However, each group constituted a purposive sample, recognising the particular expertise and insights of participants in relation to the context in which

misidentification of DFV aggrieveds/respondents may occur: the recruitment did not aim to be generalisable or representative (Liamputtong, 2019). Due to ethical considerations, Aboriginal and Torres Strait Islander people were not explicitly recruited for the research, although incidental inclusion in the sample was anticipated. This occurred in two out of four of the participant groups (see "Sample" section, below). Written or verbal consent was obtained from all participants prior to commencing a focus group/interview. Further specific ethical considerations are detailed for each group below.

Demographic information, to be used in conjunction with the interview and focus group data, was also collected voluntarily from participants via a paper survey immediately prior to their participation. Participants were not required to complete the survey to participate in the interview or focus group. Police, service provider and magistrate participants were asked to indicate their age, whether they identified as Aboriginal or Torres Strait Islander, gender, role, where their work is usually based and how long they have been in their role. Women were asked to indicate their age and whether they identified as Aboriginal or Torres Strait Islander. A total of 77 participants provided some or all of this information (reported in the "Sample" section, below).

### Data analysis

Focus groups and interviews were audio-recorded and transcribed. De-identified transcripts were uploaded to NVivo (Version 11) software and thematically analysed. Thematic analysis was undertaken by two researchers mapping patterns in participants' responses, both within and between each group to identify key perspectives regarding the identification of DFV aggrieveds/respondents where there are mutual allegations of violence (Braun & Clarke, 2006; Vaismoradi, Turunen, & Bondas, 2013). Transcripts were initially reviewed to identify emerging concepts. Themes identified in the literature review were used to code themes (deductive coding) and interpret the interview and focus group data (Nowell, Norris, White, & Moules, 2017; Terry, Hayfield, Clarke, & Braun, 2017). Seven main coding themes were identified and used to organise the data analysis: 1) conceptualising use of violence; 2) systems abuse; 3) police practice; 4) legal and extra-legal factors; 5) QPS organisational factors; 6) system factors; and 7) impacts of misidentification. During analysis, three of the

themes—police practice (3), legal and extra-legal factors (4), QPS organisational factors (5)—were consolidated. Coding the Queensland qualitative data to these themes identified in the literature provided a framework for the researchers to critically analyse the interactions between women and the legal system, and the policing and legal structures that inhibit or enable accurate identification of the person most in need of protection in Queensland. A mix of semantic and latent analysis was used, to capture both explicit and implicit assumptions and understandings expressed by the participants (Terry et al., 2017).

### Project reference group

A project reference group (see “Author acknowledgement” for a list of members) was established to inform the project and its findings, and to ensure it builds on existing knowledge and work being conducted in Australian jurisdictions. The group included representatives with expertise on the misidentification of DFV aggrieved/respondents, as service providers, researchers or both. The research team met twice with the reference group during the life of the project, first to consult on the analysis and then on the findings.

## Sample

### National policy and statistical analyses

Aggregated statistical data were provided by seven of the eight jurisdictions<sup>16</sup> and relevant publicly available policies and procedures were reviewed for all jurisdictions. Details about the data collected are provided in the section on research methods, above.

<sup>16</sup> The Australian Capital Territory was able to provide data on the number of respondents to applications for DFV orders, while other jurisdictions provided data on the number of respondents on protection orders, so the ACT’s data were not comparable. Further, due to the short time available for the compilation of aggregate data, the ACT was unable to provide any data with a breakdown for gender and Indigeneity, hence there are no results reported for the ACT in the statistical analysis.

## Queensland: In-depth qualitative component

### Interviews and focus groups

A Queensland sample totalling 100 people participated in seven interviews or 17 focus groups, in January and February 2020. This enabled an in-depth analysis of the conceptualisations and challenges associated with identifying the person most in need of protection. As discussed in the methods, the sample comprised four groups and did not aim to be generalisable or representative (Liamputtong, 2019).

#### 1. Police

A sample size of 25–35 participants was expected to provide sufficient variability across the three geographic and operational settings of the sites. The sample size was exceeded, with a total of 39 participants recruited across the three sites, representing various roles within the QPS: GDOs, representatives of the DFV and VPU, domestic violence liaison officers (DVLOs), and police prosecutors.

Of the 31 police participants who completed a short demographic survey prior to participation, there were 18 women and 13 men, ranging in age from 18–24 years to 55–64 years. Most participants had more than 10 years’ experience (n=13) or 1–5 years’ experience (n=10). No participants identified as Aboriginal or Torres Strait Islander.

The majority of participants indicated their role was mainly based in Townsville (n=12) compared to Brisbane (n=4) or Southport (n=3). Twelve participants indicated their work was based in an “other” location. These other locations included suburbs in the greater Gold Coast or Brisbane regions. Based on the researchers’ records of focus group attendance, there was an over-representation of QPS participants from Southport and the greater Gold Coast region (n=17) and Townsville (n=14), compared to Brisbane (n=8).

#### 2. Service providers

A sample size of 15–20 was determined to provide sufficient variability taking into account the number of services operating in the three different sites. The sample size was exceeded, with a total of 39 specialist DFV service providers

**Table 1:** Summary of sample for Queensland in-depth qualitative component

Sample	Site and sample size			Number per group
	Brisbane	Southport	Townsville	
<b>Participant group</b>				
QPS personnel	8	17	14	39
Service providers	15	16	8	39
Women with lived experience	10	-	7	17
<b>Participants per site</b>	<b>33</b>	<b>33</b>	<b>29</b>	<b>95</b>
Magistrates	5 (Qld-wide)			5
<b>Total participants</b>				<b>100</b>
Court observations	1 day	1 day	1 day	3 courts, 3 days

and community legal centre lawyers participating across the three sites.

Of the 33 who completed the short demographic survey before participating, four identified as Aboriginal. There were 29 women and four men, ranging in age from 18–24 years to 65–74 years. Participants' years of experience ranged from less than 1 year to more than 10 years; most participants (n=20) had 1–5 years' experience. The majority of participants indicated their role was mainly based in Southport (n=13) compared to Brisbane (n=10) or Townsville (n=7). Three participants indicated their work was based in an "other" location. These other locations included suburbs in the greater Gold Coast or Brisbane regions, or reflected that a participant worked across multiple sites. Based on the researchers' records of focus group attendance, there was an over-representation of participants from Southport and the greater Gold Coast region (n=16) and Brisbane (n=15), compared to Townsville (n=8).

### 3. Women with lived experience

The research team aimed to include 15–20 women with lived experience in the sample. Seventeen women participated: ten participated in a Brisbane-based focus group or via a phone interview, and seven participated in the Townsville-based focus groups.

Women were asked in the demographic survey to indicate their age and whether or not they identified as Aboriginal or Torres Strait Islander. Of the nine women who completed the demographic survey, five identified as Aboriginal, and

one identified as Torres Strait Islander. Two of the women preferred not to state their cultural identity. Where known, the women's ages ranged from 18–24 years to 45–54 years.

### 4. Magistrates

Participants were recruited with the assistance of the Chief Magistrate of Queensland. The study aimed for a sample of 5–7 participants, based on the small number of magistrates who specialise in DFV matters in Queensland, while also reflecting various court settings in which DFV matters are dealt with. Due to the smaller cohort of magistrates compared to other sample groups, and in order to provide anonymity, the researchers did not request recruitment of these participants to be confined to the three sample sites. Five magistrates ultimately participated in this research. Due to the small sample size and to ensure anonymity, demographic information on these participants has not been reported.

### Court observations

The research team observed three Magistrates Courts, one in each of the research sites, over a full sitting day in each court. The team spent approximately 19 hours in total observing the court environment and processes, involving approximately 51 applications for protection orders (excluding Ex parte matters).

Table 1 summarises the sample for the qualitative research undertaken in Queensland. Locations are not identified for the five magistrates interviewed, due to the small number in the sample and the need to protect anonymity.

## Ethical considerations

The research project was considered high risk, due to the nature of the research and the methods used. The possibility of women with lived experience suffering psychological distress was of most concern. The research team entered into a partnership with Sisters Inside, an organisation supporting women who are or have been in the Queensland corrections system, to recruit women for the study and support them during and after participation in an interview or focus group. In compliance with Queensland Corrective Services policy, none of the women participants were subject to a current corrections order. All participants were made aware of the availability of support, that participation was completely voluntary, and that their anonymity would be protected by de-identifying their information in the report and any other material resulting from the research. Each woman was provided with a gift card valued at \$150 to compensate for their time and any out-of-pocket expenses associated with their participation.

The major concern with the members of the other groups was the potential risk to their professional reputations and the potential for disciplinary action if they expressed views or practices contrary to their organisations' policies and procedures. The possibility that some participants would not disclose information was also of concern. It was essential, therefore, that participation was voluntary and that anonymity was protected. Care was taken to ensure an appropriate mix of police in focus groups (e.g. GDOs were not grouped with representatives of the VPU).

Protecting the anonymity of the small number of magistrates participating (n=5) was also a specific consideration. Care has been taken to avoid disclosing the locations of individual magistrates to prevent the risk of identifying their particular contribution to the research.

Ethics approval was obtained from the Griffith University Human Research Ethics Committee (GU 2019/897). Research approval was subsequently obtained from the QPS Research Committee (QPSRC-0120-1.01) before proceeding with data collection involving QPS personnel.

The Western Australia Police Force required and granted in writing specific approval for the provision of quantitative data (reference no. T547). The QGSO facilitated access to statistical data for the project under the *Statistical Returns Act 1896* (Qld).

## Limitations

The substantial amount of data analysed for this project provides a significant contribution to the limited evidence base on policing and court responses to DFV where there are mutual allegations of violence in Australia. However, the research findings are subject to a number of notable limitations, as follows.

### National policy and statistical analyses

Although national in focus, the research is not representative and caution is necessary in generalising findings across jurisdictions. In particular, quantitative data on DFV protection orders and criminal offences vary considerably between jurisdictions, limiting their comparability. The completeness of quantitative data available for this research was further constrained by inconsistencies in what was able to be provided by relevant agencies, particularly within the project's short timeframe. For example, many jurisdictions held data across multiple agencies and did not routinely collect data on all of the requested variables. This means that it was not possible to provide a detailed analysis of quantitative data relevant to the research questions.

Specific limitations of the quantitative data available for this research are as follows:

- It is impossible to know from the data provided whether the proportions of police versus private applications were consistent among the states and territories.
- Patterns of behaviours, such as recidivism rates for breaches of orders by women, compared to men, cannot be discerned from the data.
- The data also do not enable analysis of the nature of breaches, for example:

- if there are any differences in the rate of breaches of court orders versus police notices
- whether there are differences for men and women, or Indigenous and non-Indigenous respondents, in the nature of offences
- how offences came to the attention of police.

Each of the limitations for this study represents an area for further investigation to understand how effectively the laws are being applied to achieve the policy and legislative intent in respective jurisdictions, nationally. A national DFV data mapping exercise is also needed to assist in future nationally comparative quantitative data analysis, in particular to understand what questions can be answered by the available data.

The desktop review of policy documents was limited to those that are publicly available and identifiable through online searches. Although the desktop review contextualises the legislative and policy frameworks underlying the rates of protection orders and criminal offences in each jurisdiction, neither research method provides sufficient detail to establish the prevalence of, or reasons for, misidentification throughout Australia (Bowen, 2009). Further, neither method is able to explain how police and court actors apply legislation and policies in practice (Bowen, 2009). Consequently, limited conclusions are able to be drawn from these data sets and should be used as an impetus for further research.

### Queensland in-depth qualitative analysis

While qualitative data from Queensland allow for a detailed examination of the problem of identifying the person most in need of protection, consistent with qualitative research, the findings are not necessarily representative of practice across Queensland or generalisable.

Participants and sites for court observations were purposively sampled and are therefore not representative across other populations or locations (Cyr, 2017; Liamputtong, 2019). While the research design originally intended to have equal representation across participant groups, the sample of police

was increased (with ethics approval) to capture the diverse roles within the QPS and likely variation of perspectives that could point to areas needing attention. Consequently, QPS personnel (n=39) and, incidentally, service providers (n=39) were over-represented in the research compared to women (n=17) and magistrates (n=5). Although an almost even number of participants were sampled in each site in total (n=29–33), plus five magistrates across Queensland, Brisbane-based QPS personnel and Townsville-based service providers were under-represented within their participant groups. Further, none of the QPS personnel identified as Aboriginal or Torres Strait Islander. Indigenous liaison officers would have provided additional perspectives on policing in Indigenous communities but were not specifically recruited to participate in the research due to ethical considerations discussed in the methodology.

Only three sites were able to be included in the project due to resourcing constraints. Although the sites were identified through stakeholder consultation, and noting the different experiences of DFV and access to resources in rural and remote settings, the inclusion of urban centres only is a weakness of the research design.

Although focus groups offered a number of methodological strengths as discussed above, there are also limitations consistent with those inherently associated with the use of focus groups to collect data. For example, the views expressed by participants may have been influenced by pressures to conform within the group (Cyr, 2017). This is a particularly relevant consideration for interpreting views expressed by QPS personnel participating in mixed focus groups, noting the hierarchical organisational culture of police organisations. Similarly, an inherent limitation of court observations is that behaviour observed in court may have been affected by the presence of the researchers, and the interpretation of the field notes was inherently selective (Anleu et al., 2016). Further, the courts that granted permission for observations to be conducted may not have been representative of court practices generally. In addition, a focus group format is not conducive for participants to share deeply personal stories, such as victimisation experiences related to sexual violence. Examining legal responses to sexual violence in intimate partner relationships, including education and training needs

for responders, is an important area for further research (see ANROWS, 2019).

As with the national desktop review and quantitative analysis, the use of multiple methods was intended to minimise the limitations inherent in each individual research method by allowing triangulation of data. Although some limitations remain, the research represents a significant contribution to developing an Australian evidence base identifying the DFV aggrieved/respondent where there are mutual allegations of violence, and understanding the operational contexts in which police and court system actors operate when making these decisions.

## Summary

The aims of the research focused on improvements to police and court practice in applying current civil DFV law, specifically in relation to identifying the person most in need of protection, or the primary aggressor, to avoid victims/survivors being treated as perpetrators of DFV. The mixed method research design discussed in the chapter had a number of strengths, including the theoretical framework providing a feminist and critical race lens for data collection and analysis, and the in-depth qualitative component. Inconsistent recording of data nationally limited the quantitative data analysis. In addition to limitations inherent in qualitative research methods, the project timeline and resources limited the in-depth qualitative component in several ways: inclusion of Aboriginal and Torres Strait Islander people was incidental (as anticipated); data were collected in urban settings only; and experiences of LGBTQ people, intersex people, and people with disability were not explicitly sought for inclusion.

## CHAPTER 3:

# Results of national policy and statistical analyses

This chapter opens with background information about the rationale for a civil law response to DFV, with exceptional powers for police and courts. The chapter then reports on comparative analyses of a national desktop policy review, which included current DFV legislation, police policy documents and judicial bench books by jurisdiction. It also reports on quantitative analyses of data on respondents to DFV applications and orders across jurisdictions and an analysis of cross-applications and cross-orders in Queensland.

## Legislative contexts

### Background

Specific domestic violence laws were introduced in most Australian states in the early to mid-1980s following some form of investigation into the nature and prevalence of “domestic violence” in their respective jurisdiction. These investigations responded to feminist advocacy for state intervention in men’s violence against women in the home. The introduction of civil domestic violence laws was controversial, although they are now taken for granted as part of the legal landscape. The controversy was not so much about the focus on women as victims and men as perpetrators of intimate partner violence, most likely because the laws were written in gender-neutral language and not limited to women. However, there were broadly two groups of critics: those who saw civil law as a second-class legal response to violence against women, entrenching privatisation of violence within the family (see Scutt, 1986), and those who saw it as an affront to civil liberties (see Nancarrow, 2019). It is the second issue that is most relevant to this investigation.

The concerns of civil libertarians centred on the powers provided to police and courts under civil law, where the “balance of probabilities” (more likely than not) is the standard of proof required to detain a person for several hours without a charge, and impose significant limitations on their movements, including removal from their home for the duration of a court order. The debates about the justification for such measures no doubt played out in parliaments across the country as jurisdictions successively introduced civil domestic violence laws. In Queensland, the introduction of

the Domestic Violence (Family Protection) Bill 1989 (Qld) coincided with an inquiry into police corruption in that state (Fitzgerald, 1989): the concerns of civil libertarians were particularly pertinent and the parliamentary debates were sharply focused on the proposed police powers. In addition to the concerns mentioned above, the power of police to make an application for a civil protection order without the consent of the aggrieved drew considerable scrutiny. Members of Parliament on both sides of the house argued that the extraordinary powers were necessary to address gendered dynamics of power and control in couple relationships (Nancarrow, 2016, 2019).<sup>17</sup>

The Queensland Domestic Violence Task Force (QDVTF), which produced the draft Bill, made clear that it was not concerned with fights—it was explicitly concerned with “the abuse of unequal power relationships” (QDVTF, 1988, p. 13). From the outset, and in an attempt to capture the power and control dynamics, the legislative definition of domestic violence included a range of abusive behaviour, including intimidation, harassment and threats, as well as physical violence.<sup>18</sup> That is, the rationale for exceptional police and court powers in civil domestic violence was to overcome “power and control” in relationships, exercised predominantly by men over their female intimate partners (QDVTF, 1988). The Task Force had in mind, however, a powerless, submissive victim in need of state power to overcome a perpetrator’s power over the victim/survivor, while it has become clear that not all victims/survivors fit the ideal victim stereotype, and not all violence in relationships is motivated by power and control (Kelly & Johnson, 2008; Nancarrow, 2016, 2019; Stark, 2007).

The concept of power and control is well understood by those who have experienced it, or worked extensively with those who have, but it can be difficult to explain to those who have not. Although the term “coercive control” was introduced by Schechter (1982), it was popularised by Stark who defined it as an attack on “autonomy, liberty and equality” (2006, p. 1023), distinguishing it from fights, in which there is a lack

<sup>17</sup> See Nancarrow (2019) for a detailed discussion of the policy context for the legislation, parliamentary debates and subsequent amendments including the extension of legislative protection to a broader range of family relationships in 2002.

<sup>18</sup> This is notably different to the US legislative approach. The inclusion of non-physical abuse was a key factor in opting for a civil law response: a lower standard of proof is required.

of intent to achieve general control over the life of the other person. It is a strategy of entrapment and the literature on typologies of violence, including Stark (2006, 2007), Kelly and Johnson (2008) and others, shows that coercive control is almost exclusively perpetrated by men against women. Tarrant, Tolmie, and Giudice (2019) highlight that coercive control is uniquely tailored to the victim/survivor. Perpetrators employ tactics of control that they develop over time, resulting in social entrapment of the victim/survivor, whose actions must be understood in that context.

The *Domestic and Family Violence Protection Act 2012* (Qld) reinforced the position of the 1988 Task Force. As stated by the minister responsible for the introduction of this Bill, “these orders are to stop the person who has power and control over others from causing further harm” (Queensland, 2012, p. 2). The legislation includes several strategies to achieve that goal and avoid misapplication of its provisions. First, it has provided a preamble setting out the policy context of the legislation; it includes the statement: “domestic violence is most often perpetrated by men against women with whom they are in an intimate partner relationship and their children ...” (*Domestic and Family Violence Protection Act 2012* [Qld], Preamble para [7]). Second, it has included the definition of domestic violence behaviour “that ... is coercive, or in any other way controls or dominates ... and causes ... fear for the second person’s safety or wellbeing or that of someone else” (s 8[1]). Third, the legislation “focuses the court on the protective needs of the aggrieved and whether imposing conditions on the respondent’s behaviour is necessary or desirable to meet these needs” (Explanatory Note, *Domestic and Family Violence Protection Bill 2011* [Qld], pp. 5–6). Officially, the intention of the new legislation is as follows:

The Bill aims to ensure that the person who is most in need of protection is identified. This is particularly important where cross-applications are made ... and which often result in cross-orders ... This is 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. A cross-application may be used by a

respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings. Also, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken. (Explanatory Note, *Domestic and Family Violence Protection Bill 2011* [Qld], p. 3)

Similarly, Western Australia sought to ensure that protection orders are issued as intended under its legislation, and to address systems abuse, by using the person most in need of protection concept. Although there is no explicit reference to cross-orders, it seems that provisions related to special circumstances allowing the court to refuse an order aims to prevent them. The relevant section was explained as follows when the *Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016* was introduced:

In considering whether “special circumstances” exist, the court will be required to have regard to the principles set out in section 10B. Special circumstances may be said to exist where the making of an order would create a clear inconsistency with the principles; for example, where the person seeking protection is not the person in the relationship most in need of protection or is a perpetrator of family violence who is attempting to use the RO Act [*Restraining Orders Act 1997* (WA)] as a means of further controlling the respondent. (Explanatory Memorandum, *Restraining Orders and Related Legislation Amendment [Family Violence] Bill 2016*, pp. 11–12)

Further, the exceptional police and court powers in civil laws are applied to a wider range of circumstances than originally intended, capturing those who resist violence against them, and other acts of violence not designed to achieve power and control (Nancarrow, 2016, 2019). Restrictions imposed on respondents on civil domestic violence court orders may remain in place in perpetuity, unless revoked on application to a court, while fixed terms range from 1–5 years (see Appendix C for details of each jurisdictions’ provisions). Considering the standard of proof required for civil domestic violence orders, the impost on civil liberties and the implications of breaches of orders, it is important that the use of exceptional police and court powers is justifiable in relation to the intent of the legislation.

The idiosyncratic DFV civil laws were designed, and are justifiable, for coercive controlling abuse. In these circumstances, victims/survivors are denied autonomy and are not at liberty to seek redress through criminal law (for assault, for example) or other action, such as ending the relationship, which escalates risk of serious harm or homicide in cases of coercive control. While no abuse is ever acceptable, incident-based abuse does not result in the same barriers to help-seeking as coercive control. It is, thus, more difficult to justify the use of exceptional state power (and resources) in civil DFV law for abuse that is not an expression of coercive control.

## Desktop review of legislation

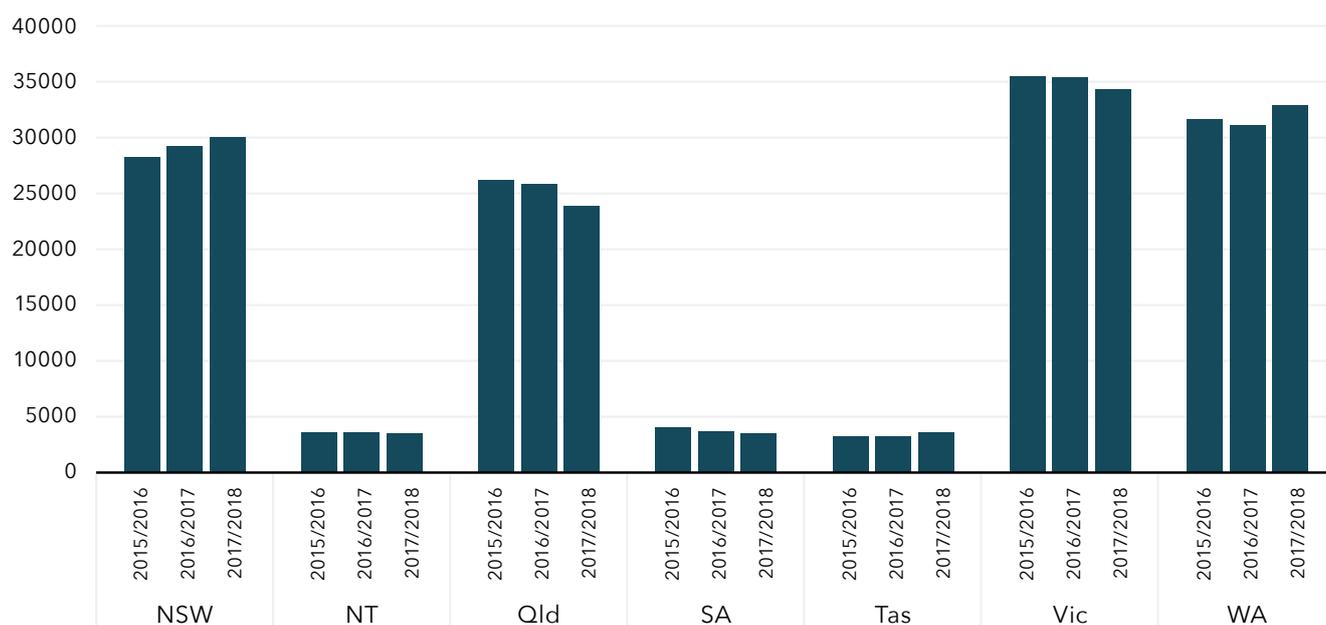
The broader Australian legislative context regarding DFV-related civil and criminal legal responses (including enforcement by police) has been canvassed elsewhere (see Taylor et al., 2015). The desktop review of legislation<sup>19</sup> for this project focused specifically on examining DFV protection order legislative requirements for police and courts regarding identifying the person most in need of protection and responding to mutual allegations of violence in each Australian jurisdiction.

Appendix A provides a comparison of relevant legislative provisions for each Australian state and territory. Although all jurisdictions have coercive control provisions, Queensland and Western Australia have explicit provisions related to determining the person most in need of protection, legislation in New South Wales refers to “the person in need of protection” and the “primary person”, and legislation in Victoria also mentions the “primary person”. Legislation in New South Wales refers to the person in need of protection in relation to a magistrate determining the content and effect of DFV protection orders, and the primary person is defined as an alleged victim of a family violence charge or a person seeking protection through an AVO application (*Crimes [Domestic and Personal Violence] Act 2007* [NSW]). In Victoria, legislation refers to the primary person with regard to confidential information sharing, and information gathering, to protect the safety of someone at risk of having family violence committed against them by a “person of concern” (*Family Violence Protection Act 2008* [Vic]).

<sup>19</sup> Current as at 10 March, 2020.

Queensland legislation specifies that courts make decisions aligned with the guiding principle of the law, being to ensure the safety and wellbeing of the person most in need of protection, and provides that police officers unable to identify the person most in need of protection may make applications to the court for the benefit of both parties (*Domestic and Family Violence Protection Act 2012* [Qld]). The guiding principles of the law in Western Australia for both courts and police are ensuring the safety of those at risk of having family violence committed against them, preventing behaviour that would place a person in fear of having family violence committed against them, and ensuring the wellbeing and protection of children from family violence (*Restraining Orders Act 1997* [WA]). Queensland legislation requires police and courts to identify the person most in need of protection in instances of conflicting allegations or where there are indications of mutual violence, whereas legislation in Western Australia requires police and courts to identify the person most in need of protection where two or more family members are committing violence, and when use of a DFV protection order may itself be an act of violence.

Some states and territories have less specific legislative provisions that can guide the determination of a person most in need of protection. For example, legislation in the Australian Capital Territory states that “family violence is predominantly committed by men against women and children” (Preamble para [2(b)]), that it “extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years” (Preamble para [2(c)]), and that, when making DFV protection orders, courts should consider previous orders made as well as patterns of behaviour (*Family Violence Act 2016* [ACT] s 14 [1(g)]). Legislation in New South Wales and Victoria also refers to the gendered nature of domestic violence perpetration along with power imbalances and patterns of abuse, with South Australia referring courts to only consider the patterns of behaviour (*Intervention Orders [Prevention of Abuse Act] 2009* [SA]). Western Australia legislation asks courts to consider a few things: past history of parties in relation to DFV protection orders, parties’ other current legal proceedings, previous behaviours, and risk assessments or other risk-related information regarding the parties’ relationship.

**Figure 1:** Total number of DFV protection order respondents by state/territory**Table 2:** Total number of DFV protection order respondents by state/territory

Jurisdiction	2015/2016	2016/2017	2017/2018
NSW	28,308	29,276	30,054
NT	3,613	3,597	3,524
Qld	26,253	25,830	23,905
SA	4,055	3,669	3,572
Tas	3,221	3,301	3,611
Vic	35,506	35,425	34,356
WA	31,644	31,149	32,908

## National statistical comparison of selected measures

Quantitative analysis of aggregate data<sup>20</sup> provided by the states and the Northern Territory<sup>21</sup> shows that Victoria, Australia's second most populous state, had the largest number of DFV protection order<sup>22</sup> respondents for each of the 3 years from

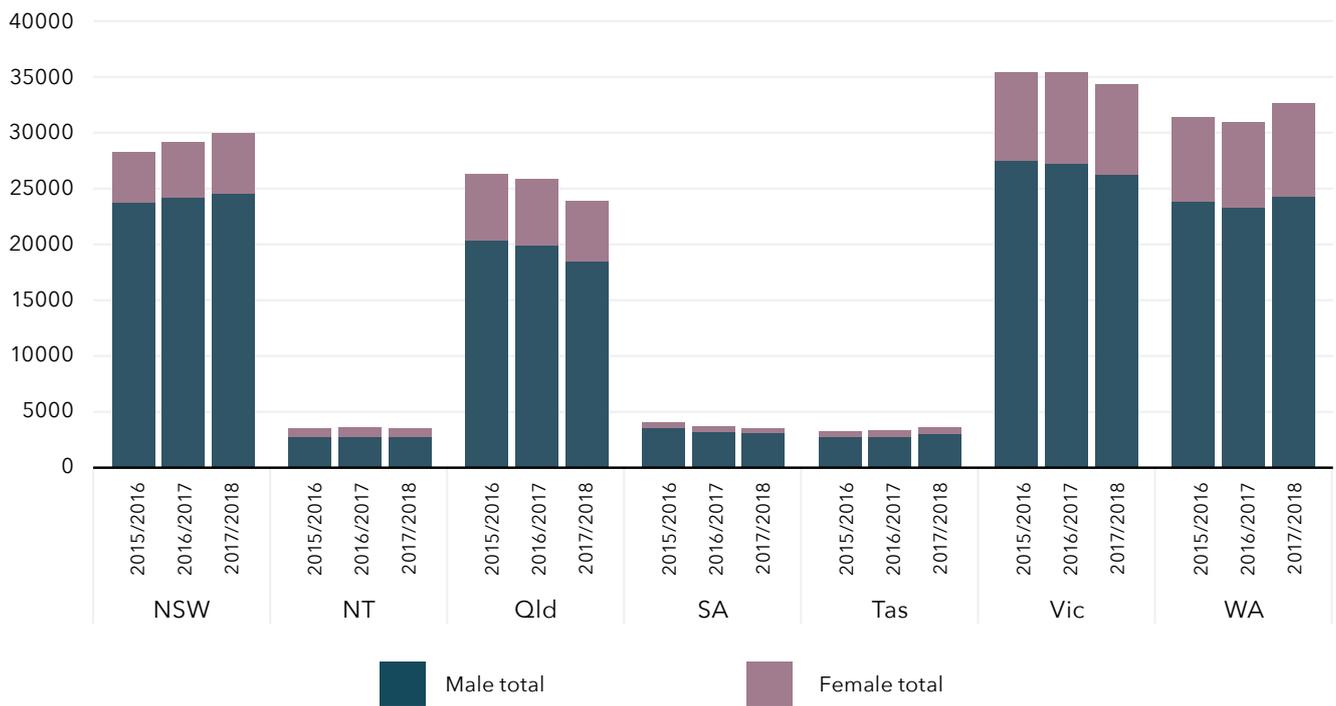
2015–2018 (Figure 1), more than twice that of New South Wales, the most populous state.<sup>23</sup> This coincides with the state's legislative and policy focus on DFV related to the Victorian Royal Commission into Family Violence in 2016. Further, it shows that, in comparison with other states and territories, Western Australia has a higher count of DFV protection order respondents relative to its population. Full counts for each jurisdiction are included in Table 2. However, these results should be read with caution. Jurisdictions may have differed somewhat in data collection and reporting about whether multiple respondents were counted for a single offence, and whether respondents may have been counted on numerous occasions for multiple offences.

<sup>20</sup> All statistical data referred to in this quantitative analysis, including tables and figures, were provided by the agencies listed in "Author acknowledgment" on p. iv and in fn. 9, for their respective jurisdictions.

<sup>21</sup> The Australian Capital Territory was able to provide data on the number of respondents to applications for DFV orders, while other jurisdictions provided data on the number of respondents on protection orders, so the ACT's data were not comparable. Further, due to the short time available for the compilation of aggregate data, the ACT was unable to provide any data with a breakdown for gender and Indigeneity, hence there are no results reported for the ACT in the statistical analysis.

<sup>22</sup> Note that the term "protection order" includes safety notices and similar issued by police.

<sup>23</sup> See Australian Bureau of Statistics' Estimated Resident Population figures for June 2016 at <https://www.abs.gov.au/AUSSTATS/abs@nsf/allprimarymainfeatures/9D56A542A17EF188CA2580EB001335A8?ope ndocument>

**Figure 2:** DFV protection orders by respondent gender

Note: Information in this figure excludes cases where gender was unknown or recorded as indeterminate.

A comparative analysis of data on the gender of DFV protection order application respondents was able to be done for all jurisdictions except the Australian Capital Territory. The results are shown in Figure 2.

In these jurisdictions a significant majority of the respondents were male, as would be expected. However, Figure 2 illustrates that a sizeable proportion of respondents were female and that the proportions varied to some extent between the jurisdictions represented. This is examined more closely below.

Table 3 presents the proportion of male and female respondents by jurisdiction for each of the 3 years for which data were provided. Western Australia had the highest proportion of female respondents: approximately one quarter of all respondents in each of the 3 years reviewed. Following closely behind Western Australia in the proportion of female respondents on DFV protection orders were Victoria, Queensland and the Northern Territory. In each of those jurisdictions for each of the 3 years, more than one fifth of all respondents were female.

The share of females in the total number of respondents in New South Wales and Tasmania was under one fifth. However, there was a slight increase each year in the percentage of female respondents in these two states, each with an increase of approximately 2 percentage points over the 3 years.

South Australia had the lowest proportion of female respondents in each year. However, an upwards trend was also evident there, with an increase of approximately 2 percentage points from 2015/2016 to 2017/2018.

Analysis of the data on respondents' gender did not indicate meaningful differences between Indigenous and non-Indigenous respondents. However, disproportionality was found for Indigenous respondents in relation to the general population, consistent with the literature on the over-representation of Aboriginal and Torres Strait Islander people in the legal system overall. Figure 3 shows the proportion of the population of each jurisdiction who were identified as Indigenous in the 2016 ABS census alongside the proportion of Indigenous respondents.

Quantitative analyses of protection order breaches and other DFV-related offences were limited, although a comparative analysis of breaches of DFV protection orders in four jurisdictions was possible. The results highlight differences by respondent gender and Indigeneity when considering Figures 4, 5, and 6 together, with the Northern Territory and South Australia reporting much higher rates of breaches by female respondents, and Indigenous female respondents in particular.

**Table 3:** Percentage of male and female respondents by state/territory

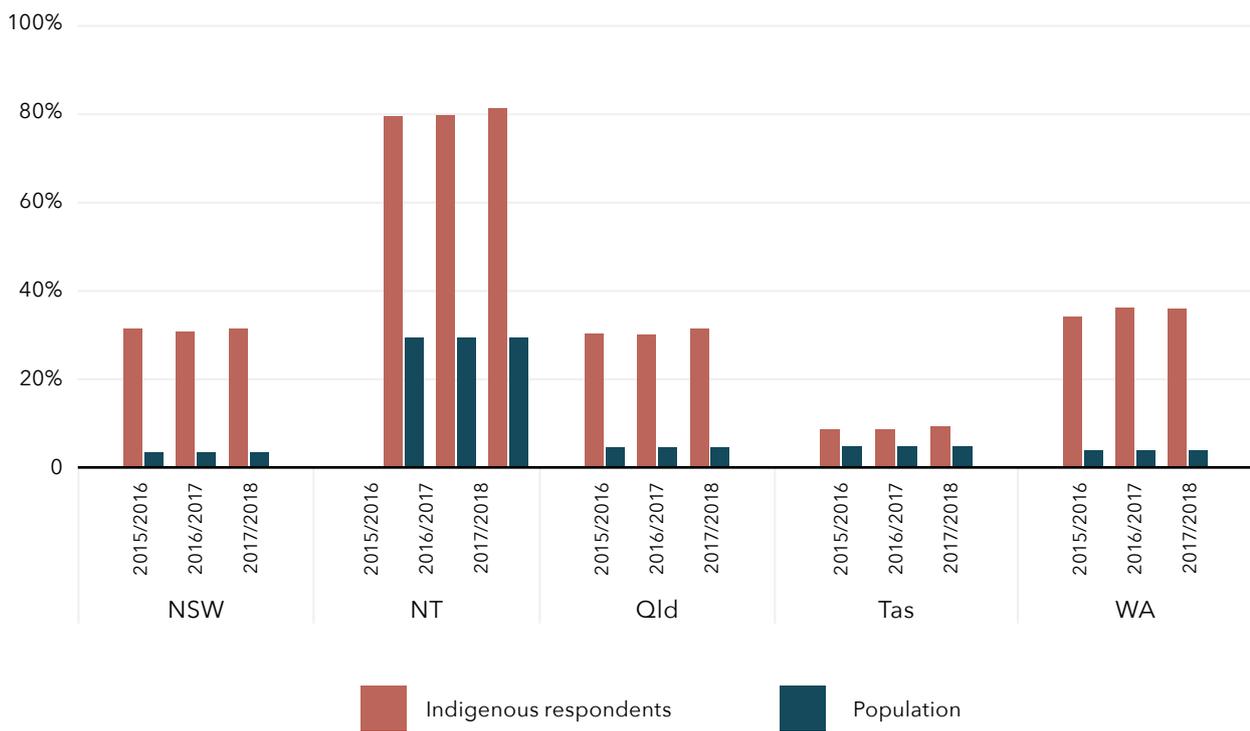
Jurisdiction	2015/2016 %	2016/2017 %	2017/2018 %
<b>NSW</b>			
Male	83.7	82.4	81.6
Female	16.1	17.4	18.2
<b>NT</b>			
Male	75.7	76.6	76.8
Female	22.3	22.8	22.6
<b>Qld</b>			
Male	77.5	77.0	77.1
Female	22.5	23.0	22.8
<b>SA</b>			
Male	87.3	86.8	85.7
Female	12.4	13.0	14.2
<b>Tas</b>			
Male	83.4	82.8	81.6
Female	16.6	17.2	18.4
<b>Vic</b>			
Male	77.3	76.9	76.3
Female	22.5	23.0	23.6
<b>WA</b>			
Male	75.2	74.8	73.7
Female	24.1	24.6	25.6

Note: Percentages do not always add to 100 due to the exclusion of data where gender was unknown or indeterminate.

Evidence of a disproportionate number of Indigenous respondents was found for most jurisdictions. In New South Wales, Queensland and Western Australia about a third of respondents were reportedly Indigenous, but 2016 ABS census data suggests that only 4–5 percent of the population in those states identified as Aboriginal or Torres Strait Islander. In the Northern Territory, about 80 percent of respondents were Indigenous, yet in 2016 less than a third (29.5%) of the Northern Territory’s population identified as Aboriginal or Torres Strait Islander.

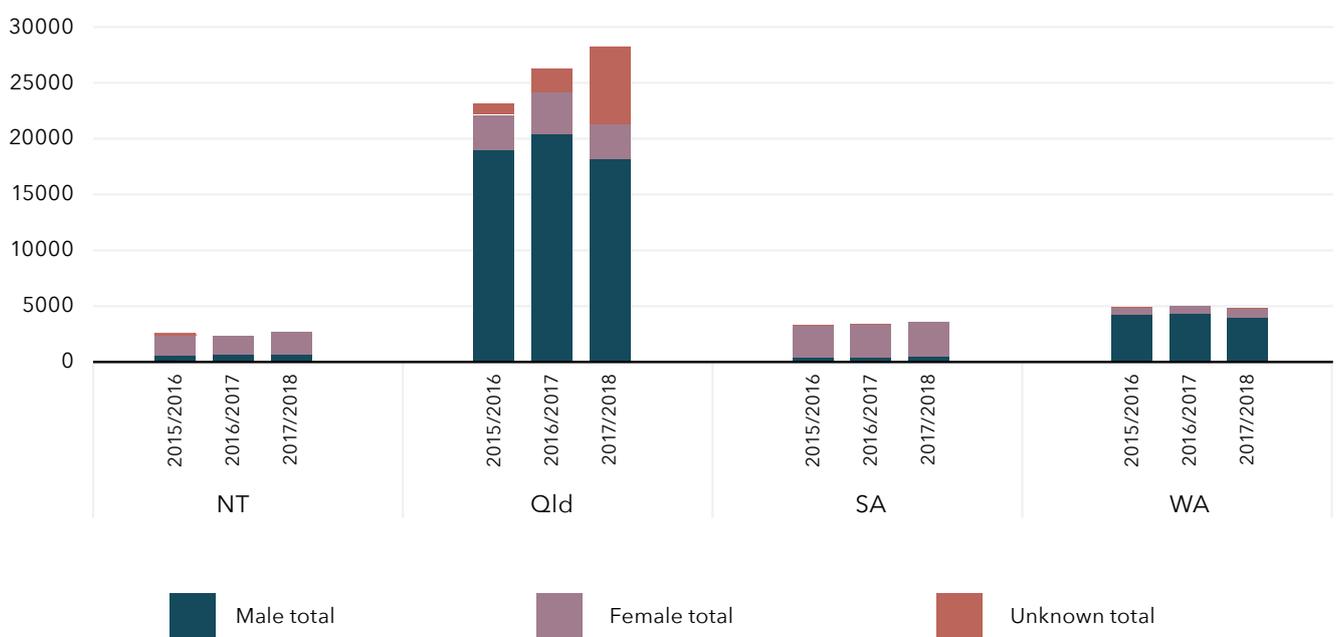
The apparent substantial decline in Indigenous respondents’ breaches in 2017/2018 in Queensland, shown in Figure 6, is likely explained by the higher proportion of cases in that year where gender was unknown (see Figure 4).

**Figure 3: Indigenous respondents by population proportion**

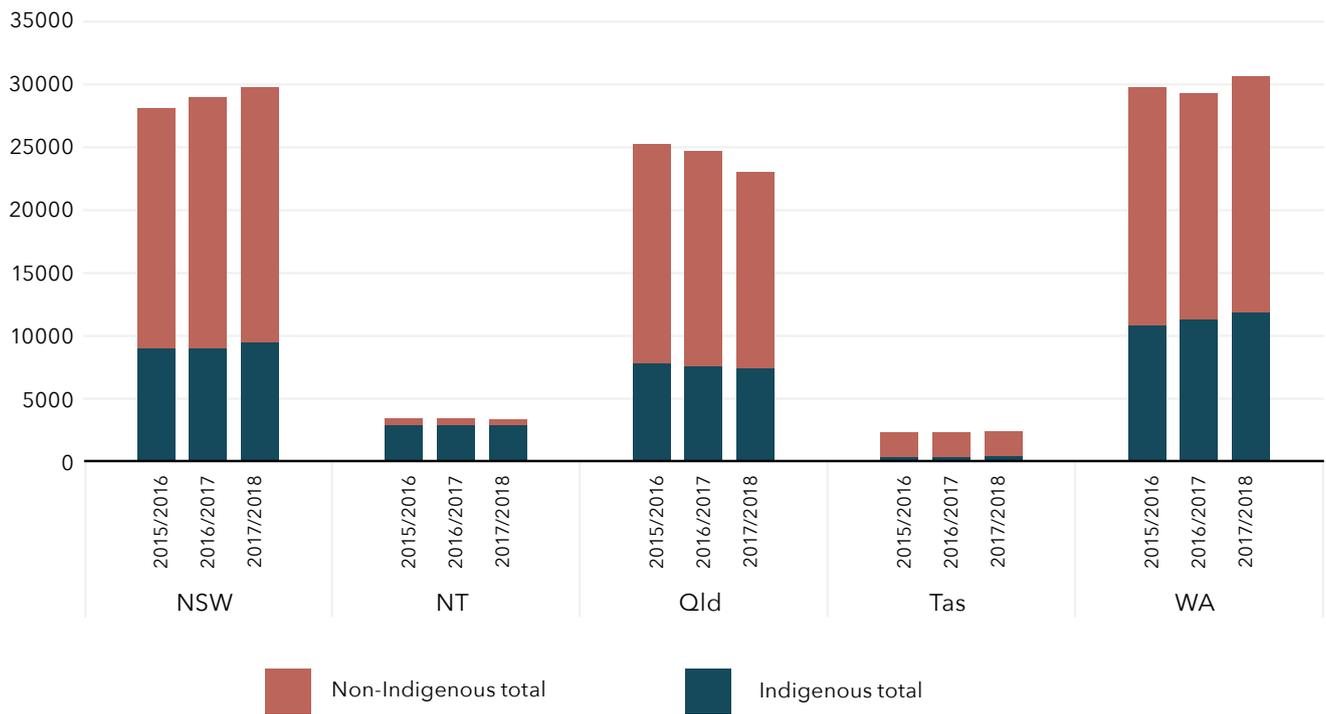


Note: Information in this figure excludes applications where gender was unknown or recorded as indeterminate.

**Figure 4: Breaches of DFV protection orders by respondent gender**

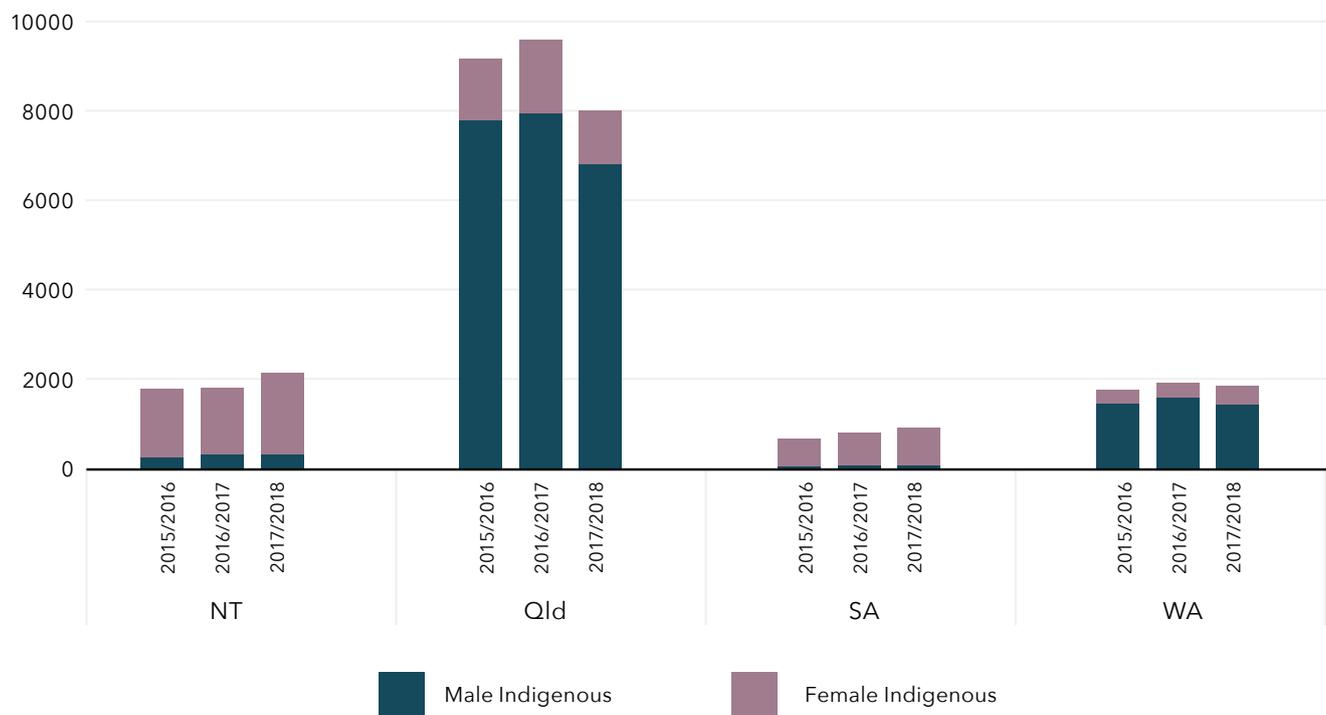


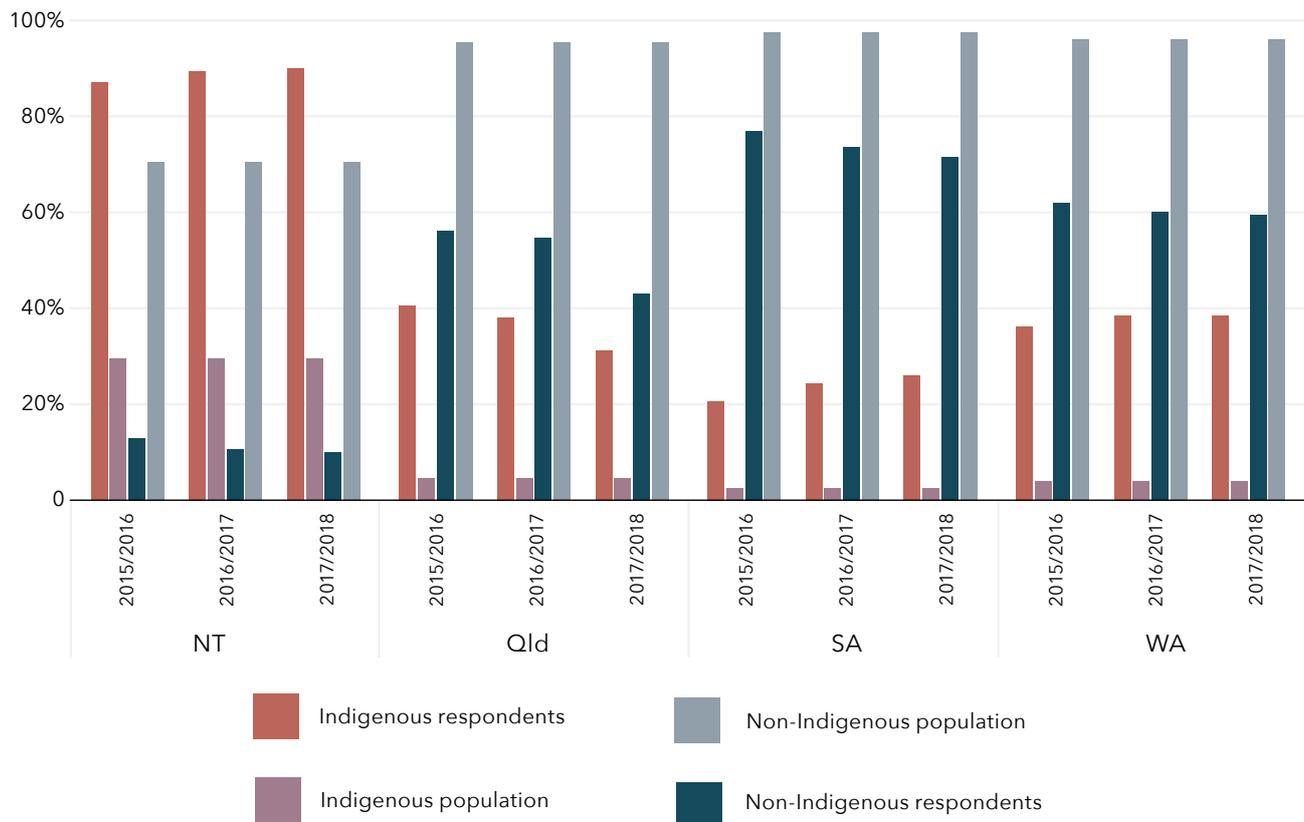
**Figure 5: DFV protection orders by respondent Indigeneity**



Note: Information in this figure includes applications where gender was unknown or recorded as indeterminate.

**Figure 6: Indigenous respondents' breaches of DFV protection orders by gender**



**Figure 7:** Protection order breaches by respondent indigeneity and population proportion

Note: Information in this figure includes applications where gender was unknown or recorded as indeterminate. Further, some percentages will not add to 100% due to the exclusion of data where Indigeneity was unknown.

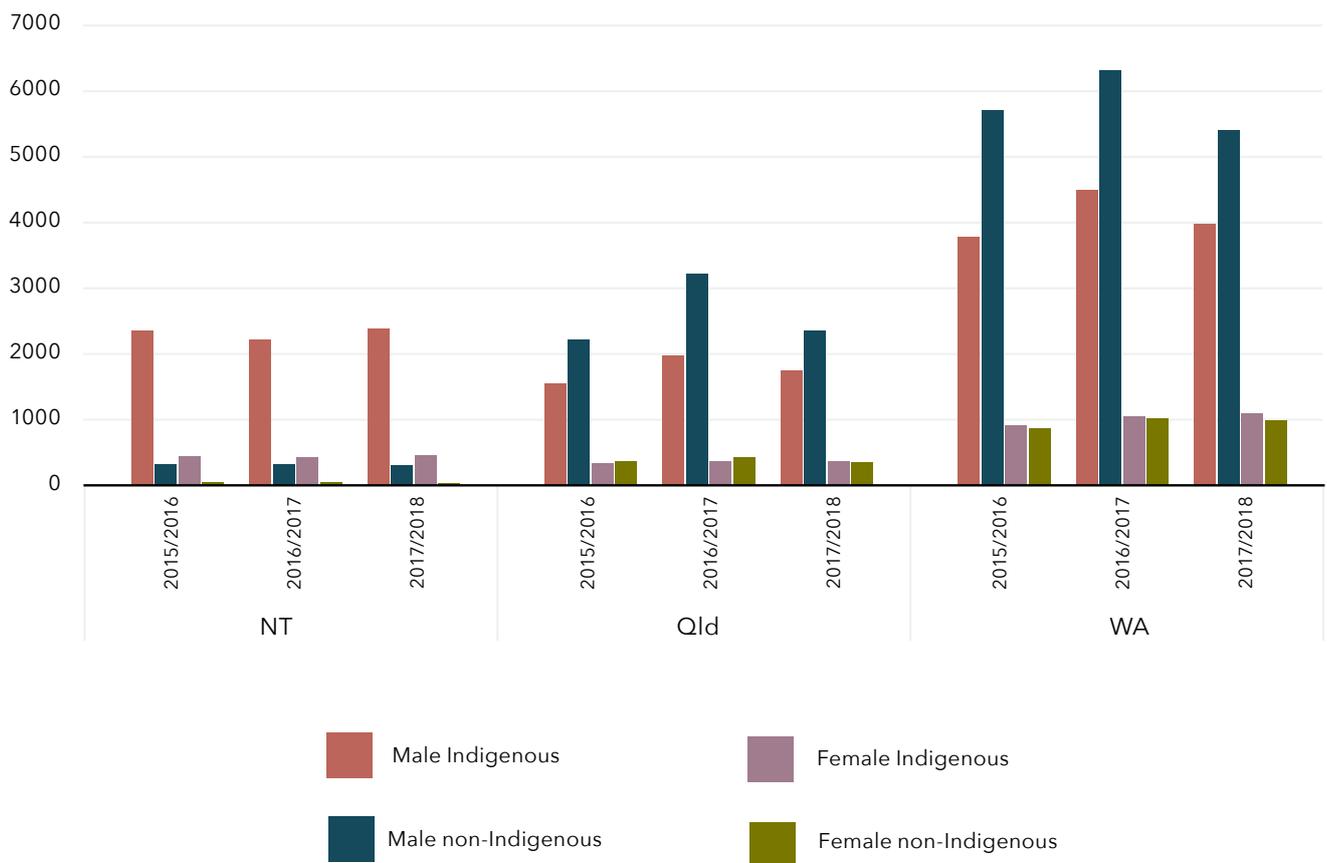
In addition to disproportionality of respondents on DFV protection orders, disproportionality of respondents charged for breaching their orders was also found. Using 2016 ABS census data, Figure 7 shows the proportions of Indigenous and non-Indigenous people in the population of each jurisdiction, alongside the proportions of Indigenous and non-Indigenous respondents. In all jurisdictions reported, the proportion of respondents who were Indigenous and non-Indigenous were similar, suggesting that not only is it more likely that Aboriginal and Torres Strait Islander people will be respondents on DFV protection orders than non-Indigenous Australians, as respondents, they are again more likely to be charged for breaching the order against them. Note that this second layer of disproportionality is smaller in the Northern Territory, compared with other jurisdictions.

Quantitative data on DFV-related offences (ranging from serious offences such as homicide to more commonly charged offences such as assaults) in the Northern Territory, Queensland and Western Australia were able to be compared. Results indicate that males were charged with the vast majority of all non-breach, DFV-related offences, with Indigenous males

charged at disproportionately high rates compared with the general population. This disproportionality appears most extremely in the Northern Territory, as shown in Figure 8.

The ABS (2020) report on DFV offences in Australia for 2018–2019 found that the majority (80–85%) of defendants in each state and territory were male and that, in the majority of cases (63–85%), the charges were proven. In most states and territories, those proven guilty of an offence were sentenced to a non-custodial order. In the Northern Territory, however, the majority (71%) received a custodial sentence. Breach of a protection order was the most common offence in Queensland (69%) and Western Australia (41%). Assault was the most common DFV-related offence in other states and territories (47–58%).

The comparative statistical analysis shows that despite the legislative understanding of the gendered nature of DFV and policies and procedures aimed at identification of the primary aggressor, or person most in need of protection, many women are respondents on DFV protection orders

**Figure 8:** DFV-related offences by respondent gender and Indigeneity

and are charged with breaching those orders. In particular, Indigenous women in the Northern Territory appear to be overwhelmingly charged for breaches of protection orders, though they constitute a small proportion of protection order respondents. Overall, the quantitative results echo national trends of the over-criminalisation of Aboriginal and Torres Strait Islander peoples, along with an increasing trend of the over-criminalisation of Aboriginal and Torres Strait Islander women (ALRC, 2017).

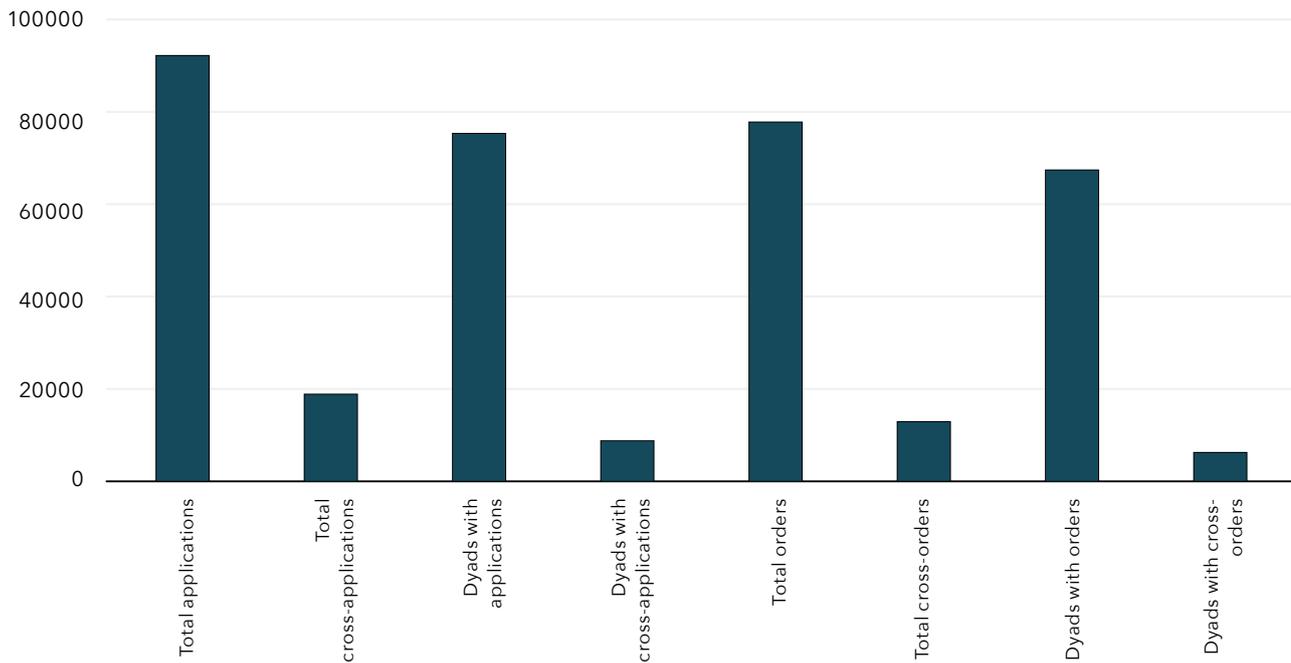
### Cross-applications

All states and territories except Tasmania and Western Australia<sup>24</sup> have legislation specific to cross-applications, or mutual applications, where a person has applied for or been granted a DFV protection order and the other party applies for a DFV protection order also, or where the police issue mutual DFV protection orders at the scene. The Queensland legislation specifies courts' jurisdiction when applications

are before multiple courts, and specifies the sequence of application hearings when applications are before the same court; in general, the legislation requires one court to hear both applications in one hearing unless safety concerns prevent this (*Domestic and Family Violence Protection Act 2012* [Qld]). If a Queensland court hears applications separately, or hears a cross-application to an application made in another court, the legislation requires magistrates to explain why in their ruling.

The South Australia and Northern Territory legislation specifically states that frivolous, vexatious or abusive use of applications may be refused, dismissed, varied, or revoked (*Intervention Orders [Prevention of Abuse] Act 2009* [SA] s 21 [3(b)]; *Domestic and Family Violence Act 2007* [NT] s 35A), whereas other states and territories provide the court with guidelines to consider when reviewing cross-applications. In the Australian Capital Territory, courts are expected to consider the overarching protective purpose of the legislation, the "affected person's perception of the nature and seriousness" of the alleged behaviour, child welfare, accommodation needs of the affected person and any children, hardship that might be caused by a DFV protection order, previous instances of

<sup>24</sup> Although the Western Australia legislation does not specifically refer to cross-applications, its provisions related to the person most in need of protection seem to be aimed at addressing cross-applications and cross-orders.

**Figure 9:** Total Queensland cross-applications and cross-orders 2015–2018

family violence, previous DFV protection orders and any violations of those orders, potential for property damage, and anything else the court thinks is relevant (*Family Violence Act 2016* [ACT] s 14).

In New South Wales alone, the Registrar has legislated discretion to disallow an application for an apprehended personal violence order to be filed at the court, where there are “compelling reasons”. Matters regarding compelling reasons include “the nature of the allegations ... the relative bargaining powers of the parties ... [and] ... whether the ... application is a cross-application” (*Crimes [Domestic and Personal Violence] Act 2007* [NSW] s 53). However, there is no explicit guidance in the legislation for courts when considering cross-applications in New South Wales.

As requested, the QGSO provided cross-application data extracted from the Queensland Police Records and Information Management Exchange (QPRIME) system by creating linked dyads of unique respondents and aggrieved persons with protection orders and protection order applications. Relevant data were extracted for a period of three financial years (2015–16 to 2017–18).<sup>25</sup> Figure 9 shows the total numbers of DFV protection order applications (n=92,191) and orders (n=77,789) made; the total number of cross-applications

(n=18,874) and cross-orders (n=12,935); the total number of dyads, or matched pairs of respondents and aggrieved, that were able to be linked in the dataset to allow for analysis of cross-application and cross-order rates; and the total numbers of dyads with cross-orders and cross-applications made. Of all dyads with applications (n=75,330), about 12 percent (n=8779) had cross-applications, and of all dyads with orders (n=67,409), approximately 9 percent (n=6257) had cross-orders.

## Policy context: Police

A desktop review of publicly available police policies and procedures identified the following policy and practice guidance regarding police identification of the person most in need of protection and responses to mutual allegations of violence.

### Australian Capital Territory

A police manual was unable to be located online, but the ACT Policing (ACTP) website states that a Family Violence Coordination Unit was started in October 2015 “to ensure our officers implement best practice policies and procedures when responding to incidents of family violence” (Australian Federal Police [AFP], n.d.). The website also states that training is given to frontline officers on legislation reform, and that the Unit works closely with interstate police forces

<sup>25</sup> That is, in this analysis, an application is deemed a cross-application if Person A and Person B are each named an aggrieved and a respondent, in respect to each other, on applications made within the 3-year monitoring window. The same applies for the definition of cross-orders.

(AFP, n.d.). The 2018–2019 ACTP Annual Report (AFP, 2019) indicated that a prevention program, ACTP’s Family Violence Early Intervention Program, had begun and a recently published paper (Dowling & Morgan, 2019) reported that since March 2017 ACTP has been using the Family Violence Risk Assessment Tool (FVRAT), a 37-item tool that officers complete when responding to a reported incident of intimate partner violence. The items of the scale are weighted based on the officers’ risk assessment, severity of the incident, nature of the relationship between alleged victim and offender and their past histories of violence, and the alleged offender’s criminal history and mental health record (Dowling & Morgan, 2019).

## New South Wales

The NSWPF *Code of Practice for the NSW Police Force response to Domestic and Family Violence* notes that, while most incidents “involve a male offender and a female victim ... both genders can be victims and offenders” (NSWPF, 2018a, p. 23). The code requires a “proactive approach” to offenders, with a focus on “strategies to reduce repeat offender behaviour and manage repeat and high-risk offenders”, and requires officers to take a “proactive approach” to identifying the primary victim/offender.

Further, the NSWPF “discourages police from arresting and charging both parties arising out of a domestic or personal violence incident with limited exception”<sup>26</sup> (NSWPF, 2018a, p. 44). It provides the following limited guidance about how officers should try to identify the primary person in need of protection, at the scene:

Police will consider whether there is any prior history of domestic violence or ADVOs [apprehended domestic violence orders], witness statements, the behaviour of the people involved, and whether there are any injuries, etc. If an officer is having difficulty determining the primary victim at the scene they are to consult their Supervisor or the DVLO [Domestic Violence Liaison Officer] for advice. (NSWPF, 2018a, p. 44)

The Code also requires that police “speak to all parties in private where possible, including children, to identify persons

in need of protection, victims, witnesses and offenders, and obtain an individual account of the incident” (NSWPF, 2018a, pp. 75–76).

In addition to the code, the NSWPF has a domestic and family violence policy (NSWPF, 2018b), but it does not provide more detailed guidance for identifying the primary aggressor. It states:

When police attend a domestic and family violence incident they will investigate the incident with a view to identifying the alleged victim in the incident together with the person of interest. To make an informed decision the process will involve looking at all the circumstances of the incident, the history of domestic violence between the parties and forming an opinion on the basis of the information at hand. (NSWPF, 2018b, p. 17)

## Northern Territory

The Northern Territory Government released its *Family Safety Framework: Practice Manual* in 2015, based on the South Australia manual (Northern Territory Government, 2015). The manual is led by Northern Territory Police, in partnership with other government agencies. Module 8, “Safety consideration—conflicts of interest, information and records” notes that DFV responses require “special safeguards and precautions ... be put in place to maintain safety”. The manual states that such precautions are important for the following reason:

Sometimes when perpetrators of violence are accused of violence they respond by making cross allegations against the victim as a way of continuing to disempower the victim and avoiding accountability for their own actions. (Northern Territory Government, 2015, p. 42)

Though the manual uses gendered language referring to victims as women and perpetrators as men, it does not directly address situations where there are mutual allegations of DFV. Thus, advice about identifying the person most in need of protection where there are mutual allegations of violence is not present in the manual.

<sup>26</sup> Exceptions include where there are outstanding warrants, or if a victim maliciously damages an offender’s property after being assaulted.

## Queensland

The *Queensland Police Operational Procedures Manual* includes a chapter on responding to domestic violence that explicitly states that “officers should actively enforce legislation and make use of investigative skills and evidence gathering procedures to identify and support the person most in need of protection” (QPS, 2020, para 9.2). If officers are in doubt as to which person is most in need of protection they should conduct an investigation and avoid cross-applications unless necessary for safety reasons.

During an investigation, officers are instructed to:

- look for existing protection orders and release conditions
- interview witnesses to the incident
- take a written and/or electronically recorded statement from the aggrieved as well as a statement from the respondent if possible
- take the respondent into custody “if justified”
- “where there is sufficient evidence” issue a police protection notice (PPN)<sup>27</sup> or temporary protection order (QPS, 2020, para 9.4.2).

The manual states that, when further investigation is needed, officers should:

- consider conducting further witness interviews, including with children
- “where practicable”, review previous protective assessments for the aggrieved and DFV incidents and contraventions or history of violence
- consider if the level of risk is increasing and if there are any new risk factors, particularly those labelled as Category 1,<sup>28</sup> and if so to consider taking the respondent into custody to prevent further injury to person or property
- determine if children (including unborn) are endangered and in need of protection
- gather supporting evidence for a DVO application, including:
  - medical evidence

- statements and/or affidavits from aggrieved, witnesses, neighbours, etc.
- prior contact with DFV support agencies by the aggrieved
- photographic and/or video evidence of the aggrieved and/or incident premises
- statement or affidavit from the investigating officer
- determine if any Family Law Court orders are in effect and if they may be in contravention with a protective order
- follow procedures for prosecution of statutory offences
- issue a field property receipt for anything seized, such as weapons (QPS, 2020, para 9.4.2).

Officers are specifically instructed to conduct investigations in DFV incidents where there are allegations of evidence of suffocation, choking or strangulation. They are directed to follow the Domestic Violence Protective Assessment Framework (DV-PAF), described as “a decision-making framework designed to assist officers in assessing the protective needs of an aggrieved” (QPS, 2020, para 9.4.2). The DV-PAF includes two categories of risk factors for officers to consider once they have already identified the aggrieved and respondent parties, with Category 1 including frequency, pregnancy, previous incidents/contraventions, relational separation, severity of harm, sexual violence, significant change in circumstances (i.e. recent unemployment, child custody disputes), strangulation/suffocation, threats to kill, and use of weapons; and Category 2 including alcohol/drug misuse, animal cruelty, child abuse, controlling behaviour, cultural considerations (i.e. barriers to reporting, lack of knowledge of legal rights), mental health issues, respondent history of violence, ongoing conflict, significant damage/destruction of property, stalking, suicidality, and violent threats. In addition, officers are instructed to consider the perceived level of fear the aggrieved has about future occurrences of DFV, as well as three levels of risk, defined as follows:

**Medium:** no significant/current indicators of risk of harm to the aggrieved. Changes in circumstance or DV [domestic violence] may create risk for the aggrieved and any future incidents should be carefully assessed.

**High:** proactive police response to risk is recommended. Indicators of risk of harm to the aggrieved have been identified. The respondent has the potential to cause harm.

<sup>27</sup> A PPN is a temporary form of a protection order filed by a police officer. All temporary protection orders are short term and remain in force until heard by a magistrate.

<sup>28</sup> Category 1 and Category 2 risks are listed in the following paragraph.

They may also have the potential to cause serious harm if there is future violence and/or risk and/or a change in circumstance.

Extreme: proactive police response to risk is highly recommended. There are identifiable indicators of risk of serious harm to the aggrieved. An incident could happen at any time and the impact could be serious. (QPS, 2020, app 9.1)

While the DV-PAF provides some practical guidance for officers, it is based on the assumption that the officer has already identified the person most in need of protection. Specific guidance on how to identify the person most in need of protection in the first instance does not appear to be included in the chapter.

## South Australia

The South Australia Government has developed a practice manual on family safety, which at the time of writing was under review by the Office for Women (South Australia; Government of South Australia, 2015). The publicly available version published in 2015 provides guidance on assessing risk, but it does not provide guidance on determining the person most in need of protection or the primary/predominant aggressor.

## Tasmania

The *Tasmania Police Manual* (TPM) states:

(1) Tasmania Police has a pro-intervention policy in relation to family violence. Where members reasonably suspect that family violence has been, or is likely to be committed, they will ensure the safety of the victim and any affected children.

(2) Tasmania Police will hold offenders accountable for their actions. Where substantive charges are identified, and there is sufficient evidence to proceed, offenders should be arrested and prosecuted. (Tasmania Police, 2019, para 2.5.1)

Police members adhere to guidelines within the TPM (para 2.5) and the *Family Violence Manual* (Tasmania Police, n.d.). Police officers are required to submit a family violence incident report prior to the conclusion of the member's shift, and the report is to be validated by a supervisor. This includes completion of a specific Risk Assessment Screening Tool (RAST) to assist in identifying risk factors to the victim and affected persons.

## Victoria

The Victoria Police *Code of Practice for the Investigation of Family Violence* is currently under review (Victoria Police, 2019a). Operationalising the Multi-Agency Risk Assessment and Management Framework (MARAM) within their workforce began in September of 2018 as part of the Victorian Government's commitment to implementing all recommendations of the 2016 Victorian Royal Commission into Family Violence (State of Victoria, 2016). Within Victoria Police, this includes development of Family Violence Investigation Units, a new Family Violence Report (known as the L17), and a Case Prioritisation and Response Model for the new units, along with targeted training and a mandatory, force-wide education program. The L17 is a family violence risk assessment and risk management tool, known as the Family Violence Report (FVR), based on actuarial risk assessment. It requires police officers to answer 39 questions to achieve a risk score, but allows for professional judgment to override the score where high risk factors are otherwise identified (State of Victoria, 2019). Although it is "informed by similar research and evidence about intimate partner violence as the MARAM, scored items on the FVR(L17) are drawn from a different data set than the MARAM" (Victoria Police, 2019b, p. 2). The tool includes some of the MARAM's risk indicators, along with additional "validated evidence-based risk indicators" (Victoria Police, 2019b, p. 2).

While the police use the FVR(L17), other agencies in Victoria use the MARAM. Practice guidelines for MARAM suggest key considerations for identifying a predominant aggressor, extracted below:

The respective injuries of the parties;

Whether either party has defensive injuries, or there is evidence of self-defence;

The likelihood or capacity of each party to inflict further injury;

Self-assessment of fear and safety of each party, or if not able to be ascertained, which party appears more fearful;

Patterns of coercion, intimidation and/or violence by either party;

Prior perpetration/histories of violence;

Accounts from other household members or witnesses, if present; and

The size, weight and strength of the parties. (Family Safety Victoria, 2019, p. 60)

It is not yet clear how successful implementation of these reforms has been, but a 2018 study suggested the importance of officer education in its finding that “police members lack familiarity with” the code of practice and “where the primary aggressor is wrongly identified ... this correlates strongly with duty failures” (Ulbrick & Jago, 2018, p. 1). In 2017, Victoria Police acknowledged the importance of police education, listing police education in “behavioural characteristics and patterns of perpetrators to improve responses to protect victims, including accurately identifying the primary aggressor” as a strategic priority (Victoria Police, 2017, p. 19).

## Western Australia

The Western Australia Police Force manual is not available online. The Government of Western Australia Department for Child Protection and Family Support has published a *Common Risk Assessment and Risk Management Framework*, which includes a factsheet titled “Determining the Primary Aggressor” (2015). The factsheet defines the primary aggressor as “the person who poses the most serious and ongoing threat to safety and wellbeing” and suggests officers look for an “ongoing pattern of coercive power and control” by considering behavioural context, intent and effect; agency; assertion of will; empathy; entitlement; and fear (Government

of Western Australia. Department for Child Protection and Family Support, 2015, p. 69).

## Policy context: Courts

A desktop review of publicly available materials identified the following policy and practice guidance for courts in addressing mutual allegations of violence.

### National

The Family Court of Australia and Federal Magistrates Court of Australia have published best practice principles for courts exercising jurisdiction under the *Family Law Act 1975* (Cth; Family Court of Australia & Federal Circuit Court of Australia, 2016). These principles, quoted below, include a list of questions for courts to consider when determining the primary perpetrator in an interim hearing:

Who provides a more clear, specific and plausible account of the violent incident(s)? Who denies, minimises, obfuscates, or rationalises the incident? (The victim more likely does the former; the perpetrator the latter).

What motives are used to explain why the incident(s) occurred? (Victims tend to use language that suggests they were trying to placate, protect, avoid, or stop the violence, whereas perpetrators describe their intent being to control or punish).

What is the size and physical strength of each party relative to the amount of damage and injury resulting from the incident(s)? Does either party have special training or skill in combat? (Perpetrators who are better equipped are able to cause the greater damage).

Are the types of any injuries or wounds suffered likely to be caused by aggressive acts (the perpetrators) or defensive acts (the victims)?

If the incident(s) involved mutual combat, were the violent acts/injuries by one party far in excess of those of the other? (Violent resisters tend to assert only enough force to defend and protect; when primary perpetrators retaliate, they are more likely to escalate the use of force aiming to control and punish).

Has either party had a prior protective order issued against them—whether in this or a former relationship (indicating who was determined to be the primary aggressor in the past)? (Family Court of Australia & Federal Circuit Court of Australia, p. 21)

The *National Domestic and Family Violence Bench Book* (Douglas & Chapple, 2019) includes a “Summary of considerations” for protection orders under section 7.12, with the following three considerations directly related to dealing with cross applications/mutual protection orders:

Whether the cross application by the respondent/perpetrator may be intended to further harass, control or abuse the applicant/victim.

Whether the risk of further domestic and family violence to each party is equivalent or one is at greater risk than the other.

Whether the mutual orders may have the effect of minimising the domestic and family violence experienced by one party. (Douglas & Chapple, 2019, s 7.12)

The use of cross-applications as a tactic of systems abuse by the actual perpetrator is also discussed in s 3.1.11 of the bench book.

## States and territories

The Australian Capital Territory, Northern Territory, South Australia and Tasmania do not publish bench books or other relevant court guidance publicly. The Judicial Commission of New South Wales local court bench book provides limited guidance on courts’ issuing of DFV protection orders (called AVOs), but nothing specific to identifying the person most in need of protection (Judicial Commission of New South Wales, 2020). A practice note from 2012 outlines procedures for courts to follow when parties in a hearing for an interim DFV protection order are absent from court or there are cross-applications (Judicial Commission of New South Wales, 2012).

The bench book in Queensland for the *Domestic and Family Violence Protection Act 2012* (Qld) reminds courts that

identifying the person most in need of protection is a fundamental principle of the legislation (Magistrates Court of Queensland, 2019). With regard to cross-applications, the bench book states that the person most in need of protection must be identified, and that both parties cannot be victims and perpetrators “in an ongoing pattern of abuse”; a cross-application may be used by an offender in an effort to seek revenge, or tactical advantage in the legal system, or to continue victimising the person most in need of protection; and that violence in self-defence or defence of children may be misconstrued as domestic violence if patterns of behaviours and contexts are not considered (Magistrates Court of Queensland, 2019, para 3.7).

The Supreme Court of Western Australia’s *Equal Justice Bench Book* (Supreme Court of Western Australia, 2009) includes a chapter on DFV (“Chapter 13: Family and Domestic Violence”). Though the chapter was under review at the time of writing this report,<sup>29</sup> the first edition available online provides some guidance on identifying the person most in need of protection. The bench book suggests that courts “be aware that restraining orders may be used by perpetrators of domestic violence as a way to control and punish the primary victim”, and consider how perpetrators of domestic violence may be brought into contact with their former partner through co-parenting arrangements and other Family Court orders, and reminds courts that DFV protection orders are invalid to the extent they are inconsistent with a Family Court parenting order (para 13.3.2). The *Equal Justice Bench Book* notes that

the majority of victims of domestic abuse are women and the majority of perpetrators are men, this can create barriers for men who are victims of domestic violence, compromising their ability to seek help and respond appropriately to abuse. (Supreme Court of Western Australia, 2009, para 13.2.5)

It also outlines research about experiences of male victims and potential impacts of their victimisation for courts to be aware of, including common barriers to reporting and help-seeking. Courts are encouraged to be aware, when deciding who is the person most in need of protection, that other vulnerable populations include women in rural and remote communities (such as stations, farms and mining

<sup>29</sup> See <https://www.supremecourt.wa.gov.au/equaljustice/>

communities) and migrant and culturally and linguistically diverse (CALD) women (Supreme Court of Australia, 2009, para 13.2.6).

Similar to Western Australia, the Victorian *Family Violence Bench Book* acknowledges that family violence involves cycles of coercive power and control, and though it is less common, men can be victims of DFV (Judicial College of Victoria, 2014). It suggests the list of questions, quoted below, to ask a man presenting as the person most in need of protection:

Have you ever been violent towards your partner?

Were you at fault, in any way in causing her violence? ...

Are you afraid of her? What are you afraid that she might do? ...

Describe exactly what she did to you.

Describe the frequency and any patterns of the violence.

What has held you back from seeking help earlier or trying to escape the situation? ... (Judicial College of Victoria, 2014, s 5.4.5)

It also suggests considering the following questions:

Has the man had any history of criminal behaviour or allegations of such behaviour, particularly involving violence?

Has the man had any intervention orders taken out against him in the past?

Is there evidence of the man using controlling attitudes, beliefs and behaviours, or having rigid attitudes towards gender roles?

If the accused woman has attended court, has she ever felt the need to apply for an intervention order?

Does the woman say that she was defending herself, or is there any other evidence to suggest this was the case? (Judicial College of Victoria, 2014, s 5.4.5)

The bench book also acknowledges that migrant and CALD populations are particularly vulnerable and less likely to report DFV and seek help (Judicial College of Victoria, 2014,

para 5.6.1). A recent article indicates that multidisciplinary specialist domestic violence courts are currently being rolled out across the state and that the Judicial College of Victoria has begun delivering training, but the training materials are not yet publicly available (Peattie, 2020).

## Summary

Throughout the 1980s most Australian jurisdictions responded to inquiries on the abuse of women by male intimate partners with idiosyncratic civil DFV laws, providing exceptional police and court powers to address gender-based coercive control. Although policies and data differ nationally, the comparative analyses in this chapter suggest that there remains a shared recognition of the gendered nature of DFV, and that some patterns, such as an over-representation of Aboriginal and Torres Strait Islander respondents on DFV orders, unfortunately seem consistent across jurisdictions. Queensland's ongoing data collection on cross-applications and cross-orders represents an emerging opportunity to improve the monitoring and implementation of legislation and other policies intended to support police in identifying the person most in need of protection. Further, by collating key points from relevant policy documents, this chapter sheds light on various approaches to risk assessment and highlights that no jurisdiction provides explicit guidance for police and courts on how to identify the person perpetrating DFV.

# Results of in-depth qualitative component

This chapter presents findings from the qualitative interviews, focus groups and court observations conducted in Queensland. Discussion of the interview and focus group data from all participant groups is organised thematically. Where quotes include an exchange between multiple speakers, participants have been numbered to distinguish between speakers. These numbers reflect the number of speakers within that quote, not the total number of participants within a focus group. The chapter also includes a case study of one participant, Julia,<sup>30</sup> who was interviewed. It illustrates the complex interplay of multiple factors and themes communicated in focus groups and observed in court, including the significant impact of misidentification. Court observation data are discussed separately to describe the environments in which police prosecutors and magistrates exercise their powers under the *Domestic and Family Violence Protection Act 2012* (Qld) and those that victims/survivors experience when subject to cross-applications and cross-orders.

## Interviews and focus groups

### Conceptualising the use of violence

The focus groups and interviews revealed conceptualisations of violence that included violence as either a tactic of control or as resistive violence. However, police prosecutors identified the tendency for police to focus on physical injury in determining action to be taken and against whom:

[Participant 1:] She's making allegations of prolonged domestic violence but actually in their wording they've got, "We can see scratches and bite marks on him therefore we have determined he is in most need of protection. She presents with no injuries. He is in most need of protection" ... so more often than not they're kicking the female out because they need that cool-down period. And inadvertently ... they've kicked the true aggrieved out but he's there with an injury.

[Participant 2:] When officers ... look at injuries and determine causation and whatever, they're looking based on a criminal approach and investigative approach in terms of that incident alone, instead of looking at the entire relationship and the dynamics of that relationship

and other allegations of DV and anything like that. (QPS focus group 6 [police prosecutors])

GDOs expressed a different perspective, illustrated in the exchange below, which seems to validate the concerns of the police prosecutors in regard to treating physical abuse as domestic violence in isolation from previous episodes of violence and abuse. The concluding comment from the second participant, however, suggests some confusion about what is expected of police at the scene.

[Participant 1:] So, we rock up and someone who was an aggrieved yesterday is a respondent today and has stabbed their partner or something like that, well I would suggest that DV's occurred and they're a respondent and the aggrieved is in need of protection, otherwise they're going to get a knife in their back. So, we do what we need to do.

[Participant 2:] It's like you said before, there's times and they'll be like, "Well, they punched me yesterday". Okay, well that's yesterday. Yes, we do need to deal with that in isolation but today you've just stabbed them, so that's what—you've still not done the right thing here, yeah, you've got to deal with the isolated and then that's where we look at the case management and stuff and review the whole file and see that they both need help in some way. (QPS focus group 9 [GDOs])

Magistrates who were interviewed understood the need for, and the complexity of, determining the dynamics at play:

Neighbour calls the police because they hear a disturbance, the police come around, he's passed out and in bed drunk, she's similarly alcohol affected. Is it [domestic violence]? Every matter has to be taken on its merits and sometimes there are things where I've got question marks. My pre-review has more question marks than anything because there's something in there that's concerning or there's something [not] there that should be there, whereas I think [it] might be missing, particularly with coercive behaviour. It's always got to be in the back of your mind. (Magistrate interview 3)

Evidence from the women with lived experience and service providers, however, highlighted women's use of resistive violence. This included retaliation, self-defence and actions

<sup>30</sup> A pseudonym.

aimed at defending their children, as shown in the following experiences women described in one of the focus groups:

[Participant 1:] He didn't so much bash me every day but he did things like he would stop me from ringing people, he'd eat my SIM cards and lock me inside my house and turn my electricity off. So I couldn't leave, I couldn't ring anyone, little things like that. Over the course of him doing that constantly to me I kind of lost it and went insane.

[Participant 2:] I used to go wild, like get mad and ... swear and abuse him and get wild and I just wanted to hurt him because he did that to me. I'd wake up and the [c ...] would be on top of me doing things to me and that's not right. Every time I told the solicitor and Legal Aid that they'd go, "Oh no, you'd have to blah, blah. You'd have to go and do a police report or something". No ... why? I might fuck the chances of seeing my kids. (Women's focus group 1)

Some of the women discussed how their actions were aimed at defending others, particularly children:

[Participant 1:] We're just mothers that want to try and defend our children.

[Participant 2:] Indigenous are family-oriented. The women aren't violent, they're protective, and that's what they are. They get in, they protect, they'll self-defend, they'll use their backbone. This violence bullshit, no it's not violent, it's incorrect wording. (Women's focus group 1)

Service providers reported similar examples of resistive violence by women resulting in them being labelled a perpetrator of DFV after reacting to threatening and intimidating conduct by the perpetrator who then reported her to the police. One participant noted: "That just reinforces that message that she's receiving from the perpetrator that she's actually the problem" (Service provider focus group 2).

In a discussion of women's use of resistive violence, some service providers acknowledged the challenges for police in determining who the victim/survivor is and who the perpetrator is, such as in the following example:

... we know, it could be battered wife syndrome, there could be multiple factors surrounding it. But because that's

what they [police] saw, they place the order, instantly TPO [temporary protection order], and then we're on the back foot from the get go ... But in saying that, it's hard for a police to make the call on the spot as well, because if they don't there could be ramifications. (Service provider focus group 4)

Police, magistrates and women with lived experience all gave examples of behaviour they felt was characteristic of fights, rather than "true" DFV. The following is an exchange between participants in a police prosecutors' focus group on the issue of fights versus "power and control".

[Participant 1:] There's the combination of familial connection and substance abuse so they do go at it. Equally. There's no true aggrieved, no true respondent, they're just backwards and forwards.

[Participant 2:] Family members—a lot of brothers having blues, we get a bit of that [in location], a lot of family violence. But often if it's intimate personal and they need cross-orders, it's usually associated with substance abuse and general use of violence.

[Participant 3:] Often ... police have been called out ... at the time parties go, "Nothing happened". But neighbours called and ... often you'll see a lot of entries [DV other actions or DV no action] ... before there's a domestic violence police application ... It's either just an argument over the kids and police get called out but that's not technically an act of domestic violence ... It's either neighbours calling because they're hearing yelling ... or one of [the couple] gets sick of it and calls the police. (QPS focus group 6 [police prosecutors])

GDOs also described fights and discussed the challenges of unwanted police intervention:

[Participant 1:] You might rock up though and see it happening, and then the ... respondent will be, "You should see what she did last week to me and you guys didn't do anything about that". And then this story goes on from there. And you're just like, holy crap. So, it's just, for lack of a better term, a shit fight ...

[Participant 2:] Or you'll get both of them saying nothing happened. Because like [name] said, they don't want

us there. The neighbours call because they've heard a female screaming or male screaming, whatever. That's why we're there. They don't want us there. (QPS focus group 2 [GDOs])

The frustration of the police with the lack of cooperation was palpable in this discussion. The denial that anything happened could be a consequence of neither party to a fight wanting police involvement, or it could be a consequence of coercive control, which occurs predominantly, though not exclusively, in intimate partner relationships. The discussion illustrates the real challenges the police face in figuring out an appropriate response, but it also reveals a lack of insight about the dynamics of coercive control which may have been at play in two of the scenarios described.

A magistrate recounted the following fight, in which it appeared that cross-applications were sought as a tactic in an ongoing process of reciprocal malevolence and retaliation.

They filed their applications half an hour after each other. They were two old people just being pains in the arse to each other. One of them would go and turn off the electricity because the other one had the air conditioner on. One got a grinder and grinded the other one's mother's antique table. And video each other. Lock the doors, got cameras in their bedrooms. Just completely lost the plot. And so, that was pretty easy, they both needed to be—well, I had to separate them, ultimately, but they both needed to pull their heads in and behave appropriately towards each other. So those ones are somewhat easy, but I actually had to have a little mini-hearing to determine that, because otherwise it was just all paper allegation and counter-allegation: "I didn't do that". (Magistrate interview 4)

Some police and women's focus group discussions pointed to fights occurring in a context of substance abuse and trauma, including individuals having been exposed to violence in their families throughout their lives:

The demographic of this half of the state ... is totally different where we will actually have female respondents who are legitimately female respondents but because ... they've been brought up around violence, so it's reactive and normal behaviour, especially Indigenous family, extended family, is extraordinarily violent and

we constantly get females who are just naturally violent, but they will also have violence committed against them probably a majority of their lives. (QPS focus group 7 [DVLOs, police prosecutors])

That's the only time I just went in [jail] ... only happens when I'm intoxicated. So, it just sets the trigger off when you're drunk, then I'll try and go and sort things out when I'm sober. Then I'll try and make amends out of it and apologise ... I've been fighting since I was 15 years of age ... I grew up with my family ... they'd have fights with people. (Women's focus group 3)

Some police prosecutors thought cross-applications were appropriate for addressing fights, for example in response to two adult brothers fighting or where substance abuse is involved:

[Participant 1:] Can I just say one thing about cross-orders. It's wonderful for men. Two brothers, whether they be 18 and 19 or 63 and 65, it's fabulous for that. And they don't see anything wrong with it. They've been fighting all their life. It's their other family members who report it ...

[Participant 2:] Sometimes even in intimate personal relationships I've seen circumstances where people need cross-orders and it's often to do with substance abuse ... So, there is some circumstances ... where you get people with severe substance misuse, who've had it their entire lives, who just resort to violence in every part of their lives. And cross-orders work in that respect as well I think. (QPS focus group [police prosecutors])

The focus groups also highlighted the confusion that some research participants experienced in distinguishing the aggrieved and respondent in complex cases that appeared to be associated with mental illness. Many of these discussions reflected confusion about cases where coercive controlling behaviour may be exacerbated by mental health or substance use issues, and cases where mental health and substance use were distinct from DFV behaviours and required different responses. A mixed group of QPS personnel discussed the challenges of both substance use and mental health as circumstances triggering violent episodes within the home and being treated as domestic violence.

The other one that I've seen a fair amount of is, you have

mum as the aggrieved, and teenage son ... as part of their drug-fuelled psychoses, they've committed violence and smashed up the place; and the neighbours have heard this, they've rung the police, police have gone "domestic relationship, act of violence, property damage, you've got the order against you now" ... you've got mum ... or dad, or whoever comes to court saying, "He's just unwell, we've taken him to mental health, we've tried everything, we've gotten him help, he's just not getting better, this is making him even worse". And how can we protect that family from that person, if there's that play of mental health and/or drugs? (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel])

Service providers also discussed the inappropriate application of domestic violence legislation, where violence is seen as a consequence of a "mental health problem":

So, where I'm currently representing the mother and I've got ATSILS [Aboriginal and Torres Strait Islander Legal Service] [for] the daughter: she's currently in rehab and prosecution won't do anything about dropping it and the court is like, "Well, prosecution, they have a right to try this if they want it so we're not willing to dismiss the application", despite it being a mental health problem. It's not a DV issue, but this poor girl who's got mental health problems ... she's going to get a DVO against her and it was only because I was able to find out she was in rehab that I was able to stop the court from even putting a final order on her because, obviously, she wasn't there because she was in rehab. So, I had to represent mum, who doesn't normally get represented as the aggrieved in a police application to go to the court and go, "Stop. She's in rehab. She's not missing. She's not disrespecting the court. Don't make a final order. Adjourn it to this date", otherwise she would've been up for a final order for a mental health problem. (Service provider focus group 2)

The concept of true domestic violence was implied in the discussion above, and across all participant groups, although there was no explicit discussion of what constitutes such violence. The concept was generally expressed in terms of what it is not: that is, it is not violence that occurs in a context of resistance to violence or that is associated with trauma (drug-induced, or other, mental illness), or incident-based

fight. This indicates a lack of a shared understanding of the meaning of power and control in relationships, or at least an inability to clearly enunciate the meaning. The discussions did, however, reflect a general understanding that true domestic violence is related to ongoing abuse, rather than isolated incidents.

### Systems abuse by perpetrators

Systems abuse by perpetrators was a significant theme across all participant groups, with a circular effect emerging where systems abuse by perpetrators contributes to the misidentification of the person most in need of protection, and misidentification in legal responses enables systems abuse to occur. Women and service providers discussed a range of experiences relevant to both of these issues, whereas QPS personnel and magistrates were primarily concerned with systems abuse occurring during the court process via private applications.

### Systems abuse results in misidentification

Women and service providers described a number of sophisticated strategies successfully used by perpetrators to portray themselves as victims at multiple points of the legal system. Women described examples of perpetrators successfully making false allegations to police with little or no evidence and using a range of image management strategies, such as being the first to call police, making cross-applications and presenting as calm in contrast to women's heightened state of emotion:

Me and my ex, we used to get into arguments and I've never, ever rung the police on him and this time I have. You know when you've just had enough. So, I rung the police. I don't know, he tried to make it that I stabbed him. They came through the house afterwards and checked it out, all the knives were there, whatnot. None of that happened, he just said that to flip the script and it worked. (Women's focus group 2)

He was all calm and collected by the time they got there; I was the one that was going off smashing everything and all the rest of it and that's why I had the orders put on me because that's what they walked into, but I had marks all

over me ... [but] they came into me being the one that was screaming and me—yeah. (Women’s focus group 1)

Service providers supported these accounts of perpetrators frequently manipulating both police and victims/survivors, and suggested first responders may miss and in fact enable these tactics if they lacked a trauma-informed understanding of victims’/survivors’ responses:

So when the police rock up he’s calm and cool and collected and they end up talking about football or cricket or something and she’s like not behaving very calmly with the police and telling them maybe to eff off or “Leave me alone” and some of that behaviour might be because she knows what’s going to happen after the police leave, that this is not ending here, and it might be the neighbours that have called. Rarely does she call, but it seems to be that once he’s got a protection against her he’s pretty quick to call. It’s really quite obvious, the systems abuse there. (Service provider focus group 5)

A magistrate highlighted how being alert to the dynamics of coercive control and taking an inquisitive approach can assist in detecting these false allegations:

She came to court and she was going to consent to an order. There was just something off about the whole dynamic. He was very confident and enjoying himself a lot in the court experience. I stood the matter down for her to talk to the Legal Aid social worker, and the Legal Aid social worker talked to my police prosecutor [who] asked her to remove her scarf. She had his imprint of both hands on her throat. (Magistrate interview 1)

Service providers were particularly concerned about perpetrators’ false allegations and image management being used successfully against people with limited English in the absence of interpreters:

[A] trend that’s been happening for quite some time last year and continuing into this year is that CALD women, so police attending, interpreters not used, they appear to be heightened or unable to communicate, he can communicate perfectly, speaks English, they speak to him, they get his version of events, she then becomes

the respondent without her version of events being heard. (Service provider focus group 3)

In contrast, although QPS personnel and magistrate participants accepted that police may misidentify the person most in need of protection if parties lie to them, they were generally confident in the reliability of responding officers’ initial assessments of who was in need of protection. GDOs in particular did not perceive police applications as the key point where misidentification occurred where systems abuse was involved. Instead, they were primarily concerned about private applications being taken out in retaliation or being used for ulterior motives in family law contexts:

[Participant 1:] It’s generally pretty clear cut. It is what it is. You know what it is. And then there might have been more things that led up to it but the actual DV incident itself, I don’t ever remember going, “Well you did it wrong and you [should have been the] respondent”. I’ve never done that. I mean if it gets down to you don’t know who it is, you’re generally going to go with the one who’s most in fear.

[Participant 2:] I think sometimes we get the wrong person with private DV app[lication]s, because people will go [to] the court and say, “Oh he did this, she did that”, and it could be a load of nonsense. They’re just getting in front of the magistrate. (QPS focus group 5 [GDOs, DVLOs])

I mean, I’m sure there’s people that speak shit to us about what’s happened and occasionally they might get us to believe them. But no, private applications they just go and say what they want and they do it just so that they can say, “Well you’ve got an order against you and they can use it against that person”. (QPS focus group 9 [GDOs])

Retaliatory private applications were identified as a common tactic by all participant groups, and there was widespread discussion by magistrates, QPS personnel and service providers about private applications being used inappropriately in family law matters:

I’m being more aware of private applications when there’s Family Court matters, when there’s cross-applications, which does concern me because I don’t know if they’re being brought in appropriate circumstances. (Magistrate interview 3)

[Participant 1:] And quite often it's so clearly a retaliatory application.

[Participant 2:] And quite often there's not even any domestic violence even articulated in it, it's purely sometimes family law matters but it still continues through. (Service provider focus group 3)

Sitting in and hearing a lot of the private applications, you will hear allegations that she said, "I'll take out a domestic violence order against you, I'll take your kids away", and all that sort of thing and that's the basis of the cross-order, is she's using essentially, the courts and the domestic violence applications to control them. (QPS focus group 7 [DVLOs, police prosecutors])

The last quote reflected concerning views expressed by some police that women were more likely than men to make false allegations in family law contexts or as a form of emotional abuse. This is despite research establishing that women are in fact fearful of making DFV allegations in family law contexts (Kaspiew et al., 2017) and "that the making of false allegations is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimisation of abuse by perpetrators" (Douglas & Chapple, 2019, s 10.7.1).

### Misidentification enables systems abuse

In addition to their experiences of being misidentified as a result of systems abuse, women and service providers articulated numerous ways that misidentification resulting in a protection order or criminal history enabled further systems abuse. A recurring theme in multiple women's and service providers' focus groups was perpetrators using protection orders and criminal histories against victims/survivors:

When they put this order on you they use that against you. (Women's focus group 1)

[Participant 1:] See, I've got a current order out now where I'm the perpetrator. And that's fearful for me because—and it's his house. All he's got to do is ring the police and he threatens me all the time with it.

[Participant 2:] You're walking on eggshells.

[Participant 3:] So, you're kind of sitting on the fence of knowing you can go to jail, just stick around with it or ...

[Participant 2:] Like you were saying, you'll get locked up.

[Participant 1:] I can't stand up for myself in fear that his retaliation is make a phone call to the cops and he could have me removed just like that. (Women's focus group 2)

Service providers and some magistrates had well-developed understanding of how failing to determine the person most in need of protection made victims/survivors more vulnerable to perpetrators' systems abuse. Examples given from practice experience included perpetrators threatening to call the police and alleging a breach of an order in place, pressuring victims/survivors to withdraw their own protection order applications, and threatening to call child safety. They explained that these tactics of systems abuse meant that if the victim/survivor phoned police for help she may not be "taken as seriously because she's already been named as a respondent" (Service provider focus group 3), and this could have serious ramifications in court settings:

[Participant 1:] ... to just be so vulnerable in terms of being controlled around this order, "If you talk back to me I'm going to call triple 0 on you ... if you don't do this I'm going to call police". The threat of breach dangling over them ... makes them so much more vulnerable to be in that relationship, to be abused ...

[Participant 2:] "You're going to jail, you're not going to see your kids again" ...

[Participant 1:] Yes. The worst responses with police—that if she actually does call 000 because she's been abused, not being taken as seriously because she's already been named as a respondent.

And I've tried to say to colleagues, "Not only is that an abuse and you're victimising the victim when they're coming to court and looking for resourcing and report when they are a victim, you are making them vulnerable to an allegation that can have criminal consequences". What better way to silence an aggrieved person than to say, "You yell when I hit you and I'm calling police, and the neighbours have heard you yelling". It's a very effective control mechanism. It's horrendous. (Magistrate interview 1)

Weaknesses in the legal system's capacity to hold perpetrators engaged in systems abuse accountable was a frustration expressed by participants in multiple groups. Women described feeling let down by the individual responses to their circumstances where evidence of systems abuse was available to police and courts:

They didn't charge him, they said, "We'll give him a warning about he can't make false allegations". [Inaudible] I couldn't believe that and just the shame and the horror of it. (Women's focus group 1)

Just to be told that's just how it is, you just have to deal with it [cross-orders being made], was a bit deflating because I thought finally something's going to get done and then nothing really. (Women's focus group 2)

Other participant groups expressed frustration with the abuses of process that they observed but felt unable to address, including the lack of screening of frivolous or vexatious applications and the waste of resources involved in dealing with them:

It's a waste of time, it's a waste of paperwork, and it's just frustrating to deal with, I guess, when you get to court. I think it's an abuse of process and it's abuse of the DV legislation and what it's put in there for. (QPS focus group 3 [GDOs])

[Participant 1:] We've seen that quite a lot as well where men would just keep reapplying, reapplying, reapplying with the same allegations, the same incidences, but because it's got to go through a process and there's many adjournment dates. There's ultimately legal costs for the woman if she can't—if she's not eligible for Legal Aid—keep going back to court many times.

[Participant 2:] So at what point should that—should somebody go, "Actually there's nothing in this"? (Service provider focus group 5)

Service providers and some QPS personnel explained that the combination of these factors—misidentification being used as a tactic by perpetrators to perpetrate further systems abuse, and lack of accountability for that systems abuse—left many victims/survivors exhausted and without protection:

I've got three current women that I'm supporting where

they are so exhausted from the systems abuse that they've gone, "I'm not fighting it. It's just easier. I've got more conditions on my order. I'm tired", and they've just given up in being supported. (Service provider focus group 2)

[Participant 1:] I think that's where we benefit with the specialist magistrates, having some more deeper understanding of the dynamics of DV, that don't necessarily fit in that legal framework, but all those other little nuances about using orders as a way. Unfortunately some of our aggrieveds will consent because they're just so exhausted.

[Participant 2:] They want out, yeah.

[Participant 1:] They're so exhausted, they're just like, yeah whatever, and so I think that a lot of those ones where aggrieveds are consenting, they're consenting just to not be in the process anymore. (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel])

In sum, there was some recognition by QPS personnel that perpetrators may manage their image or lie when police attend the scene, but many GDOs were confident they could correctly identify the perpetrator. QPS personnel and magistrates viewed the misuse of private applications as the primary form of systems abuse that complicated determinations of the person most in need of protection:

But you do see that respondents, again, if they're nasty enough and smart enough, they'll go get a private lawyer, or they'll get the duty lawyer service, and then they will file their own application in reverse, and then it becomes a bit of a sticky mess as to determine, because the courts then have to ask that question, "Well who's in the most need of protecting? Who do I believe?" which is what it all comes down to in the end. (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel])

In contrast, women and service providers highlighted that misidentification by responding police officers was a significant issue in addition to the retaliatory use of private applications, particularly when partnered with poor police practices. These findings suggest systems abuse is perpetrated at multiple points of contact with the legal system, from police involvement to court proceedings, and has far-reaching consequences for people misidentified as the perpetrator. The enabling

effect that misidentification has on systems abuse and the concerning gaps in accountability for these forms of abuse where misidentification has occurred emphasise the need for all contacts in the legal system to be alert to these issues.

### Police practice

Consistent with the literature, this research found that a number of specific police practices influenced the misidentification of or failure to determine the person most in need of protection. Service providers raised the inconsistency of practices and approaches as a major complicating factor:

I think the most alarming thing about both police and court responses is that it varies and it's so inconsistent, it really is incredibly varied and factors such as which courthouse, which police station, which police officer, what else they've been to that day, how busy they are, so you just insert all of these inconsistent variables that really, it's almost like it's being made at a whim and [it's] potluck around what happens. (Service provider focus group 3)

These inconsistencies came through in many of the police focus groups, where views expressed by one group often differed and sometimes directly contradicted views expressed in another group. This not only occurred across different geographic settings, but was also reflected in conflicting accounts sometimes given by police participants in focus groups. It is important therefore to interpret the following factors as complex and interrelated issues that combine to heighten the risk of misidentification. As discussed in the literature review, it is also important that these findings are interpreted with an understanding of how the histories of, and systemic racism experienced by, Aboriginal and Torres Strait Islander peoples contextualise their interactions with police and impact the factors informing police decision-making discussed below.

### Incident-based

Participants from most groups discussed, or in the case of GDOs, demonstrated, that responding police officers' incident-based responses were a significant contributing factor to the person most in need of protection being treated as an aggressor:

Yeah, I guess that comes back to the fact that we kind of have to look at a lot of incidents mostly in isolation. So, our legislation and our policy basically says that if we believe domestic violence has occurred, someone is a respondent and the aggrieved is in need of protection, then we must take further action in whatever form that is. So, we rock up and someone who was an aggrieved yesterday is a respondent today and has stabbed their partner or something like that. Well, I would suggest that DV's occurred and they're a respondent and the aggrieved is in need of protection otherwise they're going to get a knife in their back. So, we do what we need to do. (QPS focus group 9 [GDOs])

They just do it like a police statement so they only talk about the single incident. And then you get the victim on the day of trial and they're like, "Yeah, all this has happened throughout our relationship." I'm like, "The police officer probably didn't ask you about this, so you didn't tell him", so it's not on the paperwork. (QPS focus group 6 [police prosecutors])

So when they go to an incident and they're reporting on it and taking out a PPN against whoever and writing up their application for the court, they're talking about one incident. That's not domestic violence. (Service provider focus group 5)

And yes, there's been a lot of improvement, but I think with police officers there still needs to be a lot more—and understanding that, "Look, this doesn't just happen in a vacuum. There usually is some pattern of ongoing abuse before you, as a police officer, came along." (Magistrate interview 4)

These incident-based responses were reflected in GDOs' focus on their role being to make the scene safe, rather than assessing who was most in need of protection overall. With that lens, they were confident they rarely "got it wrong", but rather were constrained by what was before them and what they were required to do to respond in that instance. In circumstances where further history or context suggested the other party may be the perpetrator of DFV, they rejected the idea that they had misidentified the victim/survivor, but rather that the system they worked within required the response they took:

All that we can do is, I can only present this, this is what we got on the day, this is the evidence we got, this is what she told me on the day, this is what he told me on the day. We sought advice, and I thought this person needed protecting. So if they then want to go and tell different versions to a magistrate, I wouldn't say I got it wrong, because I would say that this is what got presented to us on the day. (QPS focus group 3 [GDOs])

I think in the moment, in an isolated incident, we get it right the vast majority of the time. If you look at an entire relationship, I think there's plenty of cases where if you had to pick a respondent and an aggrieved in an entire relationship then I'm certain that we take out orders against aggrieved. But the reality for us is we turn up to jobs where the aggrieved has committed in some cases significant violence against their partner and we've got to do something. (QPS focus group 9 [GDOs])

Some participants explained that responding police officers tend to take more incident-based approaches when constrained by time and resources:

We're getting a lot of calls to the service and it takes some time to get to their houses. If we get there and they're like, "Oh, but they've done this" we don't have a different side of the story. Like, what's happened before that, what's the real story here? If you can't get both sides of the story or even get the aggrieved to make a statement about it, we can't do anything. So, I think that's the main issue ... us not being able to actually take action on that. (QPS focus group 9 [GDOs])

On average, the state stats are telling us it takes us 2 hours and 45 minutes to do a DV job on average. [Name] used the example before, if he's got a stab wound and she's got no injury, they'll just write her up. We don't have the 3 hours to sit down with her and get a history. (QPS focus group 7 [DVLOs, police prosecutors])

However, even though there was strong evidence of formulaic responses from police putting victims/survivors at risk of misidentification, there were also examples of practices that relied on police discretion where it was unclear what informed their decision-making. In particular, numerous police stated that "body language" informed their assessment of who was

in fear, but did not explain what that meant. Similarly there was a reliance by both GDOs and prosecutors on their "gut feeling" to determine if someone was lying or what action was appropriate in a specific incident:

Yeah, a lot of the times it comes down to our judgement as to who we believe more, really. (QPS focus group 9 [GDOs])

... and you go, "Hey, hold on, no, this doesn't feel right" ... It comes down to common sense ... your gut feeling as a person really ... I don't think it really actually comes down to being a police officer. Whether you know them or you don't know them, their body language tells you everything of whether something's happening or not. So you've got to take that gut feeling and go with it as well. But yes, there's guidelines for us ... but it doesn't necessarily help us in some aspects. (QPS focus group 8 [GDOs, DVLOs])

[Participant:] Also, body language, the way they present themselves to you as well. You pick up on those things too, I guess.

[Facilitator:] What kind of body language?

[Participant:] Well if they don't want to give you the full story. You know, you're asking them the ABCs of policing, you know: ask questions; believe nothing; continue questioning ... (QPS focus group 3 [GDOs])

These practices were concerning when considered alongside the gendered and racialised attitudes that may inform some police decision-making, discussed further in the section on organisational factors, below.

Importantly, the incident-based focuses police adopted appeared to reflect a criminal approach to DFV incidents. For example, a number of police participants described challenges and confusion in regard to the standard of proof or the appropriate response required for civil versus criminal matters, particularly when DFV was the only civil matter they were involved in enforcing:

And there's not many offences that we can investigate that don't require a victim. Except for DV, which is why it's convoluted. Even the balance of evidence changes, but

still the way we look at it, we still want to—the difference of balance of probabilities and beyond reasonable doubt, what does that really mean operationally? You still want to figure out what happened. (QPS focus group 2 [GDOs])

If there's going to be a criminal complaint, if there's evidence, we'll proceed, if there's not, see you later. (QPS focus group 5 [GDOs, DVLOs])

So we're really, in the DV land, we're really pushing around that civil land, which is not normal police business; and that's one of the things we've done here [at location] with our reviewing, and trying to encourage officers to investigate the criminality. But that's very time consuming, and it's very resource intensive. But what we're saying is, you do it good here, and then the back end you'll see a reduction. (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel])

Well I've heard officers on the road say, "I can take it to the court 51 percent, I'm 51 percent sure that you're in need of protecting, therefore the court will make an order in your favour". (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel])

The following service provider highlighted how a combination of bringing the wrong lens to DFV situations and then responding inconsistently to civil versus criminal issues allows the actual perpetrator to avoid detection and accountability:

The problem though with coming in with that criminal kind of lens is ... they then don't act on that most of the time, they don't then charge them criminally although it appears that the evidence is right before them. They may misidentify and then they may charge or not bother to charge in the other circumstances where we're seeing those women who are reporting things that sound an awful lot like a criminal act and they're not being charged for those things ... Breaches of the protection orders have the criminal standard but they're bringing that ... balance of probabilities standard and I think they can't get the nuances of what applies when, what's a criminal act? What's the civil standard? Often it seems to be very confused in terms of what they're requiring, what they're looking for, that they're looking for specific things rather than the picture. (Service provider focus group 1)

## Legal and extra-legal factors in decision-making

In applying incident-based assessments of who was the perpetrator or aggrieved, a number of legal and extra-legal factors emerged as key influences on police decision-making. The following section summarises the key factors emerging from the data.

### Physical injury

Consistent with the literature, physical injury emerged as a common factor driving police decision-making about who was the primary aggressor:

They turn up, there's somebody with an injury, that person needs protecting right then. (QPS focus group 6 [police prosecutors])

She's got no injuries, but she's saying, "He's beaten me up", and he's the one with the injuries, but he's admitted it, "Yes, yes I've hit her", and we say, "Hang on, you've got injuries", it's pretty visible, bleeding, we say, "Right, cross-orders" and we go from there. (QPS focus group 3 [GDOs])

[Facilitator:] I think someone said before whoever's got the injury is going to be named as the aggrieved ...

[Participant:] It feels like there's an over-representation of that being the decisive factor. (Service provider focus group 1)

However, women and service providers described multiple instances of the person most in need of protection being made a respondent on a protection order despite evidence of serious physical injuries:

[Participant 1:] I was flogged to a point where I couldn't even brush my own hair. Couldn't ... lift my arm up. The female officer ... tried to talk to me but because I wouldn't talk to her ... she went and spoke to him. I was sent to the hospital too because of my injuries ... But because I didn't talk, that order went out against me.

[Participant 2:] I had my own proof. I had photos of injuries. I'd gone to the police station with injuries. He

had none of that, he just had, “Well, she did this to me on this date”, and half of it was a load of shit. And he had his family back him up. (Women’s focus group 2)

Yes, I’ve had police applications like that, their respondent was put in an ambulance and the aggrieved is fine. (Service provider focus group 1)

These experiences suggest that physical injury is often an important, but not the sole, factor in who is made a respondent and becomes more significant in decision-making when police are constrained in obtaining other evidence.

### Interviewing parties

As discussed by all participant groups, police interviewing both parties, along with physical injury, was a significant contributor to police being able to accurately determine the person most in need of protection. Some women who had been misidentified cited police failures to interview them, not believing them and reliance on the other parties’ allegations as a decisive factor in their misidentification. In contrast, police cited victims/survivors’ unwillingness to talk to them as a barrier for them to obtain sufficient evidence:

[Participant 1:] Obviously, from our experience and again body language and what we’ve been told, we can kind of sort of tell if someone is lying. And it’s hard to help someone that doesn’t want to be helped. I guess, if they’re not willing to tell us the truth, and they are not willing to help us, then that’s hard ...

[Participant 2:] That’s when your judgement call comes out. “Okay, you’re the one with all the injuries”, the other person doesn’t have any injuries. Then maybe you’re needing the most protection. And of course it comes up to that [parity/disparity in size and strength] type of thing as well. That’s fairly common. That’s about it. (QPS focus group 3 [GDOs])

The unwillingness of some women to talk to police at the scene was associated with negative past experiences of police interactions, trauma they were experiencing at the time, or their need to flee the scene for their safety:

No one ever stopped to ask what happened, “How did you get that, what’s the marks on you?” No one did that.

No, they were just quite happy to throw me in the back of the paddy wagon and take me to the watch house and charge me. (Women’s focus group 1)

[Participant 1:] In an instance where the police are called they’re only getting one side of the story, so they’re only getting probably his part of the story, but not talking to her or taking it up with her, but then just taking an order against her because of what he’s told them, so we notice that quite a bit as well up at court.

[Participant 2:] That’s a common one that ... [comes] up a fair bit as well. (Service provider focus group 5)

Some police participants (mostly DVLOs or police in victim support roles) indicated they accommodated this to some extent and understood the importance of building trust and rapport with the victim/survivor who may be unwilling to talk to them, particularly when the perpetrator is still on the scene. But many GDOs viewed parties’ reluctance to engage with them as a hindrance when they were assessing a scene under significant time pressures:

[Participant 1:] If I wouldn’t have run away and stayed there upon the police’s arrival and had my say, they would have seen that I was the one who was ...

[Participant 2:] Needed help.

[Participant 1:] Yeah. I was the one who was in danger.

[Participant 2:] But are you supposed to stay there and get your head kicked in until they come? And it would take them half an hour to get there. You know what I mean? (Women’s focus group 2)

So they’re not cooperative. They don’t want to—well, not always, but they’re not forthcoming with information. Don’t assist us. So yeah, that’s a massive challenge when trying to identify who’s in the wrong. (QPS focus group 2 [GDOs])

Sometimes we don’t get enough information but for whatever reason, the victim is not able or willing to give it, particularly in that environment when you’ve still got the perpetrator in the house that can see or hear what’s going on. (QPS focus group 7 [DVLOs, police prosecutors])

Most of the time the aggrieveds are willing to accept some help, and are appreciative of what we do; but some will just block you, no matter what, they do not want your assistance, no matter how hard you try and help them, they just do not want your help. But [the] majority will. (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel])

Police explained that interviewing witnesses or relying on informants' information supplemented their investigations when both parties were not able to be interviewed. Women were clear however that failing to interview them or investigate properly meant they ended up having protection orders made against them, sometimes without their knowledge and despite experiencing ongoing abuse, and had no opportunity to have their experiences heard, further embedding their distrust of police and the legal system:

Because they had their witnesses against me, but they were all family, not one police officer would ask for my story, they just put me in cuffs in front of my children. (Women's focus group 1)

[Participant 1]: I just don't like dealing with the police when it comes to that stuff because they tend to ...

[Participant 2:] They don't listen and ...

[Participant 1]: They don't really look at the proof. (Women's focus group 2)

Service providers also highlighted troubling police practices in failing to obtain interpreters for women with limited English:

We have a number where the woman, made the respondent, doesn't speak English or has limited English and there was no interpreters, not even effort to get an interpreter, not even later in the days following have the police got her side of the story. (Service provider focus group 1)

Yeah, and no interpreters offered, no—if there's no English, it's either no response or cross-orders. (Service provider focus group 2)

### Historical factors

Police noted that a prior history of violence was relevant to their determination of who was the aggressor, however this

was frequently limited to the existence of a police record, rather than establishing the history and dynamics of the relationship. It was accepted that this is particularly difficult for first responders to do when they had limited time and information available to them:

It's very difficult when you're going to a job to get that whole picture of the relationship in a 10-second radio transmission. Like we've got [Q lights]<sup>31</sup> now, but even so, they give us a limited amount of information and you have limited time to try and look that up. So, really when we're going to an incident in that critical moment, we focus probably more on what's happening now as opposed to the entire relationship. (QPS focus group 9 [GDOs])

I think there's issues with the time constraints on police when they go to an incident, they don't—haven't got the time to look at what's happened there and then, they don't get to take a holistic view of a relationship or patterns of behaviour over the course of the relationship so they don't get to delve in and do a full investigation to the history of violence or history of intimidation and harassment that's led up to that moment. (QPS focus group 4 [VPU])

Some women identified that relying on the parties' records, rather than investigating the context of the relationship, was a critical factor in their being misidentified as the perpetrator of DFV:

He had no history, he worked full time, he was a good person in their eyes, so they'd just stand there and talk to him about fishing for an hour and then just leave and not even listen to me ... I find that judgment comes from history as well, and I feel that they need to investigate it more instead of assuming. (Women's focus group 1)

And because of that long history my partner would always—I felt he had the upper hand where he would ring the police and they would come and get me because of that long history. (Women's focus group 2)

### Emotional state

How a party presented at the scene contributed to police perceptions of whether they were the aggressor or not. This was sometimes a product of image management by the actual

<sup>31</sup> Tablet computer devices with access to QPS systems.

perpetrator, as discussed in the section on systems abuse above, but also highlighted the continuing influence of the ideal victim stereotype on police assessments of whether someone was in need of protection:

Yeah, if they're willing to carry on when you're there, then you certainly get a bias that whatever happened before, they could well be the instigator. So that's definitely something that stands out. As [Name] said, keep an open mind. You don't rule out that it could have been the other person. But if someone's willing to carry on in front of us when we've entered their home, it's definitely a big tell. (QPS focus group 2 [GDOs])

[Participant 1]: It's the ones, the quiet ones, the ones that they don't say much at all, something's not right here.

[Participant 2]: They're a genuine case.

[Participant 1]: They're genuine cases.

[Participant 3]: Yeah and they're so rare though. (QPS focus group 5 [GDOs, DVLOs])

Yeah, and usually she's aggressive. Half the time, we're pulling a gun on her because she's trying to stab us and it's the extra training and obviously us in the specialist field, we understand but the general duties don't understand, going, "I'm here to help you, why are you trying to hurt me?" So, I think instead of who's most in need of protecting, sometimes our crews will go in with, "Who's the aggressor?" (QPS focus group 7 [DVLOs, police prosecutors])

### **Racism and past experiences of police interaction**

Service providers and women described racism and biased attitudes affecting many police responses. This resulted in unjust outcomes for the women subjected to those responses, and contributed to women's reluctance to seek police help in the future:

[Participant 1 (Aboriginal woman):] Years later now I'm in another predicament. I'm in a current relationship right now where I wasn't there again, I fled before the police can come. And sadly, admittedly, it's a thing that we think about, we don't want to be around the police. I'm very intimidated by them. Very intimidated by them.

[Participant 2 (Aboriginal woman):] It's because of past history with them. You don't trust them. (Women's focus group 2)

I was already convicted in their eyes I know because that's how they treated me, and as a black woman against the white man too they—nobody wants to hear your story, they're going to believe the white man. (Women's focus group 1)

I have seen in my experience of working with a lot of Aboriginal women that consistently across the board at one point in time or another, there is an order taken out against them, listing them as the respondent nine times out of 10. (Service provider focus group 2)

One service provider explained how these biases affected police perceptions of Aboriginal women in terms of ideal victims, not only in how a person's behaviour was interpreted in that instance but also whether the officer may make an objective assessment at all:

I think one of the other things is also there's a lot of bias or not seeing things through a particular lens perhaps right from the start to the end. I'm thinking about ... Aboriginal women who may not necessarily be acting in the way a victim should act ... and therefore, "You must be the respondent because you're acting in this way. It doesn't matter what my other criteria says is that I'm already going to put you down as a respondent based on my bias of how I see you." So it's extremely tricky to have one rule that fits all cases. That's the other thing ... where are we looking from and what are we looking for? (Service provider focus group 3)

### **Type of violence used and motivation for seeking police help**

Some police indicated they took into account the type of violence that was used and level of fear expressed by each party in determining who was in need of protection. However, even among those officers, many felt constrained by a formulaic approach to take action against the party who had used physical violence, even if defensively. Further, service providers' and women's experiences indicated there was a

lack of understanding of women’s use of defensive violence across the police service generally:

It’s just so loose too. Like necessary and desirable to protect the aggrieved. I don’t know what’s—I mean, obviously we’ve got some good precedents on what’s necessary and desirable, but at the same time if a 4-foot female pushes a 6-foot male on one occasion, most of us are jumping to assault or they need protection. I don’t believe they do need protection. (QPS focus group 2 [GDOs])

So, I’ve seen more than one occasion where they’ve come up, woman is hysterical, man is calm so, “I don’t care that the woman is the one that called me, I don’t care that the woman—he’s got defensive wounds so she’s been obviously attacking him back. I’m putting the order against her, nothing against him”, and I’ve seen that quite a few times which is just ridiculous. (Service provider focus group 2)

But police turn up to the door and they’re both saying “He hit me, she hit me”. And he’s a slender fellow and she might be a little bit larger in build, coppers go “I know all about this, this is all about physicality, she’s flogged him” when in fact she might have simply been acting in defence, defensive action because of him trying to hit, punch, kick, and all those sort of things. So there can be rapid judgement by the police. (Magistrate interview 2)

Again, reflecting an incident-based approach, the level of fear communicated by a party appeared to be a secondary consideration to whether an act of violence had occurred, rather than driving police officers’ assessments of who was at risk and in need of protection from further DFV:

I’ve even seen police applications where it’s written that the respondent, the woman, called police saying, “He’s trying to kill me”, like they’ve written that in but then obviously when they’ve got there they’re taking his version. Sometimes I feel like she is disclosing things, she’s admitting to things like “I pushed him” or whatever but in the context of “I’m fearful for my life, I’m trying to get him away”—like thinking that the police are trying to help her and she’s just being completely honest but saying “I pushed him” or something like that. He will be saying a completely different story like, “She’s crazy, she’s drunk, nothing happened, I don’t know what she’s talking about”, so he’s not admitting to anything and she

has admitted to something which could be considered DV if you’re looking at the definition, but as far as who’s in the greater need of protection it’s not right. (Service provider focus group 1)

### Organisational factors

A strong theme emerging from interviews and focus groups with police and service providers was the impact of an ingrained risk-averse culture on police decision-making. The phrase “cover your arse” was mentioned in almost every police focus group, and reflected a fear of liability that manifested in orders being taken out “just in case it does go pear-shaped later on” (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel]). Many police participants commented they would prefer to leave it up to the courts to determine who was in need of protection, rather than make the wrong decision themselves and end up in the Coroners Court:

So now when they go into DVs they’re not thinking about, “Okay, this is the policy and this is what I would normally do”, they’re thinking about, “Well I just got in trouble for not doing enough so I’m going to be extra cautious and take out a DV order when I really don’t think it needs it, because if I don’t do it and something happens I’m going to get in trouble”. So, we’re very reactive. (QPS focus group 9 [GDOs])

But it is always in the back of your mind when you do make those decisions, especially when you don’t do a PPN or take someone into custody, and you are going to do another action ... What happens if tomorrow he kills her or something? (QPS focus group 8 [GDOs, DVLOs])

And if DV has been committed, you’re like, well an order needs to go in place because if something were to happen and you haven’t done an order then we’re the ones in trouble. (QPS focus group 5 [GDOs, DVLOs])

There was a period directly after the 2012 amendments when mutual orders kind of dropped off, ‘cause that idea of looking for the person most in need of protection was put into place but the police prosecutor that I talked to about that one, we had a discussion recently where he said that he’s actually advising police officers it’s better to go to court with mutual applications and get criticised by

court than it is to be involved in a coronial inquest later. That when these police officers attend and everybody's all in high distress it's just simpler to slap them both. That's [an] increase—and I've heard that in other courts as well. (Service provider focus group 1)

This fear translated into police practices such as junior police officers deferring to senior officers' directions rather than their own judgement, interpreting requirements to "take action" to mean taking out an order, and being reluctant to withdraw orders once applied for:

It's going back to that previous practice of just putting an order on everybody. But it's also now we made the submissions to police, they have to get a senior police officer's permission to do that [withdraw the order] and they're not actually asking for it, they're just saying "No, not going to happen". (Service provider focus group 1)

But, at the end of the day, this is, we're governed by it, we have to take some sort of action. If we don't, and then something happens, for me personally, I don't want to be sitting in Coroners Court for the next 2 years, trying to explain my actions. So it's been pushed upon us to take some sort of action. Whatever it is, you take some sort of action. (QPS focus group 3 [GDOs])

Then other times I've seen a few where I've gone, "What the? Why have you taken an order out?" First time, first time really it should have been a referral and most of the time it's a fellow. "Why are you doing this because it didn't need to be? You could have done that with referrals, you've got no history." I think some people go, "Oh well, this has happened so I definitely have to take an order out". (QPS focus group 4 [VPU])

Although some police prosecutors perceived their role as a gatekeeper in minimising inappropriate applications and detecting misidentification (discussed further in the "Systems factors" section below), service providers described a similar culture of risk aversion and reluctance to withdraw orders, even where there was compelling evidence the respondent was the person most in need of protection:

[Participant 1]: They're very defensive when you ask them about it too, they're just, "No, not withdrawing, this is why we're doing it" kind of thing.

[Participant 2]: Yeah and he [a prosecutor] basically said that what they're afraid of is being involved in a coronial inquest ... (Service provider focus group 1)

[Facilitator:] Is there much scope for withdrawing like if you're getting more history and more contacts and you're thinking maybe the right decision wasn't made there or we've got more information? What's—

[Participant 1]: Well I've done it. I've done it where two officers actually couldn't agree at a thing and yeah, she was named as the respondent and the female officer at the scene actually ended up emailing the prosecutor saying, "Oh I've got some really serious concerns here".

[Participant 2]: Virtually had to fight prosecutors on a few occasions ... (QPS focus group 4 [VPU])

There was some evidence of good practice in communicating to GDOs that they are only required to justify the decisions they make, although many participants felt constrained by the lack of assistance available to them to make those decisions:

My opinion is, and I tell my guys, you've still got to have evidence there to do what you're going to do and you've got to be able to justify why you're doing [it], whether it's taking out an order or not. You've got to be able to justify it. I tell my guys that if you're going to do nothing, if it's either no DV or a DV other, which means DV is there but for some reason we're not going to do anything, that should almost be longer than an application for [a] protection order because you're justifying doing nothing when we've identified that DV is there but we're saying, "For whatever reason, we don't need to do anything right now". But you've got to word that up and 90 percent of coppers do the right thing most of the time. I think we articulate things poorly sometimes and I think that comes back to training. (QPS focus group 9 [GDOs])

Participants also cited a number of organisational barriers to investigating incidents thoroughly and being able to establish the context and history of a relationship, contributing to the risk of misidentification. These included:

- lack of resourcing, stress and the high volume of incidents GDOs have to attend in a shift
- onerous paperwork

- inexperienced officers attending DV incidents
- unhelpful policies, procedures and systems of review.

Although not directly resulting in misidentification of the person most in need of protection, these issues underpinned the frustrations expressed by many police officers about what was expected of them in their role and negative attitudes towards DFV incidents generally:

I'm not a relationship counsellor, I shouldn't be expected to be. So, when we go to a DV incident and we sort it for the night, then that's where other people need to come in and it should be their responsibility to then go and sort that relationship as opposed to that falling back to us. (QPS focus group 9 [GDOs])

The paperwork, the policies, the procedures are all, as far as we're concerned, written by people that are in an office and are not frontline police. And do not have a recollection of what being a frontline police officer is all about. They're needlessly time-consuming. And where you could respond to that many more incidents if we weren't tied up with one for a half to three quarters of the shift. And it's not like we don't want to do it. It's just so needlessly time consuming ... (QPS focus group 2 [GDOs])

The lack of clear policies and guidance was a particular issue. As noted earlier, the inconsistencies of practices communicated across and within QPS focus groups were substantial, with participants discussing different messaging about policies and guidance on what responses were expected in different situations. The varied practice in relation to cross-applications was most relevant to this research. Although there appeared to be widespread understanding that cross-orders were discouraged, the reasons why were not necessarily clear and guidance on determining who was most in need of protection was limited:

I think where they get confused, especially the juniors unless they're taught, they go in with that attitude, they go in with, "Who's the aggressor? Let's take action against the aggressor." So, that's the change in behaviour for the police—change in culture I suppose is what we need which is what they're [inaudible] heavily focused on now and the chiefs always said—and to our defence, we're very busy so they don't have a lot of time. (QPS focus group 7 [DVLOs, police prosecutors])

In terms of culture and attitudes, participants discussed that some aspects of the police service had improved in their understandings of the dynamics of DFV and referred to cultural change projects within QPS that may improve officers' responses to DFV incidents. Despite this, racism, poor relationships with local communities, misogyny, and the patriarchal culture of the police service (including the continued predominance of male police officers) were continuing issues raised by participants when discussing misidentification. These attitudes and cultures were most evident in women's experiences of police attendance (see section on racism and past experiences of police, above), including police not acting on women's allegations and a lack of compassion or respect in their interactions. Service providers explained that these attitudes and cultures also informed police conceptualisations of violence and women's conformity to the concept of the ideal victim.

[Participant 1:] There's still some attitudes in the police where I'd almost say it's misogynistic to some degree, that they see a lot of women as utilising domestic violence as a means for child custody issues and things, a means of control over a male ... I wouldn't say that they're a majority, I'd say they're quite [a] small minority.

[Participant 2:] Yeah, I think it's getting better, I honestly think the culture is improving. (QPS focus group 4 [VPU])

Consequently, both service providers and some police participants thought more training and education was needed to improve policing responses in relation to determining the person most in need of protection. Police wanted more training to keep up with quickly changing policies and procedures:

[Participant 1:] It's up to an interpretation really. It's up to the officer's interpretation of what's happening.

[Participant 2:] And that's hard, because yes, you've had all these advisory committees and all of these recommendations—awesome. Do you want to give us some training in this stuff? We're the ones that are responsible if someone potentially dies.

[Participant 3:] Especially when you've got 20-year-olds and 21-year-olds that are fresh in the job go on DVs ... I never came from that background ...

[Participant 2:] No, neither did I.

[Participant 1:] No, neither did I!

[Participant 3:] So we're going to these jobs, and you're just—we're supposed to know what action to take. (QPS focus group 8 [GDOs, DVLOs])

[Facilitator:] So, would you like to see more training?

[Participant:] 100 percent. So, I've done up training packages as a DVLO for this station, I've done up training packages for my guys and tried to get our teams through that refresher training—and in reality, it probably happens every couple of years, maybe I get the teams through for a couple of hours' session. But pretty much everything we learn is just by osmosis or trial and error. (QPS focus group 9 [GDOs])

Service providers emphasised the need for further training on defensive violence and understanding the dynamics of DFV. However, they stressed that training needed to incorporate gendered understandings to be effective:

Sometimes [another worker] feels that it actually gets worse after the police do training, so often you'll make recommendations out of this report, please do training, but it actually gets worse after that because the training is often provided to police in a non-gendered way and it's like well everyone can be a victim of DV and it's then like they put that into practice. (Service provider focus group 1)

My concern too is you can train them and you can put change-makers in there and you can have those ripples. They're still within the system they're in which is a system that doesn't allow them to do certain things for reasons such as that they're patriarchal and entrenched and it's the culture. (Service provider focus group 2)

As one woman observed:

They need more training. Like sister girl said, they need way more training because they need to put their feelings away to work. Work is work and your feelings and emotions shouldn't get involved in your work. Because that's where a lot of miscommunication and false things get dealt with. (Women's focus group 2)

## Systems factors

A key finding that emerged from this research was that a number of processes and structures within the legal system create barriers for multiple actors in identifying and responding appropriately to the person most in need of protection. These factors were connected with individual police practice and organisational factors, but were distinct phenomena; they were evident in prosecution and court practices following police intervention, but also emerged as gaps in the legal system's operation as a whole.

Of particular concern was the lack of accountability or systematic review of DFV cases to ensure they were being brought appropriately. For example, in relation to police intervention, a major theme emerged that police, prosecutors and courts each defer to the other's assessment of who was in need of protection. As discussed above, police often preferred to leave the determination to the courts when they were unsure. Many prosecutors were confident they operated as a critical point where inappropriate applications were filtered out, yet participants from those same focus groups described processes that meant prosecutors deferred back to the original police officer's decision when an application was queried:

Because that's what I always say—it's up to the magistrate to decide what happens. I'll put forward what I have done, but at the end of the day, it's the magistrate, not me. So that onus is on the court system then, not us. So I'm like, "If they don't accept it, that's up to them. So you have an issue, go to them." Because I'm like, "We can only do so much." (QPS focus group 8 [GDOs, DVLOs])

[Participant:] Obviously it starts at the start where the application is brought by police but the whole process that you go through of going to court and the investigative side of things that we take on when we are prosecuting the matter to make sure that all our bases are covered, I think that would even lessen—

[Facilitator:] It weeds it out along the way.

[Participant:] Yeah. (QPS focus group 7 [DVLOs, police prosecutors])

But when it gets to the courts, we're now looking at it going, okay, okay. So to figure this out we either need

to go back to the officers, and say, “Look you’ve done this, okay, well you’ve done it now we can’t say you did wrong, but why did you do it, and what was your gut feeling? When you spoke to both of them you believed that protection needed to be made, sure, who was your first thought? Who’s your first reaction to go, ‘you need protecting more?’” (QPS focus group 1 [DVLOs, police prosecutors, GDOs, victim support personnel])

This circular decision-making process was evident in how requests to withdraw police applications are dealt with:

So the submission goes to prosecution, then prosecutions have to speak to the applicant officer and get their position or their view on that submission or request to withdraw, and quite often it stands. (Service provider focus group 3)

Some officers go, “Look, if the aggrieved doesn’t want it—I only did it because I had to. I don’t care.” But from our inspector’s point of view, our Inspector [Name] will not withdraw unless the officer’s on side. That is a big consideration. (QPS focus group 6 [police prosecutors])

I do wonder, police so very rarely withdraw applications and it’s just I think caused so many problems with matters that we come across, whether or not they have any checks and measures that they can take after the initial [attendance at the scene]. (Service provider focus group 1)

Magistrates were seen as best positioned to decide who was in most need of protection, and some good practices were described about how individual magistrates interrogated evidence and tried to obtain context and history when considering an application. However, the magistrates interviewed explained that they had to rely on the evidence put before them or what the respondent was willing to tell them in court, and were equally resource-constrained as police:

But I need information. I can’t get that, particularly from a respondent, because all I have on a ... mention, I only have the police application, so any information I get I have to elicit from the respondent, and that means a conversation. (Magistrate interview 1)

And sometimes it’s put that, “Look, we don’t know who’s more in need of protection here, so we’re just going to take an application out against both parties and leave it to the

court to decide.” And really it makes it difficult for the court. Because when we have those civil application lists, where I’m talking about where I can have 70, 115—there’s a lot of information that the court has to get through in the day. Sometimes we have the opportunity to read some of the material beforehand, often not—more frequently not. And the information—if the information isn’t in a form which is of assistance to the court, it’s then difficult for us to determine who’s more in need of protection. And so I think that’s part of the problem, is that in the application it’s got a section for grounds for the protection order to be made. It depends upon the police officer asking the right questions, putting the information in a way which is relevant: that it’s reliable, and that it can help inform the court about which party might be more in need of protection. (Magistrate interview 4)

The combination of these approaches by police, prosecutors and magistrates essentially creates a pinball effect where the determination of who is the person most in need of protection is pushed off by each decision-maker to the next point of contact in the system. In these circumstances, the person most in need of protection may not be determined at any point in the system, and misidentification may not be resolved even where it is detected. This is compounded by police, prosecutors and magistrates relying on information becoming available at contested hearings. A number of participants discussed that the relationship history is usually not discussed at mentions, leaving a critical gap in assessing who was most in need of protection. This is particularly dangerous where police had made an application as a matter of caution, assuming the magistrates would make a more informed decision:

That’d be great. If they [magistrates] ask for all previous interactions. But at the mentions it doesn’t happen. Unless we tender at a trial it doesn’t really happen for us. (QPS focus group 6 [police prosecutors])

But I don’t know how you make findings about who’s in most need of protection without a hearing, because you’ve just got an allegation and counter-allegation. And you can look at one incident and, ultimately, that one incident will have “He did this; she did that”. Without a hearing, you can’t determine who’s in most need of protection, unless they give you a lot of background information, but

that background information is then usually contested. (Magistrate interview 5)

Relying on this system is deeply problematic where orders may be made without the respondent's knowledge, and women commonly consent to orders, either out of exhaustion or because they are pressured to do so. Both of these systemic issues left victims/survivors vulnerable to criminalisation for breaching orders they were unaware of or inappropriately take out, and an overwhelming sense of injustice that the system was not there to support them and that they were not heard at any stage in the process. This highlights the critical need for effective legal advocacy and adequate investigations to be conducted *before* applications are made:

The next few days the police come to my home and said, "This has been placed on you, a 5-year order." So they took it to court without me being there. (Women's focus group 1)

So I ended up getting a lawyer, paying \$1500 for poor advice. He said, "Just let it go through. Get it [sealed] on the day. It's not going to cost you. To fight this, it will cost you \$15,000" and I thought, "Well, don't really have—I don't have \$15,000 to fight rubbish." So the lawyer and I went to the court and then he did—he hasn't showed up once, he just sends lawyers every time because he's wealthy, and then basically, they came to some sort of agreement and both of them [cross-applications] went into the system. (Woman's interview 1)

[Participant 1]: Like I've had a couple of clients, these are the ones that didn't speak English and I was able to get Legal Aid, they were successful in getting Legal Aid to fight this. Yeah, that's like a huge battle and luckily they were able to ... but then they got a preferred supplier, private lawyer ... who just said "Well consent, what's your problem?" kind of thing ...

[Participant 2]: "It's not going on your criminal record, it's alright, don't breach it then you'll be fine."

[Participant 1]: Then that's the problem, if they say, "No, I don't want to consent" they then write to Legal Aid and say, "They're not following instructions, cancel that Legal Aid" and then they're back exactly where they started. (Service provider focus group 1)

There was also confusion about whether magistrates have the power to strike out applications, even where they assess an application has been made inappropriately. According to some participants this either resulted in temporary or final orders being made against each party or matters being adjourned for a further hearing, and therefore subjecting victims/survivors to prolonged involvement with the legal system:

So, there's differing opinions because there's no Court of Appeal authority to say at what point you can strike out a matter. So, all magistrates have different views on at what point you can strike out a matter. (QPS focus group 6 [police prosecutors])

I don't believe that I've got a power to summarily dismiss that vexatious application which is on the basis of "I want an order because she's got an order". But I'm reluctant to issue anything more than ... if there's some issue about uncertainty or doubt to make an order other than ... the mandatory conditions. (Magistrate interview 2)

I'm hoping that ends up in the right space where it's ultimately his application's struck out and I was conscious with that, I didn't strike out his application. I disallowed a temporary order and said the matter could go on to hearing. (Magistrate interview 3)

Further, participants across many groups agreed that, once made, protection orders were virtually impossible to revoke, and that victims/survivors are left to try to obtain a variation of a final order with no support:

So now I have to go all through the court process again. And then that's the other thing, it goes all through that, you don't get to appear, you have to get it revoked, but then you have to put your physical and mentally draining moments through it again just to try and have the strength and not stuff up and then give the system something to use on you. So it's such a merry-go-round. (Women's focus group 1)

Now I'm a bit stronger, it will be good to be able to go back and say, "Look, before, I wasn't—I didn't have \$15,000 to pay a lawyer to fight this, but now I'm able to", but you actually can't get rid of it. (Woman's interview 1)

The following extended exchange from a police prosecutor focus group captures how these multiple gaps in the system play out in the case of subsequent cross-applications:

[Participant 1:]: If say he took an application against her out 2 years prior and ... police then take out an order against him and that order against her is still on foot ... the police aren't applying to vary the order against her to make it end immediately. You wouldn't see that. I don't think a police officer would do that.

[Participant 2:]: We'd leave that up to her to do that.

[Participant 1:]: She could do that if she really wanted. But I can see that that's a set of circumstances where both parties might find that they have [orders on foot]. And then obviously we as prosecutors wouldn't really have much of a say in the matter I don't think.

[Participant 2:]: On the old matter at least. We'd just acknowledge it to the court and then—

[Facilitator:]: And go with the new matter.

[Participant 2:]: ... advise the court that it exists and then just say, "But we want an order for these reasons".

[Participant 1:]: And the magistrate, even if she did have all the files before the court ... they don't actually have jurisdiction I think to revoke that order.

[Participant 2:]: No, they don't. (QPS focus group 6 [police prosecutors])

The combination of these processes meant that there was no shared understanding of who was accountable for determining the person most in need of protection or correcting misidentification once it occurred. The most concerning gaps in the system appeared to be that good practice was highly dependent on the individual police officer, prosecutor or magistrate on the day being advised or recognising misidentification had occurred and taking action to remedy it. This was particularly the case where cross-orders were made at different points in time:

If there's a female respondent and *we receive the heads up from anyone* that it could be she's actually the true aggrieved, it doesn't just go by the wayside. There's a bit more digging done. It doesn't mean that that initial PPN goes away, but

there's further digging and things may change. (QPS focus group 6 [police prosecutors], emphasis added)

I think that in itself, is very alarming that you've got a system and you've got responses that are so dependent upon a particular individual and individual circumstances on that day, that that's directly impacting someone's safety. (Service provider focus group 2)

One of the magistrates interviewed gave a very concrete example of the point made by the service provider above. In this case, several years had passed between the two protection order applications, and it was by chance that both applications came to the same magistrate, who remembered the name and the original application and order. The inconsistency in the quality of police practice is also highlighted in this case, and illustrated in the discussion below.

All I saw was the application by police ... I remembered the name ... [Some years ago], the police made an application for her [an Indigenous woman]; she had been punched in the face with a closed fist, her nose was broken. Police were fantastic: did a brief of evidence, did a body-worn camera footage interview with her. She would not give police a statement, she would not attend the hearing ... The concern I had about this [in the second application mention] is she didn't attend; she'd been served and did not attend ... Original file wasn't brought to me, I just remembered the names ... All applications should have come up together. It's in the legislation ... But the police application, unusually, did not identify there was a prior application. My prosecutor actually went and looked on the police system and discovered that this woman had made [multiple] reports to police of incidents of domestic violence; no follow-up. So [in the second application mention], anybody else who'd been sitting where I was, an application against her served, 5-year final order. And that would have been an atrocity. (Magistrate interview 1)

The same magistrate also recalled an example of misidentification resulting in an application against a woman, where it was appropriate to make a cross-application:

So my prosecutors took her, made a cross-application and discontinued the application where he was going to be the aggrieved. And that was just a good pick-up, because

we had—with a stable working group of people you just know when something's off. (Magistrate interview 1)

This finding is especially concerning alongside service providers' views that responses relied on the individual police officer, magistrate and court and that practices were inconsistent and varied widely day-to-day. These systemic gaps not only leave women without legal protection, but fail to hold the perpetrator accountable and create an environment where systems abuse could be perpetrated. For women, it left a sense that the system operates independently of any of the legal actors participating in it, leaving them with little avenue for advocacy or justice within it:

I got real angry, yeah, but I don't want to be angry because that's what they want me to be. So I try and do things that I used to like doing, but just that one little thought of my kids, "Are they all right?", just sets me back because it feels like there's no justice, not at all. (Women's focus group 1)

[Participant 1:] And they just strip that from you. They strip us as women, you know what I mean? They take you to jail and they just put you—

[Participant 2:] Make you feel like a bad mum. (Women's focus group 2)

[Participant 1:] If you're sitting there and you've named a victim as a respondent, she's lost absolute faith in every system there is. Why wouldn't she?

[Participant 2:] Well, it's like double victimisation. (QPS focus group 7 [DVLOs, police prosecutors])

The impacts of these systemic failures on women and implications for legal responses more broadly are discussed further in the next section of the report.

Different strategies to improve accountability and the system generally were discussed by participants. The VPU appeared to model best practice in some locations, with women, service providers and police all indicating that they improved policing responses:

But it's not 'til you ask to speak with a [VPU] officer, it's a completely different attitude, completely different ... [VPU] are probably by far the best. (Women's focus group 1)

They've [VPU] done some great training, so quite often, I can advocate that way and they will really dig deep and engage in a respectful, gentle way and they'll really think about which officer they're going to allocate. (Service provider focus group 2)

The other thing we will do is we'll contact VPU directly and say, "Smith has been identified as a respondent. A female respondent. However, we feel that that may not be the correct course of action that we've taken." And then VPU may take up further enquiries as we go from there. (QPS focus group 6 [police prosecutors])

However, it was recognised that they were also under-resourced, relied on established relationships and were not always able to remedy mistakes once made. The Special Taskforce's system of reviewing DV incidents was more contentious, with a noticeable division between GDOs' frustrations with the added burden it created for their workload and other participants' views that it was a useful mechanism to improve compliance. However, a service provider focus group suggested it was subject to the same systemic barriers in correcting misidentification:

[Participant 1:] Now the Taskforce will still review that, and if they review everything, and they will do the pattern-based response, they will go back and look and see what's the most likely scenario here and they'll go back and ask questions, and if they find that actually that's a completely wrong decision those ones will get overturned.

[Participant 2:] Not always.

[Participant 3:] Not always, absolutely not always.

[Participant 2:] We have one at the moment where ... the Taskforce happened to be in the court support room on the day, sometimes they'll be there as well, and Taskforce definitely identified that she is the aggrieved and in most need of protection. So it was taken back to Taskforce to investigate further. That investigation has happened and they've advised us that the officer in charge will not change the decision so there's nothing further they can do and it's proceeding for her to be named as a respondent. (Service provider focus group 3)

Participants expressed highly conflicting views about whether legislative reform was necessary, with no consensus about whether the legislation was too narrow or too broad, or could be amended in any way. Specific technical legal issues were identified in a small number of focus groups that could be remedied, however:

- “loopholes” continue for police to make cross-applications by issuing a PPN at the scene against one party, and then applying for an order against the other party, despite cross-PPNs not being allowed
- there is confusion regarding whether the Act allowed magistrates to strike out applications described above.

Systemic reforms that were widely supported among participant groups were possible changes to policing and investigation models. The most popular of these were specialist DFV police units or co-responder models. Some police participants supported a specialist DFV police unit that would ease the pressures on GDOs and allow them to concentrate on making the scene safe, and allow those with expertise to make confident assessments about what response was required: “We’ve got specialist units for everything else ... the most serious thing plaguing Australia is domestic violence. Why do we not have specialist units?” (QPS focus group 2 [GDOs])

However, there was also widespread recognition this would require significant resourcing and difficulties recruiting people to these roles:

[Participant 1:] No one would work in it.

[Participant 2:] Yeah, a) no one would work in it, b) you’d have to have one at every station 24 hours a day, because we go to DVs all day every day. (QPS focus group 5 [GDOs, DVLOs])

Co-responder or embedded worker models were similarly desirable but resource-intensive:

I think the role that our embedded DV worker ... the experience she brings ... the ability to engage with people that are anti-police, it’s invaluable. So I’d really like to see that expanded. I guess we’ve just got resource constraints like everywhere in an organisation like the police, which limits our ability to be able to make the best use of that skill set. (QPS focus group 4 [VPU])

Other QPS suggestions included having “sergeants as your minimum level for DV investigation ... because they’re experienced in compiling briefs, they’re experienced in questioning these sorts of incidents and all that sort of stuff and gathering information” (QPS focus group 6 [police prosecutors]) or, for GDOs, “just something that can streamline the process” (QPS focus group 2 [GDOs]).

Ultimately, service providers and women wanted to see safeguards and review systems put in place to ensure thorough investigations were conducted and comprehensive information was obtained to inform legal responses:

I reckon there should be something put in place—one of these girls was saying before, like a follow-up thing. That you can’t just whip your hand up and say this and this and this has happened. Follow it through and make sure that it’s not going to happen again. And have the support from all parties. (Women’s focus group 2)

More than just a police officer should be speaking to these people that are involved in this domestic violence, regardless if they’re a respondent or not they need to speak to more than one person because otherwise it’s not fair and it doesn’t get heard, it’s just assumptions, that’s all that’s heard in court. (Women’s focus group 1)

[Participant 1:] [It’s the] disjointedness of the whole process ...

[Participant 2:] That’s what I would be asking for, could they review that? Because well obviously what we’re seeing [are] a lot of problems ... we’re not saying they’re deliberately making the wrong decision, however sometimes that can happen in a situation where they’re dealing with what’s just happened. However, clearly at the moment if they had to go all the way up it’s not making it all the way up there, so what needs to be done, so that there is that review system that does actually happen and is [effective]. (Service provider focus group 1)

In sum, a number of system-wide issues were identified by participants that created gaps in preventing misidentification from occurring, and correcting it when it occurred. These gaps are compounded by limited mechanisms to correct misidentification or communicate additional information, and

were critical systems-based features identified by participants as to why and how misidentification continued to occur.

## Impacts of misidentification

Women and service providers described a wide range of negative consequences for victims/survivors being identified as a perpetrator of DFV, including criminalisation, loss of housing and employment, and losing access to their children and communities:

Yeah, that's now taken a massive toll. I lost my house, my mortgage, everything. Took a massive toll now on my career, getting recruited. I'm in and out because of constant breaches. (Women's focus group 1)

I think the other impact with cross-orders and women being listed as respondents is as with any criminal and punitive process, their employment is impacted, their future opportunities are impacted, their options around their children's care are impacted. There are all these flow-on effects because now, you've got a DVO and you've been breached and you've got criminal charges, so no one looks any further. That's your record. (Service provider focus group 2)

Many of these consequences arose from the punitive operation of standard legal responses, including conditions attached to protection orders and criminal responses to breaches of protection orders or other criminal offending. In the context of misidentification, however, they had an additional layer of negative impacts on the women interviewed. These included making them more vulnerable to systems abuse by the actual perpetrator (see section "Systems abuse" above) and undermining their subsequent interactions with police and the legal system:

And then any time you talked to a police officer about it, you had to spend the first hour explaining that's not really how it looks because they don't—it's a cross-order, it's not that. (Women's focus group 2)

I think it's major impacts it has, because it's like that public identification and that really first interaction that women sometimes have with the legal system and they're identified sometimes after years of violence as the

respondent and I mean it's just a complete kick in the guts for them in relation to everything they've lived through and then the first thing that happens in a formal way is they're named as a respondent. Really from there on the trajectory for those women is really quite negative as you go through the legal system. Interaction with any kind of system afterwards, family law system, immigration system, calling the police like they are named then as a respondent. (Service provider focus group 1)

[Participant 1:] I actually felt like a bad mum just by ringing up for help and losing my kids. How the fuck does that work?

[Participant 2:] I lost my home. My house.

[Participant 1:] You wonder why people get flogged ... and don't ring the police and they keep their kids. Wonder why. (Women's focus group 2)

These consequences 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:

I turned to alcohol and drugs. Just wanted to die but I knew, you know, my kids, I went away for a while on the run. (Women's focus group 1)

At a personal level, this also translated to deeply felt impacts of misidentification on their self-worth, with many women expressing shame, humiliation and social isolation. This was 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:

[Participant 1:] That's where they get us all the time. Next time but, you're going to be in that position again and sacrifice your kids? Think about that one, because you might [not] want to make that fucking phone call to the cops just so that ...

[Participant 2:] ...when I rang the cops for help I lost my kids.

[Participant 1:] ... you're not going through all that bullshit again. (Women's focus group 2)

So, there's all these other—and obviously, women are using substances to cope with that trauma and that injustice and just complete silencing of them. So, then enter further criminal responses because now you're using and you're drinking and driving and all these other things are happening now because you're trying to regulate yourself in terms of the trauma that you've experienced that's incomprehensible and the injustice that's been layered upon that. (Service provider focus group 2)

Multiple service providers explained the broader effects misidentification could have in undermining systems' responses. Of particular concern was the failure to hold the actual perpetrator accountable and missed opportunities to provide support for the actual person in need of protection:

And it's completely taking focus away from who is doing more harm to who, what is the pattern of coercive control? There's no focus whatsoever on that. (Service provider focus group 2)

They are very vulnerable women and then it just means like [Name] said that because of that negative experience they don't want to involve the police later on, they're further entrenched in this abusive relationship. Where that could have been an opportunity to then link to services and get help that doesn't happen, yeah and there's a lot of mistrust. (Service provider focus group 1)

Service providers also indicated that victims'/survivors' distrust of the legal system constrained support services' ability to advocate for victims/survivors to seek protection from the legal system:

I agree about that reluctance to contact the police because we talk about safety planning and what to do in an emergency and we will sometimes have those responses where you say, "Please, if it's an emergency, call the police, ring 000" and they'll say, "What good it did me last time?" and you can tell that that's not going to be part of their own safety plan. (Service provider focus group 1)

So, I've got a couple of women who've got these cross-orders or have only got orders listing them as the respondent,

they don't have a cross-order in place and every time they call the police because they're fearful for their safety and for their life, straight away, police don't make any further assessment. She's the respondent and that's it. They don't manage anything at all ... and it's hopeless then trying to advocate back to those systems to have a reflection on the situation because they've made their minds up and that's it and it doesn't matter. (Service provider focus group 2)

A number of service providers and a small number of women noted that these consequences were often amplified for Aboriginal women, both in terms of social isolation from their communities and because of historic distrust of policing responses:

[Participant 1:] There's additional layers to that for Aboriginal women, like the shame and the absolute community repercussions and ripple effects around—

[Participant 2:] Because everyone knows everyone in Indigenous communities. If something happens, everyone knows by the afternoon. Doesn't matter how strong a DVO you have on the other person, they still find out somehow. (Service provider focus group 2)

I think I've noticed 'cause we get a lot of Aboriginal women in [location] and their first instinct in general is not to call the police but when a number of clients—I ask them when they have, it's been very negative towards them and then I think one of them said words to the effect, "Oh I'd rather die next time than call the police", so it just sets a really bad precedent where they just don't want to do it anymore. (Service provider focus group 1)

[Participant:] So that's my consequences. I wasn't allowed to go back home. And I'm the type of girl that we actually grew up fishing, hunting, camping. So I learnt that from my parents.

[Facilitator:] So you're isolated from your community?

[Participant:] Yeah. [Inaudible] me being in here, not having that ocean view and that sea breeze. That's my little zone for where I can calm down. And me being away from that was really—yeah, it hurt me. (Women's focus group 3)

Although only service providers and women were directly asked about the consequences or implications of being misidentified as a perpetrator of DFV, a small number of QPS personnel communicated views that suggested GDOs in particular may not comprehend the considerable and extensive negative impacts that can result from failing to accurately determine the person most in need of protection early on:

Or as I had one officer at a contested DV say to me, “I don’t see the big deal, it’s just a piece of paper”. Yeah, right. She could have been sent back to [country] and he couldn’t give a shit. Very annoying. (QPS focus group 4 [VPU])

[Participant 1:] It doesn’t mean that they’re completely unprotected forever and a day just because in that moment they ended up being the respondent given their actions at that incident ... So I think we forget that it’s not we’re protecting one person against the other, we’re just trying to make sure that people treat each other okay. I think that got lost.

[Participant 2:] And the way that the legislation has been changed too, it’s to identify who is in need of protection more, which is ...

[Participant 3:] Who’s the aggrieved?

[Participant 2:] Yeah, which is more necessary and desirable to protect.

[Participant 1:] Yeah it doesn’t mean the other person is forgotten about. (QPS focus group 5 [GDOs, DVLOs])

These views were only expressed by a small number of participants interviewed for this research. However, when considered in the context of the far-reaching and considerable injustices women had experienced as a result of misidentification—often from the point of police attendance onwards—and the ways in which systems failed to correct misidentification once it had occurred, these views are a concerning example of the disconnect between perceptions of actors within the system and those subjected to it about the negative impacts of misidentification. As one service provider commented:

I mean that beginning conversation is so important and if you get things wrong there it’s just a nightmare after that. (Service provider focus group 1)

## Case study: Julia

The experience reported by one interview participant, Julia,<sup>32</sup> in being named both an aggrieved and a respondent on cross-applications, demonstrated the interplay of a number of themes communicated by other research participants and observed to a lesser extent in courts. They include coercive control, systems abuse and the misidentification of the aggrieved/respondent, and their impact on Julia. The experience she described in her interview has been summarised here as a case study to illustrate the complex interactions of different factors that can contribute to misidentification, and the far-reaching impacts these can have on the actual victim/survivor of DFV.

<sup>32</sup> Julia consented to her experiences being included as a case study. In addition to using a pseudonym some details have been edited for anonymity. Although Julia was referred to the study by QPS personnel who were aware of her case and Julia offered to provide supporting documentation, no details or data were provided by QPS or the courts to inform the case study. It presents Julia’s experience as she described it in her interview.

## Julia

In 2019, Julia was attacked on three separate occasions by her male intimate partner, with whom she was living at the time. On all three occasions, Julia believed her then partner was going to kill her. One attack involved strangulation. In a second attack, on the roadside, he approached Julia from behind and dragged her down to the ground by her hair, causing her to hit her head on the concrete. On the third occasion, he attempted to suffocate her.

Julia left the home she shared with him 1 week after the attempted suffocation and then reported all three incidents to police. As a result, she was granted a temporary domestic violence protection order with a no contact condition.

Approximately 1 week after Julia attended the court hearing to finalise the domestic violence order, she returned to the police to make formal complaints about the criminal offences related to her former partner's attacks on her. She believed the domestic violence order afforded her the level of protection she needed to feel comfortable reporting and pursuing criminal charges. As a result, detectives from the Criminal Investigation Branch commenced investigations into three separate criminal charges from the incidents—strangulation and suffocation in a domestic setting, and assault.

Three days after the domestic violence order was granted, Julia's ex-partner arrived at a restaurant where she was having lunch and sat directly in her line of sight. Panicked and believing that he was breaching the conditions of the domestic violence order, Julia asked security to remove him from the venue. Security called the police who, on arrival, explained to Julia that she only had a "no contact" condition on her order, not the "no approach" condition she believed she had.

The following day Julia's ex-partner went to the same city police station that she had been attending to deal with her matters and spoke with the officer who had applied for her protection order. The next day, Julia's ex-partner flew to a regional Magistrates Court and successfully lodged a private application for a temporary protection order naming Julia as the respondent.

When Julia received a copy of the application lodged by her ex-partner she saw that it contained fictitious and exaggerated claims against her. It also contained quotes from the police officer who had applied for the original order to protect her, describing her as "dangerous" and "crazy".

As a result, Julia made a formal complaint regarding the officer making inappropriate comments about her, and sharing her personal information with her ex-partner. Several months later she received a letter from QPS stating that the matter had been investigated and her allegations had been substantiated. The letter also advised that the police officer was consequently required to do additional training.

Julia received legal advice on her options regarding her ex-partner's private application, including that the cost of contesting the application would be \$15,000. She did not contest the application, and agreed that the domestic violence order be made with "no admissions".

Julia and her ex-partner worked at the same organisation but he was more senior than her. He showed the domestic violence order naming Julia as the respondent to others in their workplace and used it to damage her reputation, particularly with those in the higher ranks of the organisation. He then made a complaint of workplace bullying, threats and harassment against Julia, resulting in her being investigated. He also tried to frame her with a fake phone call log.

Julia became worried that she would get "thrown in jail" before the criminal matters related to his violent behaviour were dealt with. She was afraid of talking to the police because she thought they were going to arrest her, or disclose further information to her ex-partner. Eventually, due to fear, stress and anxiety Julia quit her job with no other job to go to.

A representative of Julia's workplace advised her they were not required to investigate the alleged violence against her by their employee/her ex-partner because it had occurred out of work hours and was criminal in nature: they chose not to investigate her allegations.

Julia then tried to find a legal avenue to go back and fight the DVO that had been made against her but was informed by police this was not an option because protection orders cannot be revoked after they have been granted.

Here, exhibited in just one woman's experience, are several examples of the systemic failings and tactics of coercive control discussed in the literature and evident in the focus groups and interviews with police, service providers, women with lived experience and magistrates. The following examples were raised or corroborated in focus groups or interviews across the four participant groups.

Despite being the respondent of a protection order, and facing several criminal offence charges, Julia's ex-partner was able to manipulate the legal system to further his abuse and control of her. A police officer either knowingly or inadvertently colluded with him, and a magistrate failed to detect that the application for a protection order against Julia was a cross-application. Therefore, no consideration was given to the person most in need of protection. It also appears that little or no consideration was given to whether or not the temporary order naming Julia as a respondent was necessary or desirable.

Having manipulated the legal system to obtain a protection order against her, Julia's ex-partner was also able to manipulate administrative systems within their shared workplace with serious consequences for Julia's reputation, health and employment. Despite evidence of these coercive control tactics and systemic failings, the only avenue available for Julia to defend herself against her ex-partner's DVO was to contest the application at a hearing, which was prohibitively expensive. The fact that she had no recourse once the DVO had been made against her highlights further the problematic reliance of policing responses and the legal system on victims/survivors having sufficient means to defend themselves against DVO applications made inappropriately, even where there is evidence of coercive control tactics by the perpetrator and demonstrated failings by police and courts to establish who is most in need of protection.

## Court observations

The three court observations conducted for this research provided insights into the environment experienced by victims/survivors subject to cross-applications and cross-orders, and in which police prosecutors and magistrates exercise their

powers under the *Domestic and Family Violence Protection Act 2012* (Qld). As the observations conducted were short in duration and limited to what was discussed by parties in the courtroom, only a small number of practices specific to cross-applications or determining the person most in need of protection were evident on the days observed. Researchers' impressions of the practices have been summarised here, along with more general observations about the differences and similarities in the environments in which the three courts were operating. To preserve the anonymity of the sitting magistrates, the courts are identified by a number rather than by location. The number allocated to each court was chosen randomly: it does not represent the order in which the courts were observed, nor does it relate to population or any other attribute of the location. The number allocated to each court is used consistently throughout this section of the report.

Courts 1 and 3 were busier and had more disruptions to court proceedings than Court 2, with numerous court staff, support people and legal representatives coming and going throughout proceedings. Some of these differences were a result of specific courtroom arrangements, with the busier courts having separate entrances for the aggrieved and therefore more movement in different parts of the courtrooms. The individual magistrates' demeanour also affected the atmosphere of the courtrooms, with magistrates on Courts 1 and 2 having a warm and personable approach, in general, while the magistrate in Court 3 set a more formal, procedural tone. All magistrates established their authority through tone and expression when addressing respondents and legal representatives.

The differences in atmosphere and magistrates' demeanour were difficult to compare, noting there were significant variations in the volume and pace of matters. Court staff indicated that on the days observed, Courts 2 and 3 had a relatively low volume of matters. Excluding non-appearances/Ex parte applications (which, by their nature, were primarily dealt with via paperwork), only nine matters were observed in Court 2 and 25 in Court 3 over the full day. Sixteen appearances were observed in Court 1 by mid-afternoon, however court staff advised most matters had not been ready to proceed early in the day and numerous cases were still awaiting mention at the time the observation period concluded.

The time taken to deal with matters varied across the three courts. Some matters in Court 3 took less than 10 minutes, creating a busier atmosphere due to the quick turnover of matters. On average, more time was spent on matters observed in Courts 1 and 2, however they both appeared to deal with more matters with complex logistical or evidentiary issues on the days observed, such as needing to obtain interpreters, make further enquiries or contact different parties not present at court. In Courts 1 and 2 there were a small number of references to cross-applications during magistrates' discussions with prosecutors and other parties. There were no such references to cross-applications in Court 3.

It was not possible to establish if the apparently larger number of complex matters and the presence of cross-applications in Courts 1 and 2 were a matter of chance, or reflected different processes and practices in those courts. Practices in Court 2 were more flexible than in the others, with the magistrate adopting a more enquiring stance attuned to safety to support decision-making, while others relied on the evidence presented to satisfy the legislative requirements. The magistrate in Court 2 frequently stood down matters to allow evidence to be gathered, contact witnesses or parties who were not in attendance, or obtain interpreters, and made further enquiries with prosecutors and directly with the parties themselves to establish the safety concerns involved and practical arrangements that needed to be put in place via the protection order conditions. Although these practices were also observed to some extent in Courts 1 and 3, adjournments were much more common and interactions between courtroom actors were more procedural, possibly reflecting the higher volume of matters the magistrates had to deal with on the days observed. Further, the magistrate in Court 3 appeared to use a number of non-verbal case management practices, such as using a "live" electronic case list document, meaning less discussion occurred in court. These were efficient case management tools, but may have masked the complexity of the matters being dealt with, the number of cross-applications being considered and the practices used to determine the person most in need of protection.

In relation to cross-applications and determinations of the person most in need of protection, the researchers observed some practices that were consistent with interview and focus

group data. These included at least two matters where there had been procedural failures to ensure simultaneous cross-applications were heard together, which were only identified by the magistrate making further enquiries. There were also a small number of matters where a respondent to a police application or PPN was directed to make submissions directly to police to vary the conditions, rather than it being resolved by the court, although one private application was struck out by the magistrate due to a lack of evidence of DFV.

## Summary

The findings from interviews, focus groups and court observations presented in this chapter paint a complex picture of the circumstances in which (mis)identification of the person most in need of protection can occur in Queensland. The three court observations conducted for this research provide insights into the environment experienced by victims/survivors subject to cross-applications and cross-orders, and in which police prosecutors and magistrates exercise their powers under the *Domestic and Family Violence Protection Act 2012* (Qld). Interviews and focus groups with magistrates, police, service providers and women with lived experience in Brisbane, Southport and Townsville indicate there are numerous factors that drive policing and legal determinations of who is most in need of protection, which cannot be addressed in isolation. These include how the use of violence is conceptualised by legal actors, systems abuse tactics used by the perpetrator, poor police practices and system-level gaps and weaknesses. The complex interplay of these factors is well illustrated in the experience of Julia, a participant interviewed by a member of the research team, presented as a case study. The findings in this chapter also illustrate that the impacts of being misidentified as a perpetrator of DFV are serious and far-reaching for victims/survivors, and emphasise the need for improved policing and legal responses in determining the person most in need of protection.

# Discussion

The introduction of this chapter recaps the context of the research, setting up the discussion of its findings. The structure for the discussion of the findings is drawn from the research questions. The chapter includes, therefore, discussion on the legislative and policy guidance for police and courts, nationally, regarding accurate identification of the perpetrator of DFV, and areas for improvement; legislative, policy and practical factors that enable or hinder Queensland police in identifying the person most in need of protection; challenges in this regard and improvements that can be made; and areas for improvement to the broader legal system structures and processes.

## Introduction

Although the impetus for this research was a recommendation of the QDFVDR&AB (2017) to investigate ways to improve the identification of the person most in need of protection, a broader focus on “misidentification of DFV aggrieved/respondents” was initially taken. This broader conceptualisation responded to terminology used in recent Australian research, and concern that the term person most in need of protection was specific to one jurisdiction (Queensland). The research has, however, uncovered the limitation of the term “misidentification” from the perspective of those applying law, policy and guidelines in complex, “situationally ambiguous” (Durfee, 2012, p. 65) settings. Further, the concept of person most in need of protection is used in law to some extent in jurisdictions beyond Queensland, and in other jurisdictions concepts such as the primary person have the same intent.

The Australian and NSW Law Reform Commissions urged the use of the person most in need of protection concept to improve police training, codes of practice and guidelines to support identification of “persons who have used family violence and persons who need to be protected from family violence, and to distinguish one from the other” (ALRC & NSWLRC, 2010, p. 78). It represents another milestone in the decades of work reported in the literature review: the aim continues to be stopping the legal system treating victims/survivors of DFV as perpetrators. In some jurisdictions person most in need of protection is used as an alternative to terms such as predominant aggressor and primary person. Yet, subsequent inclusion of the term as a fundamental concept

in the *Domestic and Family Violence Protection Act 2012* (Qld) has not solved the problem. As shown in Chapter 3, for the three-year period (2015–16 to 2017–18) in Queensland, of all dyads with applications (n=75,330), about 12 percent (n=8779) had cross-applications, and of all dyads with orders (n=67,409), approximately 9 percent (n=6257) had cross-orders. This suggests that a relatively small percentage of cross-applications are being caught and addressed by courts. However, there are other reasons that a cross-application may not be converted to a court order, including that a victim/survivor has been coerced into withdrawing their application.

As noted in the introduction to this report, no prior research has explicitly sought to understand how the concept of person most in need of protection is understood and applied by police and magistrates when faced with ambiguity. The primary aim of this research was to identify strategies to improve police and court practice in regard to identifying the person most in need of protection, to avoid the making of cross-applications and cross-orders. Given the impetus for the research and the time and resources available for it, the research team used Queensland as a qualitative case study site. Three of the five research questions focused on policy and practice in that state.

It was apparent from the prior literature at the outset, however, that other jurisdictions face similar challenges to accurate identification of DFV aggrieved/respondents, and two of the research questions took a national perspective. It is anticipated that at least some of the insights from this research will be of value to all jurisdictions as they seek to ensure that legal responses to violence against women are effective.

## Findings

The five research questions are paraphrased and represented as section headings below. They structure the discussion of the research findings, which were thematically aligned to prior literature addressing the misidentification of victims/survivors as perpetrators of DFV. Further, to enable the discussion to flow and to avoid repetition that arises across the set of questions, the results of the research are not discussed directly in the order that the questions were conceived and

appear above. The first two sections address questions 1 and 3. These are focused on legislation and policy nationally and in Queensland, respectively. The third section addresses questions 2 and 4—challenges in identifying the victim/aggravated and improvements that could be made. Finally, the fourth section of the discussion considers improvements that could be made for all Australian states and territories in ensuring that victims/survivors of DFV are not misidentified as perpetrators.

The authors of this report acknowledge the significant improvements in the response of police and courts to DFV and that there are many examples of excellent practice, including some reported in the results of this project’s qualitative study in Queensland. Further, as indicated in the limitations of the research, the views and practice evident in the focus groups and interviews are not necessarily representative of police and court practice across Queensland. Consistent with the aim of the research, however, the findings focus on areas for improvement at an organisational level to assist police and courts in relation to determining the person most in need of protection, where there is ambiguity.

### **Australian legislative and policy requirements and guidance for police and courts**

Given what is known about the gendered nature of DFV, particularly coercive control in intimate partner abuse (Dragiewicz & DeKeseredy, 2012; Hester, 2013; Kimmel, 2002; Sichel, Javdani, Gordon, & Huynh, 2019; Swan et al., 2008; Wangmann, 2009) and women’s use of resistive and self-defensive violence (Boxall et al., 2020; Mansour, 2014; Ulbrick & Jago, 2018), the research team hypothesised that relative low counts of females in respondent data could indicate jurisdictions performing well in addressing power and control dynamics, rather than focusing on incidents of physical violence. Unfortunately, due to the data limitations and there being very little publicly available information on South Australia’s policies and guidelines for police and courts, it is not possible to determine why this jurisdiction has a smaller proportion of female respondents than others. The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) does not have explicit provisions about identifying the person most in need of protection (or similar) but a set of principles

to guide application of the legislation does draw attention to the fact that “abuse may involve overt or subtle exploitation of power imbalances” (s 10[1][b]). The principles go on to say, however, that such exploitation may occur as part of a pattern of behaviour, or as an isolated incident. As seen in the literature and the results of the primary research in Chapter 4, treatment of DFV as an isolated incident tends to contribute to misidentification. Provisions related to cross-applications appear to be limited to private applications related to “non-domestic abuse” (see Appendix A). Factors contributing to South Australia’s lower rates of female respondents, compared to other jurisdictions, is an area for further research.

Inappropriate use of cross-applications and cross-orders is recognised as a concern nationally, with most jurisdictions having legislative provisions specifically related to cross-applications and cross-orders and recognising that abuse of legislation may occur through frivolous or vexatious applications. Queensland and Western Australia are the only two jurisdictions with explicit provisions related to determining the person most in need of protection to avoid cross applications, and only Queensland was able to provide data on cross-applications. In Queensland, police are prohibited from issuing cross-PPNs, but may issue a cross-application for a protection order in certain circumstances, including an inability to determine the aggrieved/respondent.

Some Australian civil domestic violence laws include reference to coercion among a list of behaviours that constitute domestic or family violence, but the concept is rarely explained or illustrated in ways that can be understood by legal actors who have no first-hand experience of the phenomenon. As noted in Chapter 3, the concept of coercive control can be difficult to explain and comprehend. In most jurisdictions legislation merely hints at the need to assess for power and control dynamics operating in domestic violence matters. This is done primarily through preambles or principles that affirm the gendered nature of DFV. They typically refer to women being predominantly the victims of DFV but go on to say that men can be victims too, without explanation of the gendered differences in relation to that experience and the broader social context of gender inequality. Some state and territory legislation, including Queensland’s, also refers to Aboriginal and Torres Strait Islander peoples,

among others, as people who are especially vulnerable to or experiencing particular impacts of DFV. Again there is no reference to broader structural inequality that may help in understanding the frequent lack of co-operation with police from Aboriginal and Torres Strait Islander victims/survivors in police intervention. This is also an important context for understanding the over-representation of Aboriginal and Torres Strait Islander peoples in the DFV data (Douglas & Fitzgerald, 2018; Nancarrow, 2016, 2019).

Police manuals and codes of practice are of course underpinned by provisions in the respective jurisdictions' legislation. Several jurisdictions had clear guidelines for assessing risk (whether risk of reoffending or risk of serious harm), but these assessment guidelines were to be applied following the identification of the alleged perpetrator. However, manuals and codes of practice available for public review contained little to no additional guidance relevant to addressing gendered dynamics and identifying the person requiring legal protection against future violence. This gap has previously been identified in Victoria (NTV, 2019; Ulbrick & Jago, 2019), and No To Violence has commenced work on the development of a "predominant aggressor assessment tool" (NTV, 2019, p. 20).

Judicial bench books and guidelines, also underpinned by legislation, are important resources for judicial officers in determining whether to make a court order. The *Victorian Family Violence Bench Book* (Judicial College of Victoria, 2014) recognises that men can be victims of DFV, but indicates that this is exceptional rather than common. It proposes a set of questions for judicial officers to ask if a man presents as an aggrieved, to establish that it is a genuine case and not an attempt at systems abuse to exert further control over their partner. Importantly, and in addition to discussion of systems abuse, the Queensland bench book notes that it is not possible for both parties to be victims and perpetrators "in an ongoing pattern of abuse" (Magistrates Court of Queensland, 2019, para 3.7).

Although not explicitly gendered in the way the Victorian bench book is, the best practice principles for applying relevant sections of the *Family Law Act 1975* (Cth) (Family Court of Australia, & Federal Circuit Court of Australia,

2016) include a list of questions for courts to consider when determining who the perpetrator is. Together, the Victorian and Queensland bench books and the Family Court and Federal Circuit Court guidelines may be the most useful guidance for courts currently available.

Social entrapment theory (Tarrant et al., 2019) offers important insights for the further development of guidance for police and courts. It provides a multi-dimensional framework for analysing the facts of any particular case involving DFV. The framework draws upon a significant body of literature on the particular manner in which entrapment is experienced by and compounded for women facing multiple forms of structural inequality (e.g. gender, racial and economic inequality). Applying social entrapment theory enables a court to make visible the perpetrator's pattern of abusive behaviour to understand how it constrains the victim's/survivor's resistance and ability to escape the abuse.

## **Legislative, policy and practical factors that enable or hinder Queensland police and courts**

### **Legislative considerations**

Considering the review of the literature and the results of this research, recent developments in Queensland legislation may be seen as a further effort to convey that civil DFV laws provide exceptional powers to address the fundamental concept of power and control, increasingly referred to as coercive control, in the legislation itself. However, based on the results of the quantitative and qualitative research findings set out in Chapters 3 and 4, the intention of the legislators has not translated well into some police and court practice.

The Queensland legislation states that "coerce, a person, means compel or force a person to do, or refrain from doing, something" (*Domestic and Family Violence Protection Act 2012* [Qld] s 8[5]). This phrase does not convey the gendered dynamics of power in relationships as the Explanatory Note and Second Reading Speech (2012) suggest it is intended to do. Education and training on the concept and specific legislative intent is needed, but as discussed above, organisational cultural factors also need to be addressed.

Participants across all groups in the qualitative study indicated the need for better enunciation of coercive control versus incident-based events. Some service providers queried whether there should be a test of intent in determining action to be taken under the civil law. They saw it as a framework for identifying self-defence or resistive violence in an ongoing pattern of abuse. Police also saw the potential for an assessment of intent, when determining appropriate action to take. Their rationale was to provide some guidance for police about when it is acceptable to take action other than applying for a DVO in circumstances of violence resulting from poor mental health, where a legal response is not appropriate. Others were less confident about the utility of a test of intent: one service provider who works with men who use violence said, “We’ve never met a man in the program that says, ‘My intention was to control her’, but they felt completely entitled to do so” (Service provider focus group 3).

Regardless of a test of intent or entitlement, however, and the exhortation that protection orders are “to stop the person who has power and control over others from causing further harm” (Queensland, 2012, p. 2), no state’s or territory’s legislation requires a context of coercive control for other acts of abuse to constitute domestic violence. For example, the definition of domestic violence in Queensland includes 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])

Western Australia defines family violence similarly in its legislation. Constructing the definition in this way enables acts of physical violence, for example, to be considered in isolation from patterns of power and control in relationships, despite the intent explicitly or implicitly set out in explanatory notes and parliamentary debates. As discussed in Chapter 4, this facilitates incident-based application of the law and

a focus on injury to determine the person most in need of protection.

Queensland police personnel also discussed the challenges for police operating in the civil law jurisdiction, stating that it is “not normal police business”. The civil domestic violence law, however, is not “normal” civil law. The Task Force that conceived and drafted the original Queensland legislation noted that it spanned “both the civil and criminal jurisdictions” (QDVTF, 1988, p. 171). As noted earlier in this report it provides exceptional police and court powers, including the ability to override the wishes of a victim/survivor to address coercive control in personal relationships. Moreover, breaches of civil domestic violence orders constitute a summary criminal offence. The evidence set out in Chapters 1 and 4 indicates that police training and continuing professional development and guidelines should emphasise that civil DFV law is idiosyncratic: it requires police and courts to determine whether or not there is a pattern of abuse (rather than acting on an isolated incident, which may be addressed through criminal law or other action), and to make decisions according to the balance of probabilities. Focus groups with police indicate there is considerable confusion about applying this civil standard of proof in DFV incidents versus a criminal standard of proof to their investigations of criminal conduct. The application of civil versus criminal standards of proof in DFV investigations is therefore an important area for further training and guidance.

### Applying the concept of person most in need of protection

Focus group and interview discussions about the concept of person most in need of protection tended to revert to physical safety and, for police, to physical safety on an incident by incident basis. That is, police often saw the need for immediate medical treatment for an injury, for example, as the overriding indicator of the person most in need of legal protection, with little regard to the context of the injury or ongoing patterns of power and control in the relationship. Although the person most in need of protection construct was introduced specifically to curtail the use of cross-applications, some police prosecutors and GDOs saw that cross-applications were appropriate in specific circumstances, including in intimate personal relationships where, for example, substance

abuse is a contributing factor in perceived mutual violence and in fights between brothers. These scenarios, and those involving mental illness and violence (also discussed in Chapter 4), are very different to the conceptualisations of power and control in relationships envisaged by the advocates and legislators arguing the case for exceptional powers for police and courts to intervene in what were once considered private matters. Police do, however, have a responsibility for people's safety when called to act. Decisions on appropriate action will depend on knowledge of legislative requirements and perceived organisational support for action other than legal intervention.

Much of the discussion about identifying the person most in need of protection pointed to the need for clear guidelines for police, particularly around circumstances in which it is acceptable to take action other than an application for a protection order. Poor police practice may result from fear of being held liable for not taking action or taking action against the wrong person (Dichter, 2013; Hirschel & Buzawa, 2012; NTV, 2019). It may also arise from organisational factors related to procedures (voluminous paperwork for example) impacting on time available to investigate and act.

Co-responders—specialists accompanying police at investigations or otherwise supporting police assessments—have been cited in the literature (e.g. ALRC & NSWLRC, 2010; Nancarrow, 2016, 2019) and in this research as potential enablers of good police practice in identifying the aggrieved and respondent and appropriate action to be taken. Advocates for such a strategy acknowledge the associated costs but there may be other ways to achieve some of the benefits of a co-responder model. Consultation with a specialist unit to support investigation and decision-making, for example, was suggested by police in this research and others identified the value of review by another officer to assist in determining the person most in need of protection, and whether an application is necessary or desirable in circumstances where these matters are not clear. This may be an option for “other action”: that is, to defer a decision so that advice can be sought in relation to these matters.

## Challenges in identifying the victim/survivor and improvements to be made

### The ideal victim and misidentification

Despite decades of research on women's resistance to violence perpetrated against them, stereotypical assumptions about women subjected to violence, particularly those subjected to coercive control, persist. Women are assumed to be submissive and powerless, so those who use violence in resistance to coercive control are frequently treated as perpetrators, as demonstrated by Douglas and Fitzgerald (2018) in Queensland, Boxall et al. (2020) in New South Wales and Ulbrick and Jago (2019) in Victoria. Moreover, women who use resistive violence are also likely to use weapons, particularly household items including knives that are accessible in the moment, to counter their physical strength disadvantage (Nancarrow, 2016, 2019). Consequently it is sometimes victims of DFV that cause more visible injury. Yet police tend to use physical injury to determine the person most in need of protection.

Evidence from the focus groups with both police and women with lived experience demonstrated that an injury to one party could result in the other party being subject to legal action (an application for an order or being charged for a breach of an order), without even interviewing the person who was apparently not injured. This is despite the fact that some injuries, including those from serious assaults involving strangulation or suffocation, for example, may not be visible for a considerable period of time after an investigation. Conversely, there was evidence of misidentification due to serious physical injuries *not* being taken into account by police, suggesting that other factors in police decision-making also need to be considered.

Aboriginal and Torres Strait Islander women very often do not fit the ideal victim stereotype. They are more likely than other women to use weapons and to be uncooperative when police intervene (Blagg, 2008; Cunneen, 2009; Nancarrow, 2010, 2016, 2019). They are also more likely to have a fraught relationship with police, due to the neo-colonial context in which violence and policing of violence plays out. Throughout Australia's colonial period, police were at the forefront of implementing oppressive policies such as dispersal from traditional lands; denial of language and culture, and freedom

of movement; control of marriage, employment and wages; and removal of “half-caste” children, resulting in the stolen generations of Aboriginal and Torres Strait Islander peoples (see Cunneen, 2001; Evans, Saunders, & Cronin, 1988; Human Rights and Equal Opportunity Commission, 1997). Women participating in this research explained that their reluctance to cooperate with police was based on prior experience of an inappropriate response, feeling intimidated, experiences of racism and mistrust of the police in general. Some police understood the difficulties faced by women torn between loyalty and self-preservation, while others were dismissive and irritated by uncooperative victims/survivors.

Similarly, the complexity of legal intervention for women from culturally and linguistically diverse backgrounds was often not well understood or dealt with in the legal system. A failure to provide interpreters for women where needed remains a problem in accessing legal and other supports for women not proficient in English language. This is likely to arise from concerns about costs, time and insufficient skill in acquiring and working with an interpreter. During court observations, however, members of the research team witnessed a very efficient and effective engagement of a telephone interpreter to assist in determining a matter.

Related to the concept of the ideal victim is the expected behaviour of women in general. Research participants observed the tendency for investigating police to hold women to a higher standard than men. Some indicated this was an unconscious bias, where police (mostly men) have empathy for men being abusive towards their female partners—upset about the breakup of a relationship, for example—and less tolerance for women behaving “badly” in similar circumstances. There was a sense among service providers and the women in the qualitative study that women were punished for transgressing social norms of feminine behaviour. Some indicated this could be a result of youthful inexperience, a masculine police culture or misogyny. Police themselves identified the difficulty of comprehending “domestic violence” before they encountered it as GDOs.

### Confusion about coercive control versus incident-based acts of abuse

As noted above the Queensland legislation does not contextualise all proscribed acts of abuse as acts of coercive control, although the explanatory notes do make it clear that the purpose of the legislation is to address power and control in relationships and that it is focused on the prevention of future abuse, not punishment for past acts. This was not strongly reflected or enunciated in discussions with magistrates and police, with respect to the intention of the person most in need of protection and the meaning of necessary or desirable. Instead, these provisions were frequently interpreted in the context of immediate physical safety. This is obviously an important consideration. Using a gendered lens to assess coercive control, however, it may be reasonable for a police officer to conclude that an injured party requires medical attention but that they are not the person most in need of future protection overall and therefore a protection order is not desirable or necessary. Alternatively, action may be delayed pending medical treatment and further investigation. Such actions by police may need to be explicitly supported in policy and procedure manuals.

Magistrates interviewed in Queensland saw that the legislation provided guidance on how to identify the person most in need of protection, with one referring to the three key elements in the legislation as a staged process for identification:

1. First establish that there is a relevant relationship.
2. Then establish that an act of domestic violence has occurred.
3. If both conditions are met, consider for whom (the person most in need of protection) it is necessary or desirable to make a protection order.

In this conceptualisation, it is assumed that a court order is necessary and desirable if elements 1 and 2, and the person most in need of protection, can be established. However, it does not necessarily reflect the intention to address power and control factors, or focus on preventing future violence—a key rationale for using civil domestic violence laws in addition to the criminal law.

Confusion about the need for attention to coercive control—an ongoing pattern of abuse—versus incident-based assessment

contributes to another challenging area for police and magistrates: systems abuse. As discussed in the literature and the findings of the qualitative study for this project, perpetrators of DFV are able to exploit the incident-based focus of police and courts to make false allegations against the actual victim/survivor. Exploitation of incident-based policing is particularly effective where the actual perpetrator has injuries inflicted by the victim/survivor in self-defence. False reports may be made to police at the time of an investigation, or as a pre-emptive report made by telephone or at the local police station.

As Wangmann (2012) observed, the incident-based approach of the criminal law (retrospective and focused on punishment) is encouraged where guidelines or police procedures do not explicitly require police to consider features of coercive control (fear) or future protection in the application of civil domestic violence law. Therefore, the development of guidelines to implement the legislation must take account of the broader policy context in which it was intended to be implemented.

In the context of police and courts applying the Queensland legislation, the following areas of focus in training, education and guidelines for police and magistrates would assist in addressing the incident-based approach:

1. clarity about the rationale for a civil court order response, providing exceptional police and court powers
2. guidance about the intention and meaning of the legislative terms: a) person most in need of protection; and b) necessary or desirable
3. encouragement of positive organisational culture and leadership
4. education on trauma-informed, culturally and gender-sensitive understandings of DFV
5. streamlining of paperwork and improvement of other resourcing challenges for GDOs.

### Single protection order applications and misidentification

As discussed in Chapter 3, and summarised above, most jurisdictions have legislative provisions, policy or guidelines aimed specifically at addressing cross-applications and cross-

orders (including police-issued orders/notices). In general, the purpose is to avoid victims/survivors being treated as perpetrators of DFV. However, as one Victorian study found, misidentification of DFV aggrieved/respondents also occurs, and perhaps more frequently, where single protection orders are issued (NTV, 2019). Detecting misidentification in the court where the circumstances do not involve a cross-application may be more difficult because policy and legislation in Queensland construct cross-applications as an alert for further investigation. Detecting misidentification requires knowledge of power and control dynamics in DFV, including understanding the propensity for perpetrators of coercive control to exploit and abuse systems that are not alert to those dynamics. It also requires a willingness to investigate and act to address it.

### Police practice

Consistent with the literature on primary and predominant aggressor policies, findings from this project suggest that the person most in need of protection legislative principle and accompanying police and court policies and procedures are not sufficient, alone, to ensure appropriate legal responses. Considering Mansour's (2014) findings in the New South Wales context, there is a need to address gaps in the implementation of the person most in need of protection principle in Queensland and ensure appropriate training and education of police, prosecutors and courts on how to understand and operationalise it.

Findings from focus groups and interviews suggest improvements could be made in a number of areas to better assist police and courts to identify and support the victim/survivor in Queensland. In relation to police, there was evidence that poor police practice such as lack of investigation and failure to interview witnesses, including the victim/survivor, are areas for continued improvement. Service providers' views that interpreters were not widely used by responding police officers is a specific area of concern. Many police participants and some service providers and magistrates indicated that improving resourcing and simplifying onerous paperwork processes would assist responding officers by increasing the time they have at a scene and capacity to investigate thoroughly.

It is evident that police (whether engaging in poor or good practice) need more support in their trauma-informed, culturally and gender-sensitive understandings of DFV. Consistent with previous literature, findings in this research highlighted a continuing lack of understanding by responding police officers of the dynamics of coercive control and that this was a significant contributor to victims/survivors being treated as perpetrators of DFV. Specifically, the significant evidence of systems abuse contributing to misidentification of the actual victim/survivor, including false allegations and image management by the perpetrator to police, suggests the need for trauma-informed training and education on how perpetrators may manage their image and victims/survivors may present to police. Improved tools or guidelines for identifying and assessing risk of coercive control (as opposed to risk of “reoffending”) would also assist police in “situationally ambiguous” circumstances, where systems abuse may or may not be present. The concerning evidence from women’s and service provider focus groups indicates that there is a continuing need for this education to address sexist and racist attitudes held by some police.

Accepting that some victims/survivors may use violence, it is evident that police also need clearer guidance and training to assist them to distinguish between a) coercive controlling violence (physical and non-physical); and b) defensive, resistant and retaliatory violence. This would assist responding officers in assessing the person most in need of protection through a civil court order, and whether an application for a protection order is necessary or desirable. Having clear policies about alternative and appropriate responses to victims/survivors who use violence would also support improved police decision-making. Police and service providers identified the absence of guidelines or procedures for assessing risk of DFV where there were also concerns about mental health, mental illness or disability for either the perpetrator or victims/survivors as problematic. These are specific areas where improved guidance is needed. The qualitative data suggest police prosecutors and courts would benefit from similar training and guidance to improve the consistency of their practices in two areas: systems abuse tactics used by perpetrators, and responding to victims/survivors’ use of violence.

The literature (e.g. Hirschel & Buzawa, 2012) also points to the benefits of training to decrease dual arrest, noting it must explicitly focus on assisting police to understand gendered motivations for the use of violence and impacts of DFV on women (Poon et al., 2014), applied in the context of the intention of the legislation. Although research on best practice interventions for victims/survivors who use violence is still emerging (Mackay et al., 2018; Muftić et al., 2015), alternative, non-legal responses that may be appropriate to address that violence are an area for further research and policy analysis.

### Organisational culture

Participants’ views about the negative effects of a risk-averse culture within the police service also indicate responding officers need to be better supported in their decision-making to apply for an order or not. Some police officers believed they were compelled by law to make an application if they established that an act of domestic violence in a relevant relationship had taken place, regardless of the context. Others made cross-applications, leaving it to the courts to determine the person most in need of protection, to avoid the chance of making a wrong decision themselves, and ending up in the Coroners Court if the matter went “pear-shaped later on”. This suggests a lack of understanding of their responsibility, or insufficient skills and resources to conduct a proper investigation. It may also point to a lack of understanding of the constraints on magistrates who rely on the evidence presented to them, most frequently in police applications, to make a decision. It also reflects, however, the complexity and challenges of police work in emotionally charged and contested circumstances.

Guidelines and procedures detailing when an order may not be appropriate, and what other action should be taken, are needed to assist police in navigating this complexity. Leadership from senior officers emphasising that decisions to take action or to not take action need to be justified to the same standard would also assist. That is, it should be made clear that police are accountable for their decisions either way, but they need clarity in guidelines and procedures to assist them in effective decision-making. Training on DFV legislation, and related policies and procedures, should emphasise the gravity of using its exceptional police and court

powers: these powers have serious, often lifelong impacts on citizens, and are justified only in relation to the intent of the legislation (the use of state power to overcome coercive control and prevent future violence).

### Areas for improvement to broader legal system structures and processes

Many of the findings from the qualitative component of this research related to improving specific police practices that contribute to victims/survivors being identified as perpetrators of DFV in Queensland. However, findings also emerged about the need to improve structures and processes across the legal system. While these qualitative findings are specific to Queensland, they are relevant to other Australian states and territories.

Responding police officers have a critical role in the early and accurate identification of the actual victim/survivor, and this needs to be reinforced through organisational cultures and attitudes. For example, as noted earlier, improvement of the risk-averse culture of the police service is needed to address formulaic approaches (Nancarrow, 2016, 2019) that fail to consider the history or context of a relationship. However, as identified in the QDFVDR&AB report, responding officers may not always be best placed to undertake “nuanced analysis” (2017, p. 83); rather, VPUs, DFV coordinators or high-risk teams may be better able to do that. Participants in this research spoke positively of VPUs, and police participants in particular expressed support for specialist and co-responder models as strategies to improve policing responses, especially where GDOs are resource-constrained. Findings also emerged across multiple participant cohorts that important information for determining the victim/survivor, including the history and context of the relationship, is often established post-incident. This highlights the importance of ensuring subsequent legal actors, such as prosecutors, lawyers and magistrates, also have informed understandings of DFV (Osthoff, 2002).

These findings do not detract from the critical importance of ensuring responding police officers engage in best practice, including undertaking thorough investigations and understanding dynamics of coercive control, discussed above. As established in the literature and focus groups,

misidentified victims/survivors may experience significant negative impacts of that misidentification even if they are not ultimately subject to criminal interventions (Dichter, 2013; Larance & Miller, 2017; Reeves, 2019). However, they emphasise that other legal actors, including prosecutors and magistrates, also play a vital role in supporting the accurate identification of the victim/survivor and correcting misidentification resulting from poor police practice or systems abuse tactics by the perpetrator (Erwin, 2004).

Despite this, a major finding in this research was the disjointed processes between police and courts in responding to DFV, which were amplified in complex and ambiguous situations. For example, police practices that leave it up to the court to decide the person for whom an order should be made rely on relevant evidence being made available at contested hearings. However, consistent with Ulbrick and Jago’s Victorian study (2018), there was evidence in this research that the person most in need of protection was not accurately identified in final orders made by courts, especially when orders are made by consent.

These findings signal the need to improve the processes between courts and police, including clarifying the different roles and mechanisms for accountable decision-making in pursuing applications for protection orders or DFV-related charges between police, prosecutors and magistrates. Prosecutors appear to play a particularly valuable role in identifying where police applications may have been inappropriately made against the person most in need of protection, or establishing that there has been a history of DFV that suggests further enquiries or a different response are necessary. Improvements to how and by whom decisions are reviewed within and beyond the responding police officer’s unit are necessary.

Qualitative research findings in Queensland also highlight the need for improved systems to correct the misidentification when it occurs. Evidence from participants in all cohorts suggested that, even where magistrates, prosecutors or police recognised and accepted that inappropriate legal responses may have been initiated, it is difficult to change them. In relation to police applications and PPNs, findings suggest that responding police officers are reluctant to withdraw

applications once made. Some participants suggested this was a lack of understanding or perceived burden of how to do so, while others suggested this was a policy position reflecting risk-averse attitudes. Service providers suggested prosecutors had a similar policy position of leaving it up to the courts to decide. These findings reinforce conclusions in the literature that training to improve police practice is not enough; organisational structures need to ensure there is effective supervision and accountability for poor practices, and that negative cultures are addressed (Finn & Bettis, 2006).

In relation to court practices, there is a need for specific clarification about the circumstances in which magistrates can strike out, dismiss and revoke orders. This would improve court practices in relation to both police and private applications that are inappropriately brought. Other areas for improvement include ensuring the history of protection orders and DFV-related offending is considered by both police and magistrates in their decision-making. Findings from court observations and interviews with magistrates demonstrate that the failure to identify that history creates a significant risk of orders being made inappropriately. The reliance on magistrates enquiring about past orders in multiple court observations and experiences discussed in focus groups suggests this is another area where clarification about prosecutorial and police policy and practice could be improved.

Ultimately, while this research identified a number of specific laws, policies and practices that could be improved in relation to identifying the person most in need of protection, the broader lack of cohesion between police and court processes and the legal system's apparent reliance on individual police officers', prosecutors' and magistrates' practices indicates the need to address gaps across the system. While it is beyond the scope of this project to examine the appropriateness of legal responses to DFV generally, both service providers and women indicated that focusing on specific changes to laws, policies and practices is insufficient to address unintended consequences such as misidentification. As one participant reflected, there is a reasonable fear that "whatever changes get made end up being used against women anyway" (Service provider focus group 1).

# Conclusion

Civil domestic violence laws, introduced across Australia in the 1980s, controversially provided police and courts exceptional powers to overcome the abuse of “power” in relationships, predominantly exercised by men against intimate female partners. They are now an accepted part of the legal landscape and domestic violence protection orders are commonplace, but there appears to be a significant gap between the original intention of the law and its current application. Specifically, and despite decades of legislative, policy and procedural reform to address unintended consequences of DFV law in Australia, the problem of women being wrongly treated as perpetrators persists. The purpose of this research, prompted by the 2016–17 annual report of the QDFVDR&AB (2017), was to provide an evidence base for policy and practice design to address this problem.

The research design had considerable strengths, enabling triangulation of evidence from the international literature; national statistical and documentary analyses; and interviews and focus groups with legal actors, service providers and women with lived experience of being identified as both victims/survivors and perpetrators of violence. Its key challenges, however, were the lack of readily available, nationally comparative statistical data and the lack of readily available documentary data.

Consecutive legislative amendments have sought to clarify the intention of the law—to address coercive control—to curtail cross-applications and false allegations against women by their abusers. To this end, the concept of person most in need of protection has been introduced in several jurisdictions. In addition to identifying the person most in need of protection, Queensland police and courts are required to determine if a protection order is necessary or desirable. It appears, however, that a gap between the stated intention of the Queensland legislation and the application of its provisions remains. The evidence set out in this report suggests that the gap between intention and application is largely due to a lack of comprehension of key concepts, uncertainty about procedural expectations, and organisational practices and culture. The qualitative component of the research was conducted in Queensland. However, the themes identified in the qualitative data were consistent with the themes discussed in the international and national literature. Therefore, many of the results will resonate in other Australian jurisdictions.

## Key findings and implications for policy and practice

### Lack of evidence of best practice nationally

Due to the significant variations in legislative approaches across states and territories it was difficult to establish any best practice legislative frameworks from the desktop review. Noting the continuing issues for police and courts in implementing the person most in need of protection provision identified in Queensland, and consistent with the findings of the ALRC and NSWLRC (2010), guidance on determining the primary aggressor or person most in need of protection may be better addressed in policies and procedures.

Publicly available policies and guidance vary widely between jurisdictions. Explicit principles and guidance for determining the primary aggressor appear in the Family Court and Federal Circuit Court principles and in Victoria’s MARAM, although these are not used by Victorian police. However, findings from Ulbrick and Jago (2018) in Victoria and Mansour (2014) in New South Wales indicate that clear policies and procedures are not sufficient unless they are implemented effectively—ensuring officers are adequately trained and familiar with those procedures, and supported to implement them. Evaluations of how effectively these principles and procedures are applied in practice would assist in establishing whether they could usefully be implemented as best practice in other jurisdictions. Further, although some jurisdictions have guidance on the need to determine the primary aggressor, no state or territory provided explicit guidance for police or courts to identify the perpetrator in the context of a pattern of coercive control. All jurisdictions have risk assessment tools, but the assessment is carried out on the person already identified as the perpetrator.

### Implications for policy and practice design

Explicit guidance on identifying patterns of coercive control would assist police and courts in distinguishing the perpetrator and the victim/survivor in ambiguous circumstances, and in determining whether a protection order is necessary or desirable.

## Women are a significant minority of respondents, nationally

Statistical data analysis showed that women represented a significant minority (mostly between one fifth and a quarter) of DFV protection order respondents in all seven Australian jurisdictions able to provide the relevant data. This is inconsistent with the evidence on the gendered dynamics of coercive control in relationships, almost exclusively perpetrated by men against women. Although nationally comparative statistical data are limited, it appears that one jurisdiction (South Australia) is doing somewhat better than other Australian states and territories in regard to the proportion of women being brought into the legal system through DFV protection orders. Unfortunately, there was insufficient publicly available information about South Australia police and court policy and practice for this research to identify factors that may be contributing to the comparatively smaller proportion of female respondents in South Australia. This is an area for further exploration with potential insights for the identification of the person who should be protected under the law from future violence. Although fewer women were respondents of protection orders in South Australia, women (particularly Indigenous women) reportedly breached DFV orders at a higher rate in South Australia (and the Northern Territory), compared to other jurisdictions.

Prior research (e.g. Douglas & Fitzgerald, 2018; Nancarrow 2019) has demonstrated the over-representation of Aboriginal and Torres Strait Islander people in DFV protection order, and breach of order, data in Queensland. This research has demonstrated the problem is of national significance.

### Implications for policy and practice design

The use of exceptional powers provided to police and courts in civil DFV law is a serious matter, with potentially lifelong implications for citizens subjected to those powers. They must be used for the purpose intended. Highlighting the rationale for exceptional police and court powers in relevant legislation, policy and procedures may:

- assist understanding of the central role of coercive control in the legislative intent
- improve investigation

- reduce the misidentification of victims/survivors as perpetrators of DFV.

Consideration should also be given to education about the neo-colonial context of Indigenous violence, particularly in relation to Aboriginal and Torres Strait Islander women's violent resistance and reluctance to cooperate with police during investigations (Nancarrow, 2010; Willis, 2011).

### Confusion about key legislative concepts

In most jurisdictions, the relevant legislation explicitly includes coercive control as one in a list of behaviours defining DFV. It is not clearly presented as an overarching context for other behaviours, such as physical violence, although some jurisdictions, including Queensland, provide preambles and principles to establish the context. Explanatory notes supporting the introduction of the legislation in Queensland make clear that its purpose is to address power and control and that it is future-focused, and preventative in its intent. Further, the Queensland legislation requires that police and courts identify the person most in need of protection, and determine if a protection order is necessary or desirable. It is apparent from the evidence produced in the qualitative component of this research that these concepts are unclear to those responsible for applying them. That the intention of these provisions is to limit the use of cross-applications seems reasonably clear, but the meaning of the terms person most in need of protection and necessary or desirable, and their relationship to coercive control, are not well understood. There was also considerable confusion about applying a balance of probabilities standard of proof when investigating civil DFV matters versus a criminal standard of proof for criminal conduct. This results in police reverting to an incident-based assessment of who is most in need of protection from physical assault. Police (especially GDOs) are faced with multiple and competing pressures when responding to DFV matters, and some have difficulty shifting from the incident-based focus of police investigations in general, to the pattern-based focus of civil law. The authors recognise that it is often difficult for police to work outside of incident-based frameworks in practice. Improving the clarity and direction around these legislative concepts is important for addressing these issues, noting that adequate support and resourcing is also necessary.

### Implications for policy and practice design

Short of making these terms explicit in the legislation itself, policy, procedures and guidelines for police and courts could usefully draw on the supporting policy documents (e.g. explanatory notes, Second Reading speech, and parliamentary committee minutes) to provide clarity and direction for those responsible for applying the law. In particular, the application of civil versus criminal standards of proof in DFV investigations is an important area for further training and guidance.

### Coercive control versus incident-based acts of abuse

Currently in Queensland the application of the provisions concerning the person most in need of protection and whether a protection order is necessary or desirable is frequently more consistent with the punitive, incident-based approach of criminal law than the civil law's intention to curtail a pattern of coercive control and prevent future abuse. The focus is on single acts of violence and the person with visible injuries: there is often insufficient regard for the context in which the violence and injury occurred. This enables perpetrators of coercive control (predominantly men) to manipulate the legal system by presenting themselves as the victim of an assault. This is exacerbated by expectations about how victims/survivors, and women in general, should behave, where both parties have engaged in violence and resist police intervention.

Queensland police personnel expressed concern about the lack of guidance provided in regard to the management of cases where mental illness appeared to be a factor in the abuse, and where neither party appeared to want legal intervention. Coercive control may be present whether or not a person is suffering from a mental illness, and it can silence a victim's/survivor's plea for help. Therefore, an ability to understand and assess coercive control, the person most in need of protection and whether or not a DFV protection order is necessary or desirable is essential for appropriate application of the law.

### Implications for policy and practice design

These findings have implications for training, policy and procedures and access to specialist advice.

#### Training

Understanding the intention and meaning of key concepts, linked to the stated policy underpinning the relevant legislative provisions, is critically important for the appropriate application of the law. Effective training for this purpose would result in:

- trauma-informed, culturally and gender-sensitive understandings of DFV
- an understanding of Aboriginal and Torres Strait Islander peoples' resistance to police intervention and strategies to support victim/survivor cooperation
- an ability to detect perpetrator image management and systems abuse
- skills to investigate and present evidence of coercive control and violent resistance
- skills about how and when to apply civil versus criminal standards of proof in investigations of DFV
- the ability to determine when action other than an application for a protection order is appropriate.

#### Policy and procedures

Organisational culture emphasises the need for guidelines to be clear when an application for a protection order may not be appropriate. This may include circumstances where a decision is deferred pending medical treatment for a potential perpetrator, a mental health assessment or consultation with a specialist team member for assistance in gathering evidence of coercive control. In these cases, other action should be taken, and documented, to ensure victim/survivor safety. Police need to be aware that a civil protection order application is a serious matter with potentially lifelong impacts for those subjected to it. Therefore, police are and should be accountable for their decisions, whether or not an application for a protection order is made. However, they are faced with complex and ambiguous situations, and must be supported with clear policies and efficient procedures emphasising the importance of identifying the person most in need of protection in the context of a pattern of coercive control.

## Improving court practice and achieving a cohesive system

Qualitative findings from the Queensland study highlight the need to improve processes between courts and police. Where inappropriate applications for protection orders are made, either by police or privately, the processes and roles for prosecutors and magistrates in remedying this must be clear. Currently the system relies on a combination of victims/survivors having enough resources to contest inappropriate applications or defend charges brought against them, individual magistrates and prosecutors proactively making further enquiries and, for police applications, applicant police officers being receptive to changing their decisions when further information is available. Police, prosecutors and magistrates all discussed constraints in being able to withdraw or dismiss applications, or revoke orders, even when they accepted they had been inappropriately made. However, approaches to improving these systems and processes need careful consideration to ensure that any changes do not result in the winding back of protections for actual victims/survivors.

Findings from this research also highlight the protective role that specialist units for police, including co-responders, VPUs and high-risk teams, have in ensuring victims/survivors are not inappropriately brought into the legal system. Support for these types of models from Queensland participants suggests that resourcing these units could help to alleviate the resource burdens on GDOs, and improve policing responses for victims/survivors where there are allegations of mutual violence. Police prosecutors can also act as important safeguards in navigating, due to their distinct role as gatekeepers between the police and court systems. However, the disjointedness between the police and court systems, and how they can be improved, is an area for further research.

## Implications for policy and practice design

Policy or legislative clarification is required for magistrates to ensure they have consistent understandings of when and how they may strike out or dismiss inappropriate applications. Jurisdictions should also consider incorporating principles for determining the primary aggressor or person most in need of protection (e.g. Family Court of Australia & Federal

Circuit Court of Australia, 2016) into local bench books and other judicial resources.

Further research and policy consideration should explore ways to improve the disjointedness between policy and court processes in dealing with DFV matters where there are allegations of mutual violence or applications have been inappropriately brought.

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## List of key legislation and associated materials

*Crimes (Domestic and Personal Violence) Act 2007* (NSW)

*Domestic and Family Violence Act 2007* (NT)

*Domestic and Family Violence Protection Act 2012* (Qld)

Evidence to Community Affairs Committee, Legislative Assembly of Queensland, Brisbane, 11 October 2011, p. 3 (Karen Struthers, Minister for Community Services and Housing and Minister for Women)

Explanatory Memorandum, Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016

Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld)

*Family Violence Act 2004* (Tas)

*Family Violence Act 2016* (ACT)

*Family Violence Protection Act 2008* (Vic)

*Intervention Orders (Prevention of Abuse) Act 2009* (SA)

*Restraining Orders Act 1997* (WA)

Queensland, *Parliamentary Debates*, Legislative Assembly, 5 February 2012

## APPENDIX A:

# Relevant state and territory legislative provisions

Jurisdiction	Legislation	Provisions referring to person most in need of protection	Other provisions/legislative guidance relevant to establishing person most in need of protection	Cross-applications
ACT	<a href="#">Family Violence Act 2016 (ACT)</a>	n/a	<p>Preamble. 2 The Legislative Assembly also recognises the following features of family violence ...</p> <p>(b) family violence is predominantly committed by men against women and children; (c) family violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years;</p> <p>14 Matters to be considered—family violence orders</p> <p>(1) In deciding whether to make a family violence order, a court must consider the following ... (b) the affected person's perception of the nature and seriousness of the respondent's alleged conduct ... (f) any previous family violence or personal violence by the respondent in relation to the affected person or anyone else; (g) any previous family violence order made in relation to the respondent; (h) any previous contravention of a family violence order by the respondent;</p> <p>34 Final orders—grounds for making (2) For this section—</p>	<p>Part 3 div 3.1 s 14 Matters to be considered—family violence orders</p> <p>(1) In deciding whether to make a family violence order, a court must consider the following:</p> <p>(a) the objects of this Act in section 6; (b) the affected person's perception of the nature and seriousness of the respondent's alleged conduct;</p> <p>(c) the welfare of any child that is an affected person;</p> <p>(d) the accommodation needs of the affected person and any child of the affected person or respondent;</p> <p>(e) any hardship that may be caused to the respondent or anyone else by the making of the order;</p> <p>(f) any previous family violence or personal violence by the respondent in relation to the affected person or anyone else;</p> <p>(g) any previous family violence order made in relation to the respondent;</p>

Jurisdiction	Legislation	Provisions referring to person most in need of protection	Other provisions/legislative guidance relevant to establishing person most in need of protection	Cross-applications
ACT	<a href="#">Family Violence Act 2016 (ACT)</a>	n/a	(a) if some or all of the respondent's alleged behaviour in relation to which the application is made appears to be minor or trivial when viewed in isolation, or appears unlikely to recur, the court must still consider whether the behaviour forms part of a pattern of behaviour by the respondent from which the affected person needs protection ...	(h) any previous contravention of a family violence order by the respondent;  (i) the need to ensure that property is protected from damage.  (2) The court may also consider anything else the court considers relevant
NSW	<a href="#">Crimes (Domestic and Personal Violence) Act 2007 (NSW)</a>	<p>Part 13A div 1 s 98B Meaning of "primary person" and "associated respondent". In this Part: (a) the <i>primary person</i> is:</p> <p>(i) in relation to an apprehended domestic violence order, the person for whose protection the order is sought or made, or (ii) in relation to a charge for a domestic violence offence, the person who is alleged to be the victim of the offence, and (b) the associated respondent is: (i) in relation to a <i>primary person</i> protected or sought to be protected by an apprehended domestic violence order—the person against whom the order is sought or made, or (ii) in relation to a <i>primary person</i> who is a victim, or an alleged victim, of a domestic violence offence for which a person has been charged ...</p> <p>Part 8 s 35 Prohibitions and restrictions imposed by apprehended violence orders (1) When making an apprehended violence order, a court may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable</p>	<p>Part 2 s 9 Objects of Act in relation to domestic violence (3) In enacting this Act, Parliament recognises ... (b) that domestic violence is predominantly perpetrated by men against women and children, and ... (d) that domestic violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years ...</p> <p>16 Court may make apprehended domestic violence order (2) ... it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in, if ...</p> <p>(c) in the opinion of the court: (i) the person has been subjected on more than one occasion to conduct by the defendant amounting to a personal violence offence, and</p> <p>(ii) there is a reasonable likelihood that the defendant may commit a personal violence</p>	<p>Part 10 div 3 s 53 Discretion to refuse to issue process in apprehended personal violence order matters ...</p> <p>(5) Unless satisfied that there are compelling reasons for doing so, an authorised officer or a Registrar is not to refuse to issue process if the application discloses allegations of any of the following: (a) a personal violence offence ... (6) In determining whether or not to issue process, the authorised officer or Registrar must take the following matters into account: (a) the nature of the allegations ... (f) the relative bargaining powers of the parties, (g) whether the application is in the nature of a <i>cross-application</i> ...</p>

Jurisdiction	Legislation	Provisions referring to person most in need of protection	Other provisions/legislative guidance relevant to establishing person most in need of protection	Cross-applications
NSW	<a href="#">Crimes (Domestic and Personal Violence) Act 2007 (NSW)</a>	to the court and, in particular, to ensure the safety and protection of <i>the person in need of protection</i> and any children from domestic or personal violence	offence against the person, and  (iii) the making of the order is necessary in the circumstances to protect the person from further violence, or (d) the court is satisfied on the balance of probabilities that the person has reasonable grounds to fear the commission of a domestic violence offence against the person.	
NT	<a href="#">Domestic and Family Violence Act 2007 (NT)</a>	n/a	Ch 1 part 1.2 div 2 subdiv 1 Concepts relating to domestic violence 6 Intimidation ...  (2) For deciding whether a person's conduct amounts to intimidation, consideration may be given to a pattern of conduct (especially domestic violence) in the person's behaviour	Part 2.4 div 3 s 35A Court may refuse to hear application or order stay of proceeding  (1) This section applies if the Court is satisfied an application for a DVO is frivolous, vexatious or an abuse of the process of the Court.  (2) The Court may, at any time after the application is filed (regardless of whether notice about the hearing of the application is given to the parties to the DVO), decide: (a) to refuse to hear the application; or (b) if a hearing for the application has started—to order a stay of the proceeding
Qld	<a href="#">Domestic and Family Violence Protection Act 2012 (Qld)</a>	Part 1 div 2 s 4 Principles for administering Act  (1) This Act is to be administered under the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount ... (2)(e) in circumstances in which there are conflicting allegations of domestic violence or indications that both	Preamble. In enacting this Act, the Parliament of Queensland recognises the following—  1. Australia is a party to the following instruments—  ... United Nations Declaration on the Elimination of Violence against Women ...	Part 3 div 1A Cross-applications s 41C Hearing of applications—cross-applications before same court ...  (2) The court must—  (a) hear the applications together unless the court considers it is necessary to hear the applications separately for the safety, protection or wellbeing of the person named as the aggrieved in the original

Jurisdiction	Legislation	Provisions referring to person most in need of protection	Other provisions/legislative guidance relevant to establishing person most in need of protection	Cross-applications
Qld	<a href="#">Domestic and Family Violence Protection Act 2012 (Qld)</a>	<p>persons in a relationship are committing acts of violence, including for their self-protection, <i>the person who is most in need of protection</i> should be identified;</p> <p>41C Hearing of applications–cross-applications before same court ...</p> <p>(2)The court must–</p> <p>(a) hear the applications together unless the court considers it is necessary to hear the applications separately for the safety, protection or wellbeing of the person named as the aggrieved in the original application, the original protection order or the cross-application; and (b) In hearing the applications, consider the principle mentioned in <a href="#">section 4(2)(e)</a> ...</p>	<p>4. Domestic violence is often an overt or subtle expression of a power imbalance, resulting in one person living in fear of another, and usually involves an ongoing pattern of abuse over a period of time ...</p> <p>7. Domestic violence is most often perpetrated by men against women with whom they are in an intimate partner relationship and their children ...</p>	<p>application, the original protection order or the cross-application; and</p> <p>(b) in hearing the applications, consider the principle mentioned in section 4(2)(e).</p> <p>41D Hearing of applications–cross-applications before different courts</p> <p>(2) The court must consider whether to, and may– (a) hear the applications together; or (b) order that the application before the court be dealt with by the other court ...</p> <p>41E Hearing of applications–unreasonable notice of cross-application ...</p> <p>(6) The court may hear the cross-application before the variation application or together with the variation application only if the applicant for the variation application consents ...</p> <p>(9) The court may hear the variation application before the cross-application or together with the cross-application only if the aggrieved named in the cross-application consents.</p> <p>41F Hearing of application–existing protection order ...</p> <p>(6) The court hearing the application must take into account the court records relating to the making of both protection orders</p>

Jurisdiction	Legislation	Provisions referring to person most in need of protection	Other provisions/legislative guidance relevant to establishing person most in need of protection	Cross-applications
SA	<a href="#">Intervention Orders (Prevention of Abuse) Act 2009 (SA)</a>	n/a	<p>Part 3 div 1. General s 10–Principles for intervention against abuse</p> <p>(1) The following must be recognised and taken into account in determining whether it is appropriate to issue an intervention order and in determining the terms of an intervention order: ... (b) abuse may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of behaviour ...</p> <p>Part 3 Intervention and associated orders div 3 Court Orders s 21–Preliminary hearing and issue of interim intervention order (4) If the applicant alleges non domestic abuse and is a person other than a police officer, the Court must, in determining whether to exercise the discretion to dismiss the application, take into account–(a) whether it might be appropriate and practicable for the parties to attempt to resolve the matter through mediation or by some other means; and (b) whether the application is in the nature of a cross-application; and (c) any other matters that the Court considers relevant</p>	<p>Part 3 div 3–Court orders s 21–Preliminary hearing and issue of interim intervention order ...</p> <p>(4) If the applicant alleges non-domestic abuse and is a person other than a police officer, the Court must, in determining whether to exercise the discretion to dismiss the application, take into account–</p> <p>(a) whether it might be appropriate and practicable for the parties to attempt to resolve the matter through mediation or by some other means; and</p> <p>(b) whether the application is in the nature of a <i>cross-application</i>; and</p> <p>(c) any other matters that the Court considers relevant.</p> <p>Part 3 div 4–Variation or revocation of orders</p> <p>(4) On an application for variation or revocation of a final intervention order by the defendant, the Court may, without receiving submissions or evidence from the protected person, dismiss the application–</p> <p>(a) if satisfied that the application is frivolous or vexatious; or</p>

Jurisdiction	Legislation	Provisions referring to person most in need of protection	Other provisions/legislative guidance relevant to establishing person most in need of protection	Cross-applications
SA	<a href="#">Intervention Orders (Prevention of Abuse) Act 2009 (SA)</a>			(b) if not satisfied that there has been a substantial change in the relevant circumstances since the order was issued or last varied
Tas	<a href="#">Family Violence Act 2004 (Tas)</a>	n/a	<p>Section 18. Matters to be considered in making an FVO (1) In making an FVO, a court–</p> <p>(a) must consider the safety and interests of the person for whose benefit the order is sought and any affected child to be of paramount importance; and (b) must consider whether contact between the person for whose benefit the order is sought, or the person against whom the FVO is to be made, and any child who is a member of the family of either of those persons is relevant to the making of the FVO; and (c) must consider any relevant Family Court order of which the court has been informed</p>	n/a
Vic	<a href="#">Family Violence Protection Act 2008 (Vic)</a>		<p>Preamble. In enacting this Act, the Parliament also recognises the following features of family violence–</p> <p>(a) that while anyone can be a victim or perpetrator of family violence, family violence is predominantly committed by men against women, children and other vulnerable persons ...</p> <p>(e) that family violence may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of abuse over a period of time</p>	

Jurisdiction	Legislation	Provisions referring to person most in need of protection	Other provisions/legislative guidance relevant to establishing person most in need of protection	Cross-applications
WA	<a href="#">Restraining Orders Act 1997 (WA)</a>	<p>Part 1B s 10B. Principles to be observed in performing functions in relation to FVROs ...</p> <p>(1)(h) the need to identify, to the extent possible, <i>the person or persons in a family relationship</i> most in need of protection from family violence, including in situations where 2 or more family members are committing that violence; (i) the need to recognise that perpetrators of family violence might seek to misuse the protections available under this Act to further their violence, and the need to prevent that misuse ... (2) The person, court or other body is to have regard to the matters set out in subsection (1)(a), (b) and (c) as being of primary importance</p>	<p>Part 1B s 10F. Matters to be considered by court generally (1) When considering whether to make an FVRO and the terms of the order, a court is to have regard to the following ... (e) the past history of the respondent and the person seeking to be protected with respect to applications under this Act, whether in relation to the same act or persons as are before the court or not ... (h) other current legal proceedings involving the respondent or the person seeking to be protected ... (k) any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise ... (m) any risk assessment, or risk-relevant information, relating to the relationship between the respondent and the person seeking to be protected ... (3) In having regard to the matters set out in subsection (1)(e), a past history of applications under this Act is not to be regarded in itself as sufficient to give rise to any presumption as to the merits of the application.</p>	n/a

# Interview/focus group guide

## Police

1. Can you briefly describe what usually happens when [you attend a domestic and family violence incident/you deal with a domestic and family violence matter]?
2. When [you attend a domestic and family violence incident/deal with a domestic and family violence matter], is it common for both parties to have used violence against each other, or allege the other party used violence?
3. What do you do in those situations?
4. What do you understand the “person most in need of protection” to mean?
5. How do you identify the “person most in need of protection” when there are mutual allegations of violence?
6. What challenges do you encounter in identifying the “person most in need of protection”?
7. Do you think it is common for people to be misidentified as the victim or perpetrator of domestic and family violence?
8. What are the circumstances in which this usually occurs?
9. What policies and procedures guide your responses when dealing with mutual allegations of violence?
  - a. Are these policies and procedures helpful in guiding your responses?
  - b. How could they be improved?
10. What do you think would better assist you, or the legal system generally, to accurately identify the “person most in need of protection”?
11. Is there anything we haven’t covered that you would like to share about dealing with mutual allegations of violence, identifying the “person most in need of protection”, and/or dealing with parties who have been misidentified as either aggrieved or respondents?

## Magistrates

1. Can you briefly describe what usually happens when a protection order is applied for in your court?
2. Is it common for both parties in protection order proceedings to have used violence against each other, or allege the other party used violence?
3. What happens in those situations?
4. What do you understand the “person most in need of protection” to mean?
5. How is the “person most in need of protection” identified when there are mutual allegations of violence?
6. Do you think it is common for people to be misidentified as the victim or perpetrator of domestic and family violence?
7. What are the circumstances in which this usually occurs?
8. What policies and procedures guide magistrates’ responses when dealing with mutual allegations of violence?
  - a. Are these policies and procedures helpful in guiding your responses?
  - b. How could they be improved?
9. What challenges do you encounter in identifying the “person most in need of protection”?
10. What do you think would better assist magistrates, or the justice system generally, to accurately identify the “person most in need of protection”?
11. Is there anything we haven’t covered that you would like to share about dealing with mutual allegations of violence, identifying the “person most in need of protection”, and/or dealing with parties who have been misidentified as either victims or respondents?

## Service provider workers

1. How do clients you work with in relation to domestic and family violence matters usually come in contact with your service?
2. In your role, who do you mainly support? (women, men, children, victims/perpetrators of domestic and family violence)
3. When supporting your clients in relation to their domestic and family violence matters, is it common for both parties to have used violence against each other, or allege the other party used violence?
4. In your view, how do police and courts usually respond to mutual allegations of violence?
5. Do you think it is common for police and/or courts to misidentify the victim or perpetrator of domestic and family violence?
6. What are the circumstances in which this usually occurs?
7. What are the implications for your clients if they are misidentified as respondents/victims of domestic and family violence?
8. We're aware that police/courts use [insert relevant policies/procedures] to guide their responses to mutual allegations of violence and/or identifying the victim and perpetrator of violence. In your view:
  - a. Are these policies and procedures helpful in guiding police and/or court responses?
  - b. How could they be improved?
9. What do you think are current barriers for police and courts to identify early, and respond appropriately to, victims who may use violence?
10. What do you think could be improved to assist police or courts to identify and respond appropriately to victims who may use violence?
11. Is there anything we haven't covered that you would like to share about police or court responses to mutual allegations of violence, identifying the "person most in need of protection", and/or dealing with parties who have been misidentified as either victims or respondents?

## Victims/survivors

1. Can you describe a time when police or the court wrongly identified you as a perpetrator of domestic and family violence?
2. What were the consequences for you?
3. What do you think the police or court could have done differently to correctly identify the actual perpetrator of domestic or family violence?
4. What do you think they could have done differently to support you as the person most in need of protection<sup>1</sup> from domestic and family violence?

<sup>1</sup> Police and magistrates have statutory obligations related to the term "person most in need of protection" so it was important to ask them specifically what they understood that term means. Women with lived experience have no such obligation and were not explicitly asked about their understanding of the term. Although the language was used consistently in the interview and focus group guides, the term was not necessarily used in the focus groups or interview with women.

APPENDIX C:

# Duration of orders

Jurisdiction	Legislation	Duration of orders
ACT	<a href="#">Family Violence Act 2016 (ACT)</a>	Duration of final DFV orders is 2 years unless a longer or shorter length is explicitly stated. A maximum of 2 years for consent orders (div 3.5 s 35)
NSW	<a href="#">Crimes (Domestic and Personal Violence) Act 2007 (NSW)</a>	Duration of apprehended DVO is 1 year if respondent was under 18 at the time or 2 years if respondent was 18 or older at the time of the order, unless otherwise specified (part 10 div 6 s 79A). Orders may be of indefinite duration (s 79B)
NT	<a href="#">Domestic and Family Violence Act 2007 (NT)</a>	No duration specified, the law just states the duration of the order is as written in the order (ch 2 part 2.3 s 27)
Qld	<a href="#">Domestic and Family Violence Protection Act 2012 (Qld)</a>	If no date is specified, DFV order duration is 5 years. If courts put an order in place for fewer than 5 years, they must give reasons why (div 11 s 97)
SA	<a href="#">Intervention Orders (Prevention of Abuse) Act 2009 (SA)</a>	Ongoing, may not have a fixed duration, in effect until it is revoked (part 3 div 1 s 11)  11–Ongoing effect of intervention order (1) An intervention order is ongoing and continues in force (subject to any variation or substitution of the order under this Act) until it is revoked. (2) Consequently, an issuing authority may not fix a date for the expiry of an intervention order or otherwise limit the duration of an intervention order
Tas	<a href="#">Family Violence Act 2004 (Tas)</a>	<b>14. Police family violence orders</b>  (6) Unless sooner revoked, varied or extended, a PFVO operates from the date of service for such period, not exceeding 12 months, as may be specified in the PFVO.  No specified duration for Family Violence Orders (Court Issued) .  19. Period of FVO  An FVO remains in force–  (a) for such period as the court considers necessary to ensure the safety and interests of the person for whose benefit the order is made; or  (b) until an order is made revoking the FVO
Vic	<a href="#">Family Violence Protection Act 2008 (Vic)</a>	Duration up to 12 months if respondent is a child, otherwise as specified by the court and if not specified, indefinitely until revoked (part 4 div 7 ss 97-99)
WA	<a href="#">Restraining Orders Act 1997 (WA)</a>	If respondent is not a prisoner and order does not specify a duration it remains in place 2 years. Otherwise as specified in the order (part 2A div 1A s 16B)

## APPENDIX D:

# Court observation template

NOTE: This notes sheet is to assist with taking shorthand notes while observing. Please use it as an aid to create a more detailed summary file note as soon as possible after finishing the observation (ideally the same day).

Court:	Researcher:	Date of observation:	Observation start/finish times:
Jurisdiction/type of matters heard:			
Comments on court environment (noise/distractions/interruptions; set-up/layout):			

#	Time spent on matter (approx.)	Nature of communication (between magistrate and police prosecutor/parties)	Reference made to (by magistrate/police prosecutor/parties): <ul style="list-style-type: none"> <li>previous orders against either parties</li> <li>evidence of cross-applications</li> <li>history/context of violence</li> </ul>	Other notes, e.g.: <ul style="list-style-type: none"> <li>whether matters are being heard together</li> <li>if matter is held over for any reason</li> <li>other general comments relevant to misidentification/mutual allegations of violence</li> </ul>
1				
2				
3				
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ORGANISATION FOR WOMEN'S SAFETY

*to Reduce Violence against Women & their Children*

