CONTENTS

Effectiveness of Family Violence Laws in Australia .......................... 3
Example one – family violence .................................................. 5
Example two – battered women who kill .................................... 6
Example three: intimate partner sexual violence .......................... 6
Limits to law reform ................................................................. 7
Hope for the future ................................................................. 8

Law-making in the Commonwealth Parliament ......................... 9

Media Watch ............................................................................. 14
Criminals escape jail time as Victoria’s top prosecutor
calls for urgent legal reforms .................................................. 14
I have spent many years researching and teaching about violence against women and the legal response. I have written 15 books and over 150 academic journal articles relating to violence against women. Here, I rely upon four of these monographs:

These are:


Each of these books and particularly the 2014 book, Domestic and Sexual Violence Against Women - Law Reform and Society: Shades of Grey (‘Shades of Grey’) looks at the vast amount of law reform enacted over the past few decades to better address family violence and sexual assault. The magnitude of legislative change has been, at least in part, the consequence of global and national programs and organisations, with mandates that have included improving the legal response to victims.

However, all of these positive initiatives, the legal provisions and legal processes operate within a larger social context. Because of the nature of that context, there appears to be unconscious gendered filtering of ‘reality’, which can be influential against successful translation of legal remedies.

Indeed, we cannot look at law in isolation from the rest of the culture.

Figure 1 shows that Anglo, male, able body heterosexual values and views and ‘reality’ permeate our institutions such as our legal system and our own individual lenses that filter the language, experiences and knowledge that we are exposed to. In short, the way we perceive reality, and the reality of others, is in part a function of our limited experience.

\[ Figure 1: \text{Kaleidoscope of } \text{‘Reality’} \]

\[ \text{Ethno-} \]
\[ \text{Racism} \]
\[ \text{Perception/} \]
\[ \text{Ableism} \]
\[ \text{Assumptions} \]
\[ \text{THE DOMINENT} \]
\[ \text{REALITY} \]
\[ \text{‘NATURAL’} \]
\[ \text{‘NORMAL’} \]
\[ \text{‘OBJECTIVE’} \]
\[ \text{‘NEUTRAL’} \]

\[ \text{Sexism} \]
\[ \text{Ageism} \]

Derived from a figure in P Easteal 2010 Women and the Law in Australia

We are often not aware that we are looking through these or any lenses in the first place. This means that we assume that what we are seeing, thinking and believing are absolute truths, rather than images mediated by the lenses. We forget that our ‘thoughts, behaviours and way of looking at the world were learned’, and learned in our particular context. We begin therefore to think in terms then of natural and normal (our way) and unnatural and abnormal (others).

Thus, upon this foundation of forgetfulness emerges a belief in constructs of ‘neutrality’ and ‘fairness’ when in fact, the myriad of assumptions creates a sort of tunnel vision that unconsciously filters out the diverse experiences and ‘realities’ of many: a process in fact antithetical to neutrality.

The result is that the assumptions of those with power prevail.
And who has that power – men or women? This is not a rhetorical question. Figure 2 illustrates why or how there is a dominant gendered reality or lens. Several important cultural variables such as pay gap and gender roles contribute to persistent gender power inequity.

**Figure 2:** Cultural variables contributing to dominant reality

The socioeconomic separation of the public and private spheres is illustrated in the following Figure. This dichotomy also contributes to gender inequity.

**Figure 3:** Public/private dichotomy

The legal landscape is dotted with legal concept signposts of objectivity, reasonableness, relevance and the ordinary... However, the landscape is undulating and far from level, creating obvious obstacles in accessing justice for women.

**Figure 4:** The iceberg as it affects access to justice

**FILTERS THAT DISTORT ACCESS TO JUSTICE**

<table>
<thead>
<tr>
<th>Unconscious assumptions and biases</th>
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<tbody>
<tr>
<td>Overt Discrimination</td>
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<tr>
<td>This ‘iceberg’ affects the drafting and the interpretation of laws relevant to women who have experienced violence</td>
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As one would expect, the iceberg is indeed present too the legal system with a traditional reluctance of the players to get involved in what is seen as the private domain of the home. This dichotomy ripples into the implementation of domestic violence related laws, with criminal acts taking place within the family minimised, trivialised and denied through a very gendered lens.

**Student Activities**

1. Why do you think individuals in society and courts may interpret legislation in different ways? Do you think that a person who has been exposed to family violence may interpret the law differently to a person who lives in a secure family without any hint of violence? Explain.

2. Explain three problems that you think could reduce the effectiveness of the criminal justice system in relation to family violence and sexual assaults.

3. How can our belief system affect what we see as right and wrong?

4. Why do you think acts of domestic violence in the home may be treated differently to a criminal assault in the street?
Following are a few examples of how the iceberg effect translates into laws and/or legal responses to violence against women - underpinned with unconscious male dominated assumptions that may not correlate with the victims’ reality or experiences. Indeed, as I wrote in Less Than Equal, legal ‘truths’ are as intimidating (and as insubstantial) as the playing cards in Wonderland.

Example one – family violence

One example is how the legal systems’ view of family violence cases may collide with survivors’ experiences. The following Figure illustrates this.

From P Easteal 2001 Less than Equal, p 108

From the victim’s perspective domestic violence is insidious and unpredictable. The perpetrator’s need to control, which is at the core of the violence, generally gets worse over time and manifests in a myriad of ways aside from physical abuse. None of these manifestations necessarily stops after estrangement; in fact violence can escalate then. Abuses become so normative that victims may trivialise or normalise them to the point of invisibility. The bizarre becomes normal. Narrow definitions of violence and the power of words to construct reality may contribute to obscuring the violence from the victim’s own vision. This can make disclosure and testimony problematic.

As Figure 5 illustrated, the legal system tends to minimise the harm of emotional, mental or psychological abuses. Legal practitioners may not look at the dynamics and may not appreciate the risk of separation. Some judges and jurors, just as many in the VicHealth 2014 community attitudes survey, are still unable to understand for instance why the battered woman did not simply leave her partner – how she may have become a veritable hostage in the home. Such minimising may correlate with beliefs that reduce offenders’ culpability and deflect, at least in part, the responsibility for the violence onto the victims.

Some police officers and magistrates may have rigid definitions of what constitutes assault and tend to see violence in the home as mutual and are therefore not able to identify a victim. This is probably in part due to an equation of harm with physical injury and limited state recognition of other forms of injury.

Also, the single incident based approach of the majority of non-fatal offences against the person fails to encapsulate the on-going nature of domestic violence. Within the criminal justice system there is a tendency to ignore this context. Bail determinations can be based on a perception of the violence as a one off incident, minimising the threat of future harm. This may not be just minimising per se but actually a lack of understanding of the ‘big picture’ through the victim’s perception and experience.

The result of the ‘mismatch’ between the victims’ reality and the criminal justice system may be tragic. In the early 1990s I did research on intimate homicide in Australia and found that in almost all cases in which a man killed his partner, the homicide was the last act in a lengthy history of battering; in over half of these homicides, the woman had left the relationship.

Roughly 20 years later, in July 2012, the ABC ran a documentary, which followed two battered women’s futile attempts to find legal sanctuary from a violent partner. Each was killed by her estranged partner. Both had taken out domestic violence orders in an attempt to protect themselves. The orders had been repeatedly breached and the police had failed to act either on the breaches or on stalking charges, perhaps not comprehending the men’s need to control and the men’s inability to accept their partner’s departure from the relationship.

Such tragedy seems to be almost an inevitable outcome of a persistent blindness by some police, courts (and community) to the seriousness of violence against women. Legislation to protect victims of family violence, some enacted over the past two decades, is of negligible value if arrests,
prosecutions and convictions do not take place. Also of concern are the relatively lenient sentences given, which are of little deterrent value.

**Student Activities**

5 Why do you think women in domestic violence situations may find it difficult to report, to the police, the extent of the harm they are suffering?

6 Why might the victim of domestic violence feel as if he or she is to blame?

7 In what way may the courts fail to see the big picture of domestic violence?

8 To what extent do you think domestic violence orders are likely to be successful? Explain.

9 Why might legislation to protect victims of family violence be seen as failing?

**Example two – battered women who kill**

Other homicides that take place, and how they tend to be responded to by the criminal justice system, are also a reflection of this mismatch and lack of understanding of harm.

When we engage with the experience of battered women who have killed their violent partners, the iceberg of gendered biases and assumptions is revealed here too. Figure 6 depicts the ‘dominant lenses’.

![Figure 6: lenses of self-defence](image)

In arguing and proving self-defence, both the belief that one’s life is in danger and that force as reasonable in the circumstances tend to be interpreted through the gender-biased lens of the common law. Despite law reform and changes in common law, the courts and jurors often appear to see the battered woman’s belief in serious harm as unreasonable or mistaken when she has killed her batterer. Why didn’t she leave? Why did she strike him 14 times? How could it be reasonable when he was asleep or passed out? Each question is the consequence of those invisible biases and assumptions and inability to understand the battered woman’s reality and therefore a failure to understand her act as one of self-preservation.

**Example three: intimate partner sexual violence**

Another example of the collision of the victims’ reality with that of the community and the criminal justice system that I’ve done a lot of research on is intimate partner sexual violence (IPSV). Any efforts to effect change in how IPSV defendants are treated need to recognise that the courts’ responses again do not take place in a vacuum but are embedded within the attitudes held by many in the community and by the legacy of legal precedent and past practice. A mythology persists (as depicted in Figure 7) that constructs marital rape as less damaging or injurious than other types of rape.

![Figure 7: How false mythology affects law and sexual assault](image)


Although the ‘license to rape’ (the ‘alleged’ spousal exemption from sexual assault charges) was a fiction without the backing of case law or a legal foundation, it has had a potent impact on the beliefs and actions of the courts and the community. IPSV continues not to be seen as ‘real rape’ and this affects the legal response to perpetrators as shown in Figure 8.
Studies of attitudes toward partner-rape have found that some people simply do not believe that husbands ever use force to compel their wives to have sex; some believe it’s rare; some believe wives have no right to say no; and many do not think this type of sexual assault harms the victim because she is used to having consensual sex with her abuser.

Within the criminal justice system, we see the same minimisation of the harm of IPSV and reduced culpability of the offender reflected.

The high rate of prosecutorial discontinuances in all sexual assault cases is slightly higher in partner rape. Evidently prosecutors are influenced either consciously or unconsciously by the continuum of ‘real’ rape and they’ll ‘run’ with the cases that they believe will result in a conviction.

Now, consent is an overly complex legal construct. It is essential to be aware that proving the two elements of the offence of sexual assault is challenging, and that these problems seem to be magnified in the context of IPSV. Proving that the woman did not consent (the physical element) or an absence of consent that the defendant knew of, but chose to ignore (the fault element) is difficult, because of the history of consensual intercourse. Understanding that no consent was given is further problematised by the survivors’ experience of the different types of coercion: social; interpersonal; threat of physical force; and physical force. Many IPSV survivors experience multiple types of coercion both concurrently and over time, in the context of changing abuse patterns. Yet, the legal interpretation of consent and its cancellation focuses far more upon physical force and injury.

Defence barristers question the victim witness about specific sexual activities between her and the accused. The aim is to suggest that ‘consensual sex was more likely to have occurred on the occasion in question, just as it had in the past’. Although laws have been enacted to restrict the admission of previous sexual activity between the accused and the complainant in most western countries, such provisions continue to be susceptible to problematic judicial interpretation in IPSV cases.

### Student Activities

10. Why do you think there have been cases of women killing their violent partner rather than leaving?

11. What is IPSV?

12. How can the attitudes towards IPSV cases affect the outcome of court cases?

13. How can the question of consent be a problem in IPSV cases?

### Limits to law reform

Legal gatekeepers and legal provisions function within a larger social context. Educational and occupational sub-cultures often act to reinforce gender biased beliefs and (mis)understandings about violence. Legislation is riddled with indeterminate concepts like ‘reasonableness’, ‘ordinary’, and consent culminating in an indeterminate meaning of the sum of the parts. As a consequence, police, prosecutors, magistrates and judges may invoke stereotypes in their translation of the law into practice. Interpretation is, of course, very much affected by their capacity to ‘walk in the shoes’ of the victim; whether they believe violence has taken place; and their perception of its seriousness.

A good example of how indeterminacy and mythology may limit the intent of legal changes sadly comes from legislation such as the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT), which was enacted to prevent or reduce the re-traumatisation or secondary wounding of sexual assault victim witnesses in the courts in the Australian Capital Territory. Figure 9 illustrates how.
Hope for the future

Is the law simply too male dominated, too imbued with the ‘masculine’ to be used productively to bring about positive change? Are feminist reform efforts futile, or even worse, damaging?

I do believe that it is important to highlight the law’s failure to recognise and respond appropriately to the plight of women, and demand that it does otherwise. It is also important to acknowledge that significant improvements to both the substantive and procedural law have been made. Therefore, perhaps it is more appropriate to conceptualise feminine engagement with the law as consisting of simultaneous successes and failures and conclude that the government’s legal response to violence against women needs more work.

From a holistic perspective, we must recognise that law is only a cog in the societal wheel and, as we have seen, its ability to effect change is therefore limited by society’s institutions and values as depicted in Figure 10.

Adapted from Carline and Easteal 2014 Shades of Grey, p 257.

To address and improve the legal response to violence against women it is not just the laws that need to be re-conceptualised and in some cases redrafted, but the cultural landscape requires a major redesign too with some thawing of the gendered iceberg… this is the major message of Our Watch’s primary prevention framework.

Instead of maintaining and perpetuating sexist attitudes and victim-blaming attitudes, objectifying women and girls, constructing violence (or the avoidance of) as the responsibility of women, we need clear messages and programs that empower survivors/victims.

One cannot discount law though as an important cog in the wheel, and also potentially an instrument of broader social change. The legal system has traditionally contributed to gender inequality, acceptability of violence in the home, women’s responsibility for men’s sexuality. Perhaps it is because of this role and its power, that over time, law can challenge social norms and myths that populate the social landscape.

Wherever possible, added specifications could reduce the grayness of the law and the possibility for ambiguity and (mis)interpretation.

Figure 9: How the intentions of law reform may be affected

Developed by P Easteal for teaching the subject Women and the Law

The special measures apply to victim witnesses who are deemed as being vulnerable for example, as likely to suffer severe emotional trauma because of the nature of the alleged offence. But, who is the ‘vulnerable’ or the ‘special’ rape victim witness? Those who do not conform to society’s (or the judge’s) idea of someone who has experienced ‘real’ rape, may not be perceived as especially vulnerable and therefore slip through the gaps and be left unprotected by the legislation.

Another change to help victim witnesses was amending section 41 of the Commonwealth Evidence Act 1995, which made it mandatory, rather than discretionary, for judicial officers to disallow improper questions. But, what is considered an ‘improper’ question remains open to subjective assessment. The definition of improper questions now includes questions that are ‘misleading or confusing ... unduly annoying, harassing, intimidating, offensive, humiliating or repetitive ... belittling, insulting or otherwise inappropriate’. How one perceives the offensiveness of a question is affected by the invisible and unconscious biases or lenses that I discussed earlier. The judge’s interpretation of the definition may differ greatly to the victim’s: Indeed, ‘drawing the line between acceptable and unacceptable cross-examination is not simply a matter of legislative definition or mandated powers of intervention, it is a question of perspective’. And, unless the judge or prosecutor perceives a question to be improper, it does not matter much if it is discretionary or mandatory that they intervene.

Figure 10:

MACRO LEVEL CHANGES

- Minimizing gender and ‘other’ differences in power
- Legal processes less gendered and less mainstream-eg Specialist courts; better screening for DV; sentencing guidelines improved
- Increase knowledge & sensitivity about violence (including intersectionality) with expert witnesses, media campaigns etc.

CHANGES IN THE LAW

- Laws linked to the woman’s reality eg. Definition of marriage, DV law, consent, stalking. Use of experts.
- Recognition that ‘reasonable’, ‘relevant’ seriousness, nature of assaults ‘ordinary’ are NOT neutral
- Simplify judicial directions in rape and reduce judicial indeterminacy by making words, phrases and meaning less grey

Adapted from Carline and Easteal 2014 Shades of Grey, p 257.
Additionally, reformulated provisions need to reflect an understanding that a purely ‘objective’ standard is inadequate in today’s society. A benchmark that is entirely subjective is also potentially misinformed and prejudiced. One possibility then would be legislative wording that reflects a two-tiered test with both objective and subjective components.

Crucially, the application of any definition that uses an objective or subjective standard must be prefaced with the court’s receipt of relevant information. Experts can perform this task by providing instant, ‘on the spot’ education and assist decision-makers in identifying their own unconscious perceptual biases. Through showing the court exactly how an action that intuitively seems alien, does in fact fit within someone else’s reality, the expert can redefine what is ‘reasonable’ or ‘ordinary’ behaviour for specific individuals. A good example of law reform enabling this type of understanding is in Victoria, sections 322J and 322M Crimes Act 1958 (Vic.) and in 2015, amendments to the Jury Directions Act 2015 (Vic.) – both hopefully facilitating a better understanding of reasonableness and battered women who kill.

In conclusion, we have seen examples here of how the law fails to provide justice, how old norms and stereotypical ways of thinking continue to inform and impact upon the law and work to exclude women’s experiences, and how discretion – even when it appears to have been limited by parliament – is frequently read back into the law.

More work is necessary. All reforms are necessarily contingent and fallible, often involving compromise and frequently precarious consensus. Moreover, reforms can only ever reflect a particular political and historical moment in time. No reform can fully anticipate nor encapsulate the future, and neither is it possible to predict in advance how provisions will be interpreted and work in practice, how they will affect the lives of others, and how a range of social and cultural factors will impede their implementation and effectiveness. This does not mean that we cannot or should not agitate for further reforms. Indeed, quite the opposite, we must press for improvements, but at the same time also remain critical and vigilant, which requires an acceptance that the future is always unknown and unknowable.

Student Activities
14 How does the ability of the courts and police to ‘walk in the shoes’ of the victim assist them to understand what crime has taken place?
15 Investigate sections 322J and 322M Crimes Act 1958 (Vic.) and amendments to the Jury Directions Act 2015 (Vic.). How do these acts assist in the understanding of the concept of ‘reasonableness’ and battered women who kill?
16 Do you think the law in domestic violence cases fails to provide justice? Discuss. In your discussion comment on the successes and failures of the justice system.
17 Why do you think individuals in society and courts may interpret legislation in different ways? Do you think that a person who has been exposed to family violence may interpret the law differently to a person who lives in a secure family without any hint of violence? Explain.
18 Explain three problems that you think could reduce the effectiveness of the criminal justice system in relation to family violence and sexual assaults.
19 How can our belief system affect what we see as right and wrong?
20 Why do you think acts of domestic violence in the home may be treated differently from a criminal assault in the street?
LAW-MAKING IN THE COMMONWEALTH PARLIAMENT

Professor Spencer Zifcak. Allan Myers Professor of Law at the Australian Catholic University, Founding Director of the Accountability Round Table

The Commonwealth Parliament is the most important law-making institution in Australia. It is the embodiment of the fundamental constitutional principle that underpins Australian political life. That is, representative democracy.

Representative democracy means that governments in Australia are made and unmade by the people of Australia. This happens at elections which, for the Commonwealth Parliament, are held once very three years. The next election for the Commonwealth Parliament is scheduled to occur in the second half of 2016.

These principles have been very well summarised in the United Nations Universal Declaration of Human Rights. Article 21(3) of the Declaration states:

The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote. Democratic legislatures must be made up of the elected representatives of the people. The people are all the adult citizens of the country.

In Australia, the Commonwealth Parliament is made up of two houses of parliament. The house that represents the people is called the House of Representatives. The house that represents the states is called the Senate. Having two houses of parliament is called having a bicameral system of parliament.

The Constitution provides for the election of representatives to both houses. So, for example, S.24 of the Australian Constitution provides that:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth.

The Commonwealth Parliament exercises what is called ‘legislative power’. In essence this means law-making power. More formally, legislative power is the power to make new laws, to amend existing laws, to impose taxation, and to provide for the expenditure of money.

Questions
1. Why do you think the Commonwealth Parliament is the most important institution in Australia?
2. Explain representative democracy.
3. How is S.21(3) of the United Nations Declaration of Human Rights relevant to the Commonwealth Parliament?
4. What is a bicameral system?
5. Define legislative power.

The Commonwealth Parliament has the exclusive power to make laws. With minor exceptions, no other branch of government can do so. The Commonwealth Parliament’s exclusive authority to make laws means that it is the pre-eminent institution of governance. It is supreme over executive government because executive government can only act in conformity with laws passed by the parliament. It is supreme over the judiciary because the role of courts is only to interpret the laws made by the parliament, not to change them.

This is what we mean by the constitutional doctrine of ‘parliamentary sovereignty’. That is the idea that the parliament has the right to make or unmake any law whatever. No other institution of government can do this.

In the Australian system of government, however, parliamentary sovereignty is limited in several important ways. Of the most significant is that the Commonwealth Parliament cannot make laws that are contrary to the terms of the Australian Constitution. So, for example, the Constitution contains a number of provisions that set boundaries to the Commonwealth’s legislative power.
The first is that the Commonwealth Parliament can only make laws with respect to the powers set down in S.51 of the Constitution. These are powers to make laws with respect to matters such as foreign affairs, defence, immigration, taxation, corporations, industrial relations and social security. Other matters that are not contained in S.51, such as health and education, remain the responsibility of state governments.

The Constitution also places certain limits on Commonwealth legislative power. For instance, the Commonwealth Parliament cannot abolish trial by jury, it cannot abridge freedom of religious belief, and it cannot acquire property compulsorily unless it provides fair compensation.

A different kind of limit on law-making is that for any law to be adopted, it must be approved by both houses of parliament; the House of Representatives and the Senate. This raises the problem of what to do if the two houses of parliament cannot agree on a law. The Constitution sets down a complex procedure for resolving such deadlocks.

If a law proposed by the House of Representatives is rejected two times by the Senate, the governor-general can call a new election for both houses of the Commonwealth Parliament. If the two Houses still disagree after a third vote is taken after the election, the governor-general can convene a joint sitting of both houses of parliament. At this sitting a final vote will be taken on whether to accept or reject the law in dispute.

How then, do laws get passed? The procedure is quite complicated but, in short, it proceeds as follows. Ideas for new laws are developed by the prime minister and the cabinet. These are commonly founded on commitments made by the governing party at an election. The minister responsible for the area to which the idea relates then prepares a draft law, for instance with respect to some matter of immigration like the entry of refugees. The draft law is called a bill.

The minister then presents the bill to parliament and makes a speech justifying it. There is a parliamentary debate as to whether or not the bill should be adopted. Sometimes a controversial bill will be sent to a parliamentary committee for detailed consideration. The parliament will then have another look at the bill to see whether it should be amended in some way. Finally there is a vote of the members of parliament. If there is a majority in the House of Representatives and the Senate, the bill will become law. When it becomes law a bill is called an act of parliament.

Student Activities

6 What is meant by parliamentary sovereignty?

7 Explain two ways that the legislative power of the Commonwealth Parliament are limited.

8 Explain what may occur if a proposed law is rejected by the Commonwealth Parliament two times.

This is all straightforward in theory. In practice, however, there are a number of problems that have arisen with respect to the law-making process. The first and most important of these is that, in theory, the parliament holds the executive government to account for its actions. In practice, the executive government led by the prime minister and cabinet, dominates the parliament. This inversion of what was intended has occurred principally because of the development of the party political system.

In our Westminster system of government, the prime minister and cabinet are drawn from the members of parliament. That means that they are all drawn from the political party that has a majority in parliament. In the last election in 2013, the Liberal-National Party defeated the Labor Party. For that reason, the leader of the Liberal-National Party, became the prime minister. (This was Tony Abbott at the time of the election but in late 2015 Malcolm Turnbull took over the position of prime minister.) The prime minister chooses members of his party as ministers who comprise the cabinet.

So, once the prime minister and cabinet propose a law to Commonwealth Parliament, it is almost never defeated in the House of Representatives. That is because party discipline is very strong. Party discipline means that all members of the governing party are required to vote in favour of any law proposed by the cabinet. As a result, although it is the parliament that ultimately adopts laws, it is the executive (the prime minister and senior ministers) that is in control of the law-making process. The role of the House of Representatives in drawing the government and its ministers to account for their actions, therefore, has been radically weakened.
A second problem with parliamentary law-making has to do with access to information. The government has far more information about proposed laws and policies than the parliament does. The government has all the departments of state, other government agencies and the entire public service to provide it with the information it requires. The parliamentary opposition has a very meagre staff, and the parliamentary library, while immensely valuable, is severely limited in the research that it can conduct on behalf of parliamentarians. About two thirds of parliamentary sitting time, therefore, is devoted to government business, and only one-third is taken up with business raised by the opposition, private members and parliamentary committees. Without adequate information, the parliament’s capacity to hold the government to account for its laws and actions is very limited.

Inadequacies in parliamentary procedure add to the information deficit. The principal mechanism for opposition parties in parliament to obtain information from the government is in question time. Question time consists of about an hour each day when the parliament sits, during which members of the opposition and the governing party can ask hard questions. Ministers are required to answer each question.

The problem is that Question time does not work as it should. Government ministers, from whichever side of politics, tend to evade answering questions or waste time in doing so. Questions from members of the government are usually prepared and provided to ministers in advance. These questions are not designed to acquire important information but instead to give ministers a chance to list their achievements or criticise the opposition’s performance.

Information does get exchanged in parliamentary committees. Generally speaking, these work quite well because party discipline is somewhat relaxed. That means that members of parliament from both the government and the opposition can work together more productively and are more likely to arrive at bipartisan policies. The most important parliamentary committees are the Scrutiny of Bills Committee, the Regulation and Ordinances Committee and the Parliamentary Human Rights Committee.

Parliamentary committees have significant powers. They can conduct public hearings on the matters they are investigating, They can summon witnesses, order government departments to provide them with documents and compel nominated individuals to provide them with evidence under oath. The Senate has its own set of parliamentary committees known as Senate estimates committees. Their task is to review the performance of government departments and agencies, thereby promoting public service accountability.

Finally, there is the Senate. The Senate began its life as the house representing the interests of the states. That is why the Senate consists of 12 members from each state and two members from each of the territories.

**Student Activities**

9. The parliament holds the executive government to account for its actions. In what way has this theory been inverted?

10. Why is a law proposed by the cabinet and prime minister almost never defeated in the House of Representatives?

11. How, in theory, does the executive have control of the Commonwealth Parliament?

12. Explain why access to information can be a problem in the law-making process.

13. How do parliamentary committees assist in information access?

Today, however, the Senate has turned into a house of review. That is, the Senate looks carefully at every bill passed by the House of Representatives. It may establish Senate committees to examine bills that are particularly contentious or controversial. The committees can recommend amendments to bills. In the end, the committee investigating a bill must decide whether to support or reject it.
The powers of the Senate, therefore, are equal to those of the House of Representatives, except in relation to bills concerned with the allocation of money. But as far as law-making is concerned, there are some problems with this arrangement. The first is that the Senate is not as democratically representative of the Australian people as the House of Representatives is. This is because each state has an equal number of senators. Tasmania, with only 600,000 people has 12 members and so does New South Wales with 5.5 million people.

So, a vote in Tasmania is worth almost ten times as much as a vote in NSW. This is inconsistent with the fundamental democratic principle of ‘one vote, one value’. The idea that the less democratic House of Parliament should have power equal to that of the more democratic House is unfair. The Senate has more power than it should with respect to law-making.

The second problem is that the voting system for the Senate is different from that of the House of Representatives. The Senate has a system of proportional representation. This means that it is always likely that a collection of minor parties will be elected. Particularly if there is a hung parliament, in which neither the Liberal or Labor parties has a majority, the minor parties will exercise a measure of influence far beyond their numerical representation. Consequently, they will be able to vote with one party or the other to give that party the majority it needs. It will be smaller parties like the Hunters and Fishers Party or the Motor Enthusiasts Party that could make or break legislation.

The third problem is that the term of office for senators, six years, is twice as long as for members of the House of Representatives. That means that when a new government is elected, it will face a Senate that is half elected at the same time, and half elected at the election that took place three years earlier. So, the half of the senators that were elected earlier do not have any contemporary democratic legitimacy, but they still vote as if they do. This makes clashes between the two houses of parliament far more likely than they should be.

Having said all that, Australia’s parliamentary democracy works tolerably well. Nevertheless, it could do with substantial reform to make it fairer, more accessible and more representative.

**Student Activities**

14 In what way do you think the Senate is more of a house of review today than a states’ house?

15 In most ways the powers of the Senate are equal to those of the House of Representatives. How is this a problem?

16 Explain one way where the powers of the Senate and the powers of the House of Representatives differ.

17 How do you think proportional representation in the Senate could be a problem for democracy?

18 Australia’s parliamentary democracy works tolerably well. Discuss.

19 Comment on three ways that Australia’s parliamentary democracy could be reformed to make it fairer, more accessible and more representative.

20 Investigate a Commonwealth parliamentary committee. Comment on a recent investigation, the methods used by the committee during its investigation and the outcome of the investigation.
VICTORIA’s top prosecutor has called for urgent legal reforms as figures show thousands of criminals are escaping jail time.

More than 30,000 Community Corrections Orders were given to offenders last year, more than double the 13,300 just a year earlier.

Thugs, paedophiles, armed robbers and domestic abusers have all walked free with no prison time or minimal sentences after being placed on the orders. It follows a guideline judgement handed down by the Court of Appeal in 2014.

Chief Crown Prosecutor Gavin Silbert, QC, said the orders were not working and immediate reform was needed.

“They’re going to have to get rid of them because the breaches (of CCOs) are going to swamp the County Court,” he said.

“What you are getting now is a little bit of prison and little bit of CCO. The whole law-and-order exercise has been a fraud by politicians.”

CCOs were introduced by the Baillieu Coalition government to replace suspended prison sentences.

But the 2014 guideline ruling said CCOs could replace a range of “medium” jail sentences. Criminals who previously would likely have been jailed have since walked free.

A MITCHAM man found with hundreds of images and videos of child porn, including the rape of a child, 6, was freed in February on a four-year CCO.

A MAN, 37, who pleaded guilty to drugging a man, 62, before stealing over $300,000 in jewellery got a five-year CCO.

TWO thugs who attacked an intellectually disabled man in a Belmont library, leaving him with a broken arm, avoided jail last year.

A HOON driver in Ballarat who slammed into a vehicle at high speed while drag racing and then fled was banned for 10 months and given a 12-month CCO with no jail.

AN 18-year-old man who used Facebook to arrange a threesome with 14-year-old girls got a three-year CCO including 200 community work hours.

Some violent offenders were given minimal jail sentences coupled with CCOs.

CCOs were to be used to punish offenders in cases where a court believed a prison sentence was not warranted.

In 2014, the Director of Public Prosecutions asked the Court of Appeal for a guideline judgment on their use.

But Mr Silbert said that judges had since had to make decisions that were not in line with public expectations.

“(The ruling) says CCOs are punitive and should be regarded as serious punishment. If the community didn’t agree with suspended sentences, they’re not going to agree with these,” Mr Silbert said.
“(Also) in every plea of guilty, defence counsel stands up and cites (the ruling), saying you don’t have to go to jail even in homicides … and judges are listening,” he said.

Shadow attorney-general John Pesutto said CCOs were intended “to put real teeth into community-based sentences, not to allow violent and dangerous offenders to walk free when previously they would have been jailed to protect the community”.

“In our view, the Court of Appeal’s decision wrongly extended CCOs to serious offences generally, like aggravated burglary, some forms of sexual offences involving minors, as well as some kinds of rape and homicide,” he said.

But Attorney-General Martin Pakula said it was “high time the Liberals admitted that CCOs are operating exactly as they designed them to”.

He said the Government was monitoring use of CCOs, and “if it becomes clear that the design of the former government’s legislation is flawed, then we may have to fix it in the same way we’ve had to fix their Bail Act and their baseline sentencing debacle.”

### Student Activities

1. What is a community corrections order (CCO)? What is the equivalent order in your state?
2. Explain the problem with CCOs.
3. Choose one of the examples and state the sentence that you think would be appropriate. Give your reasons.
4. What is a guideline judgment?
5. Explain the findings in the guideline judgment relating to CCOs.
6. Discuss the advantages and disadvantages of CCOs (or your state’s equivalent).