

Policy Paper 1

“Officer she’s psychotic and I need protection”: Police misidentification of the ‘primary aggressor’ in family violence incidents in Victoria (updated 8 October 2018)

Introduction: Family violence is a highly gendered pattern of abuse in which women are predominantly the victims, and men the perpetrators (ANROWS 2014). However family violence lawyers and social workers in urban and rural Victoria, Australia, have observed an alarming frequency in the rate at which women are being *misidentified* as respondents in police applications for family violence intervention orders (FVIOs). Data analysis of Women’s Legal Service Victoria (WLSV) duty lawyer intake forms from January to May 2018 inclusive at MMC found that when police identify a female respondent as the primary aggressor, they are mistaken 58% of the time¹. This finding was derived from 346 police applications made against male and female respondents on FVIOs.

In addition to quantifying this trend, WLSV has sought to illuminate the context in which police are determining who the primary aggressor is on FVIOs. Our findings are confirmed by the considerable body of literature which indicates that so-called “mutual” violence between men and women is most often asymmetrical and seeks distinct ends. Understanding that context has implications for how police decide who needs the protection of a FVIO, and therefore whom they name as the “primary aggressor” during their risk assessment. It is our hope that shedding light on this issue will assist police in bringing greater evidentiary clarity to incidents of family violence.

To this end, we are also seeking to better understand the impacts, particularly on the women involved, of misidentification (or “MisID”). One WLSV client – who had been misidentified as the primary aggressor, and been visited by DHHS to assess the safety of her infant child – told us that she would not call the police again. *“Police scare me now ... I needed to be protected [but] I don’t feel like they protected me”*. This is a sentiment commonly expressed to us by misidentified women, whose safety may nevertheless remain compromised by family violence.

From the research, three things stand out. First, some women named as respondents use violence. That said, when we look more deeply into the

circumstances in which women use violence, the data show that they are very strongly correlated with women experiencing often long term violence at the hands of the alleged “victim”. These traumatised women do not necessarily elicit a protective reaction from police, even if that is exactly what they need.

Second, in Victoria, some police members lack familiarity with the fairly sensible guidance in the [Code of Practice for the Investigation of Family Violence](#) (“The Code of Practice”). Attending members can arrive into a chaotic and overwhelming scene. Where the primary aggressor is wrongly identified, our research shows that this correlates strongly with duty lapses. Our duty lawyers at MMC have made this observation while reviewing informants’ notes on police applications for a FVIO, and based on women’s descriptions of police procedure. The provisions of the *Code of Practice* that guide police members in identifying the “primary aggressor” – or the person most fearful and at risk, are particularly relevant here.² The requirement, strengthened post Royal Commission into Family Violence (RCFV), that an independent interpreter be used is particularly relevant (see below).³

Third, the research, as well as the observations of our duty lawyers, suggest a trend in which male perpetrators are increasingly gaming the intervention order system – and the protective role of police – to further their abuse. This trend is not unique to Victoria, but is occurring globally as family violence is criminalised (see Policy Paper 2). We also identify this trend (below) as a major driver of police ‘misidentifying’ the ‘primary aggressor’ when attending the scene of a family violence incident (Wangmann 2009; Mansour 2014; Smith 2015). Despite inadequate state-wide statistical data about police mis-identification in Victoria, the research literature, WLSV’s own data analysis, and anecdotal evidence reveal that the problem is serious and pervasive. This is true not just for Victoria but across Australia, and in comparable jurisdictions elsewhere (such as the UK and Canada).

Background: FVIOs were introduced to remediate the power differentials that arise with the high standard of proof (beyond a reasonable doubt) required in the criminal jurisdiction. These civil orders

¹ We suspect the figure may be higher, as we have not yet examined the context of violence in which women were “correctly” identified as primary aggressors. Note we are in the process of customizing our CLASS data base so it can track these data. The methodology for this study is set out in the Duty Lawyer File Review Snapshot on our website.

² See Section 3 of the *Code of Practice*, in particular.

³ These duty failures see Indigenous women, women from non-English speaking backgrounds, women with mental illness and/or substance misuse problems, and women with disability, overrepresented among women misidentified as primary aggressors.

have subsequently become the most frequently relied-on legal mechanism available to victims of family violence (Hunter 2006). That said, police misidentification of the 'primary aggressor' of family violence undermines the effectiveness of intervention orders, and weakens their protective power. Importantly, it fails to hold the genuine perpetrator to account - while initiating court processes against already traumatised women.

Consequences for Victims: Police misidentification has significant adverse outcomes and legal consequences for the victim, such as:

- Criminal charges: women with no prior criminal history face criminalisation (replicates trauma and abuse, "gas-lighting"⁴), and women with a prior history face continued criminalisation;
- Separation from children and trauma to children;
- Loss of reputation/access to services, employment, housing rights and access to crisis accommodation, homelessness;
- Immigration rights/visa status – already precarious for victims of family violence, and worse for victims of police misidentification;
- Issues arise in other jurisdictions such as: family law (both parenting and property) and child protection;
- Serious economic costs: as well as being economic abuse, it is a significant waste of the victim's (as well as policing, legal and judicial) time and resources;
- Denial of financial payments from crisis services, implications for VOCAT claims;
- Increased vulnerability to further violence;
- Loss of trust in police and the justice system. "*I thought they were there to keep me safe*".

Characteristics of misidentified women:

Our research found that, in the five months of January – May 2018, of misidentified women (from a sample size of 32):

- 1 in 2 (50%) were also victims of verbal and/or physical abuse perpetrated by the other party on the day the police responded. This included verbal threats, punching, kicking, choking (a red flag for homicide), slapping, and physical restraint.
- 19 in 32 (59%) were also victims of serious historical family violence perpetrated by the other party. The violence included: verbal abuse including derogatory name calling and threats to harm; *Physical abuse* (as above); *Emotional abuse*, such as gas-lighting⁵ and psychological control; *Sexual abuse*, including consistent demands for sex and/or rape; *economic abuse*, such as controlling resources and finances; and *other manipulative behaviours*, such as controlling their whereabouts and social life.
- 9 (28%) had current/prior IVOs against the other party

- 2 were pregnant.
- 14 in 32 (43%) had dependent children.
- 13 in 32 (40%) were suffering from a psychological illness. This included depression, anxiety, bipolar disorder and suicidal thoughts.
- 13 in 32 (40%) were at risk of homelessness.
- 17 in 32 (53%) were culturally and linguistically diverse (CALD) and came from non-English speaking backgrounds.
 - o 14 (44%) were born in Asia
 - o 5 (15%) were born in Europe
 - o 1 (3%) were born in Africa

Noting the prevalence of risk factors for these women, our findings illuminate a context that was likely not considered at the time of misidentification.

"Officer she's psychotic": 'Mutual' violence viewed through the lens of family violence: The task of identifying the 'primary aggressor' and 'primary victim' of family violence is 'complex, technical and nuanced work' (ALRC 2009). There are a number of reasons why it can be difficult - particularly in a charged and challenging environment where police members are also under pressure to get to the next "job". We have identified the following four key drivers of police misidentification of the 'primary aggressor' of family violence:

(1) Aggressors gaming the system

Reflective of the experience in the US, 'primary aggressor' language appears to lead police to focus on 'who started it' or 'who got in first' (ALRC 2009). This incident-based approach (see below) has resulted in an assumption that whomever calls the police first is most likely to be the victim requiring police protection (See Policy Paper 2, which shows an increasing awareness among perpetrators of family violence of this police assumption). Victim-survivors tell our duty lawyers that their partners use threats to call police as a form of coercion, and that they observed a police bias in favour of the person who called. One survivor was taken to the police station in the back of a paddy wagon and when she asked an officer why they weren't taking the actual aggressor, was told "*unfortunately he was the one that made the phone call*".

Where women have been rendered mute (e.g. from strangulation), are "hysterical", or aggressive, the perpetrator's articulacy can be highly persuasive to untrained, or hurried, or in the worst case, sympathetic police members. The Royal Commission made recommendations in relation to this issue. For instance, it recommended that the *Code of Practice* be amended to provide clearer practical guidance on identifying predominant family violence perpetrators – with emphasis on 'cases where men persuasively present themselves as the primary victim' (see also, ALRC 2009).⁶

⁴ "Gaslighting" occurs when a person manipulates another person by psychological means into doubting their own sanity.

⁵ See note 4

⁶ This "gaming" of the FVIO process, and of police and court powers to protect victims, is a global phenomenon we discuss in Policy Paper 2.

The Royal Commission also recommended that there be procedures for amending the police LEAP database when a service provider subsequently informs police that a person is not the primary aggressor. These recommendations have yet to be implemented.

- (2) Police seeing mutual and equal violence between the parties, without seeing the context of family violence.

Often in cases where police fail to identify the genuine 'primary aggressor' of family violence, the male party has claimed 'she hit me first'. There is a rigorous and substantial body of literature indicating that the notion of mutual violence between men and women is a largely discredited. This extensive research has found that women's use of violence in intimate relationships is not symmetrical with men's; it is both qualitatively and quantitatively different and 'tends to be in the context of their own victimisation' (Wangmann 2009: 13; Dobash et al 1992; Yllo 1993; Cavanagh 2003) including the imperative of self-defence.

Women's use of force and 'what women actively "do" when attempting to make their relationships safe for themselves and their children' is poorly understood by police (Cavanagh 2003: 230-231). As Cavanagh argues, police responses 'infer uniformity in women's responses to violence', which are linked to conceptions of abused women as being 'passive, submissive, downtrodden and unable to "leave"' (Wangmann 2009: 13).

The all-or-nothing view that women decide either to 'stay' or to 'leave' situations of family violence fails to recognise the complexity of intimate relationships characterised by violence (Cavanagh 2003). Women's use of force is 'not always defensive ... often it is more aptly described as "violent resistance"', insofar as some women will respond to a violent partner with violence to stop or reduce the violence, or through 'anger, frustration or retaliation' (Wangmann 2009: 14; Johnson & Ferraro 2000; Ferraro 2006). WLSV is currently collecting case studies (including impact stories) for misidentified women. Their use of violence mirrors this earlier research.

The narrow definition and complex legal character of 'self-defence' has also contributed to poor understanding around women's use of force. Research has found that while women do use moderate and serious levels of force in response to family violence, women are much more likely to be experiencing coercive control, sexual violence, and are much more likely to sustain injuries than men (Swan et al 2005; 2008; Stuart et al 2006). Moreover, Temple et al (2005) found that women's violence overall is less severe than men's. The injuries that men typically sustain are superficial (e.g. scratches) and/or defensive (bite marks, sometimes inflicted on him during strangulation). However, assumed uniformity in women's responses to victimisation has meant that the cumulative impact of men's coercive

control may make women's behaviour seem disproportionate in the incident police attend.

The challenge for police members called out to incidences of family violence is therefore to recognise the differences in men's and women's violence. Women's use of violence tends to be in response to their own victimisation and seek to challenge men's use of violence, while men's use of violence is more likely to be driven by entitlement and control motives (Swan et al 2008). Many of the patterns of violence men use against women (e.g. coercive control, using cognitive distortion) are covert. These psychological, coercive tactics are a distinguishing feature of family violence – but increased training can make it easier for police to identify these subtle patterns.

As Buzawa et al (2017) explain, without an understanding of the 'ongoing, every day character of coercive control' her reports of victimisation may seem disproportionate to the incident, leading police to view her as "crazy" – this is 'a perception the abuser is attempting to perpetuate' (Elliott 2017: 2).

Women who use violence in their relationships – defensively or not – often have complex needs and histories of trauma. They are therefore likely to challenge our culture's dominant 'real' victim stereotype. In these cases, the woman's behaviour at the time police arrive – whether she was affected by alcohol or other drugs, whether she was hostile, hysterical or aggressive towards police – conflicts with expected norms and idealised notions of a genuine and credible victim (worth rescuing). Research has shown these factors influence police decision-making (Wangmann 2009; Miller & Meloy 2006; Feder & Henning 2005). Police have shared with us accounts of women being aggressive towards them, and that this does the woman "no favours" if she wants their help. This perspective is understandable only as long as the causes of her aggression, and the continuing risk she and her children face, remain hidden. Navigating these complex dynamics requires skill and perspective.

The influence of the 'ideal' victim myth bears further consideration as a key factor in police misidentification. The notion of a 'deserving' rather than 'undeserving' victims, and myths relating to "victim" versus "agent" in terms of 'how a victim should respond or behave' are factors which heavily influence police assessments (Wangmann 2009: 13). These myths confront 'a central tension within feminism of a false dichotomy between women's victimisation and women's agency' – these myths suggest that a 'real' or legitimate victim is compliant, sober, and polite, and conforms to rigid gender role assumptions (Wangmann 2009: 14; Schneider 2000).

According to research by Miller and Meloy, women who appear erratic, who may be substance-affected, who yell or are otherwise aggressive, or hostile to police when they arrive, 'are the ones who will continue to face arrest' (2006: 95). As our research shows, this ignores the reality that a victim's

behaviour may be affected or distorted by injury, fear, and/or trauma. By contrast, the male party may seem calmer and more rational to police – because he has control of the situation and is neither fearful nor traumatised. Significantly, Wangmann argues that 'the legal system finds it hard to see women who use violence, or women who fight back, as victims of violence' (2009: 44).

Police, lawyers and magistrates therefore need to be mindful of the complexity of violent relationships and be aware of the strategies of resistance that women deploy in order to stop men's violence (Cavanagh 2003). In this way, women's experiences of victimisation are an important contextual factor – which emphasises the need for whole of story investigating.

The misidentified women we see at our duty lawyer service often present with the following demographic characteristics and indicators of disadvantage. These give necessary context to her victimisation:

- Indigenous women, with histories of complex, intergenerational trauma who in addition, may experience racial discrimination and prejudice when engaging with police
- Refugee and migrant women, who may also face discrimination in engaging with police
- Disability or mental health issue/s
- Substance misuse
- Caring responsibilities for children
- Male partner commonly has a criminal history
- Have complex needs and are known to police
- Have had police FVIOs made for their protection against the now alleged victim.

Another compounding factor is that occasionally the female party will also have a criminal history for low-level dishonesty offences – often linked to her experiences of victimisation and poverty. Once she is known to police, they may struggle to respond to her need for protection.

(3) Incident-specific Focus

Our experiences in court suggest that police misidentification results from a focus on incident-specific violence. As the preamble to the *Family Violence Protect Act 2008* (Vic) points out, family violence may be cyclical or a one-off acute act of violence. Significantly, as outlined above, victims of family violence might engage in defensive or retaliatory behaviours as a response to violence. Where police use an incident-specific lens and do not see the context of the violence, this may erode the legitimacy of a woman's 'victimhood'.

As the Family Violence Bench Book states, 'documented reactive behaviours, such as retaliating against physical or psychological violence with violent behaviour ... need to be understood as different to the primary aggressor's behaviour' (2018: 5.2.3.5). A key difference that distinguishes reactive/resistance violence from the violence

perpetrated by the predominant aggressor is an absence of controlling intent.

- (4) Failure to interview both parties and/or interview parties separately.

Another contributing factor to police misidentification that we have observed is uneven police practice around interviewing the parties. Among women we assisted as duty lawyers, misidentified women more often than not were either: not interviewed separately, interviewed without an independent interpreter, or not interviewed at all. Failing to interview both parties separately means that the victim is not given an opportunity to tell her story, much less contextualise her use of force.

Interviewing each party separately is crucial to identifying coercive control. Research has shown that men are able to convey their perspective more effectively (e.g., seen as the rational party) and are able to better negotiate the system (Pollack et al 2005). Separate interviews can prevent the male party from influencing and exploiting the frustration and trauma of the victim to impact her 'credibility' – for example, where the male party claims that the female party is "mentally ill" and that she "lashed out", and that he was just acting in self-defence.

We have also found that in many cases involving migrant and refugee women, no interpreter was present when police attend the incident, nor in court. This means that misidentification is not corrected at any stage along the way, with compounded impacts on the actual victim. Giving greater priority to compliance with the *Police Code of Practice*, which states that interviews should be conducted safely and separately, and with interpreters, will go some way toward reducing the likelihood of misidentification. We commonly hear from police informants that they were not able to get an interpreter – this is an issue that bears consideration for VicPol.

We note that even when given the chance, victim-survivors may be too fearful or embarrassed to speak to police members. Careful follow up and risk assessment becomes even more crucial when this is the case.

Correcting the record is a resource- and emotionally-draining process, particularly where the female respondent considers it safest for her to "take the blame" and consent to the order (breach of which can later see her criminalised). According to family violence specialist magistrates, where a female respondent has expressed intention to consent to an order – often under emotional duress in a pressured court setting – it is almost impossible for a magistrate to correct the police misidentification.⁷

Where to From Here?: Taking an early intervention approach is most likely to yield improved outcomes, including a restored sense of safety and retained trust in police for women affected by family violence.

⁷ Unpublished research, primary author.

As first responders, the importance of police correctly determining the party in need of police and court protection is essential. Police are making significant efforts to increase the skill and understanding of their members in relation to family violence, including misidentification.

In order to increase awareness of the impacts and prevalence of the problem, WLSV is continuing to collect evidence on female clients whom police have identified as the 'primary aggressor'. As our evidence base (both qualitative and quantitative) grows, we are reaching out to other change champions both across the family violence and criminal justice sectors, including, and especially, our colleagues at Victoria Police. We are engaging with police both at station and command levels with respect to the recommendations of the RCFV on police misidentification, and look forward to sharing its results.

The problem of police misidentification post RCFV remains pervasive. We are aware that police in Victoria are devoting significant resources to training, and retraining, staff to respond better to family violence. This paper is intended to support the shift in culture that additional police training is intended to bring. We urge a prompt and thorough engagement at Police Station level in Victoria with the sound guidance that the Code of Practice offers. Misidentification is best avoided at the earliest stages through improved police understanding of the dynamics of family violence and coercive control, and the contexts that contribute to women's victimisation.

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