Violence Prevention for 'Enmeshed' Dating Relationships: Interpreting Queensland's Civil Law

Heather Nancarrow

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Preamble

In the interests of transparency, and to contextualize certain comments made in the body of the report, I wish to advise of my professional involvement in the development of the Model Domestic Violence Laws (1999) and the amendments to Queensland's domestic violence legislation, which led to the inclusion of 'enmeshed' dating relationships. In both cases this related to my position as manager of the Domestic Violence Prevention Unit in the (then) Department of Families, Youth and Community Care, with responsibilities including administration of the domestic violence legislation. I held this position between 1994 and 2002 (although I was seconded to work on amendments to Queensland's adoption legislation for a year between 2001 and 2002).

The Model Domestic Violence Laws project was initiated in 1996 at a National Domestic Violence Forum, convened by the Federal Government, which identified the need for greater consistency of domestic violence legislation across the country. Consequently, a Working Group of officials from States and Territories and the Commonwealth was convened to develop model laws to assist in achieving this greater consistency. Queensland was represented on the Working Group by myself and Katey Daley, who was also employed in the Domestic Violence Prevention Unit at that time.

The period of time I managed the Domestic Violence Prevention Unit coincided with the comprehensive review of Queensland's domestic violence legislation, including consultation on the proposed legislative provisions for 'enmeshed' dating relationships. However, I was not working in this area when the Domestic Violence Legislation Amendment Bill 2001 was introduced to, and passed by the Parliament.

Acknowledgments

First and foremost I wish to thank the clients, domestic violence court assistance workers, and magistrates who participated in this study. I also wish to acknowledge the members of the Domestic Violence Court Assistance Network, particularly Pam Godsell, for raising the need for the research with me and for assistance in developing and testing the data collection tools. My sincere appreciation also goes to: Judge Marshall Irwin, Chief Magistrate, for his assistance with the distribution of the survey for magistrates; Sharon Conway for assistance with transcribing interview tapes, tabulating responses, and searching the Domestic and Family Violence Database; Annie Webster for general research assistance; and to Michelle Bradford, Kass Fenton, Pam Godsell and Kim Chandler for their feedback on drafts of the report.

Finally, I would like to acknowledge the Queensland Department of Communities, which provides funding for the Queensland Centre for Domestic and Family Violence Research to undertake research and evaluation and to develop educational resources pertaining to domestic and family violence in Queensland.

I trust that this work will make a useful contribution to deliberations about legislative protection against dating abuse, and to the Department of Communities' impact evaluation of the changes to the *Domestic and Family Violence Protection Act 1989*, which included the extension of the Act's coverage to 'enmeshed' dating relationships.

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Table of Contents

Introduction

In March 2003, legislative provisions expanding the coverage of Queensland's domestic violence legislation commenced. The expanded legislation enables people in family relationships, 'intimate personal relationships' and 'informal care relationships' to seek legal protection against abuse by their relationship partners. These amendments were the culmination of a process that began when the then Department of Families, Youth and Community Care (DFYCC), in conjunction with the second-term Queensland Domestic Violence Council commissioned a consultant to research and make recommendations on legislative options for non-spousal domestic violence. This had been a recommendation of the Queensland Domestic Violence Taskforce (1988) which investigated and reported on spousal domestic violence.

The Report on Legislative Options for Non-Spousal Domestic Violence recommended:

> 'That the *Domestic Violence (Family Protection) Act 1989* be amended to enable a person who is or has been in a domestic relationship with another person to apply to the court for a protection order against that other person'; and
>
> 'That the *Domestic Violence (Family Protection) Act 1989* define domestic relationship to include the following situations:
>
> (a) where the person is a partner of the other person
>
> (b) where the person is a family member of the other person
>
> (c) where the person ordinarily or regularly shares a household or resides with the other person
>
> (d) where the person has a close personal or intimate relationship with the other person'. (DFYCC 1996, pp. 151-152)

The Report on Legislative Options for Non-Spousal Domestic Violence was released for public consultation in 1996, coinciding with a comprehensive review of the *Domestic Violence (Family Protection) Act 1989*. The legislative review had been triggered by the Queensland Domestic Violence Council which had, in 1995, recommended urgent technical amendments to the Act to address problems with the breach provisions contained in section 82 of the Act. Following an extensive review of the *Domestic Violence (Family Protection) Act 1989*, between 1995 and 1998, the Minister for Families, Youth and Community Care, the Honourable Anna Bligh, split the review into two stages, with the first to focus on technical amendments and the second to consider the broader policy questions concerning the relationship types that should be covered in the legislation. This decision was based on the need to immediately advance technical amendments which were not in dispute, and some of which had been identified as urgently needed in 1995, while allowing further consultation on the more contentious policy decisions to be made about the coverage of the Act. In 1999, a raft of technical

amendments and the explicit inclusion of same-sex spousal relationships were passed by Parliament, and the Department of Families, Youth and Community Care released a consultation paper titled *Legal Protection Against Family Violence, Abuse by Informal Carers, And Abuse Within Dating Relationships*. The discussion about dating relationships included reference to the concept of 'enmeshed' dating relationships as provided for in the Model Domestic Violence Laws, which had only recently been released.

The consultation paper proposed two options for consideration: a separate Act to parallel the existing *Domestic Violence (Family Protection) Act 1989,* as advocated by the funded domestic violence sector; or the creation of two parts of the same Act to provide separately for spousal and non-spousal domestic violence. The second part was to 'provide protection against family violence, abuse by informal carers and abuse between people in enmeshed dating relationships' (p.11).

Many of those working in the existing, specialist domestic violence prevention field opposed extending the *Domestic Violence (Family Protection) Act 1989* to include 'non-spousal' domestic violence, except for 'dating violence' which was considered to have the same 'power and control' dynamics as spousal domestic violence. Others, particularly those advocating for victims of elder abuse, argued that separate legislation would be considered 'second-class' legislation and would not be adequately resourced and enacted to effectively protect those suffering from non-spousal 'domestic' abuse. Police and court staff argued that duplication of legislation for different target groups would unnecessarily complicate the implementation of protective orders and compromise the effectiveness of the legislation. Ultimately, State Cabinet approved the expansion of the existing legislation, rather than duplicating the Act to protect people in non-spousal relationships.

The Explanatory Notes accompanying the Domestic Violence Legislation Amendment Bill 2001 (p. 8) states that section 12:

> *…introduces a new concept of an 'intimate personal relationship'…The clause covers…Persons who are or have dated each other and their lives have become enmeshed so that the actions of one of them affect or affected the actions or life of the other.*

The Notes explain that same sex couples are included and that a sexual relationship is not relevant to the concept of an 'intimate personal relationship'. The following example of such a relationship is provided:

> *…a girlfriend and boyfriend who although not engaged and not living together have been dating for 10 months…have joint bank accounts and are saving money to go overseas together for three months*.

The Notes also state that 'the clause is not intended to cover those people who have merely dated on a number of occasions', and then list the indicia of an intimate personal relationship provided in the Bill as 'factors that may assist the courts in determining whether the relationship can be an intimate personal relationship' (p. 8).

The second stage amendments to the *Domestic Violence (Family Protection) Act 1989* commenced on 10 March 2003, with implementation supported by a booklet featuring the Act's new name and published by the Department of Families to explain the new legislation. The booklet, *Legislation: The Domestic and Family Violence Protection Act 1989*, explains that 'intimate personal relationships…includes people who are or were previously dating and whose lives have become enmeshed' (p. 4), before listing the indicia of such relationships provided in the legislation as circumstances that 'will be considered to decide whether an intimate personal relationship exists' (p. 4).

By December 2004, concern was being expressed by Domestic Violence Court Assistance Network members about the lack of clarity of the term 'enmeshment' and inconsistencies in how the magistrates were interpreting it. Specifically, some court assistance workers reported concerns about magistrates relying on the existence of joint bank accounts, or shared financial commitments, as grounds for determining whether or not a dating relationship was 'enmeshed'. The research addresses these concerns.

Prevalence and nature of dating violence

Internationally

Internationally, but especially in the United States of America, numerous studies on dating violence have emerged since the first such study by Makepeace in 1981. These studies focus on young people and most have been quantitative studies, using Straus's *Conflict Tactics Scale* (Straus 1979), or variations of it, which was developed to measure intra-family violence. The *Conflict Tactics Scale* (CTS) measures the frequency of individual acts of aggression without considering the meaning, context and consequences of the violence. As a result, the gendered nature of such violence is masked by the apparent gender symmetry in the use of violence against one's partner, in studies using only the CTS. A study by Molidor and Tolman (1998), for example, found that 36.4% of the girls in their study who had ever dated, and 37.1% of the boys reported that they had experienced physical violence by their dating partner. On further investigation, however, they found the girls reported that it was their male partners who started the violence 70% of the time, while the boys said that it was the girls who started it only 27% of the time. Further, 17% of boys reporting experience of physical violence in a relationship said that the violence they experienced was in response to them making unwanted sexual advances toward their girlfriends.

The most significant variation to the CTS has been the inclusion of sexual aggression, which is consistently and significantly more often experienced by women and perpetrated by men, and this has helped to highlight the gendered nature of dating violence. A gender analysis of other forms of violence is also illuminating. Riggs and O'Leary (1996) show that females are over-represented as perpetrators of the less serious forms of physical violence, such as slapping, grabbing or shoving a partner, while males are over-represented as perpetrators of the more serious forms of violence such as choking, beating, threatening a partner with a knife or a gun, and rape.

O'Keefe (2005) notes, however, that *'rates of dating violence in high school samples has been found to be as low as 9%...and as high as 57%'* . One of the problems in

attempting to measure the prevalence of dating violence is the variation in defining dating violence. Some definitions include psychological and emotional abuse as well as physical abuse, while others' definitions are limited to various physical forms of abuse, which may or may not include sexual abuse. Another problem leading to the variance in prevalence rates across studies is that some focus on violence in current relationships, while other studies include violence in current and/or past relationships.

In Australia

Very few studies on dating violence have been conducted in Australia and where they exist they relate to dating relationships among young people, and focus almost exclusively on sexual violence. The most extensive study of dating violence in Australia, to date, was commissioned by National Crime Prevention and the Department of Education Training and Youth Affairs (2000). This national study, which had qualitative and quantitative research elements, surveyed 5000 young Australians between the ages of 12 and 20 years about the experiences of violence in dating relationships. Using a variation of the *Conflict Tactics Scale* to measure prevalence, it found that boys and girls participating in the study, and who had been in a dating relationship, almost equally (37% of boys and 36% of girls) reported experience of some form of physical abuse in one or more dating relationships. While there were similarities in the number of reported incidents of physical violence, there are substantial gender-based differences in these experiences, as identified in table 1, below, adapted from National Crime Prevention and the Department of Education Training and Youth Affairs (2000, p. 115).

Table 1: Experiences of victimisation by gender

	Pushed, grabbed or shoved	**Attempt to be physically controlled(e.g. held)**	**Physically threatened**	**Attempts to force sex**	**Slapped**	**Bitten, hit or kicked**
Girls	26%	25%	19%	14%		
Boys	19%	16%			21%	13%

Further, the study found that the females were more likely than males to have been both physically hurt and frightened: "24% of all girls who have been in a dating relationship have been frightened and/or hurt by intimate violence that they had experienced, compared to boys in the same circumstances (nine per cent)" (p. 122).

The study found that almost half of 19 - 20 year olds who have been in an intimate relationship have experienced at least one act that can broadly be classified as dating violence (p. xvi of Full Report). It also found higher rates of victimisation in personal relationships being associated with disadvantage and revealed, for example, high rates of violence experienced by Indigenous young people (p. xv).

In Queensland

The Domestic and Family Violence Database[1] housed at the Queensland Centre for Domestic and Family Violence Research, reveals that for the two-year period between 1 October 2003 and 30 September 2005, there were 3,694 recorded cases for people in 'Intimate Personal Relationships'. This is 8.6% of the total new client matters (n = 42,869) recorded in that period of time. The Queensland Police Service[2] records a similar rate of intimate personal relationships involved in calls for service to respond to domestic violence. People in this category of relationship accounted, on average, for 8% of calls for service in the period March 2003 to March 2004, and accounted for 8.6%, on average, of calls for service in the period April 2004 to April 2005.

'Intimate Personal Relationship' is the third most frequently recorded relationship category in the Domestic and Family Violence Database (the first and second most frequently recorded are 'spousal relationships' and 'parent/step-parent/child relationships', respectively). Females comprised 82.4% (n = 2,930), and males comprised 16.8% (n = 597), of the total new client matters in this category of relationships. Of the 3,694 new client matters recorded for 'intimate personal relationships', 137 involved same-sex relationships, with the majority (80%) of these new clients being women[3].

Of the 3,694 recorded cases for people in 'Intimate Personal Relationships', 293 identified as Aboriginal or Torres Strait Islander, which is 10.4% of all Aboriginal or Torres Strait Islander people, whose matters are recorded on the database (n = 2,822), seeking assistance in relation to violence in an 'intimate personal relationship', compared to 8.6% of all recorded cases involving access to service for violence in 'intimate personal relationships'.

Fifty per cent of all the new client matters recorded on the Domestic and Family Violence Database as involving 'intimate personal relationships' were primarily seeking court support. This is consistent with the primary reason for access to services, generally, as recorded on the Domestic and Family Violence Database.

Australian legislative provisions for 'dating relationships'

Model Domestic Violence Laws

In 1998-99, Model Domestic Violence Laws were developed by a Commonwealth, State and Territory Working Group, to facilitate greater consistency in State and Territory domestic violence legislation. The report of this Working Group notes that 'some contributors suggested that the definition (of domestic violence) should specifically include persons in … boyfriend/girlfriend relationships and dating relationships …' (Partnerships Against Domestic Violence 1999, pp. 25-27). The Working Group considered that, in general 'these relationships lie beyond the scope of domestic interactions and that other protective legislation, such as laws proscribing stalking, are better suited to dealing with those situations' (1999, p. 27). On this basis, the Working Group applied a test of 'enmeshment of lives' in the definition of 'other personal relationship', thus section 4 (2) of the Model Domestic Violence Laws states:

> ‘other personal relationship’ means a personal relationship of a domestic nature between two persons in which the lives of the persons are or were enmeshed and the actions of one of them affect or affected the other’ (1999, p. 24).

Not all states provide for dating relationships in their legislation, whether limited by a test of ‘enmeshment’ or not. Relevant provisions from jurisdictions that do provide for dating relationships are summarised below.

Queensland

Queensland’s *Domestic and Family Violence Protection Act 1989* provides for legal protection against violence in dating relationships, under the category of ‘intimate personal relationships’. In addition to couples who are or were engaged to be married, or who are or were betrothed or promised under customary law or cultural practice, this category includes some dating relationships. Section 12A (2) of the Act provides coverage for:

> a relationship that exists between 2 persons, whether or not the relationship involves or involved a relationship of a sexual nature, if –
>
> a) the persons date or dated each other; and
>
> b) their lives are or were enmeshed to the extent that the actions of 1 of them affect or affected the actions or life of the other.

Tasmania

Under section 4 (Interpretation) of the Tasmanian *Family Violence Act 2004*, the term ‘family relationship’ means:

> ‘a marriage or a significant relationship within the meaning of the *Relationships Act 2003*, and includes a relationship in which one or both of the parties is between the ages of 16 and 18 and would, but for that fact, be a significant relationship within the meaning of that Act’.

The purpose of explicit inclusion of parties aged between 16 and 18 is to over-ride provisions in the *Relationships Act 2003*, which defines a significant relationship as a relationship between two adults, while limiting the coverage of the domestic violence legislation to people aged 16 years and over.

Western Australia

Western Australia's *Restraining Orders Act 1997* includes, under section 4 (1) (f), protection for people 'who have, or had, an intimate personal relationship, or other personal relationship, with each other'. Subsection (2) defines 'other personal relationship' as 'a relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person'.

Northern Territory

In addition to spousal, de facto and family relationships, section 3 (2) of the Northern Territory's *Domestic Violence Act* simply states that 'a person is in a domestic relationship with another person if he or she… 'has or has had a personal relationship with the other person'. There is no further explanation or guidance in the legislation about what constitutes a 'personal relationship'.

Victoria

Section 3 (1) of Victoria's *Crimes (Family Violence) Act 1987* defines 'domestic partner' as:

> an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person-
>
> (a) for fee or reward; or
>
> (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

Section 3 (3) of the Act states that:

> For the purposes of the definition of "domestic partner" in sub-section (1) -
>
> (a) in determining whether persons are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 275 (2) of the Property Law Act 1958 as may be relevant in a particular case;
>
> (b) a person is not a domestic partner of another person only because they are co-tenants.

Comparison of State and Territory provisions for dating relationships

The Northern Territory appears to be unique in providing legislative protection against violence in any dating relationships by including, without qualification or further explanation, 'other personal relationships'.

Similar to the Model Domestic Violence Laws, Queensland, Tasmania and Western Australia all qualify the availability of legislative protection for people in dating relationships but they do this in different ways. Queensland and Western Australia's legislation follow the Model Laws most closely, although Western Australia uses the term 'interrelated' instead of 'enmeshed' and does not elaborate on the meaning of 'interrelated' in this context. The Western Australian legislation restricts applications for protection orders to people over the age of 16 years. Tasmania limits its legislative protection to people aged 16 years and over who are in a significant relationship, as defined by its *Significant Relationships Act 2003*.

Queensland's *Domestic and Family Violence Protection Act 1989* and Tasmania's *Significant Relationships Act 2003* provide guidance on what constitutes enmeshment of lives, and a significant relationship, respectively. Section 12A (3) of Queensland's legislation states:

> In deciding whether an intimate personal relationship exists under subsection (2), a court may have regard to the following-
>
> (a) the circumstances of the relationship, including, for example, trust and commitment;
>
> (b) the length of time for which the relationship has existed or did exist;
>
> (c) the frequency of contact between the persons;
>
> (d) the level of intimacy between the persons.

Sections 12A (4) of the Queensland legislation states: "An intimate personal relationship may exist whether the 2 persons are the same or the opposite sex", and section 12A (5) states: "The lives of 2 persons are not enmeshed merely because the persons date or dated each other on a number of occasions".

Similarly, Tasmania's *Significant Relationships Act 2003* provides guidance for determining whether two people are in a significant relationship (and which is not registered as a significant relationship under Part 2 of that Act). This Act states that:

> all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

(a) the duration of the relationship;

(b) the nature and extent of common residence;

(c) whether or not a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(e) the ownership, use and acquisition of property;

(f) the degree of mutual commitment to a shared life;

(g) the care and support of children;

(h) the performance of household duties;

(i) the reputation and public aspects of the relationship.

Section 4 of the *Significant Relationships Act 2003* makes it clear that it is not necessary to establish the existence of any of the matters listed above, or any combination of them for the court to determine that a significant relationship exists. Further, this section provides for the court 'to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case'.

Research design and process

Design

The interpretive-constructivist approach of this qualitative study enables an understanding of the experience of various participants in dealing with section 12A (2) of the *Domestic and Family Violence Protection Act 1989* in terms of how and why they hold the views they do, about the section and its purpose. The research question arose from debates during consultation on proposed amendments to the domestic violence legislation that took place between 1999, when the insertion of the concept of 'enmeshment' in the legislation was first proposed, and March 2002, when the Queensland Parliament passed the legislation containing section 12A (2). The need to examine the way in which this section of the amended Act was being interpreted was reinforced by the experience of court assistance workers following implementation of the amendments in March 2003.

The court assistance worker and client interview guides were constructed in consultation with members of the Domestic Violence Court Assistance Network, and trialled in three sites by domestic violence court assistance workers. The survey that was constructed to elicit the experiences and views of magistrates was trialled by a magistrate in a regional city. In each case, the trials resulted in some minor amendments to the data collection tools.

Magistrates' survey

Magistrates were asked to complete and return a survey (appendix 1) covering how frequently they had considered section 12A (2) applications; how easy or difficult it had been to determine 'enmeshment' in a relationship; what they saw as the key features of 'enmeshment'; the length of time taken to hear matters; the kinds of relationships they thought the legislator had intended to be covered; why they thought the legislation had been restricted to 'enmeshed' dating relationships; and what, if any changes to the Act would assist them in determining whether a relationship was 'enmeshed'.

Court assistance workers' interview guide

The court assistance workers' interview guide (appendix 2) covered: 1) experience with the implementation of section 12A (2) of the *Domestic and Family Violence Protection Act 1989*; and 2) views and understandings about the provisions for dating violence in the Act.

The first section covered the number of clients: assisted by the participant; granted a protection order; and refused a protection order because the court found the relationship was 'not enmeshed'. The interview guide also asked: whether a participant agreed or disagreed with any court decision to refuse an order on the basis that the relationship was not enmeshed; if the participant disagreed, they would be asked to state how they thought the relationship was enmeshed; and they were asked if they had experienced any difference in outcomes for police applications compared with private applications.

In the second section participants' views and understandings were explored with questions on the following topics: views about the key features of an 'enmeshed' relationship; which relationships they thought were meant to be covered in the legislation; those relationships that they thought should be covered, and why they thought this; and their understandings of why the legislation was limited to 'enmeshed' dating relationships and not just any dating relationship. Participants were then given the opportunity to add anything else they thought relevant.

Clients' interview guide

The clients' interview guide (appendix 3) asked clients about their age and ethnicity; whether their application had been a police or private application; whether it had been successful or not; if an order had been made, had it been successful; and where applications had not been successful, whether or not it was due to a failure to meet the test of 'enmeshment'. Clients were also asked about the nature of their relationship and what they understood by the term 'enmeshment'. As with the court assistance workers, the clients were also invited to add anything they thought relevant.

Process

Based on information from the Domestic and Family Violence Database about the geographical distribution of the cases of 'intimate personal relationship', thirteen locations throughout Queensland were identified as target areas for the study.[4] This approach increased the likelihood of including participants with experience in assisting

clients seeking protection under section 12A (2) of the domestic violence legislation. Surveys were distributed by the Chief Magistrate, Judge Irwin, via email on my behalf, to 46 magistrates in the target 13 locations. The email explained the purpose of the study and invited them to share their experience with and views about section 12A (2) of the *Domestic and Family Violence Protection Act 1989*. After the deadline for responses to this request had passed, I followed up with a letter to those magistrates who had not responded at that stage.

I conducted semi-structured interviews with court assistance workers at their workplaces in the same 13 locations as the magistrates. After conducting the interviews, I asked court assistance workers about their willingness to support the collection of data from their clients. All court assistance workers agreed to assist with the data collection and I provided training for them to do so. There were two inter-related reasons for this approach. First, clients applying for protection orders under section 12A (2) are few and far between, and generally have only one encounter with the court assistance workers, so the court assistance worker was best placed to ask clients if they were interested in participating in the study. Second, court assistance workers are best placed to assess clients' level of distress and the appropriateness of asking clients about their interest in participating, given the circumstances. Some of the court assistance workers suggested that the best way to get clients' responses would be to ask the clients to write them down, while they were waiting for their matter to be heard. On the basis of this advice, the interview guide was re-formatted to enable clients to write their answers if they preferred this method of giving information. All client data was gathered, and forwarded to me, by court assistance workers.

Limitations of the research

Although police obviously have a significant role in the implementation of section 12A (2) of the *Domestic and Family Violence Protection Act 1989*, a decision was made to exclude police from the research, as the research question focused on the way magistrates interpret the concept of enmeshed dating relationships.

The data collected from court assistance workers and clients relates to interim or consent orders, which are made without the claims of the 'aggrieved' (the person to be protected) being contested by the 'respondent' (the person from whom protection is sought) at a hearing. Therefore, in these cases, the magistrates were not required to make a decision about 'enmeshment' after hearing from respondents who might have contested that the relationship was 'enmeshed'. This limitation arises because court assistance workers generally only provide court assistance to clients at the mention stage, so they were not able to report on their experiences of magistrates' decisions regarding contested matters, and the clients they approached to participate in the study were those seeking court assistance from the court assistance workers.

I had sought access to transcripts of hearings, without identifying information, which would have, to some extent, addressed this limitation, and it would also have provided data that wasn't based on recollections and perceptions. However, access to the court transcripts from a centralised point was denied on the basis of restricted access to 'publication' of domestic violence proceedings provided for in section 82 of the *Domestic and Family Violence Protection Act 1989,* and read in conjunction with Queensland's

'privacy principles'. I was advised by the Department of Justice that I would need to approach magistrates individually and seek their assistance in asking parties to an application if they would agree to have their non-identifying information released for the research. I did not pursue this avenue as it seemed questionable whether genuine informed consent could be obtained through this process. Therefore, the data is based on the recollections and perceptions of magistrates, court assistance workers and clients. Nevertheless, the purpose of this study was to examine how the concept of 'enmeshed' dating relationships is being interpreted and, particularly, to test anecdotal evidence from court assistance workers about inconsistencies in the way magistrates interpret the concept. The available data is sufficient to draw conclusions about this.

Results

Magistrates

A total of eight magistrates (17% of the total in the sample) completed and returned the survey. One of them reported never having heard matters under section 12A (2) of the Act and six reported some experience of hearing applications under this section. Of these, four magistrates reported they had 'sometimes' heard such matters, while one reported 'often' hearing, and another reported 'rarely' hearing, such matters. Four of the six magistrates with some experience, found it 'difficult', or 'very difficult' to determine whether or not a relationship was 'enmeshed'.

In regard to their views on the key features of 'enmeshed' relationships, magistrates most commonly cited (n = 4) financial situation (not necessarily joint bank accounts), as a key feature. Other key features identified as features of 'enmeshment' were: exclusivity in the relationship (2); dependency (2); length of relationship (2); frequency of contact (1); property/children (1); and one cited the key features of 'enmeshment' as those which appear in section 12A (2) (b) of the Act.

Five of the six magistrates with experience of section 12A (2) thought that it took 'about the same time' to hear matters under this section, as other matters. One of these added that it was sometimes shorter, because they were not dealing with complex matters such as property and children. The sixth magistrate in this set found that applications under section 12A (2) took somewhat longer to hear because of the need to clarify information given in support of the claims of 'enmeshment'.

A variety of responses were received from magistrates when asked about the relationships they thought were intended to be covered under this section. Three magistrates cited relationships characterised by intimacy, dependency and commitment, with one spelling out the relationships intended to be covered in the following statement:

> *Persons in co-dependent committed relationships, publicly acknowledged, who may not live at one address but spend nights/week-ends together – an element of granting an order is re-occurrence, so if it's a transient relationship, they're not likely to maintain contact.*

The following types of relationships were each cited by one magistrate only: a boyfriend / girlfriend with either a child or property; relationships in which issues of power and control have surfaced; and people who have made a commitment and may have changed their own life to fit into the relationship – for example moved town, taken on or rejected a transfer or position. One magistrate said it was difficult to say with any certainty because no examples were provided.

Three magistrates said they didn't know why the legislation is restricted to 'enmeshed' relationships, and three said it was limited to 'domestic relationships', deliberately excluding those relationships where power and control does not exist. In the words of one magistrate '*those that do not involve commitment over a period of time cannot be said to be 'domestic relationships'…'*. Three magistrates, also, said the legislation needed to provide a 'clear definition and specific examples'. Expanding on this theme, one magistrate said there was a need for 'some very clear examples of enmeshed relationships and the reason for not including short-term dating relationships should be spelt out'. Another magistrate said that *'no changes to the legislation (are needed) but need tick boxes on the application form for indicators of enmeshment – then (there is) no need to ask intensely private questions'*.

Court assistance workers

Semi-structured interviews were conducted with 35 domestic violence court assistance workers. This represents almost all of the funded domestic violence court assistance workers in Queensland at the time. Participants were asked to state, approximately, the number of clients they had assisted to access protection under section 12A (2) of the *Domestic and Family Violence Protection Act 1989*. Where the participant has indicated an approximate range, such as 10-12, the lower figure has been used in this report.

Five participants reported no experience with assisting the aggrieved on applications for protection under section 12A (2) and one had assisted only to the extent of providing an interpreting service for the aggrieved. While these cases are not included in the results for the section on experience with supporting clients under section 12A (2) of the Act, they are included in the results for the section on court assistance workers' views and knowledge about section 12A (2) of the Act.

Experience with assisting section 12A (2) clients

An estimated total of more than 718 clients were reportedly assisted by 29 participating court assistance workers to access protection orders under section 12A (2) of the *Domestic and Family Violence Protection Act 1989.* The number of clients assisted by individual participants ranged from 1 (n = 4) to more than 100 (n = 2), as illustrated by table 2.

Table 2 Court assistance workers' experience with section 12A (2) clients

Number of court assistance workers	Estimated number of clients assisted
4	**1**
6	**2- 4**
9	**5 - 20**
5	**24 - 50**
3	**50 - 100**
2	**> 100**
Total workers 29	**Total estimated clients 718**

Twelve court assistance workers reported that an estimated 68 clients, (16% of the clients reportedly assisted by these 12 workers and 9.47 % of the total 718 reportedly assisted), were refused a protection order because the magistrate deemed they were not in an 'enmeshed' dating relationship. Table 3, below, shows the relationship of the 68 cases to the experience of the 12 court assistance workers who reported these cases. The table compares the data across three variables: the estimated number of clients supported by each court assistance worker participating in the study; their experience of orders being refused on the basis the relationship wasn't 'enmeshed'; and the number where the court assistance worker disagreed with the magistrate's interpretation that the relationship was not enmeshed.

Table 3: Number of clients assisted x number of orders refused because relationship not 'enmeshed' x number disputed by court assistance worker

Court assistance workers reporting decisions based on 'enmeshment'	Total number of clients assisted by these 12 workers	Number of these clients court decided not 'enmeshed'	Number of cases where worker disagreed with magistrate
1.	52	2	1
2.	10	1	0
3.	100	1	0
4.	1	1	1
5.	100	1	1
6.	1	1	1
7.	6	2	1
8.	1	1	0
9.	2	2	1
10.	24	1	0
11.	80	20	10 ('some')
12.	50	35	32 (90%)
Totals	**427**	**68**	**48**

In 48 (70.6%) of the 68 cases refused an order because 'enmeshment' was not present, the client's court assistance worker disagreed with the magistrate's decision. However, this represents disagreement in only 11% of all decisions for clients assisted by this group of 12 court assistance workers, and 6.7% of the total 718 decisions by magistrates reported by 29 court assistance workers. Also, the majority (87.5%) of the disputed cases occurred in the experience of just two of the 12 court assistance workers who had experienced clients being refused an order on the basis that they were not in an 'enmeshed' relationship. The court assistance worker who disagreed with 32 out of hr experience of 35 decisions that the relationship was not 'enmeshed', said she disagreed with the magistrate because 'the victims believed that they were enmeshed (and) they were enmeshed enough to have violence perpetrated against them on a regular basis'. Reasons given by others for disagreeing with magistrates' decisions related to the length of the relationship; that the relationship was acknowledged by family and /or mutual friends; and, in some cases, that the parties had a relationship with each other's children or other family members.

Court assistance workers' views and knowledge about section 12A (2) of the Act

The court assistance workers' views and knowledge about section 12A (2) were ascertained across four aspects. These were: 1) key features of enmeshment; 2) kinds of relationships meant to be covered; 3) kinds of relationships that should be covered, and why; and 4) why the legislation is limited to coverage for people in 'enmeshed' (i.e. not all) dating relationships. The following results are summarised in Table 4 on page 17.

When asked to identify key features of 'enmeshment' court assistance workers frequently referred to guidelines in the *Domestic and Family Violence Protection Act 1989* to help magistrates decide whether or not a relationship is enmeshed. In three instances, the court assistance worker referred directly to the Act, while 17 quoted the same, or similar, indicators provided in the Act as key features of 'enmeshment'; frequency of contact, length of relationships, and level of commitment were the most frequent examples of this. Although the Act does not refer to shared financial arrangements as a matter to be considered in deciding 'enmeshment', seven court assistance workers cited joint financial arrangements, or considerations, as key features of enmeshment. This might reflect a tendency for the views of court assistance workers to be influenced by what they thought magistrates look for in deciding 'enmeshment'. One participant said her responses, which included length of relationship, frequency of contact and sleeping over at each other's place, were *'based on what we have learned magistrates are looking for'*. Two other participants said they thought the key feature of 'enmeshment' was the identification of the aggrieved as being in an 'enmeshed' relationship – *'look …at how the woman herself identifies the relationship to be'*.

In response to the question about which kinds of relationships they thought were meant to be covered by section 12A (2), ten participants said it was intended to cover young people. Some of them expanded on this theme, saying it was intended to cover young people in close, intimate relationships similar to, but not meeting the legislative definition of spousal relationships (which includes de facto relationships of same and opposite sex couples). Other responses focused on the depth of the relationship in terms of trust, commitment, and intimacy and whether the parties are seen, externally, as a 'couple'.

The next question, which asked participants what kind of relationships they thought should be covered and why, aimed to discover the extent to which court assistance workers agreed or disagreed with what they saw as the intent of section 12A (2). Eleven of the participants agreed with the legislation placing limits on the type of dating relationships covered by the legislation, rather than all dating relationships, and 19 disagreed with the limitation. The remainder was not sure, or said they were unable to form an opinion because they had not given it sufficient thought. For those who agreed with limiting the type of dating relationships included, the main reasons given related to the need to maintain the focus of the legislation on 'domestic' relationships' and that without continuity and commitment, an ongoing pattern of domination and control (features of 'domestic violence') could not be established. They saw other relationships as being able to be simply ended or dealt with by stalking and assault provisions in the criminal law. For those who disagreed with the limitation, the major concern was that there is no effective protection from violence for people in other relationships. Some of the 19 people who disagreed wanted to extend the legislation to 'all dating relationships', while another thought it should be extended to include 'all dating relationships and friendships', and others thought it should cover any kind of relationship where there is violence. For them, the presence of violence between two people personally known to each other, rather than the nature of the relationship, should be the sole criteria for access to protection under the *Domestic and Family Violence Protection Act 1989.*

The last specific question for court assistance workers asked why they thought section12A (2) was limited to 'enmeshed' dating relationships. Twenty-two (63%) of the 35 participants said they did not know, or it was unclear to them, why the legislation was limited to 'enmeshed' dating relationships. Nine participants, including some who said they didn't know why not all dating relationships were included but had a guess, said the legislators wanted to narrow the scope of the legislation. Among these nine participants, and the remainder of the participants who put forward a view about why the legislation was limited, there were two schools of thought. One group thought that the legislators wanted to limit the number of people accessing the courts; and the other group thought the limitation was to maintain the integrity of the legislation by focusing on relationships that require a civil legislative response to abuse because the nature of the relationship is not conducive to simply ending it, nor using the criminal law to address abuse.

Twenty-nine of the 35 participants took the opportunity to add further comments before the end of the interview. Eight of the 29 (27.6%) spontaneously mentioned their local magistrates' responses to section 12A (2) applications. Seven of these responses were positive including comments such as *'the magistrate here has been good…doesn't seem to have a problem getting his head around what enmeshment means'* and *'…after two years of the introduction of this new thing, somehow I think magistrates are more open…so in reality, in practicality, magistrates are already kind of prepared to give orders…'*

Each of two participants making these positive comments about magistrates had assisted 50 or more people seeking protection under section 12A (2), and a further two had each assisted between 24 and 50 such cases. One of the six participants who had no first hand experience of assisting clients to access protection under section12A (2) of the Act said *'magistrates have differing interpretations of enmeshed'*.

Table 4: Court assistance workers' views and knowledge about section 12A (2) of the Act

Aspect	Responses (main categories)	Percentage and number court assistance workers	
Key features of 'enmeshment'	Referred specifically to the Act (e.g. 'as in the legislation')	8.6%	3
	Mentioned the same or similar indicators provided in the Act	48.6%	17
	Where the aggrieved identifies as being 'enmeshed'	5.7%	2
Kinds of relationships meant to be covered	Young people	28.6%	10
	Depth of relationship in terms of trust, commitment, and intimacy	23%	8
	Where the parties are acknowledged by others as being a 'couple'	5.7%	2
	Spouse-like but not living together	11.4%	4
Kinds of relationships that should be covered	Those currently covered in the Act	31.4%	11
	Should be all dating relationships or, for some, any relationship (e.g. co-tenants, friends etc)	54.3%	19
Why the legislation is limited to 'enmeshed' (i.e. not all) dating relationships	Do not know why	63%	22
	To narrow the scope of the legislation *(either to reduce demand on courts; or to retain policy scope of the legislation)*	26% *(includes some who didn't know but guessed)*	9

Clients

The seven clients who participated in the research were all women, ranging in age from 18 years to 48 years. Five were aged more than 20 years, and the remaining two were aged 18 years. All participants identified as being non-Indigenous Australians.

Experience with section 12A (2).

All participants had been granted an order or temporary order. Five orders resulted from private applications and two resulted from police applications. Of those present in the court when the order was made, and who remember the magistrate's comments, one said the magistrate asked if the respondent was the father of her children, and one remembered the magistrate noting that the respondent had not appeared and, in his absence, a two-year order was made.

Nature of the relationship

The specified length[5] of relationships varied between 'six weeks all up over a seven month period' to three and a half years. Four of the participants had been in the dating relationship for more than a year and three of these specified they had been in the dating relationship for three years or more. The kinds of things they did together most commonly involved socializing as a couple with family (all seven participants) and mutual friends (all but one). They all agreed that the respondent's actions affected their life; however, their examples of ways in which this occurred indicated confusion about the question in all but one case. For example, responses to this question included:

> ' Restricted my life, caused fear and anxiety;
>
> Social circles suffer, mutual friends and family involved, difficult for all;
>
> Lost confidence in myself, unsure who I am; and
>
> Made me scared of males in relationships'.

One participant said '*we were living together so his actions were affecting me because we were always around each other'*. The data don't reveal why this woman had applied for protection under section 12A (2), rather than as a 'spouse' under section 12 (2) (c).

Where noted, participants were equally divided in their response to whether their actions affected the life of the respondent. For those who agreed that their actions affected the respondent, examples of ways in which this occurred included:

> His family said his behaviour was unacceptable;
>
> He can't let go; and
>
> Same reason his affected mine (lived together, always around each other).

Understanding of the term 'enmeshed' dating relationship

Three participants said they didn't know what was meant by 'enmeshed' dating relationship, but one of these guessed it meant '*a sexual relationship, feelings are shared and the other person is close to you'.* One participant simply said it was a 'common bond'; while another tentatively said it was *'a long-term couple who don't live together…having mutual friends and having to deal with that after the break-up'.* One woman described an enmeshed relationship as:

> A relationship where the other person affects your life to the point that he is considered in everything that you do. His influence is always there – you're not single and the two of you need to be in agreement about what you do. There's an influence over everything you do.

Discussion

<u>The legislation</u>

While several states and the Northern Territory have civil legislative provisions to protect against dating violence, those of Queensland and Western Australia are the most similar. Essentially they both adopt the Australian Model Domestic Violence Laws' coverage for 'a personal relationship of a domestic nature between two persons in which the lives of the persons are or were enmeshed and the actions of one of them affect or affected the other' (1999, p. 24). In relation to this clause, the only variance between the two states' provisions is that Western Australia has replaced the word 'enmeshed' with 'inter-related' in section 4 (2) of its *Restraining Orders Act 1997.*

Given this similarity, I was curious to know if there had been any concerns in Western Australia about the way magistrates were interpreting the concept, although analysis of this was beyond the scope of the current research project. It is interesting and relevant, that a representative[6] of Western Australia's Domestic Violence Unit in Legal Aid advised that there seemed to be no concern in this regard (personal communication, 2005) and that section 4 (2) appeared to be universally understood to include any dating relationship. He attributed the apparent effective and consistent implementation of the section to the fact that all relevant agencies, including police, magistrates and domestic violence court assistance workers, had undertaken the same training program, delivered by the same two people.

In Queensland, there was a range of training programs and communication strategies conducted in 2002 to support the implementation of the changes to the domestic and family violence legislation[7]. The Department of Families, the agency responsible for the administration of the *Domestic and Family Violence Protection Act 1989* provided training on the amendments to the Act in 40 locations throughout the State. Training sessions were well attended and included participants from domestic and family violence support services, disability services, courts, police and various government departments. In addition, the Queensland Police Service (QPS) developed, in partnership with the Department of Families, a 'Train the Trainer' course for Operational Police on the

changes to the legislation. QPS delivered the training across the State to all Operational Police below the level of 'Superintendent'. Magistrates were not provided any specific training, although the Department provided a briefing on the changes to the legislation shortly before the new legislation commenced.

While this represents comprehensive coverage in terms of delivering training across Queensland, and necessarily takes account of Queensland's more decentralized population, the approach is not as uniform, nor as comprehensive in regards to the personnel trained, as that in Western Australia. Perhaps a more important difference, however, is that no specific training was provided in Western Australia about the concept of 'inter-related' lives of the parties to a protection order application, because all dating relationships were assumed to be inter-related, while in Queensland attention was drawn to the concept of lives being 'enmeshed' in subsections of the legislation itself, and in various publications supporting the implementation of the legislation.

It is also notable that the Western Australia legislation does not permit people under the age of 16 years to apply for a protection order on their own behalf, while in Queensland young people under the age of 16 years may apply for an order but relevant court documents must be provided to a parent or guardian of the young person. This requirement was the subject of debate at the time of consultation on the (then) proposed amendments to the domestic violence legislation because advocates for young people believed it would deter them from seeking legislative protection and, thus, leave them vulnerable to ongoing abuse. This point is relevant to a proposition that the purpose of restricting the coverage of the legislation to 'enmeshed dating relationships' is to reduce the demand on courts that might arise from facilitating easy access to the legislation for quite young people experiencing intimate personal relationship breakdown for the first time. Indeed, as shall be seen in discussion of the views and understanding of participants about section 12A (2), a number of service providers and magistrates believed this was the intention of limiting the coverage of the *Domestic and Family Violence Protection Act 1989* to 'enmeshed', rather than all dating relationships.

Policy debates and considerations leading up to the development of the Model Domestic Violence Laws and, subsequently, Queensland's *Domestic and Family Violence Protection Act 1989* did include concerns about net-widening and the impact on courts. However, the primary policy concern of the Model Domestic Violence Laws Working Group was to 'ensure the scope of this model is limited to domestic situations and not extended to situations of a casual or purely temporary nature, such as dating relationships' (1999, p. 27). Unfortunately, the Working Group's Report does not expand on the analysis of the different dynamics, or circumstances, operating in casual dating relationships compared to those in 'enmeshed dating relationships". Queensland's Consultation Paper, *Legal Protection Against Family Violence, Abuse by Informal Carers and Abuse within Dating Relationships* (1999), supporting the review of Queensland's domestic violence legislation, argues that simply ending a casual, abusive dating relationship and seeking support and protection from family and friends may be the most appropriate response, with any ongoing abuse being dealt with by the criminal law. It recognizes, however, that some dating relationships are more complex and, by way of an example of enmeshment, describes a situation in which "the parties may have established firm friendships with the families and friends of the other" (p.9). In understanding the position put forward in the paper, it is also helpful to consider

discussion about dating relationships in the context of the paper's Foreword, which starts by stating that people being abused in intimate personal relationships have particular difficulties using the criminal law because, in part, 'perpetrators of violence and abuse in intimate, personal relationships exploit their victims' shame, embarrassment and fear of family breakdown to avoid detection and criminal sanctions' (p.2). These points, read together, emphasise that the inherent policy position was aimed at protection for people in an ongoing relationship with an impact on, and expectations from, extended family and social networks, concerning the relationship. The consultation paper also highlights the early intervention role of the civil law as 'critical in personal relationships because of the ongoing nature of the relationship and the tendency for the abuse and violence to escalate over time" (p. 2). This is another example of the civil law response to domestic violence being justified on the basis that victims want the relationship to continue and the violence to stop. In other words, the legislation facilitates the continuation of the relationship, where desired, while attempting to end the violence, recognising the range of barriers that otherwise exist for victims of domestic violence to take any action.

Experience with section 12A (2) applications

This research is the result of a perception among domestic violence court assistance workers of significant inconsistencies in the way Queensland magistrates interpret section 12A (2) of the *Domestic and Family Violence Protection Act 1989*. It finds that the majority (four out of six) of the magistrates who responded to the survey and who had some experience with section 12A (2), found it 'difficult', or 'very difficult' to determine whether or not a relationship was 'enmeshed'. On this basis (although only 17% of the magistrates in the target areas responded), inconsistencies with interpretation of the section may be expected. Although all clients participating in the study reported that their applications for protection under section 12A (2) had been successful, they numbered only eight, and were not spread across the target areas, so this experience has limited application for the research. However, the 35 participating court support workers reported that magistrates refused only 68 applications (9.47% of the total 718) because they decided the relationship was not enmeshed. Court assistance workers disputed 48 of these 68 decisions (nearly three quarters, at 70.6%). The number of disputed decisions, however, is a small percentage (6.7%) of the total number of decisions made in relation to section 12A (2) of the Act. This is illustrated in table 5, below.

Table 5: Number of disputed decisions as % of total decisions and % of refusals

	Total number of section 12A (2) cases	**Number and % of applications refused because not enmeshed**	**Number and % of total decisions disputed by court assistance workers**
	718	68	48
% of total section 12A (2) cases	**100**	**9.47**	**6.7**

Surprisingly, more than three-quarters (87.5%) of the disputed cases occurred in the experience of just two of the 12 court assistance workers who had experienced clients being refused an order on the basis that they were not in an 'enmeshed' relationship. One of these 12 court assistance workers disagreed with 32 of the decisions in which she experienced a magistrate deciding the relationship was not enmeshed, accounting for 67% of all the disputed cases. She disagreed because, in her view, the victims' belief that the relationship was enmeshed was sufficient evidence of 'enmeshment'. Generally, the bases of disputes by the remaining 11 court assistance workers involved matters such as the length of the relationship; recognition by family members and friends that the parties were a couple; or, in some cases, because the parties had a relationship with each other's children or other family members. These are matters that can be considered under the provisions of the Act in deciding whether or not a relationship is enmeshed, while victims' self-identification of 'enmeshed' dating relationship status is clearly not provided for in the legislation.

As the purpose of the research is to examine the way section 12A (2) of the *Domestic and Family Violence Protection Act 1989*, is being interpreted, it is useful to consider the overall level of disagreement between magistrates and court assistance workers, once the 32 cases, disputed on the basis of victim identification of 'enmeshment', are removed from the equation. First we see that, on the basis of interpretation of legislative provisions, court assistance workers dispute only 16 of the 68 magistrates' decisions to refuse a protection order because the relationship was not 'enmeshed'. That is, slightly less than a quarter (23.5%) of the magistrates' decisions to refuse an order on this basis was disputed by court assistance workers.

Further, the number of decisions disputed by the 11 court assistance workers is only 2.2% of the total 718 decisions regarding the making of an order under section 12A (2) of the *Domestic and Family Violence Protection Act 1989*, as illustrated in table 6.

Table 6: Number of disputed decisions, based on legislative provisions, as % of total decisions and % of refusals

	Total number of section 12A (2) cases	**Number of applications refused because not enmeshed**	**Number of decisions disputed (on legislative basis) by court assistance workers**
	718	68	16
% of applications refused because not enmeshed		100	23.5
% of total section 12A (2) cases	**100**	**9.47**	**2.2**

Overall, the research related to the *experience* of magistrates, court assistance workers and clients has found little evidence of substantial, wide-spread inconsistencies in the way Queensland magistrates interpret the concept of 'enmeshed' dating relationships, pursuant to section 12A (2) of the *Domestic and Family Violence Protection Act 1989*, at least at the initial stage of making an order. However, it should be noted that the data generally relate to *uncontested* matters, and there has been only one appeal against a magistrate's decision not to grant a protection order on the basis that the relationship was not enmeshed. In that case, the magistrate found past acts of violence and the likelihood of it recurring, but also found that the parties were not in an intimate personal relationship, as defined in section 12A (2), because they were 'casual acquaintances and there was little impact on the aggrieved's every day life by the respondent' (as reported by Judge Wylie QC, 8 April 2005).

In considering the appeal, Judge Wylie referred to the example provided in the Explanatory Notes (see page 2 of this report), observing that the example adds to the words 'boyfriend', 'girlfriend' and 'dating', a sense that the relationship had reached a point where the parties were '*confident enough'* to have joint bank accounts and to make plans for a future, shared experience. In summing up the appeal case, Judge Wylie says *'in this case there might have been dates but there was no enmeshing of two lives and no evidence of 'trust and commitment…There was no intimate personal relationship to the magistrate's satisfaction (and) I am of the same mind'*. Thus he reads the example of the joint bank accounts as an example of 'trust and commitment', which is specifically cited in section 12A (3) of the *Domestic and Family Violence Protection Act 1989* as a circumstance that courts may consider to determine if a relationship meets the definition of 'intimate personal relationship'. Judge Wylie concluded the appeal process by ordering that the appellant pay the associated costs of the appeal for the respondent.

This case highlights just what is at stake in defining, and articulating the kinds of relationships covered by the legislation. There was no dispute that the respondent had abused the aggrieved but, apparently due to a lack of shared understanding about who was covered under section 12A (2), the aggrieved was not only left without protection from the violence but was ordered to pay the court costs for the man who had abused her. If there had been a clearer articulation, hence, a more uniform understanding of which relationships are covered in the legislation, the aggrieved may not have sought a protection order; may have been advised to seek alternative legal intervention; or may, at least, have been advised not to appeal the magistrate's decision. No doubt this would have avoided the emotional and financial burden arising from the court action. As the appeal decision does not address the nature of the abuse, it's not possible to even speculate on whether the criminal law may have been an appropriate avenue for intervention in this case.

<u>Views and understandings about section 12A (2)</u>

While the data on the experiences of magistrates, court assistance workers and clients do not indicate widespread problems associated with interpreting section 12A (2) of the *Domestic and Family Violence Protection Act 1989*, analysis of the 'views and understandings' data, provides a more complete and complex picture of the situation.

The results indicate that participants' views about key features of 'enmeshed relationships' were influenced strongly by the indicia provided in the legislation and, for some court assistance workers, by what they thought magistrates were looking for to establish 'enmeshment'. Therefore, the following discussion focuses on participants' views and understandings about the kinds of relationships intended to be covered; and why they thought the legislation is limited to 'enmeshed' dating relationships.

Kinds of relationships intended to be covered

In thinking about the kinds of relationships intended to be covered by section 12A (2) of the Act, magistrates tended to focus on the nature of the relationship, citing relationships characterised by intimacy, dependency and commitment. Examples given of these features included: relationships in which issues of power and control have surfaced; and people who have moved town, taken on or rejected a transfer or position, or otherwise changed their own life to fit into the relationship. While some court assistance workers focused on the depth of the relationship in terms of trust, commitment, and intimacy and whether the parties are externally acknowledged as a 'couple', about a third of court assistance workers thought section 12A (2) was intended to cover young people, or young people in close, intimate relationships similar to, but not meeting the legislative definition of spousal relationships.

Eleven of the court assistance workers also thought the legislation should be limited to relationships characterized by an ongoing pattern of domination and control (features of 'domestic violence', which can only result from a relationship based on continuity and commitment) to retain the integrity of the domestic violence legislation. However, a greater number (n = 19) of court assistance workers disagreed with the limitation, with their major concern being the lack of effective alternative legislation to protect women from being abused. These two positions represent two policy options considered by the Model Domestic Violence Laws Working Group and the Queensland Government in drafting civil legislative protection against abuse for people in dating relationships.

The first position is the one adopted by both the Model Domestic Violence Laws Working Group and the Queensland Government. It holds that certain relationships warrant special legislative consideration because their circumstances mitigate against ending the relationship and seeking criminal justice responses to deal with residual violence. This position is not taken lightly as it is contentious both in terms of civil liberties where, for example, respondents may be detained in police custody without being arrested and charged, and in terms of feminist analyses of justice responses to domestic violence.

Feminist critiques of civil law responses to domestic violence assert that "domestic violence is not a private matter; it is a crime that must be owned by the State representing the public interest, like any other crime (Nancarrow 2006, p. 99); and that civil responses collude with perpetrators by trivializing and minimizing criminal assault in the home. Douglas and Godden (2002) found that domestic violence in Queensland is rarely prosecuted as a criminal offence. They conclude that Queensland's civil law has "trumped" the operation of the Queensland Criminal Code, effectively "decriminalising" domestic violence in this State. Such critiques have led to ongoing and increasing advocacy from some organisations and individuals for stronger criminal justice sanctions (Nancarrow 2006, p. 89). However, there is also much feminist critique that points to the

failure of the criminal justice system to effectively address women's justice needs (e.g. Martin, 1998; Snider 1998; Coker, 2001; and Smart, 1989). This is particularly true in the case of domestic violence, because of its insidious nature, predicated on power and control dynamics; the inter-dependency associated with domestic, especially spousal, relationships; and the requirement of the criminal law for proof 'beyond reasonable doubt' before a conviction can be obtained, when there are seldom willing witnesses other than the parties involved,. Further, many women participating in the 1988 Queensland Domestic Violence Taskforce investigation reported that they would be very reluctant to use the criminal law, even if they could, because they didn't want to jeopardize their relationship; they just wanted the violence to stop.

Recognising and considering the importance, and the limitations, of criminal sanctions against domestic violence, the Taskforce recommended civil legislation to provide court ordered protective measures for victims 'as an adjunct to the criminal law in areas where the criminal law has not provided effective protection…' (1988, p.160). In short, the civil law response was seen as an undesired, but necessary 'stop-gap' for gender-based abuse in contexts where the criminal law was not an effective alternative, and this position prevailed in the determinations of the Model Domestic Violence Laws Working Group, the Queensland Government and, no doubt, other jurisdictions seeking to limit the civil legislative response to 'domestic violence' cases, given their special circumstances. Given the likelihood of non-criminal abusive behaviour to escalate over time to criminal assault or stalking, for example, the civil law response was also seen by the Queensland Government to play an important preventative role. As noted by the Department of Families, Youth and Community Care (1999) the criminal law response is more concerned with punishing past individual behaviour, acting as a general deterrent from violence, and cannot otherwise deal with prospective violence.

The views of the 11 court assistance workers who agreed with section 12 A (2) limiting coverage to 'enmeshed' dating relationships reflect the desire to restrict the use of civil law responses to domestic violence to cases where it is necessary (though not preferred) because of the nature of the relationship and the consequent ineffectiveness of the criminal law. The 19 court assistance workers who disagreed with the limitation and said it should cover all dating relationships represent the desire to protect all women from abuse, with a relatively easy-to-access protection order system. For some of these court assistance workers, however, the problem of where to draw the line became more apparent in thinking about whether or not women suffering abuse at the hands of men who were co-tenants, colleagues, friends, or acquaintances should also be covered by the legislation. That is, where would they draw the line, and how would they articulate it?

Why the legislation is restricted to 'enmeshed' dating relationships

Three magistrates and 22 (63%) of the court assistance workers said they didn't know why the legislation is restricted to 'enmeshed' relationships. Others generally saw it as either a strategy to limit the demand on courts, or a strategy to retain the focus of the Act on relationship abuse characterised by an ongoing pattern or power and control, and the inability of the 'victim' to end the relationship and use criminal law sanctions where available. It is apparent that the policy intention has not been adequately communicated to those implementing the Act, although an understanding of the policy intent is likely to assist in deciding if section 12A (2) of the Act applies in particular cases.

Conclusion

This research has found little evidence (at least in regard to uncontested matters) of inconsistencies in the way Queensland magistrates interpret the concept of 'enmeshed' dating relationships prescribed in section 12A (2) of the *Domestic and Family Violence Protection Act 1989*. As some of the court assistance workers indicated, it appears that the perception of such inconsistencies may have been based on early experiences becoming conventional wisdom. However, this does not represent a complete picture of the complexity involved in regard to the interpretation of the concept of 'enmeshed' dating relationships. Although the research did not confirm the perception of widespread inconsistencies in the way magistrates are interpreting the concept of 'enmeshment', it has highlighted the need for clarity about the policy intent and lack of consistent inter-agency training.

Policy intent

Analysis of the results of the research on views and understandings about section 12A (2), highlight the complexities concerning the appropriate application of civil law, rather than criminal law, to cases of gender-based violence and the retention of a focus on relationships in which abuse is an ongoing tactic of dominance and control, facilitated by some degree of dependence on the perpetrator of the violence. It also highlights that the policy intent of section 12A (2) has not been clearly communicated to stakeholders including, most importantly, those with a role in its implementation. The intent is considered as being either to reduce the burden on the courts by preventing access for people in casual dating relationships; or to retain the integrity of the legislation by keeping the focus on relationships that share similar dynamics and circumstances as spousal relationships. Neither the Explanatory Notes accompanying the Domestic Violence Legislation Amendment Bill 2001, nor the Government's information booklet *'Legislation: The Domestic and Family Violence Protection Act 1989'* appear to have added much to the information actually provided in the Act to help decide if a dating relationship is enmeshed or not.

Based on his reading of the Explanatory Notes, Judge Wylie dismissed an appeal (8 April 2005) against a magistrate's decision that a relationship was not 'enmeshed' because the appellant failed to demonstrate 'trust and commitment' in terms of *'confidence'* in a future relationship with the respondent. Confidence in a future relationship as a key element of an 'enmeshed' dating relationship is also reflected in the following statement made by one of the clients who participated in the research:

> A relationship where the other person affects your life to the point that he is considered in everything that you do. His influence is always there – you're not single…

This seems a useful, plain English definition of the kinds of relationships the legislation aims to cover.

The experience of the woman whose appeal was dismissed by Judge Wylie, and the case law arising from the appeal, gives cause to develop and widely distribute clearer information about the intent of the policy underpinning section

12A (2) of the *Domestic and Family Violence Protection Act 1989*, including examples that draw on the case law and the experience of clients who participated in the research.

Training

It is also apparent that further training is required for those involved in the implementation of section 12A (2) of the *Domestic and Family Violence Protection Act 1989* and this can also be assisted by the existence of case law to better illustrate the relationships intended to be covered.

Ensuring that court assistance workers and magistrates have a shared understanding of the policy intent, and the scope of section 12A (2), will reduce the likelihood of ineligible clients making applications for protection under this section. It will also increase the likelihood that clients are referred to more appropriate interventions, including the application of the criminal law.

Finally, consistent and high quality training for those involved in implementing section 12A (2) will reinforce appropriate understandings of the nature of domestic violence intended to be covered by the *Domestic and Family Violence Protection Act 1989.*

Recommendations

Based on the scope and findings of the research it is recommended that:

1. The Minister for Communities and/or the Department of Communities, as the agency responsible for the administration of the *Domestic and Family Violence Protection Act 1989,* provide a statement to further clarify the concept of 'enmeshed' dating relationships, particularly in light of existing case law;

2. The Queensland Centre for Domestic and Family Violence Research work with members of the Domestic Violence Court Assistance Network and the Department of Communities to:

   (a) produce and distribute an information resource addressing the clarified policy intent and legislative scope of section 12A (2) of the *Domestic and Family Violence Protection Act 1989*; and

   (b) develop a training initiative to enhance consistency across agencies involved in implementing section 12A (2) in regard to effectively supporting and referring people affected by abuse in dating relationships.

Appendices

Appendix 1: Magistrates' survey questions

1. How frequently have you had to consider applications made under section 12A (2) of the *Domestic and Family Violence Prevention Act 1989* (i.e. 'enmeshed' dating relationships)?

   a) never b) sometimes c) often d) frequently

2. In your experience, how easy/difficult is it to determine if a dating relationship is 'enmeshed'?

   a) very easy b) easy c) not difficult

   e) difficult f) very difficult

3. What are the key features you look for when deciding if a relationship is 'enmeshed'?

4. Do cases involving 'enmeshed dating relationships' generally take longer than cases involving other relationships covered by the *Domestic and Family Violence Prevention Act 1989*?

   a) yes, much longer b) yes, somewhat longer

   c) no, about the same time, d) no less time

   Please provide some brief comments in support of your response to question 4.

5. In your own words, what kind of relationships do you think section 12A (2) is aiming to cover?

6. Why do you think the Act it is restricted to 'enmeshed' (i.e. not all) dating relationships?

7. What, if any changes to this section of the Act, would assist in determining these matters?

Appendix 2: Court assistance workers' interview guide

1. How many people seeking protection under section 12A (2) of the *Domestic and Family Violence Prevention Act 1989* (i.e. 'enmeshed' dating relationships) have you assisted (in any way*)?*

2. How many of these clients have been granted an order?

3. How many, to your knowledge, were not granted an order because the court considered they were not in an 'enmeshed' relationship?

4. How many of those do <u>you</u> think did meet the criteria of 'enmeshment'?

5. In what way did they meet the criteria?

6. Have you noticed any difference in the likely success of an application based on whether it's a private or police application? Please comment…….

7. What are the key features you would look for if deciding a relationship is 'enmeshed'?

8. In your own words, what kind of relationships do you think section 12A (2) of the *Domestic and family Violence Protection Act 1989* is aiming to cover?

9. In your own words, what kind of relationships do you think this section of the Act should cover? Why?

10. Why do you think the Act is restricted to 'enmeshed' (i.e. not all) dating relationships?

11. Anything else to add?

Appendix 3: Clients' interview guide

1. What is your age?

2. Which of the following cultural groups do you mainly identify with?
   - ☐ Aboriginal Australian
   - ☐ Torres Strait Islander
   - ☐ Aboriginal and Torres Strait Islander
   - ☐ Non-Indigenous Australian
   - ☐ Other (Please state)…….

3. Who made the application for your protection order? (Please circle)

   a) Police b) self c) other d) don't know

4. Was the application successful (i e you did get the order)?

   Yes / No (skip Q. 5)

5. If yes, (i.e. <u>you did</u> get a protection order):

   - What date was the order made? (Approximate if need to) / /
   - Has the order been effective in stopping the abuse? Please comment.

6. If you <u>did not</u> get the protection order, why do you think your application was unsuccessful?

7. If you were present in court when the magistrate decided whether to give you an order or not, do you recall any particular things that the magistrate said about the nature of your relationship?

   - ☐ I was not present at court
   - ☐ No, I don't recall anything
   - ☐ Yes, I recall the Magistrate said:

8. I need to ask some questions about the nature of the relationship to help understand how the court reached its decision.

   a. Can you tell me about how long you were dating (e.g. days, weeks, months, years)?

   b. What kinds of things did you do together?

c. Did you spend time with each other's families? (please circle)
Yes / No

d. Did you have mutual friends? (please circle)
Yes / No

e. Did his/her actions affect your life? (please circle)
Yes / No

f. If yes, in what way?

g. Did your actions affect his/her life? (please circle)
Yes / No

h. If yes, in what way?

9. In your own words, what do you think is meant by an 'enmeshed' dating relationship?

10. Is there anything else you want to say about this?

References

Coker, D. (2001) “Crime Control and Feminist law Reform in Domestic Violence Law: A Critical Review” in *Buffalo Criminal Law Review* (Vol.4: 801).

Department of Community Development, Family and Domestic Violence Unit “Guide To The Acts Amendment (Family And Domestic Violence) Act 2004: Western Australian Government.

Department of Families (2003) Legislation: The *Domestic and Family Violence Protection Act 1989.* Queensland Government.

Department of Families, Youth and Community Care (1999) *Legal Protection Against Family Violence, Abuse by Informal Carers, And Abuse Within Dating Relationships: Consultation Paper*. Queensland Government.

Department of Families, Youth and Community Care (1996) *A Report on Legislative Options for Non-Spousal Domestic Violence*. Queensland Government.

Douglas, H. and Godden, L. (2002) *The Decriminalisation of Domestic Violence,* Griffith University.

Makepeace, J. (1981) ‘Courtship violence among college students’ in Family Relations 30: 97-102.

Martin, D. L. (1998) “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” in *Osgoode Hall Law Journal* Vol. 36, No. 1.

Molidor, C. and Tolman, R. (1998) ‘Gender and contextual factors in adolescent dating violence in Violence Against Women, 4(2), 180-194

Nancarrow, H. (2006) "In Search of Justice for Domestic and Family Violence: Indigenous and non-Indigenous Australian Women's Perspectives" in Special Issue of Theoretical Criminology (Vol. 10, No. 1, February 2006): Gender, Race and Restorative Justice. SAGE Publications.

National Crime Prevention and Department of Education Training and Youth Affairs (2000) *Young People and Domestic Violence.* Attorney-General’s Department, Commonwealth of Australia.

O’Keefe, M. (2005) *Teen dating violence: A review of risk factors and prevention efforts* VAWnet, National Resource Centre on Domestic Violence.

Partnerships Against Domestic Violence (2001) *Young people and domestic violence*. National Crime Prevention and Department of Education, Training and Youth Affairs. Commonwealth of Australia.

Partnerships Against Domestic Violence (1999) *Model Domestic Violence Laws Report*, Commonwealth Attorney-General’s Department, Canberra.

Riggs, D. S. and O'Leary, K.D. (1996) 'Aggression between heterosexual dating partners: An examination of a causal model of courtship aggression.' Journal of Interpersoanl Violence 11(4): 519-540

Smart, C. (1989) *Feminism and the Power of Law*, London: Routledge.

Snider, L. (1998) "Towards Safer Societies: Punishment, Masculinities and Violence Against Women" in *British Journal of Criminology*, Vol. 38: 1-39.

Straus, M. A. (1979) 'Measuring intrafamily conflict and violence: The Conflict (CT) Scale' in *Journal of Marriage and the Family* February: 75-88

Endnotes

[1] The Domestic and Family Violence Database records the number of 'new client matters' for which assistance was sought from one of 27 agencies funded in 2003 by the Queensland Department of Communities to respond to the support needs of people covered in the expanded domestic violence legislation.

[2] Provided by Senior Sergeant Ross Patching, State Domestic Violence Co-ordinator, Queensland Police Service from the Domestic Violence Index: Calls for Service

[3] The majority of services participating in the Domestic and Family Violence Database are services for women, so the prevalence of women, compared to men, in same sex relationships in the data set is not unexpected.

[4] The 13 locations were: Brisbane, Ipswich, Toowoomba, Gold Coast, Beenleigh, Logan, Sunshine Coast, Caboolture, Petrie, Mackay, Townsville, Cairns and Mt Isa.

[5] One participant said she and the respondent had been dating for "years", but did not specify how many years

[6] Michael Hovane, Lawyers' Manager, Domestic Violence Unit, Legal Aid, Western Australia via telephone conversation on 29 September 2005.

[7] Information on training programs was provided by an Officer of the Department of Communities who had been involved in the delivery of the training.

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