

DOMESTIC RELATIONSHIP EVIDENCE IN QUEENSLAND: AN ANALYSIS OF A MISUNDERSTOOD PROVISION

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Relationship evidence or evidence that reveals an individual's propensity to engage in certain offences has been the subject of much discussion in the context of domestic violence. Our understanding and awareness of domestic violence has developed immensely over the past decade and we now understand that domestic violence encapsulates much more than just physical violence against women. We now acknowledge it extends to sexual assault and child sexual abuse. This article examines the current protections provided by the law to restrict the admission of relationship or context evidence in order to ensure an accused person receives a fair trial. It does so by considering the development of the law surrounding relationship evidence, particularly the introduction of s 132 of the Queensland Evidence Act 1977 in 1998. This article explores the application of s 132B and questions whether its aim to simplify the process for admitting relationship evidence has actually been realised.

I INTRODUCTION

Evidence of the history of a domestic relationship between an accused person and his or her victim can have significant consequences when admitted at trial. By shedding light on the nature of the relationship between the parties, the finder of fact is able to put the charged offence in context. This can be particularly critical in cases of unlawful killing where the voice of the victim cannot be heard.¹ Similarly, non-fatal acts of domestic violence such as assaults or sexual offences often occur in a situation where there are no witnesses,² and as such evidence of the previous relationship between the parties involved can be very

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1 Taskforce on Women and the Criminal Code, 'Report of the Taskforce on Women and the Criminal Code' (Department of Justice and Attorney-General (Qld), 2000) 110.

2 Queensland Council for Civil Liberties, Submission to Attorney-General & Minister for Justice (Qld), *Taskforce on Women and the Criminal Code*, 4 February 2000, 21.

useful in establishing a case. Historically, relationship evidence has been the subject of much discussion in the context of domestic violence against women. Our increased awareness and understanding of domestic violence means that we now acknowledge it extends beyond physical assault to sexual violence and also to child sexual abuse, especially given that many child sexual offences are committed in the family home.³

Broadening our understanding of what encapsulates and defines domestic violence in turn requires review of the laws governing the area including the consideration of legislative reform. Whilst considering the previous conduct of an accused person may seem logical in determining the probability of his or her reoffending, in an effort to protect the pre-eminent right a person has to a fair trial, strict rules exist to manage the admissibility of this type of evidence.⁴ In fact, the rule restricting adducing any evidence revealing previous misconduct of a defendant has been described as ‘one of the most deeply rooted and jealously guarded principles of our criminal law’.⁵ The most pertinent challenge to the admissibility of relationship evidence is the prejudicial effect it may have on a defendant, by suggesting a propensity to engage in criminal conduct such as the offence charged.⁶ Despite the existence of many trials where this type of relationship evidence has been admitted,⁷ the position of the law in Queensland remains uncertain.

Legislative reform to the *Evidence Act 1977* (Qld) (*‘Evidence Act’*) in 1998 sought to clarify the process for admitting relationship evidence into a proceeding. Section 132B was introduced providing that: ‘relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding’,⁸ where a domestic relationship means ‘an intimate personal relationship, a family relationship or an informal care relationship’.⁹ The section notably only applies to criminal proceedings for offences under chapters 28 to 30 of the *Criminal Code 1899* (Qld) (*‘Criminal Code’*), including murder, manslaughter and assault. Courts continue to grapple with the application of section 132B and various commentators have suggested that despite its proposed purpose it has done little to alter the common law position.¹⁰

3 David Hamer, ‘Proof of Serial Child Sexual Abuse: Case-Law Developments and Recidivism Data’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 242, 243, citing Kelly Richards, ‘Misperceptions about Child Sex Offenders’ (2011) 1(429) *Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, 2011) 2–3.

4 Ibid 244.

5 *Maxwell v DPP* [1935] AC 309, 317 (Lord Sankey).

6 Andrew Hemming, Miiko Kumar and Elisabeth Peden, *Evidence: Commentary and Materials* (Thomson Reuters, 8th ed, 2013) 367.

7 *HML v The Queen* (2008) 235 CLR 334, 358 (Gleeson CJ, 370–1 (Kirby J)) (*‘HML’*). See below in Part II(B) for a discussion of the distinction between general context evidence and contextual evidence which reveals the commission of uncharged or charged acts.

8 *Evidence Act 1977* (Qld) s 132B(2).

9 *Evidence Act 1977* (Qld) s 132B(3); *Domestic and Family Violence Protection Act 2012* (Qld) s 13.

10 See, eg, Taskforce on Women and the Criminal Code, above n 1, 140–5; Zoe Rathus, *Rougher than Usual Handling: Women and the Criminal Justice System* (Women’s Legal Service, 2nd ed, 1994) 139;

This article examines the effect of section 132B on the admission of relationship evidence into criminal proceedings in Queensland. It will briefly explore foundational concepts of evidence including the policy justifications for admitting relationship evidence into criminal proceedings and provide an overview of the jurisdictional organisation of evidence law in Australia. The circumstances surrounding the provision's enactment, including its intended purpose and scope will then be addressed. This discussion will lay the foundation for a review of various Queensland cases involving the admission of relationship evidence. This will facilitate an analysis of how section 132B is presently being applied and whether this is in accordance with the aims of the section when it was introduced.

Specifically, the article will explore the following three situations in which it is submitted section 132B and more generally the law on relationship evidence are of particular relevance to. Firstly, where a victim of domestic violence retaliates against his or her abuser and either kills or seriously injures him or her, the important role relationship evidence can play in providing context of the history of the relationship and the availability of any defences the accused person may have. Secondly, where a perpetrator of domestic violence finally goes further than usual by seriously injuring or killing his or her partner, evidence of the history of the relationship can play a crucial role in displacing any argument that the behaviour of the accused was out of character and thus warrants raising the defences of provocation or self-defence. And finally, situations of child abuse in the family, where evidence of the relationship between the complainant and defendant can provide insight into the behaviour of the accused person towards the complainant over time and subsequently reveal other relevant incidents and uncharged acts. The article will explore the limitations of the provision; with a particular focus on the above three situations, the provision's limited application to chapters 28 to 30 of the *Criminal Code* and its relevance requirement. A comparative analysis will then be made of the position of the law in other Australian states in order to make measured recommendations for reform in Queensland.

II CONTEXT

A Evidence Law in Australia

A number of jurisdiction specific pieces of legislation govern the operation of evidence in Australia. In 1979 the Australian Law Reform Commission commenced a review into the laws of evidence, which culminated in the publication of a report and draft code.¹¹ Ultimately, it was this review that led to the Commonwealth and New South Wales adopting similar legislative frameworks governing evidence in 1995.¹² Tasmania, Victoria, the Australian

Geraldine Mackenzie and Eric Colvin, 'Homicide in Abusive Relationships: A Report on Defences' (Report, 6 July 2009) 53.

11 Hemming, Kumar and Peden, above n 6, 2.

12 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW).

Capital Territory, the Northern Territory and Norfolk Island have since followed suit, adopting the uniform evidence legislation.¹³ Despite this era of significant reform and the Commonwealth Government's hopes for a uniform approach to evidence law in Australia, Queensland, South Australia and Western Australia have resisted adopting the uniform evidence legislation.¹⁴ In Queensland the *Evidence Act* applies, however, the law on evidence is largely governed by the common law.¹⁵

B Key Evidential Concepts

One aim of the evidential reforms in 1995 was to expand the scope of evidence available to be admitted in a proceeding, thus reducing the number of exclusionary rules.¹⁶ This is a trend Hemming, Kumar and Peden have identified in recent evidential reforms, and one they predict will continue.¹⁷ While relaxing limitations on the admissibility of evidence allows the court to consider a greater variety of evidence relating to a matter, it also raises competing policy concerns that evidence may be admitted which is unfairly prejudicial to the accused. This policy tension is characteristic of the debate concerning propensity evidence. Propensity or similar fact evidence is evidence that 'shows that on some other occasion the accused acted in a way more or less similar to the way in which the prosecution alleges the accused acted on the occasion subject of the present charge'.¹⁸ The case of *Pfennig v The Queen*¹⁹ states the classic rule for admitting propensity evidence which still applies in Queensland:²⁰ '[Propensity] evidence ... will be admissible only if its probative value exceeds its prejudicial effect ... in other words, that there is no reasonable view of the evidence consistent with the innocence of the accused'.²¹ Dawson J suggested in *Harriman v The Queen*²² that this high standard of proof is required due to the fact that propensity evidence is circumstantial as opposed to direct, meaning the only proof it provides is obtained by inference.²³

In the prosecution of domestic violence offences, propensity evidence of the relationship between an accused person and their victim is often sought to be admitted. However, as David Field identifies, what may be labelled relationship or context evidence can often in fact be 'thinly veiled' propensity evidence,

13 See *Evidence Act 2011* (ACT); *Evidence Act 2004* (NT); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic). Note that whilst these states adopted uniform evidence legislation, the provisions of each act do vary slightly.

14 Hemming, Kumar and Peden, above n 6, 2.

15 Note that the *Evidence Act 1995* (Cth) prevails in Federal courts within Queensland to the extent of any inconsistencies with Queensland law.

16 Hemming, Kumar and Peden, above n 6, 3.

17 Ibid.

18 Taskforce on Women and the Criminal Code, above n 1, 367.

19 (1995) 182 CLR 461 ('*Pfennig*').

20 David Field, *Queensland Evidence Law* (LexisNexis Butterworths 4th ed, 2017) 251. See also *BBH v The Queen* (2012) 245 CLR 499, 541–2 (Crennan and Kiefel JJ); *R v Watson* [2017] QCA 82, [15] (The Court).

21 *Pfennig* (1995) 182 CLR 461, 483–4 (Mason CJ, Deane and Dawson JJ).

22 (1989) 167 CLR 590.

23 Ibid 602 (Dawson J).

which can still have a highly prejudicial effect.²⁴ Relationship evidence is tendered to provide context or background to a charged offence. It is particularly useful in cases where the complainant is the sole witness to the incident, for example in offences of domestic violence, sexual assault cases and child sexual abuse. The 2000 Report of the Taskforce on Women and the Criminal Code highlighted the damaging effect of portraying the offence behaviour in isolation.²⁵ The recommendations and observations of the Taskforce were made against a backdrop of cases involving women who felt they had been let down by the justice system. The Taskforce attributed this sentiment to the prevalence of an accused person successfully raising the provocation defence where the offence was an assault-based one. In such circumstances, the Taskforce observed a tendency for the court to consider the accused's behaviour to be 'out of character'.²⁶ The Taskforce identified a trend in women shying away from seeking the prosecution of assault-based offences in Queensland for this reason.²⁷ Queensland and Western Australia are the only states where provocation remains a complete defence to the offences of common assault, serious assault and assault occasioning bodily harm.²⁸

Similarly, in homicide cases men began pleading the complete defences of accident and self-defence or the partial defences of provocation or diminished responsibility.²⁹ To murder, provocation is a partial defence in Queensland, meaning that where it is successfully raised it has the effect of reducing a charge of murder to manslaughter.³⁰ Outside of Queensland, South Australia, New South Wales, the Australian Capital Territory and the Northern Territory have all retained the partial defence to murder,³¹ while Western Australia, Victoria and Tasmania have abolished it.³² Compounded by the impossibility of the victim giving evidence, families of the deceased were left horrified at the falsity of the portrayal of the relationship before the court.³³ The Taskforce reported that the overwhelming consensus from their consultations was that relationship evidence was essential to prosecutions involving family violence:

24 David Field, *Queensland Evidence Law* (LexisNexis Butterworths 3rd ed, 2014) 233.

25 Taskforce on Women and the Criminal Code, above n 1, 128–30. See example given regarding the Queensland case of *R v Brown* [1993] QCA 330 where Brown stabbed his first wife to death, but was convicted of manslaughter on the basis of diminished responsibility. At trial the jury was not allowed to hear evidence of the violent relationship. Within 10 months of being on parole in 1996 he strangled his second wife to death. See also Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report No 97 (2007) 218–23.

26 Taskforce on Women and the Criminal Code, 128–30.

27 Ibid.

28 *Criminal Code 1899* (Qld) s 269; *Criminal Code 1913* (WA) s 246.

29 Taskforce on Women and the Criminal Code, above n 1, 128–30.

30 *Criminal Code 1899* (Qld) s 304.

31 See *Crimes Act 1900* (ACT) s 13(1); *Crimes Act 1900* (NSW) s 23(1); *Criminal Code Act 1983* (NT) s 158. The South Australian law relating to the partial defence of provocation continues to rest on the common law of provocation.

32 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas); *Crimes (Homicide) Act 2005* (Vic); *Criminal Law Amendment (Homicide) Act 2008* (WA).

33 Taskforce on Women and the Criminal Code, above n 1, 129, citing Women's Coalition Against Domestic Violence, *Blood on Whose Hands? The Killing of Women and Children in Domestic Homicides* (Federation Press, 1994) 109, 115.

The artificial way in which the law isolates pieces of evidence as inadmissible and removes them from the picture is incomprehensible to most ordinary people who encounter the criminal justice system. The jury is often asked to decide what happened in a situation when they have only been given some of the jigsaw pieces.³⁴

Where relationship evidence is admitted, the court is careful to restrict its use to that of providing context to the offence and details of the relationship between the parties, rather than as evidence to prove the truth of a statement or to suggest the accused has a tendency to act in a particular way.³⁵ This ensures that the evidence does not offend the rule against hearsay. This issue received unprecedented attention in the decision of *R v Babsek*.³⁶ In that case, evidence of the victim applying for a domestic violence order against the accused the day prior to his death and evidence from a social worker regarding the violent relationship, were both ruled inadmissible due to offending the rule against hearsay. However, this issue has largely been resolved following the introduction of section 93B into the *Evidence Act* in 2000, which allows hearsay statements to be adduced in certain circumstances.

The principle of relevance is the fundamental rule of evidence.³⁷ For evidence to be admissible in any proceeding, the prosecution must first establish it is relevant. Evidence will be relevant if it ‘could rationally affect (directly or indirectly) the assessment ... of the probability of the existence of a fact in issue in the proceeding’.³⁸ Relationship evidence was historically considered relevant as it places the charged offence and the evidence surrounding it in context, and may also reveal a ‘guilty passion’ of the accused and their propensity to engage in particular acts, which helps explain a reason for the incident occurring.³⁹ The case of *HML v The Queen* (*‘HML’*)⁴⁰ demonstrates the predicament judges have with differentiating relationship evidence that provides a contextual background from that which has the potential to show tendency or propensity reasoning.⁴¹ A fine line exists between the two, with the High Court describing *Pfennig* as ‘a case about the fact of propensity as circumstantial evidence in proof of the offence charged’, and *Roach v The Queen*⁴² as ‘a case involving evidence that happened to show propensity’.⁴³

In *HML*, Hayne J opined that relationship evidence could only be admitted in situations where it could be proved beyond a reasonable doubt.⁴⁴ However this

34 Taskforce on Women and the Criminal Code, above n 1, 133.

35 Ibid 132.

36 [1998] QCA 116.

37 *Wilson v The Queen* (1970) 123 CLR 334, 339 (Barwick CJ) (*‘Wilson’*).

38 *Smith v The Queen* (2001) 206 CLR 650, 654 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

39 Thomas Smith and Paul Holdenson, ‘Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions – Part I’ (1999) 73 *Australian Law Journal* 432, 432, citing *R v AH* (1997) 42 NSWLR 702, 708 (Ireland J).

40 (2008) 235 CLR 334.

41 David Hamer, ‘Admissibility and Use of Relationship Evidence in *HML v The Queen*: One Step Forward, Two Steps Back’ (2008) 32 *Criminal Law Journal* 351, 352–3.

42 (2011) 242 CLR 610 (*‘Roach’*).

43 *R v MBO* [2011] QCA 280, [5] (Fraser JA), citing *Roach* (2011) 242 CLR 610, 623 (French CJ, Hayne, Crennan and Kiefel JJ).

44 (2008) 235 CLR 334, 406 [196].

opinion was qualified, with Hayne J noting this high standard should be limited to cases where the absence of consent was not an element of the offence.⁴⁵ Kiefel J suggested that where evidence is only tendered to provide context and not for the purpose of showing tendency on behalf of the accused, then the *Pfennig* test need not be satisfied.⁴⁶ However, this was not a unanimous proposition, with the Court failing to reach a consensus on whether context evidence, which only incidentally revealed the accused's propensity for misconduct, should still be subject to *Pfennig*.⁴⁷

The High Court again grappled with this definitional question in *BBH v The Queen*.⁴⁸ In that case a majority of the High Court dismissed BBH's appeal against conviction for sexual offences against his daughter, and held that evidence admitted in proof of his propensity to commit such offences was relevant and admissible. The majority, consisting of Crennan, Kiefel and Bell JJ took an approach consistent with that suggested by Kiefel J in *HML*. However, Hayne J, with whom Gummow J agreed, opined that the evidence of uncharged acts was inadmissible because it was irrelevant.⁴⁹ Hayne J considered the classification of evidence through the use of a broad term such as 'relationship evidence' risked obscuring the correct principles to be applied, and diverted necessary attention away from why the evidence was relevant.⁵⁰ Hayne J maintained that evidence of uncharged acts could only be admitted to prove tendency where it satisfied the *Pfennig* test.⁵¹ The evidence in question was evidence of the complainant's brother having seen the complainant bent over, unclothed with the accused's hands on her waist and BBH's face near her bottom. It was considered that there might have been an innocent explanation for the interaction such as BBH examining an ant bite on the complainant. Because the evidence was open to bearing this innocent explanation, Hayne J opined it was not admissible, stating:

The applicant was not on trial for whether, on the occasion observed by the brother, he performed some act of indecency on or in respect of the complainant. The conclusion that the applicant had performed an act of indecency on that occasion could be reached only by concluding that he had committed one or other of the offences charged. Doubt about whether the charged offences were proved was not, and could not be, resolved by the brother's evidence. The brother's evidence could be taken to describe sexual conduct *only* if it was proved that the applicant had a sexual interest in his daughter on which he had acted. Yet the jury were told that they could use the brother's evidence not only to show the 'relationship' between the applicant and the complainant but also to 'evaluate and decide that the complainant's evidence is true'. Acceptance of the evidence given by the brother did not necessarily inculcate the applicant in the offences charged. The evidence was equivocal.⁵²

45 Ibid 382 [102].

46 Ibid 502 [511]–[512].

47 Hamer, 'Admissibility and Use of Relationship Evidence', above n 41, 367.

48 (2012) 245 CLR 499 ('*BBH*').

49 Ibid 522–7 [62]–[82].

50 Ibid 524–7 [68]–[82].

51 Ibid 525 [71].

52 Ibid 527 [80]–[81] (emphasis in original). See also 521–2 [56]–[59] (French CJ). Cf 557–9 [196]–[200] (Bell J).

The question of adducing relationship evidence has been commonly raised in cases involving child sexual abuse. In *HML* the Court identified the public policy justifications for admitting this evidence including that: the sexual abuse of children is often characterised by repeated episodes; incidents can often be difficult to prosecute due to the nature of the evidence; by disallowing evidence of previous uncharged acts the incident could be conceived to be concocted; juries are more sophisticated today and less likely to misconceive evidence particularly with judicial direction; and finally the argument that a complainant should be able to give a 'fair and coherent account' of the incident instead of effectively '[quarantining] the charged acts'.⁵³ Yet, despite these considerations, section 132B does not apply to offences of a sexual nature.⁵⁴

III THE INTRODUCTION OF EVIDENCE ACT SECTION 132B

In interpreting the meaning of a provision, the highest regard must be given to the purpose of the Act, including the drafter's intentions.⁵⁵ With section 132B commonly labelled a redundant provision,⁵⁶ it is prudent to begin by tracing the development of the section.

The 1970s marked the beginning of a period of significant legal reform in Australia in response to the recognition of domestic violence and sexual offences against women as a significant societal issue.⁵⁷ The 1990s in particular saw parliamentary committees established to consider legislative reform.⁵⁸ This newfound awareness prompted debate regarding the historical treatment of women under the criminal law. These reviews revealed that the law's representation of women, their role in society, families and sexual relationships were outdated and ill informed.⁵⁹ A woman's position in society and role in the family unit had changed immensely, and the law, created and implemented almost entirely by men, was increasingly identified as archaic and inappropriate.⁶⁰

53 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) 1296 [27.270] ('*Family Violence Report*'), quoting *HML* (2008) 235 CLR 334, 366–8 [56] (Kirby J).

54 See below in Part III and Part V(A). The common law governs the admission of relationship evidence for offences of a sexual nature.

55 *Acts Interpretation Act 1954* (Qld) s 14A.

56 See, eg, Rathus, above n 10, 139; Taskforce on Women and the Criminal Code, above n 1, 140–5; Mackenzie and Colvin, above n 10, 53.

57 *Family Violence Report*, above n 53, 1111.

58 See, eg, Criminal Code Review Committee, 'Final Report of the Criminal Code Review Committee to the Attorney General' (July 1992); Taskforce on Women and the Criminal Code, above n 1; Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Sexual Violence: The Hidden Crime – Inquiry into the Incidence of Sexual Offences in New South Wales: Part 1* (1993); M Heenan and H McKelvie, 'The Crimes (Rape) Act 1991: An Evaluation Report' (Report No 2, Rape Law Reform Evaluation Project, Department of Justice, Victoria, January 1997); Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003).

59 *Family Violence Report*, above n 53, 1111 [24.54].

60 Ibid; Rathus, above n 10, 12; Queensland, *Parliamentary Debates*, Legislative Assembly, 20 March 1997, 698 (Tim Mulherin).

Until 1990, the *Criminal Code*, contained within the *Criminal Code Act 1899* (Qld) Schedule 1, operated without any major amendments.⁶¹ In 1994 the Goss Queensland Labor Government proposed a new draft code, the *Criminal Code 1995* (Qld).⁶² The proposed code varied substantially from that of the *Criminal Code* and was met with much criticism.⁶³ Among the controversial additions were the proposed changes to the law on admitting similar fact evidence into a proceeding, the content of which would later become sections 132A and 132B of the *Evidence Act*.⁶⁴ A change of government in 1996 saw the minority Borbidge Queensland Coalition Government scrap the *Criminal Code 1995* (Qld) and propose their own reforms through the Criminal Law Amendment Bill 1996 ('the Bill').⁶⁵ As well as providing for amendments to the *Criminal Code*, the Bill also proposed changes to the *Evidence Act*.

Despite the abandonment of the *Criminal Code 1995* (Qld), the Bill sought to preserve one of the key proposals of the Goss Government regarding reform to the law on similar fact evidence. In what was described as 'a bold move', the Bill retained the proposed changes to the law for admitting similar fact evidence into a proceeding.⁶⁶ A new section 132A was proposed and passed, providing that 'similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion'.⁶⁷ This section was introduced with the intention of superseding the decision in *Hoch v The Queen*.⁶⁸ In that case the High Court held that evidence, which was the possible result of concoction between complainants, should be deemed inadmissible and not be put before a jury.⁶⁹

A provision, the content of which was originally proposed by the 1994 reforms but importantly not endorsed by the Borbidge Government was section 132B.⁷⁰ Section 132B was introduced into Parliament by the then Shadow Attorney-General, Matt Foley.⁷¹ Foley spoke of how he hoped the provision would address the injustice and discrimination experienced by women under the

61 Heather Douglas et al, *Criminal Process in Queensland and Western Australia*, (Lawbook Co, 2010) 7–8.

62 Ibid; Sally Kift, 'How Not to Amend a Criminal Code' (1997) 22 *Alternative Law Journal* 215, 215–6.

63 See generally R S O'Regan, 'Law Reform and Politics' (1996) 14 *Australian Bar Review* 1.

64 See Queensland, *Parliamentary Debates*, Legislative Assembly, 16 June 1995, 12756–8 (Tony Fitzgerald; Dean Wells, Attorney-General, Minister for Justice and Minister for the Arts).

65 The Criminal Law Amendment Bill 1996 (Qld) was introduced into Queensland Parliament in December 1996, passed with minor amendments on 26 March 1997 and assented to on 3 April 1997.

66 Wendy Harris, 'Evidence in Queensland – Recent Legislative Changes' (1998) 18 *Queensland Lawyer* 196, 197.

67 *Evidence Act 1977* (Qld) s 132A.

68 (1988) 165 CLR 292.

69 Ibid 296 (Mason CJ, Wilson and Gaudron JJ).

70 See Queensland, *Parliamentary Debates*, Legislative Assembly, 16 June 1995, 12763 (Denver Beanland); for the original proposed section, see *Criminal Code 1995* (Qld) sch 2 pt 2 *Evidence Act 1977* item 4.

71 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1997, 824 (Matt Foley, Shadow Attorney-General).

previous criminal justice system by defining clearly and unambiguously the process for admitting evidence of prior domestic violence.⁷²

Numerous speakers attributed this injustice to the fact that the *Criminal Code* was drafted and enacted solely by male lawyers and politicians during a time when women were still considered to be the legal property of men and marriage breakdowns rarely occurred.⁷³ Other Labor members echoed this call, describing the amendment as ‘a fundamental and important request’ from women working in the field of domestic violence, while an independent member emphasised the positive effect this amendment could have for women who put up with years of mistreatment in an attempt to protect their relationship and their children.⁷⁴

A common theme among the arguments endorsing the provision was the effect domestic violence can have on a woman’s behaviour and response to dealing with different forms of violence. Proponents of the provision spoke of the contrasting behaviour of men and women in dealing with violence. They argued that while men often react immediately and sometimes retaliate with violence, for women often the response will be delayed and as a result, many incidents may accumulate before a woman reacts.⁷⁵ This focus is reflective of the debate existing in Australia at the time regarding the legal recognition of battered woman syndrome (‘BWS’).⁷⁶ The concept was introduced by American psychologist Lenore Walker in 1979 as a theory describing ‘learned helplessness’ and the psychological impact a long history of violence could have on a woman.⁷⁷ The theory was used to help explain why women would stay with their violent partner despite being subjected to years of abuse. This BWS evidence became particularly useful in determining questions of criminal responsibility and supporting claims of self-defence and provocation in cases where a woman had retaliated after years of abuse by killing her violent husband.⁷⁸ Numerous rules of evidence were identified as barriers to the admission of evidence of BWS, particularly the exclusionary rule regarding hearsay.⁷⁹ Some commentators anticipated section 132B would more readily allow evidence from battered women, their family members or treating psychologists of the nature of their

72 Ibid.

73 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 608–9 (Anna Bligh); Queensland, *Parliamentary Debates*, Legislative Assembly, 20 March 1997, 698–9 (Tim Mulherin), quoting letter from Eunice Donovan, Coordinator of the Domestic Violence Service in Mackay.

74 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1997, 824 (Judy Spence); Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 868–9 (Denver Beanland, Attorney-General).

75 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1997, 824 (Judy Spence); Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 868–9 (Denver Beanland, Attorney-General).

76 See, eg, Scrutiny of Legislation Committee, Parliament of Queensland, *Alert Digest*, No 2 of 2000, 14 March 2000, 19–20 [11].

77 Heather Douglas, ‘Criminal Responsibility and Family Violence: The Relationship between (Feminist) Academic Critique and Judicial Decision-Making,’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 176, 178.

78 Ibid 178–181.

79 Kift, above n 62, 219.

relationship to be admitted into a proceeding by creating an exception to the rule against hearsay.⁸⁰

Despite these arguments, the proposed section was met with great opposition from the Government. The Attorney-General strongly opposed the provision labelling it a 'political charade' and mere 'window-dressing' of an established principle at common law.⁸¹ During parliamentary debate on the section, he observed that:

an amendment such as this could bring the Parliament into disrepute. It will cause the judges to raise more than their eyebrows; they will be raising their collective wigs, scratching their collective heads and pondering what great wisdom this Parliament has had in telling them how to suck eggs ... The amendment does nothing at all to advance the cause – whatever the cause might be – of putting relevant evidence in relation to domestic violence before the courts.⁸²

In support of this argument, the Attorney-General referred extensively to the case of *Wilson v The Queen* ('*Wilson*')⁸³ and in particular the judgment of Menzies J.⁸⁴ He cited *Wilson* as authority for the proposition that the High Court had already 'clearly and unequivocally' held that relevant evidence of domestic violence was admissible in a proceeding, thus labelling section 132B as 'misleading' and the product of a 'political exercise'.⁸⁵ *Wilson* was convicted of murdering his wife by shooting her whilst she operated a tractor on their farm.⁸⁶ He claimed her death was a fatal accident, and that the shotgun had accidentally discharged.⁸⁷ As there were no eyewitnesses to the incident, the Court was faced with the predicament of whether to allow in evidence of previous domestic violence between the husband and wife as witnessed by others. This included evidence that on one occasion a witness had seen the couple arguing and overheard the deceased say 'I know you want to kill me, why don't you get it over with'.⁸⁸ On appeal, the High Court upheld the Victorian Supreme Court's decision to admit the evidence with Menzies J making the following observation:

Any jury called upon to decide whether they were convinced beyond reasonable doubt that the applicant killed his wife would require to know what was the relationship between the deceased and the accused. Were they an ordinary married couple with a good relationship despite differences and disagreements, or was their relationship one of enmity and distrust? ... To shut the jury off from any event throwing light upon the relationship between this husband and wife would be to require them to decide the issue as if it happened in a vacuum rather than in the setting of a tense and bitter relationship ...⁸⁹

80 Ibid.

81 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1997, 825 (Denver Beanland, Attorney-General).

82 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 869 (Denver Beanland, Attorney-General).

83 (1970) 123 CLR 334.

84 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 869 (Denver Beanland, Attorney-General).

85 Ibid 868–9.

86 *Wilson* (1970) 123 CLR 334.

87 Ibid 336 (Barwick CJ).

88 Ibid 337 (Barwick CJ).

89 Ibid 344 (Menzies J).

Those in the legal profession also questioned the purpose of the provision. In a report to the Queensland Government on women and the criminal justice system,⁹⁰ Zoe Rathus of Women's Legal Service expressed doubts regarding the effectiveness of the provision, emphasising its limited application to certain offences and requirement of relevance.⁹¹ Rathus observed that by requiring the evidence be 'relevant', section 132B was a circular provision that did nothing more than restate the position at common law.⁹² Sally Kift was also perplexed, noting that '[a] specific statutory amendment to reinforce the concept that relevant evidence is admissible in a criminal trial is an interesting approach',⁹³ before contemplating whether the section could possibly be an exception to the rule excluding hearsay evidence.⁹⁴

The Taskforce on Women and the Criminal Code formed by the Beattie Queensland Government in 1998, reported that although the section ostensibly does not advance the common law rules of evidence, by explicitly providing the evidence of a history of domestic violence will be admissible, it has the effect of encouraging trial judges and solicitors to seriously consider the relevance of this evidence to their cases.⁹⁵ Further, the Taskforce observed that the provision's specificity could see legal arguments over threshold admissibility issues avoided.⁹⁶ These were all arguments raised by Foley in defence of the opposition voiced by the Attorney-General. Foley conceded that while *Wilson* did support the proposition that evidence of a domestic relationship could be adduced into a proceeding at common law, it was not a precedent that judges had consistently followed.⁹⁷ Labor's consultation with women's groups revealed this was an issue of concern and interested stakeholders sought stability and consistency in the law.⁹⁸

In support of this proposition, Foley referred to the case of *R v R*,⁹⁹ a South Australian case where a woman was found guilty of murdering her sleeping husband with an axe.¹⁰⁰ At trial, the judge refused to allow the jury to consider the defence of provocation despite evidence of previous altercations between the couple, as the altercations did not occur at the moment immediately preceding the killing.¹⁰¹ On appeal to the Supreme Court, King CJ opined that the evidence, taken in context, should have allowed the jury to consider provocation.¹⁰² Linking

90 Rathus, above n 10.

91 Ibid 139.

92 Ibid.

93 Kift, above n 62, 219.

94 Ibid.

95 Taskforce on Women and the Criminal Code, above n 1.

96 Ibid.

97 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 869–71 (Matt Foley, Shadow Attorney-General).

98 Ibid.

99 (1981) 28 SASR 321.

100 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 870 (Matt Foley, Shadow Attorney-General).

101 *R v R* (1981) 28 SASR 321, 321–3 (King CJ).

102 Ibid 326–8; Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 870 (Matt Foley, Shadow Attorney-General).

this proposition back to cases involving BWS, and long histories of domestic violence, Foley referred to the sometimes ‘rougher than usual handling’ of women in these kinds of cases.¹⁰³ He considered that section 132B would provide certainty for victims of domestic violence, such that relevant evidence revealing the history of the domestic relationship would be admissible.¹⁰⁴ Despite much debate and controversy surrounding the proposed provision, the section passed in the Legislative Assembly with a majority of 42 to 41 on 26 March 1997.¹⁰⁵

As established during the parliamentary debate, relationship evidence had been admitted at common law prior to the commencement of section 132B.¹⁰⁶ Traditionally, relationship evidence had been admitted into proceedings as circumstantial evidence; in fact this was the approach taken by the Court in *Wilson*.¹⁰⁷ However, with the courts identifying the possibility for this evidence to be prejudicial to an accused person they began treating it as propensity evidence.¹⁰⁸ This saw a shift in the common law approach and consequently, Queensland courts applied the strict test from *Pfennig*, refusing to admit relationship evidence unless it showed ‘there is no reasonable view of the evidence consistent with the innocence of the accused’.¹⁰⁹ This apparent sense of confusion from the judiciary is no doubt what Foley referred to when he acknowledged the principle from *Wilson*, but noted the approach of the Court had not always been consistent and thus required legislative clarification.¹¹⁰

IV CURRENT APPLICATION OF SECTION 132B AND THE COMMON LAW POSITION

It is widely acknowledged that the common law position concerning relationship evidence is a complex one; Lord Hailsham once described it as a ‘pitted battlefield’,¹¹¹ while Andrew Palmer went as far as saying ‘the High Court’s pronouncements ... are so ambiguous that there is little to be gained from a close textual analysis of them’.¹¹² Section 132B was introduced with the intention of clarifying and simplifying the process of admitting relationship evidence; however, whether it has achieved this aim is something over which

103 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 870 (Matt Foley, Shadow Attorney-General).

104 Ibid.

105 Ibid 871.

106 Ibid 868–9 (Denver Beanland, Attorney-General).

107 See also *R v Ball* [1911] AC 47.

108 *Harriman v The Queen* (1989) 167 CLR 590, 597 (Dawson J); *S v The Queen* (1989) 168 CLR 266, 275 (Dawson J).

109 (1995) 182 CLR 461, 484 (Mason CJ, Deane and Dawson JJ); See, eg, *R v Ingram* [1996] QCA 294; *R v W* [1998] 2 Qd R 531; *R v Rushton* [1997] QCA 171; *R v Smith* [1997] QCA 350; *R v Carne* (1997) 94 A Crim R 249; *R v O’Keefe* [2000] 1 Qd R 564.

110 See Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1997, 869–71 (Matt Foley, Shadow Attorney-General).

111 *R v Boardman* [1975] AC 421, 445.

112 Andrew Palmer, ‘Propensity, Coincidence and Context: The Use and Admissibility of Extraneous Misconduct Evidence in Child Sexual Abuse Cases’ (1999) 4(1) *Newcastle Law Review* 46, 51.

commentators have expressed doubt.¹¹³ Heather Douglas observed that the narrow interpretation of the provision had meant it had not had the impact first intended in 1996.¹¹⁴ An analysis of existing case law applying section 132B reveals whether this evaluation is accurate.

A *Roach v The Queen*¹¹⁵

The 2011 High Court case of *Roach v The Queen* is generally considered the most comprehensive analysis of the interaction between section 132B and the common law on relationship evidence. Roach was convicted at trial of assault occasioning bodily harm of a woman whom he had been in a relationship with for approximately two years.¹¹⁶ At trial, the prosecution led evidence of at least five separate occasions Roach had assaulted the complainant, revealing a relationship interspersed with violence.¹¹⁷ Most of these instances of assault were uncharged acts. The trial judge justified the admission of the evidence by saying that without it ‘the jury would be faced with a seemingly inexplicable or fanciful incident. The evidence of the incident charged would otherwise appear to be given in a vacuum ...’.¹¹⁸

The issue on appeal to the High Court was whether the trial judge had erred in allowing the evidence of previous assaults to be admitted as evidence in the proceedings under section 132B. Before the Queensland Court of Appeal,¹¹⁹ Roach submitted the trial judge had incorrectly failed to apply the *Pfennig* test in conjunction with section 132B.¹²⁰ In the alternative, Roach argued that if the evidence was rightfully admitted, the jury should have been directed that the evidence could not be considered unless they were satisfied of its truth beyond reasonable doubt.¹²¹ The Court of Appeal dismissed both of these arguments, declaring relevance as the only requirement of section 132B.¹²² Ultimately, this aspect of the decision was upheld by the High Court.¹²³

Roach pursued the same arguments before the High Court, further submitting in the alternative that the *Pfennig* test should be incorporated into the application of the section 130 discretion.¹²⁴ Section 130 of the *Evidence Act* is the statutory

113 See, eg, Rathus, above n 10, 139; Department of Justice and the Attorney-General (Qld), above n 1, 140–5; Mackenzie and Colvin, above n 10, 53–4.

114 Mackenzie and Colvin, above n 10, 54, citing Heather Douglas, Submission to *Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009).

115 (2011) 242 CLR 610.

116 Roach punched the complainant with a closed fist more than eight times after she questioned him helping himself to a drink from her fridge as soon as he arrived at her house: *R v Roach* (2009) 213 A Crim R 485, 487 [4] (Holmes JA).

117 Ibid.

118 *Roach* (2011) 242 CLR 610, 618 [19] (French CJ, Hayne, Crennan and Kiefel JJ).

119 *R v Roach* (2009) 213 A Crim R 485.

120 The test from *Pfennig* requires that that evidence should only be admitted where ‘there is no reasonable view of the evidence consistent with the innocence of the accused’: (1995) 182 CLR 461, 484 (Mason CJ, Deane and Dawson JJ).

121 *R v Roach* (2009) 213 A Crim R 485, 488–9 [8] (Holmes JA).

122 Ibid.

123 *Roach* (2011) 242 CLR 610, 621–2 [31] (French CJ, Hayne, Crennan and Kiefel JJ).

124 Ibid 622 [33]–[34] (French CJ, Hayne, Crennan and Kiefel JJ).

source of the common law *R v Christie*¹²⁵ discretion giving the court the overriding power to exclude evidence if it is satisfied it would be unfair to the accused. By reference to its common law origins, section 130 is generally applied by considering whether the probative force of the evidence outweighs its prejudicial effect.¹²⁶ In addressing this question, the High Court confirmed the application of section 132B is subject to section 130.¹²⁷ However, the Court observed that section 132B is not restricted to evidence tendered for the purpose of showing tendency on behalf of the accused; evidence of other acts of domestic violence could be relevant as evidence of state of mind, for proving intent or as part of the *res gestae*.¹²⁸ As the *Pfennig* test is confined to propensity evidence, the Court concluded that incorporating it into section 132B would be inappropriate.¹²⁹

Considering the purpose for which evidence of the history of a relationship could be tendered, the High Court noted the differing opinions of the Court of Appeal and trial judge as to whether the evidence ought to be characterised as propensity evidence or relationship evidence. The trial judge considered the evidence was admissible as relationship evidence adduced to provide context to the charged offence.¹³⁰ However, Holmes JA of the Court of Appeal commented that whilst the evidence gave context to the charged act it did so by demonstrating Roach's 'disposition to aggression against the complainant', which would induce propensity reasoning.¹³¹ Holmes JA referred to the judgment of Mason CJ, Deane and Dawson JJ in *Pfennig*, where their Honours suggested that propensity evidence and relationship evidence 'are not necessarily mutually exclusive'.¹³² The High Court pointed out that while *Pfennig* was a case where propensity was identified by circumstantial evidence in proof of the offence charged, in *Roach* the relationship evidence, including that of previous assaults, was tendered to explain the circumstances of the charged act so that the complainant's evidence of the event did not appear 'out of the blue'.¹³³ In interpreting the purpose of the provision the majority made the following remarks:

It is difficult to resist the conclusion that it was intended, by the insertion of s 132B, that persons suffering from domestic violence not be disadvantaged in the giving of their evidence and that they be able to tell their story comprehensively. It may be taken to express a perception that it is in the public interest that they be able to do so and that the prosecution of offences which involve a history of domestic violence be thereby enabled. The reception of the evidence operates

125 [1914] AC 545.

126 J D Heydon, *Cross on Evidence* (LexisNexis, 11th ed, 2017) 448 [11125].

127 See Andrew West, 'Pfennig and the s 130 Discretion' (2012) 32 *Queensland Lawyer* 64.

128 *Roach* (2011) 242 CLR 610, 616 [11], 621 [30] (French CJ, Hayne, Crennan and Kiefel JJ).

129 *Ibid* 624–6 (French CJ, Hayne, Crennan and Kiefel JJ).

130 *Ibid* 625–6 [48] (French CJ, Hayne, Crennan and Kiefel JJ).

131 *R v Roach* (2009) 213 A Crim R 485, 491 [19] (Holmes JA).

132 *Ibid* 491–2 [19]; *Pfennig* (1995) 182 CLR 461, 465. See also *BBH* (2012) 245 CLR 449, 550 [169] (Crennan and Kiefel JJ).

133 *Roach* (2011) 242 CLR 610, 624 [42] (French CJ, Hayne, Crennan and Kiefel JJ).

more fairly to a complainant. Unfairness to the accused, by its reception, is to be considered by reference to s 130.¹³⁴

This debate regarding the purpose and effect of relationship evidence is one that has arisen in many appellate decisions regarding the application of section 132B.¹³⁵ As Holmes JA explained in *R v Roach*, even though evidence may appear to be adduced merely for a contextual purpose, often this can incidentally reveal a tendency for the accused to act in a particular way.¹³⁶

The vital role of an adequate judicial direction in guarding against unfair prejudice to the accused was considered by the High Court in *Roach*.¹³⁷ Where relationship evidence is adduced and the risk of propensity reasoning exists, the judge should direct the jury that the evidence is to facilitate the complainant's account of events and the jury must consider the weight to be attached to it and its likely truth value.¹³⁸ The judge must explain the purpose for which the evidence is being tendered, whether it is to be evidence of propensity or evidence to give context and background to the charged act.¹³⁹ In *Roach* the trial judge specifically directed the jury to consider the evidence only for contextual purposes and not as evidence of propensity.¹⁴⁰ Ultimately, this direction was approved by the High Court. Two recent cases that have considered *Roach* are *R v Pearson*¹⁴¹ and *R v Susec*.¹⁴²

Pearson pleaded guilty to the manslaughter of his wife, but at trial was convicted of murder.¹⁴³ At trial, evidence of 13 previous episodes of violence between the accused and deceased was adduced in accordance with section 132B.¹⁴⁴ Upon giving evidence, one of the witnesses to the violence was asked whether an incident had occurred whilst the couple were separated; the witness replied '[y]es. Or he was in jail. I'm not quite sure'. Defence counsel submitted the jury be discharged due to the high risk of prejudice the statement carried. In particular, it was argued the jury might infer Pearson had been incarcerated for domestic violence.¹⁴⁵ The trial judge dismissed this, and held that a direction to the jury to ignore the comment would 'appropriately and sufficiently' deal with the risk of prejudice.¹⁴⁶ The Court of Appeal agreed this was appropriate. Referring to *Roach*, the Court observed that the application of section 132B was not restricted to evidence tendered for the purpose of showing tendency; and as such, a judicial direction regarding intent and the risk of propensity reasoning was not necessary for the remainder of the evidence. As the appellant had already

134 Ibid 624 [43] (French CJ, Hayne, Crennan and Kiefel JJ).

135 See, eg, *ibid*; *R v Susec* [2013] QCA 77; *R v Reed* [2014] QCA 207; *R v Pearson* [2015] QCA 157; *R v MBO* [2011] QCA 280.

136 *R v Roach* (2009) 213 A Crim R 485, 492–3 [22]–[23] (Holmes JA).

137 *Roach* (2011) 242 CLR 610, 625–6 [46]–[48] (French CJ, Hayne, Crennan and Kiefel JJ).

138 Ibid 625 [47] (French CJ, Hayne, Crennan and Kiefel JJ).

139 Ibid.

140 Ibid 625–6 [48] (French CJ, Hayne, Crennan and Kiefel JJ).

141 [2015] QCA 157 ('*Pearson*').

142 [2013] QCA 77 ('*Susec*').

143 *Pearson* [2015] QCA 157, [2] (Holmes JA).

144 Ibid [18] (Holmes JA).

145 Ibid [6] (Holmes JA).

146 Ibid [7]–[8] (Holmes JA).

pleaded guilty to the assault that caused the death of the deceased, the evidence of previous instances of violence were adduced for the purpose of ‘establishing the animosity in the relationship as relevant to intent’.¹⁴⁷

In 2011, Susec was convicted of the murder of his wife by stabbing. At trial, the defence led evidence that the deceased had thrown pepper in the face of Susec and then stabbed him.¹⁴⁸ Susec sought to rely on three defences, each in the alternative: first, that the deceased was stabbed accidentally during the struggle in which Susec was also stabbed; second, self-defence; or third, provocation.¹⁴⁹ A key piece of evidence led at trial and a point of appeal, was evidence from two witnesses who had observed suspicious behaviour from Susec 12 weeks prior to the offence.¹⁵⁰ The appellant and the deceased had been arguing in the kitchen, when the deceased left the kitchen she could be heard saying ‘if you want to kill me, kill me’.¹⁵¹ The appellant remained there sharpening a knife and watching the deceased leave with ‘a twisted look on his face’.¹⁵² The Court of Appeal rejected the appellant’s arguments that the prejudicial effect of the evidence outweighed its probative value, observing that the evidence was relevant, and that as required by *Roach* the trial judge’s ‘clear and comprehensible’ direction had sufficiently remedied the risk of propensity reasoning being open to the jury.¹⁵³ The evidence was correctly admitted in accordance with section 132B, as not only was it relevant to the state of the relationship between the appellant and deceased but also to the defences of provocation and self-defence.¹⁵⁴

Despite the High Court and Court of Appeal’s emphasis on the importance of judicial directions in the above cases involving relationship evidence, some judges and commentators have expressed doubt over whether juries actually understand and follow judicial directions. In the case of *KRM v The Queen*, McHugh J opined that ‘[t]he more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings’.¹⁵⁵ The role of comments, warnings and directions to the jury was a topic explored by the Australian Law Reform Commission in their 2006 report on the uniform evidence law.¹⁵⁶ There, the Commission referred to studies which found that the use of directions containing subject matter that was new, difficult or which called for jurors to disregard or limit the use of particular evidence could in fact be counterproductive.¹⁵⁷ Australian academic, Dorne Boniface,

147 Ibid [24] (Holmes JA).

148 *Susec* [2013] QCA 77, [24] (Gotterson JA).

149 Ibid [25] (Gotterson JA).

150 Ibid [29]–[30] (Gotterson JA).

151 Ibid [30] (Gotterson JA). See also *Wilson* (1970) 123 CLR 334, 337 (Barwick CJ) where on a prior occasion, a witness had overheard the deceased say to the accused ‘I know you want to kill me, why don’t you get it over with’.

152 *Susec* [2013] QCA 77, [32] (Gotterson JA).

153 Ibid [42] (Gotterson JA).

154 Ibid.

155 *KRM v The Queen* (2001) 206 CLR 221, 234.

156 See Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) 589–645.

157 Ibid 593, citing J Alexander Tanford, ‘The Law and Psychology of Jury Instructions’ (1990) 69 *Nebraska Law Review* 71, 86–7. See also Dorne Boniface, ‘The Common Sense of Jurors vs the Wisdom of the

considered that in such cases, juries have a demanding task ‘to comprehend the limited use [of the evidence subject of the direction], and then to resist the temptation to employ a impermissibly prejudicial use’.¹⁵⁸

However, despite the commentary and literature that exists on this topic, the very nature of the jury system and the laws that exist to protect its independence present obvious limitations in regards to the scope of research available, particularly regarding the Australian system. Boniface concedes this point, noting that there is little to no research on the effect of warnings and directions given in sexual assault trials, including those relating to the use of propensity or relationship evidence.¹⁵⁹ The Australian Law Reform Commission too acknowledged this in their report and recommended an inquiry into the operation of the jury system including into the utility of judicial directions and warnings.¹⁶⁰

As the cases demonstrate, until empirical evidence on this matter exists, Australian courts will continue to operate on the assumption that juries do understand and follow judicial directions. It is important however, that in directing juries judges are careful and measured in their approach and do not simply consider directions as a complete remedy or solution for potential prejudice presented by the admission of context or tendency evidence. As was observed by McClellan CJ in *DJV v The Queen* (*‘DJV’*),¹⁶¹ the effectiveness of judicial directions in reducing the risk of prejudice will differ depending on the facts of the case and must be closely scrutinised by the judge when considering whether the evidence should be admitted. McClellan CJ considered that a direction would be effective to avert the risk of prejudice only where it could be said that the jury were left in ‘no doubt’ that they could not follow the impermissible line of reasoning raised by the evidence.¹⁶²

B Expert Evidence and Section 132B

In cases involving a long history of violence, an accused person may seek to adduce expert evidence to justify raising a particular defence. This situation will most likely arise in cases where BWS is identified as being a relevant issue.¹⁶³ By having an expert give evidence on such a topic and identify it as common among victims of domestic violence, the jury is more likely to comprehend what may otherwise appear to be inexplicable behaviour.¹⁶⁴ This is one aspect of section 132B that has received some attention recently in the courts. In 2016, Jones was

Law: Judicial Directions and Warnings in Sexual Assault Trials’ (2005) 28 *University of New South Wales Law Journal* 261, 263–4.

158 Boniface, above n 157, 268.

159 Ibid 270.

160 Australian Law Reform Commission, above n 156, 594–5 [18.16]–[18.17].

161 (2008) 200 A Crim R 206.

162 Ibid 217 [31].

163 See *Osland v The Queen* (1998) 197 CLR 316. Note that in this case the High Court of Australia recognised BWS. Whilst Heather Osland was convicted of murder and did not succeed on appeal, Gaudron and Gummow JJ recognised BWS as a suitable subject for expert evidence: 337 [57]. Kirby J also pointed out that BWS might also be applicable to men, who can also be victims of domestic violence: 370–1 [159].

164 Taskforce on Women and the Criminal Code, above n 1, 121.

convicted of murdering his mother by stabbing. At trial, it was accepted that Jones was responsible for her death.¹⁶⁵ However, under section 132B he sought to adduce expert evidence from his treating psychiatrist of the consultations in which he had discussed his mother's violent episodes. This was done with the view of raising the defence of provocation. The Court differentiated evidence of the history of the domestic relationship between the appellant and his mother with the psychiatrist's opinion of the relationship.¹⁶⁶ Whilst the former is admissible under section 132B, opinion evidence is a completely different category of evidence and is not to be confused.¹⁶⁷ Further, the Court observed that unlike BWS, the tense relationship between the appellant and his mother was one a reasonable member of the jury could form judgment on without expert assistance.¹⁶⁸ The Court also weighed in on the debate regarding the purpose for which evidence can be adduced under section 132B commenting that:

Section 132B does not facilitate the admissibility of evidence at large such as propensity evidence rather it permits the reception of 'relationship' evidence. Though in a given case the account of the events may, by different routes, be admissible both as 'propensity' evidence properly understood and as 'relationship' evidence.¹⁶⁹

The case law on relationship evidence demonstrates how the decision of *Roach* has been instrumental in clarifying the application of section 132B and how it operates alongside common law principles. Further, *Roach* displays an unprecedented willingness of judges to consider the purpose for which the section was introduced, namely that it was proposed with knowledge of the rule in *Pfennig*. However, it is also apparent that a number of cases involving section 132B and relationship evidence continue to end up in the appellate courts due to the uncertainty involved in its application.

V THE LIMITATIONS OF SECTION 132B

Many have questioned the significance of section 132B on the basis of established common law principles. The cases applying section 132B and the corresponding commentary of legal scholars go further than this, and reveal the extent of the provision's limitations. Whilst the most pertinent restriction of the section is its limited application to chapters 28 to 30 of the *Criminal Code*, questions have also been raised as to whether the explicit requirement that the evidence be 'relevant' is really necessary.

A Chapters 28 to 30 of the *Criminal Code*

Section 132B states that it is only applicable to charged offences under chapters 28 to 30 of the *Criminal Code*. This excludes the section's application to

¹⁶⁵ *R v Jones* [2016] 2 Qd R 310.

¹⁶⁶ *Ibid* 316–8 (North J).

¹⁶⁷ *Ibid* 318 (North J).

¹⁶⁸ *Ibid* 317 (North J).

¹⁶⁹ *Ibid* 318 (North J).

any cases involving child sexual offences, sexual assault and rape contained in chapters 22 and 32 respectively.

Section 132B was introduced following a period of legal reform in Queensland and Australia recognising domestic violence as a prevalent and serious issue in society. Focus at this time was on ensuring women who killed or seriously injured their abuser after years of being the victim of domestic violence were adequately protected and provided for under the respective criminal codes and evidence legislation. For this reason, the reform centered on violence in relationships including the offences of assault, murder and manslaughter with very little said about sexual assault within domestic relationships. In fact, women's accusations of rape and sexual assault were routinely overlooked or downplayed by both the criminal justice system and society at large.¹⁷⁰ A matter involving Australian swimming coach, Scott Volkens, generated much debate in the early 2000s as to how the Queensland justice system dealt with sexual assault and complaints of sexual assault. This issue sparked an inquiry into how all types of sexual offences were handled in Queensland. The inquiry found that major reform was urgently needed, particularly in the area of obtaining and disseminating evidence and generally improving the criminal justice process for victims.¹⁷¹

The introduction of the *Domestic and Family Violence Protection Act 2012* (Qld) expanded the category of relationships applicable in domestic violence under section 132B to include 'an intimate personal relationship', 'a family relationship' or 'an informal care relationship' as defined under the Act.¹⁷² An 'intimate personal relationship' refers to a spousal relationship, engagement relationship or a couple relationship, whilst a family relationship is any kind of relationship involving related persons, including step-parents and step-siblings.¹⁷³ An 'informal care relationship' is broadly construed to include those in a carer type relationship, but excludes commercial arrangements.¹⁷⁴ It is also prudent to note that the introduction of section 93B into the *Evidence Act* in 2000 aimed at admitting hearsay evidence in certain circumstances of domestic violence, applies to prescribed criminal proceedings in chapters 28 to 32 of the *Criminal Code*, therefore including sexual offences. Whilst these changes ensure consistency regarding domestic violence and domestic violence relationships very little has been said about section 132B's limited application to chapters 28 to 30 of the *Criminal Code*.

More recently, the Queensland Government has demonstrated its commitment to the issue of domestic violence by implementing a Domestic and

170 Crime and Misconduct Commission, 'Seeking Justice: An Inquiry into How Sexual Offences Are Handled by the Queensland Criminal Justice System' (Final Report, June 2003) 12. Note that until legislative amendments in the 1980s, it was legally impossible for a man to be charged with the rape of his spouse, or even de facto partner, in some cases: *Family Violence Report*, above n 53, 1113.

171 Crime and Misconduct Commission, above n 170, xvi–xviii.

172 *Domestic Violence Protection Act 2012* (Qld) s 13. See also Council of Australian Governments, 'National Plan to Reduce Violence against Women and Their Children (2010–2022)' (Department of Social Services, 2011).

173 *Domestic Violence Protection Act 2012* (Qld) ss 14, 19.

174 *Domestic Violence Protection Act 2012* (Qld) s 20.

Family Violence Prevention Strategy that includes a 10 year plan focused on how the community can take action to end domestic and family violence.¹⁷⁵ The strategy emphasises the issue of sexual assault in intimate relationships, defining domestic and family violence as behaviour that: 'is physically, sexually, emotionally, psychologically or economically abusive, threatening, coercive or aimed at controlling or dominating another person through fear'.¹⁷⁶

Within the family home, women are not the only victims of physical and sexual abuse. Studies have revealed many children also experience sexual abuse at the hands of a relative or person known to the family.¹⁷⁷ According to data obtained by the Australian Bureau of Statistics, 13.5 per cent of perpetrators were fathers or step-fathers of the victim and 30.2 per cent were other male relatives.¹⁷⁸ Further, a shift in societal values and norms has seen the traditional family structure change with an increasing prevalence of mixed families. This demonstrates that the way domestic violence has traditionally been understood is now outdated including the limited application of section 132B. Child sexual offences are characterised by high attrition rates and low conviction rates.¹⁷⁹ The reception of evidence in matters involving child sexual offences has faced longstanding challenges. The nature of the complaints and the character of the type of offences involved has led to a tendency for the adversarial system to focus on accusations of complainant fabrication and concoction.¹⁸⁰ This is a problem common to all sexual offence matters, particularly those against women.

In 2006, PAB was convicted of four counts of indecent treatment of a girl under the age of 12 years; the victim was his stepdaughter.¹⁸¹ At trial, the prosecution sought to adduce evidence of previous uncharged acts of physical violence and sexual abuse inflicted by the accused on the complainant. PAB appealed against his conviction, arguing the trial judge had inadequately and erroneously directed the jury as to the proper consideration of the evidence revealing his previous relationship with the complainant. On appeal, Keane JA observed that the evidence of uncharged physical violence towards the complainant was correctly admitted under common law principles, and that the trial judge had adequately directed the jury that this evidence was to be considered only for the purposes of revealing the nature of the relationship.¹⁸² Keane JA acknowledged the charges in the case did not fall within the prescribed jurisdiction of section 132B, but nonetheless remarked that there was no reason

175 Queensland Government, 'Domestic and Family Violence Prevention Strategy 2016–2026' (2016).

176 Ibid 1.

177 Annie Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia' (Report, National Child Sexual Assault Reform Committee, 2010) 49; Kelly Richards, 'Misperceptions about Child Sex Offenders' (Paper No 429, Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, September 2011) 3.

178 Australian Bureau of Statistics, *4906.0 – Personal Safety Survey, Australia, 2005* (21 August 2006) 42 <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf)>.

179 Cossins, above n 188, 54–5.

180 Ibid 185; see generally, Australian Institute of Judicial Administration Incorporated, *Bench Book for Children Giving Evidence in Australian Courts* (February 2015) 116.

181 *R v PAB* [2008] 1 Qd R 184.

182 Ibid 187.

why section 132B could not be applicable to a charge of indecent treatment of a child under chapter 22 of the *Criminal Code*.¹⁸³ Keane JA opined that section 132B could not impliedly exclude the admissibility of evidence for other offences under the *Criminal Code* as the section ‘does not add “anything to the common law, which recognises that evidence of a relevant and specific ‘relationship’ between an alleged offender and a complainant is not caught by the rule against ‘character’ or propensity evidence”’.¹⁸⁴

As already identified the law on this position is unclear. Whilst *HML*,¹⁸⁵ a case involving a father on trial for the sexual assault of his daughter, confirmed that the *Pfennig* test is still the test to be applied at common law for admitting evidence of uncharged acts of a similar nature where the evidence is admitted to show tendency, it remains unclear whether contextual evidence that only incidentally reveals the accused’s propensity for misconduct, should still be subject to *Pfennig*.¹⁸⁶ In *PAB*, Keane JA suggested the prejudicial effect of relationship evidence and tendency to suggest propensity will be greater where both the uncharged offences and the charge subject of the proceeding are sexual in nature.¹⁸⁷ A similar notion can be identified in the discussion surrounding the provision of separate trials for an accused person who has multiple charges on a single indictment. Section 597A(1) of the *Criminal Code* permits the court to order separate trials for an accused person where it is possible the person ‘may be prejudiced or embarrassed ... by reason of the person’s being charged with more than 1 offence in the same indictment ...’.

While some areas of the law have been adapted in an effort to address the challenges of sexual offence matters, the laws of evidence still fail to address many complexities of the issue. In his 2015 analysis of the law surrounding serial child sexual abuse, David Hamer observed that urgent reform is needed to ensure the courts continue to move forward towards greater flexibility with the admissibility of previous offending.¹⁸⁸ Hamer identified the issue of child sexual assault as ‘a serious social problem which the criminal law is currently failing to address adequately’ and further, that ‘the exclusionary rule continues to be applied too strictly in many cases, unnecessarily hindering prosecutions’.¹⁸⁹ This conclusion is apt, particularly when considering the volume of sexual assault cases that routinely deal with adducing relationship evidence. It is surprising that despite the confusion that surrounds the common law position in Queensland, legislative reform by way of expansion to section 132B has not been considered by the Parliament.

183 Ibid 189.

184 Ibid 189 (Keane JA), quoting John Forbes, *Evidence Law in Queensland* (Thomson Reuters, 5th ed, 2004) [132B.2]; Harris, above n 66, 198.

185 (2008) 235 CLR 334.

186 Ibid 502 [511]–[512] (Kiefel J).

187 *R v PAB* [2008] 1 Qd R 184, 189 [26].

188 Hamer, ‘Proof of Serial Child Sexual Abuse’, above n 3, 260.

189 Ibid. Note Hamer’s reference to the exclusionary rule refers to the test from *Pfennig*: at 245.

B Relevance and Section 132B

Section 132B expressly states, that to be admissible, evidence of the history of the domestic relationship between the defendant and the complainant must be ‘relevant’.¹⁹⁰ On its face this requirement of relevance is not unusual considering it is a foundational concept in evidence law and the first requirement of admissibility in any matter.¹⁹¹ However, its explicit inclusion in the provision has for some commentators formed the basis of their argument that the section does not alter the established common law position.¹⁹² Zoe Rathus of the Women’s Legal Service observed that the section was particularly unhelpful due to the fact that ‘[t]he threshold issue for women is to ensure that the history of violence achieves the status of being considered relevant’. By incorporating relevance into section 132B, Rathus submitted that the provision does nothing to assist with overcoming this common law requirement.¹⁹³

VI RELATIONSHIP EVIDENCE IN OTHER STATES

Before making recommendations for legal reform in Queensland, it is important to first consider how relationship evidence in criminal trials is treated in other states, including those governed by the uniform evidence legislation.

A The Uniform Evidence Act States

Section 101(2) of the uniform evidence legislation¹⁹⁴ provides that tendency or coincidence evidence adduced by the prosecution (in accordance with sections 97 and 98) cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. There is a significant volume of commentary on whether the test under section 101 is in fact different or more stringent than the common law *Pfennig* test and also on whether the *Pfennig* threshold must still be satisfied in cases where section 101 applies. This topic was explored at length by the New South Wales Court of Criminal Appeal in the matter of *R v Ellis*.¹⁹⁵ This case did not involve a domestic relationship, however it is nonetheless very important as it represented a clear statement from the Court that the application of section 101 does not require that the *Pfennig* test be satisfied.¹⁹⁶ In the leading judgment, Spigelman CJ opined that whilst the formulation of the statutory test under section 101(2) requiring that the probative value of the evidence ‘substantially’

190 *Evidence Act 1977* (Qld) s 132B(2).

191 In *Wilson* (1970) 123 CLR 334, Barwick CJ remarked that ‘[t]he fundamental rule governing the admissibility of evidence is that it be relevant. In every instance the proffered evidence must ultimately be brought to that touchstone’: at 337.

192 See, eg, Kift, above n 62; Rathus, above n 10, 139.

193 Rathus, above n 10, 139.

194 *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 2004* (NI); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

195 (2003) 58 NSWLR 700.

196 *Ibid* 717 [89] (Spigelman CJ).

outweigh its prejudicial effect was in a similar territory to *Pfennig*'s 'no rational explanation' test, it was nonetheless still a different standard.¹⁹⁷ Spigelman CJ went on to clarify that the test under section 101(2) expressly called for a court to make a judgment after first conducting a balancing exercise unique to the facts of each case.¹⁹⁸ Spigelman CJ differentiated this from *Pfennig*, by concluding that the *Pfennig* 'no rational explanation' test obviated any real balance by requiring such a high standard of probative value.¹⁹⁹ Despite this, Spigelman CJ did not rule out the possibility of section 101(2) applying to the extent of *Pfennig*'s 'no rational explanation' requirement in cases where the facts called for a higher threshold.²⁰⁰

In a paper presented to Judges of the County Court of Victoria, Justice Hulme discussed the statutory construction of the sections involving the admissibility of tendency and coincidence evidence under the uniform evidence legislation.²⁰¹ Justice Hulme considered that while the formulation of section 101(2) is weighted in favour of excluding evidence this was necessarily balanced out by section 137 which is expressed in more neutral terms.²⁰² Section 135 provides that the court may refuse to admit evidence where its probative value is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party, be misleading or confusing or cause undue waste of time.²⁰³ Section 137 is expressed in similar terms but explicitly applies to criminal proceedings.²⁰⁴

Justice Hulme also explored the difference between tendency evidence and context or relationship evidence. He identified the difficulty in properly distinguishing these types of evidence and the corresponding issues such classification can give rise to in criminal trials. In particular he referred to the risk of tendency evidence being improperly adduced by the prosecution as context or relationship evidence in order to avoid having to meet the stringent statutory test under section 101(2).²⁰⁵ In uniform evidence act jurisdictions, context or relationship evidence exists independently to tendency evidence and is not caught by the test under sections 97 and 101(2).²⁰⁶ Instead, to be admitted, relationship evidence must firstly be considered relevant to an issue in the trial²⁰⁷

197 Ibid 717–18.

198 Ibid 718 [95].

199 Ibid.

200 Ibid 718 [96].

201 Justice R A Hulme, 'Admissibility of Tendency and Coincidence under the Uniform Evidence Act' (Paper presented to Judges of the County Court of Victoria, 27 November 2009).

202 Ibid 29.

203 *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 2004* (NI); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

204 *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 2004* (NI); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

205 Justice Hulme, above n 201, 15–19.

206 *DJV* (2008) 200 A Crim R 206, 216–7 [28]–[30] (McClellan CJ).

207 See *R v ATM* [2000] NSWCCA 475, [72] (Howie J).

and secondly must meet the requirements of section 135 and section 137.²⁰⁸ Consequently, evidence which does not pass the test under section 101(2) may still be admitted under section 137 despite its possible prejudicial effect.²⁰⁹ If the evidence is admitted under sections 135 or 137, the trial judge must then in accordance with section 136 carefully direct the jury how the evidence can be used, including that it cannot be used as tendency evidence.²¹⁰

The matter of *DJV*²¹¹ demonstrates the danger of tendency evidence being improperly admitted as context evidence in a trial, culminating in the possibility of impermissible reasoning by the jury. At trial DJV was convicted of one count of aggravated sexual intercourse and one count of assault with an act of indecency. The complainant was DJV's daughter, who was 13 or 14 years old at the time of the commission of the offences. The alleged act of aggravated sexual intercourse involved the appellant forcing his penis into the mouth of the complainant while she was lying on a couch, under a blanket, in the appellant's home. It was alleged the second offence occurred in the context of the complainant and her brother sharing a bed with the appellant and his partner at the time. The appellant had 'placed his penis between [the legs of the complainant] and rubbed himself to ejaculation'.²¹² Initially at trial the Crown served tendency notices upon the defence in accordance with section 97²¹³ in an effort to adduce evidence of the complainant of other uncharged sexual misconduct committed by the appellant. In particular, the complainant alleged DJV had sexually assaulted her in a tent while on a family holiday and that on numerous occasions she had caught him watching her while she was showering.²¹⁴ Ultimately, this evidence was admitted as context or relationship evidence under section 137, and not as tendency evidence under section 101(2). On appeal, McClellan CJ expressed concern over the prosecution tendering 'tendency' evidence as context evidence in an effort to get around the stringent requirements of section 101(2):

I understand that it is common, at least in New South Wales, for the Crown to serve a tendency notice in relation to this class of evidence but when, as will almost always be the case, the defendant objects to its admission, the Crown alters course and confines the purpose of the tender to evidence which explains the context of the offences including the nature of the relationship between the accused and the complainant. Whatever be the purpose for which it is tendered the evidence will almost always occasion significant prejudice to an accused. Care must be exercised both as to its admission and, if admitted, the directions given to the jury as to its use.²¹⁵

208 *DJV* (2008) 200 A Crim R 206, 216–17 [28]–[30] (McClellan CJ).

209 *Ibid* 211 [16] (McClellan CJ).

210 *Ibid* 211 [17] (McClellan CJ), citing *Qualtieri v The Queen* (2006) 171 A Crim R 463, 487 [80] (McClellan CJ).

211 *Ibid*.

212 *Ibid* 208–9 [4] (McClellan CJ).

213 *Evidence Act 1995* (NSW).

214 *DJV* (2008) 200 A Crim R 206, 208 [3] (McClellan CJ).

215 *Ibid* 210 [14] (McClellan CJ).

This issue was also acknowledged in the matter of *Qualtieri v The Queen*,²¹⁶ where Howie J stated:

It seems to me that one of the problems that arises in respect of ‘relationship evidence’, particularly in child sexual assault cases, is that there is never a clear understanding of what that term means in any given case ... [E]vidence does not necessarily become admissible merely because it is said to disclose the relationship of the accused and the complainant: it must also be relevant and must not be unfairly prejudicial.²¹⁷

In *DJV* the trial judge considered that despite the uncharged acts occurring years prior to the offences the subject of the indictment, they represented ‘a continuity demonstrating a relationship’ and concluded that a direction to the jury would minimise any prejudicial effect to the accused.²¹⁸ The New South Wales Court of Criminal Appeal disagreed, ruling that despite the directions given, the evidence had the clear capacity to go beyond providing mere context of the relationship between the complainant and the accused.²¹⁹ In the leading judgment, McClellan CJ considered the evidence of the tent incident made no relevant contribution to the charged events as it occurred around the same time as them, and further that the evidence of the accused watching the complainant in the shower could not be considered context evidence as it revealed ‘evidence of a guilty passion’ which clearly put it in the category of tendency evidence.²²⁰ Ultimately the Full Court agreed, ordering that DJV’s conviction be quashed and a new trial ordered.

In Victoria sections 135 and 137 do not limit the admission of evidence of family violence pursuant to Part IC of the *Crimes Act 1958* (Vic).²²¹ In 2004 Victoria undertook a large-scale review into the law of homicide. This inquiry included a detailed analysis of the law of relationship and family violence and culminated in significant legal reform. Provisions were introduced into the *Crimes Act 1958* (Vic) which allowed for the admission of evidence of family violence in cases involving homicide. The introduction of the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) went a step further by making these provisions applicable not only to homicide offences but instead to any offences which raise self-defence, duress, sudden or extraordinary emergency or intoxication.²²² Section 332J of the *Crimes Act 1958* (Vic) provides for a range of types of evidence that may be relevant in such a case including: the history of the relationship between the person and a family member; the cumulative effect of violence including the psychological effect; and the general nature and dynamic of the relationship.²²³ This aspect of Victorian law represents

216 *Qualtieri v The Queen* (2006) 171 A Crim R 463.

217 Ibid 492 [112] (Howie J).

218 Ibid 219 [33]–[35] (McClellan CJ).

219 Ibid.

220 Ibid 220–1 [39] (McClellan CJ).

221 *Evidence Act 2008* (Vic) ss 135, 137.

222 Heather Douglas, ‘Social Framework Evidence: Its Interpretation and Application in Victoria and Beyond’ in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 94, 109. See also Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic).

223 *Crimes Act 1958* (Vic) s 322J.

acknowledgment by the legislature of the significance of relationship evidence in cases involving domestic violence and suggests a move towards reducing the restrictions on admitting relationship evidence.

B Western Australia

The equivalent of section 101(2) in Western Australia's *Evidence Act*,²²⁴ section 31A, is largely considered 'the most complete break from the common law'.²²⁵ In fact, in 2010 the National Child Sex Assault Reform Committee named it the 'most successful' of the reforms centred on the admission of tendency or propensity evidence.²²⁶ Importantly, unlike section 101(2), section 31A extends to the admission of relationship or context evidence. Section 31A provides that propensity or relationship evidence is admissible in a proceeding if the court considers the evidence firstly has significant probative value either by itself or in combination with other evidence, and secondly 'that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial'.²²⁷

This test is considered to be far less stringent than the *Pfennig* 'no rational explanation' test and instead is considered a replica of McHugh J's balancing test outlined in his dissenting judgment in *Pfennig*.²²⁸ In the case of *Di Lena v Western Australia*,²²⁹ the Western Australian Court of Appeal considered in detail the purpose and construction of the section. Roberts-Smith JA considered that section 31A represented acceptance by the legislature that the admission of propensity or tendency evidence will almost always be prejudicial to an accused person and as such raise the risk of an unfair trial.²³⁰ The section seeks to ameliorate this risk by considering whether the evidence is so probative that the public interest in admitting the evidence should have priority over the risk of an unfair trial.²³¹ Roberts-Smith JA opined that unlike the *Pfennig* test or the test under the uniform evidence legislation, section 31A does not involve the exercise of discretion, but instead is a question of law:

There is no discretion, because if the trial Judge concludes the propensity evidence has significant probative value, and that fair-minded people, comparing that probative value to the risk of an unfair trial would think the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial, he or she is bound to admit it.²³²

224 *Evidence Act 1906* (WA).

225 *Family Violence Report*, above n 53, 1283 [27.210].

226 *Ibid*, citing Cossins, above n 177, 186–203.

227 *Evidence Act 1906* (WA) s 31A(2).

228 *Family Violence Report*, above n 53, 1282. See Western Australia, *Parliamentary Debates*, Legislative Council, 24 September 2004, 6547 (Nick Griffiths).

229 (2006) 165 A Crim R 482.

230 *Ibid* 494–5 [58].

231 *Ibid* 494 [57] (Roberts-Smith JA).

232 *Ibid* 495 [60].

Another distinguishing feature of the provision is the absence of any requirement that the judge give a direction or warning to the jury where propensity or relationship evidence is tendered.²³³

The case law applying section 31A demonstrates a willingness of the Court to admit propensity or relationship evidence, particularly in cases involving sexual offending where there is an application of joinder for multiple complainants.²³⁴ In the recent matter of *Western Australia v Couzens*,²³⁵ the Supreme Court considered whether evidence of the domestic relationship between the accused and the deceased could be admitted in a murder trial. The deceased was the partner of the accused whom it was alleged had been strangled with a rope. The Crown sought to adduce evidence of five separate witnesses who had on previous occasions observed physical violence and verbal arguments between the accused and deceased. One witness gave evidence that he had observed an altercation between the accused and deceased a week prior to the death of the deceased, with the accused standing over the deceased, yelling and waving his arms in an aggressive manner.²³⁶ Another neighbour had observed a similar altercation occur in front of the couple's unit. He had observed an argument between the accused and the deceased where the deceased shouted '[f]uck off you dog, just do it then', before yelling 'I can't do this anymore'.²³⁷

McGrath J considered that this evidence had significant probative value as it told of the nature of the relationship between the deceased and accused which was 'highly relevant' to the facts in issue.²³⁸ McGrath J went on to conclude that fair-minded people would consider it was in the public interest to adduce the evidence despite the risk of prejudice because without it 'the jury would be left in ignorance of the evidence concerning the accused's conduct and relationship with the deceased and therefore depriving the proper context in which it is said the accused is alleged to have committed the offence of murder'.²³⁹ McGrath J went on to consider that this was a case where a direction to the jury regarding the use of the evidence would be appropriate to '[neutralise]' the risk of an unfair trial.²⁴⁰

An analysis of the position of the law regarding relationship and tendency evidence in the uniform evidence jurisdictions demonstrates Queensland courts are not alone in their difficulty with the classification and admission of relationship evidence in criminal trials. Yet despite sharing this definitional problem, the case law demonstrates that Queensland's legislative and common law approach to propensity and relationship evidence is far more stringent than

233 *KMB v Western Australia* [2010] WASCA 212, [59]–[60] (Buss JA), quoting *Upton v Western Australia* [2008] WASCA 54, [65] (Steytler P, McLure and Pullin JJA agreeing); *Noto v Western Australia* (2006) 168 A Crim R 457, 464 [26]–[28] (McLure JA).

234 See *VIM v Western Australia* (2005) 31 WAR 1; *Donaldson v Western Australia* (2005) 31 WAR 122; *Horsman v Western Australia* (2008) 187 A Crim R 565.

235 [2017] WASC 208.

236 *Ibid* [28] (McGrath J).

237 *Ibid* [33] (McGrath J).

238 *Ibid* [36].

239 *Ibid* [39].

240 *Ibid* [40].

that prescribed by the Uniform Evidence Acts. Common to the uniform evidence jurisdictions' and Western Australia's provision for the admission of context or relationship evidence, is the balancing exercise comparing probative value with prejudicial effect. This is considered a lower threshold than the *Pfennig* 'no rational explanation' test. Further, the respective provisions are applicable to a range of offences, including sexual offences and are not limited to murder, manslaughter and assault, as is the case with section 132B. The Western Australian provision, section 31A, is unique in that it applies to the admission of relationship evidence as well as propensity evidence, unlike section 101(2) of the uniform evidence legislation which does not apply to relationship or context evidence. Section 31A is considered the most successful and progressive of the reforms centred on the admission of tendency and relationship evidence.²⁴¹ Its reference to the 'public interest' is unique and reflects the public policy justification in favour of the admission of relationship evidence as was referred to by the majority of the High Court in *Roach*.²⁴²

VII RECOMMENDATIONS FOR THE FUTURE

The limitations, flaws and proposed failures of section 132B have been identified by judges, legal professionals and academics; yet despite the criticism, very few have been willing to consider reform of the provision. Section 132B was framed to respond to cases where women killed their violent abusers, however we now understand domestic violence to encapsulate sexual offences, including those against children. It should therefore be considered whether the provision's limited application to chapters 28 to 30 *Criminal Code* is outdated; and furthermore, whether it is too burdensome a requirement that the party seeking to introduce the relationship evidence must prove it is relevant.

In their 2009 report to the Attorney-General addressing defences to homicide in abusive relationships, Geraldine Mackenzie and Eric Colvin briefly outline some suggestions for the reform of section 132B as per the submissions of certain stakeholders.²⁴³ However, they note that the report would not make recommendations on this issue due to the 'strong body of legal opinion' advocating for a wider review of the law of evidence.²⁴⁴ Yet, eight years on, no such review has been undertaken. One of the suggestions included in the report came from the Women's Legal Service who proposed removing the word 'relevant' from the beginning of section 132B(2) observing that:

The existing drafting of s 132B(2) of the *Evidence Act* is not helpful. Unless it comes within one of the exceptions such as hearsay, relevant evidence is always admissible. The purpose of the section is to state that evidence of the history of the

241 *Family Violence Report*, above n 53, 1283, citing Cossins, above n 177, 186–203.

242 See reference to this quote in Part IV(A); *Roach* (2011) 242 CLR 610, 624 [43] (French CJ, Hayne, Crennan and Kiefel JJ).

243 Mackenzie and Colvin, above n 10, 53–4.

244 *Ibid* 54.

domestic relationship is admissible and relevant, not that relevant evidence is admissible and relevant.²⁴⁵

Rathus proposed a similar legislative approach; with an additional recommendation that the provision be expanded to cover ‘assault offences’. She proposed the section should be amended to read:

In any criminal proceeding involving an ‘assault offence’ where the defendant and the person assaulted are or have been in a domestic relationship in which abuse has occurred, evidence of the nature, duration and extent of the abuse is relevant.²⁴⁶

The Victorian Law Reform Commission considered the criticisms of section 132B in its *Defences to Homicide Options Paper* and considered Victoria could overcome a similar problem by introducing a section that specified the types of evidence that will be relevant and admissible, including for example:²⁴⁷

the nature, duration and history of the relationship between the accused and the abuser, including prior acts of violence or threats, whether directed at the accused or at others ... [and] any efforts made by the accused to resist, expose, or minimise the violence, and the results of such efforts ...²⁴⁸

The Commission considered that while legislative clarification of what is ‘relevant’ could be construed as being unnecessarily prescriptive, greater specificity could have the effect of avoiding long and costly legal arguments over the admissibility of evidence.²⁴⁹

The National Child Sexual Assault Reform Committee made similar recommendations in its 2010 report. The Committee recommended that Queensland enact a new provision rendering relationship evidence ‘prima facie admissible’ in all sexual proceedings with the condition that appropriate warnings and directions be given to the jury regarding its use.²⁵⁰ The Committee proposed relationship evidence be defined in the section in the following terms:

evidence that shows the nature of the relationship between the defendant and the complainant, and/or the context and circumstances in which the alleged acts constituting the offences occurred. Relationship evidence includes but is not limited to, evidence of sexual interest, guilty passion, motive, opportunity or intention on the part of the accused, whether occurring before or after the offences charged.²⁵¹

The recommended provision went further to provide that such evidence would only be admissible: ‘for the limited purpose of determining the nature of the relationship between the complainant and the defendant, and of enabling the evidence relied upon by the Crown in proof of the offences charged to be assessed and evaluated within a realistic contextual setting’.²⁵² The Committee also considered the role of judicial directions to be of extreme importance,

245 Ibid, quoting Women’s Legal Service, *Submissions to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (5 May 2009).

246 Rathus, above n 10, 140.

247 Victorian Law Reform Commission, *Defences to Homicide: Options Paper* (2003) 134–5.

248 Ibid 146.

249 Ibid 135.

250 Cossins, above n 177, 244.

251 Ibid 235–45.

252 Ibid.

recommending that the provision include subsections requiring that where relationship evidence is admitted the Court:

- a) explain to the jury the limited purpose for which the evidence is admitted;
- b) direct the jury not to substitute the relationship evidence for evidence of the specific offences charged; and
- c) warn the jury against engaging in the following type of reasoning—that because the relationship evidence might show that the defendant has engaged in other misconduct he has a tendency to commit the type of offences charged.²⁵³

The Queensland Office of the Director of Public Prosecutions highlighted the risks associated with the interpretation and application of section 132B.²⁵⁴ It expressed concern that victims of domestic violence who did not speak out about their experience to avoid fear or shame would be disadvantaged at trial.²⁵⁵ Further, it commented that the section could risk trials becoming ‘royal commissions’ into the relationship by diverting focus away from the charge the subject of the proceedings.²⁵⁶

As has been acknowledged by the various stakeholders, legislative reform is needed to clarify the application and purpose of section 132B. Its current application is ineffective and without change we will continue to see lengthy legal arguments over the admissibility of evidence, culminating in appeals. In considering options for reform it is important to remember key concepts of evidence and of the common law system more generally. Strict rules of evidence exist to protect the right a defendant has to a fair trial and to the presumption of innocence. Relevance, the touchstone of evidence, is one of these protections.²⁵⁷ As such, removing the relevance requirement in its entirety would risk tipping the balance too far in favour of the prosecution. Even so, it is difficult to think of a scenario where the history of a domestic relationship would not be relevant to a charge of murder, manslaughter or sexual assault in a domestic setting.

Perhaps the balance can be struck by reversing the onus of proof and specifying that evidence of the ‘nature, duration and extent of the abuse is relevant’ to prescribed offences involving a domestic relationship unless the accused person can prove otherwise.²⁵⁸ The burden of proof resting with the defendant would then be on the balance of probabilities. This change would emulate similar public interest justifications such as Western Australia’s section 31A, and look to facilitate rather than hinder the prosecution process. The risk of unfair prejudice to an accused can be sought to be limited by ensuring judges give adequate directions to juries regarding the misuse of propensity reasoning and the purpose of adducing relationship evidence. Further, it is submitted that the application of section 132B should be expanded to cover sexual offences including those against children in chapters 22 and 32 of the *Criminal Code*. This

253 Ibid 244–5.

254 Mackenzie and Colvin, above n 10, 54, citing Office of the Director of Public Prosecutions, *Submission to Victims Who Kill Their Abusers: A Discussion Paper on Defences* (6 June 2009).

255 Ibid.

256 Ibid.

257 *Wilson* (1970) 123 CLR 334, 337 (Barwick CJ).

258 Rathus, above n 10, 140.

amendment would reflect the law's recognition of sexual assault as a serious issue within the scope of domestic violence.

VIII CONCLUSION

The law on relationship evidence in Queensland is far from clear. An analysis of existing case law and various interpretations of the provision demonstrate that this is a vexed issue and one that urgently requires reform. The second reading speeches and parliamentary debate over the introduction of section 132B reveal that the provision was fraught with controversy from the moment it was proposed. Whilst the section was introduced with the intention of providing clarity and certainty to a confused area of the common law, the disparity in its application suggests it has not achieved this goal. *Roach* signaled a move away from the court viewing section 132B as a restatement of the common law, with the High Court acknowledging it was introduced with knowledge of the decisions in *Pfennig* and *Wilson*, albeit not quite reaching a determination on its true purpose. Despite this explanation, cases continue to reach the Queensland Court of Appeal seeking clarity on issues of relationship evidence adduced pursuant to section 132B.

Section 132B was introduced with the purpose of simplifying the process for admitting relationship evidence in Queensland. The provision was framed to respond to cases where women killed their violent abusers. Women's groups advocated for the introduction of the section, arguing that it would assist victims of domestic violence by ensuring a fairer trial process where the nature of the charged act could be fully understood. It was intended to aid in a woman's defence by shedding light on the context of the violent relationship. Our understanding of the law surrounding domestic violence has evolved considerably since 1998. Domestic violence is now understood as an issue that encompasses sexual assault, rape and extends to offences against children. This has in turn shifted the dynamic in regards to the utility of context or relationship evidence in assisting the prosecution case rather than that of the defendant. Whilst section 132B has been partially reformed to reflect these changing views,²⁵⁹ largely it has remained unaltered since its introduction. This is surprising given relationship evidence is routinely adduced in cases of sexual assault, rape and child sexual abuse.

The case law and commentary on section 132B and relationship evidence more generally supports the proposition that the limited application of section 132B is now outdated and requires reform. Legislative reform, including expanding the application of the section to child sexual offences, sexual assault and rape, as well as an amendment to the relevance requirement would see this provision transform with the rest of the law on domestic violence, and in turn ensure complainants receive fair treatment before the courts.

259 The introduction of the *Domestic Violence Protection Act 2012* (Qld) in 2012 expanded the category of relationships applicable in domestic violence under s 132B to include 'an intimate personal relationship, a family relationship or an informal care relationship' as defined under the Act in s 13.