

What's at stake when parliamentary committee inquiries rely on voluntary executive cooperation?

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INTRODUCTION

Parliamentary committees are a key mechanism to hold the executive to account, with most having broad inquiry powers to call members of the executive to answer questions or produce documents. Governance arrangements and parliamentary committee practice reveal that it is predominantly a minister—not a committee—who ultimately exercises discretion to determine what government-held information will or will not be provided to a parliamentary committee inquiry. This includes which government officials will or will not attend to provide evidence at a public hearing held as part of a parliamentary committee inquiry.

A high-risk scenario results when parliamentary committees appear largely unwilling to 'flex their muscles' during an inquiry to try and compel witnesses or documents, or to seek and publish reasons for an invitation to appear as a witness being declined or information being withheld. In that, parliamentary committees are reliant on voluntary executive cooperation to deliver on their accountability 'promise' to hold the executive to account for their actions and to deliver better policy and legislative outcomes as part of their inquiries. Government guidelines that limit the circumstances for executive participation in parliamentary committee inquiries are an added risk factor.

This paper considers how the reluctance of parliamentary committees to use or test their compulsive powers to obtain relevant government-held evidence during an inquiry into matters of public interest restricts their ability to hold the executive to account, scrutinise government action and deliver outcomes. It argues that the parliamentary committee practice of relying largely on good faith and voluntary cooperation from the executive limits the ability for committees to fulfil their roles when conducting inquiries, suggesting that this limitation is exacerbated by current government guidelines and the difficulty for inquiry topics to 'fit neatly into the jurisdiction of one particular department, or of the Commonwealth or the state governments'.¹ The paper reveals the limits of parliamentary committee inquiries to deliver on their 'promise' to hold the executive to account and identifies a need to recalibrate expectations on what parliamentary committee inquiries can deliver.

¹ Gabrielle Appleby, Alexander Reilly and Laura Grenfell (3rd ed), *Australian Public Law*. Australia and New Zealand: Oxford University Press, 22 October 2018, p. 297.

Scope and key terms

Apart from the known limitation regarding the inability of parliamentary committees to compel a member of the other House in the Australian bicameral system,² this paper does not address the scope of the powers of parliamentary committees to compel witnesses and documents in the course of an inquiry, including from outside their jurisdictions. Other academics have considered these matters in detail.³

The powers and processes of parliamentary committees and how they engage with the executive vary for an array of reasons (for example, the type and composition of a committee, or the subject matter and political context of a committee inquiry).⁴ How these reasons may influence the relationship between a parliamentary committee and the executive, and their ability to hold the executive to account, are not explored in this paper.

The executive is defined as ministers, ‘all the personnel in the department: the public service and other public officers’⁵ and the ‘myriad offices and bodies that assist the executive to fulfil its duties, but fall outside the formal department system.’⁶ For the purposes of this paper the term ‘government officials’ is used to refer to members of the public service.⁷

FEDERALISM AND THE SEPARATION OF POWERS

Australia’s Constitution delineates the responsibilities of Commonwealth and state parliaments and anticipates a dual functionality in some areas (for example, health and education), noting that where a Commonwealth and state law conflict, the Commonwealth law will prevail.⁸ At federation the text of the Constitution sets out the division of law-making powers⁹ but in modern Australia it is

² Harry Evans, ‘The Parliamentary Power of Inquiry: any limitations?’. *Australasian Parliamentary Review* (2002) 17(2) (Spring), p. 133.

³ See, for example, Geoffery Lyndell, ‘Parliamentary Inquiries and Government Witnesses’. *Melbourne University Law Review* (1995-1996) 20, p. 383-422; Harry Evans, ‘The Parliamentary Power of Inquiry: any limitations?’. *Australasian Parliamentary Review* (2002) 17(2) (Spring), pp. 131-139; Patrick Dupont, ‘The uncooperative witness: the punitive powers of parliamentary committees’. *Australasian Parliamentary Review* (2011) 26(2) (Spring), pp. 114-123.

⁴ See, for example, Vanessa O’Loan, ‘The power to compel the attendance of witnesses and the giving of evidence before committees – lessons from the NSW Legislative Council’. *Australasian Parliamentary Review* (2023) 38(2) (Spring/Summer).

⁵ Gabrielle Appleby, Alexander Reilly and Laura Grenfell (3rd ed), *Australian Public Law*. Australia and New Zealand: Oxford University Press, 22 October 2018, p. 255.

⁶ Gabrielle Appleby, Alexander Reilly and Laura Grenfell (3rd ed), *Australian Public Law*. Australia and New Zealand: Oxford University Press, 22 October 2018, p. 256.

⁷ It is acknowledged that: a government official is held accountable through their relevant minister, who is responsible for the actions of their relevant department; and individual ministerial responsibility is important so that government officials feel comfortable providing ‘frank and fearless’ advice and service to the government, while also ensuring accountability: Gabrielle Appleby, Alexander Reilly and Laura Grenfell (3rd ed), *Australian Public Law*. Australia and New Zealand: Oxford University Press, 22 October 2018, p. 296. It is also acknowledged that while the public service is ‘required to provide frank, impartial and timely advice to the Government of the day (often referred to as ‘frank and fearless’ advice). Ministers are not obligated to accept and act on this advice’: Written correspondence to Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, 17 October 2023, pp. 1-2 (Brigid Monagle, Victorian Public Sector Commissioner).

⁸ *Australian Constitution* ss 51, 52, 109, ch V.

⁹ Gabrielle Appleby, Alexander Reilly and Laura Grenfell (3rd ed), *Australian Public Law*. Australia and New Zealand: Oxford University Press, 22 October 2018, p. 134.

becoming increasingly challenging to identify Commonwealth and state responsibilities for the delivery of government services—for example, those delivered in response to the COVID-19 pandemic.¹⁰

The Constitution creates a system of separated powers, dividing power between the legislative (parliaments), executive (ministers) and judicial (courts) branches of government. This prevents one branch becoming predominant and is a fundamental principle of Australia's democracy.¹¹ As the legislative and executive functions are drawn from the Parliament, the system makes a 'promise' that the executive will be held to account for their actions by the Parliament.¹²

Governments are supposed to be accountable to parliament, and through parliament to the electorate; that is, governments are supposed to give account of their conduct of public administration so that the electorate can pass judgement on their performance ... [The parliament] often through committees, regularly compels government to account for its activities when it would not otherwise do so.¹³

A number of accountability measures have been developed to deliver on this 'promise',¹⁴ such as the broad powers of the Parliament to conduct inquiries into matters of public interest including the actions of the executive government.¹⁵ It is generally accepted that these powers extend to inquiries conducted by parliamentary committees.¹⁶

PARLIAMENTARY COMMITTEE INQUIRY POWERS

Parliamentary committees are made up of a group of members of parliament appointed by their respective houses. They generally have considerable powers to undertake inquiries on behalf of the Parliament, including into government policies, administration and performance—providing important 'checks and balances' on the activities of government.¹⁷ Committee inquiries can: 'create a transparent arena for interaction between interests and the state in key policy domains'; provide 'a platform through which emerging issues and grievances can be constructively aired'; and make positive contributions to legislative amendments.¹⁸

¹⁰ See, for example, Anne Twomey, 'Multi-Level Government and COVID-19: Australia as a case study'. *The University of Melbourne Forum on Constitution Building in the Asia and Pacific*, 17 September 2020; Alan Fenna 'Pandemic Policy-Making in Australia's Federal System'. *Australia and New Zealand School of Government John L. Alford Case Library: Canberra*, 2020.

¹¹ David Clark (5th ed), *Introduction to Australian Public Law*. Chatswood, NSW: LexisNexis, 2016, pp. 79-80.

¹² *Australian Constitution* chs I-III, ss 44, 61, 64, 71.

¹³ Harry Evans, 'The Role of the Senate'. Department of the Senate, *Papers on Parliament no. 25*, December 2009, p. 97.

¹⁴ For example, independent bodies such as Ombudsman and Anti-Corruption Commissions are designed to investigate corruption, misconduct and maladministration in the public sector. Chris Field 'The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability', (2013) 72 *AIAL Forum*, pp. 24-33.

¹⁵ Harry Evans, 'The Parliamentary Power of Inquiry: any limitations?'. *Australasian Parliamentary Review* (2002) 17(2) (Spring), p. 131.

¹⁶ Harry Evans, 'The Parliamentary Power of Inquiry: any limitations?'. *Australasian Parliamentary Review* (2002) 17(2) (Spring), p. 131; Lynn Lovelock and John Evans (1st ed), *New South Wales Legislative Council Practice*. Sydney: The Federation Press, 2008, pp. 487-488.

¹⁷ Austin Asche, 'Parliamentary Democracy: Checks and Balances'. *Australasian Parliamentary Review* (2004) 19(1), pp. 139-143.

¹⁸ Ian March and Darren Halpin, 'Parliamentary Committees and Inquiries' in Brian Head and Kate Crowley (1st ed), *Policy Analysis in Australia*. Bristol: The Policy Press, 2015, pp. 137-138.

On paper, most parliamentary committees have powers to summons witnesses to provide evidence and require the production of documents, but these are very rarely used in contemporary Australian practice.¹⁹ Federally these powers come from the Constitution²⁰ or the legislation that established a committee²¹ and the associated Standing Orders and resolutions of the Houses.²² This is similar at a state level, where legislation²³ and Standing Orders generally provide these powers to committees.²⁴ A person who fails to comply with a summons can be punished for contempt.²⁵ Parliamentary privilege applies to all evidence given or received by a parliamentary committee, including evidence provided following the issuance of a summons. This ensures that anything a person says in evidence to a parliamentary committee inquiry cannot be used in legal proceedings against them or anyone else.²⁶

On the face of things, the primary purpose of a parliamentary committee should be obvious from its founding source, (for example, the associated Standing Order, Act or resolution that led to their establishment). However, in practice, a committee could see their primary role or purpose in a range of contested ways. Government members of a committee may see their purpose as advancing and protecting the government's policy agenda, whereas the public may see the committee's role as being a forum for them to 'have their say' about issues relevant to their lives. As a result, it can be challenging to identify a 'shared primary purpose' in practice.

Despite this challenge, it remains logical to assume that parliamentary committees will seek to use the powers they are given to ascertain the most reliable, relevant and accurate information—meaning, if required during the course of an inquiry, to acquit their responsibilities parliamentary committees would use their powers to order people to attend by summons to give evidence and/or produce documents. Where a parliamentary committee publishes information about what is happening 'behind the scenes' in relation to evidence gathering as part of an inquiry,

¹⁹ Vanessa O'Loan, 'The power to compel the attendance of witnesses and the giving of evidence before committees – lessons from the NSW Legislative Council'. *Australasian Parliamentary Review* (2023) 38(2) (Spring/Summer), p.75.

²⁰ *Australian Constitution* s 49.

²¹ See, for example, *Public Accounts and Audit Committee Act 1951* (Cth) s 13; *Parliamentary Committees Act 2003* (Vic) s 38.

²² Senate, Parliament of Australia, *Standing Orders and other orders of the Senate*, October 2022, O 34; and Senate, Parliament of Australia, *Standing Orders and other orders of the Senate*, October 2022, pp. 109-118 (Parliamentary privilege: Resolutions agreed to by the Senate on 25 February 1988); House of Representatives, Parliament of Australia, *Standing Orders*, 2 August 2022, O 236.

²³ See, for example, *Parliamentary Committees Act 1991* (SA) s 28; *Parliament of Queensland Act 2001* (Qld) ch 3 pt 1; *Parliamentary Privileges Act 1858* (Tas) ss 1-3.

²⁴ See, for example, Legislative Assembly, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, January 2024, O 192; Legislative Assembly, Parliament of Queensland, *Standing Rules and Orders of the Legislative Assembly*, Effective 31 August 2001 (Includes amendments effective 16 June 2023), O 205.

²⁵ Patrick Dupont, 'The uncooperative witness: the punitive powers of parliamentary committees'. *Australasian Parliamentary Review* (2011) 26(2) (Spring), pp. 114-115.

²⁶ J. R. Odgers (14th re ed), *Odgers' Australian Senate practice*. Canberra: Commonwealth of Australia, 2016, pp 45-47; Bill of Rights Act 1689 (UK), art XI; *Australian Constitution* s 49; *Parliamentary Privileges Act 1987* (Cth); *Constitution Act 1975* (Vic) s 19, *Defamation Act 2005* (Vic) s 37, *Constitution of Queensland 2001* (Qld) s 9, *Parliament of Queensland Act 2001* (Qld) ss 8, 9, 36; *Defamation Act 2005* (Qld) s 27. It is noted that the law of parliamentary privilege in New South Wales is different to other Australian jurisdictions and 'relies on the common law, without recourse to statutory expression or to the historical privileges of the Houses of Parliament in the United Kingdom': Stephen Frappell, 'Parliamentary privilege in New South Wales'. *38th Annual Course of the International Association of Law Libraries*, Sydney, 28 October 2019, pp. 2-4.

especially when it comes to executive involvement, this goes some way to promoting accountability.²⁷ However, ‘from the outside’ committee practice appears to predominantly involve inviting evidence as part of an inquiry and for it be provided voluntarily, and where it is not forthcoming, take no further action. This reveals the limitations of the accountability ‘promise’ of parliamentary committee inquiries as a mechanism to hold the executive to account for their actions and to deliver better policy and legislative outcomes.

POSITIVE IMPACTS OF VOLUNTARY EXECUTIVE COOPERATION

Many examples, one of which is explored in detail below, demonstrate the benefits to parliamentary committee inquiries where Commonwealth and state government officials voluntarily cooperate with a committee’s invitation to provide evidence.²⁸

In 2023 the Victorian Legislative Assembly’s Standing Committee on Legal and Social Issues commenced an inquiry into increasing the number of registered organ and tissue donors.²⁹ As part of this inquiry, the Committee received evidence from Commonwealth, and Victorian and South Australian government officials which enabled scrutiny of past government actions and informed evidence gathering aimed at delivering better policy and legislative outcomes in the donation sector.

The independent Commonwealth statutory authority that leads the national approach to improve donation rates provided a written submission and Commonwealth government officials from the authority appeared at a public hearing. This included information about the complex funding and service provision landscape for organ and tissue donation in Victoria and Australia.³⁰ Understanding these governance arrangements allowed the Committee to direct questions to the right decision-makers throughout the inquiry.³¹ Figure 1 was used by the Committee in its final report to provide a high-level summary of the sector structure, including funding streams and service provision relationships in Victoria.³²

²⁷ Examples of parliamentary committees creating a public record of executive non-cooperation during an inquiry are discussed in the ‘Missed opportunities where there is a lack of voluntary executive cooperation’ section of this paper.

²⁸ See, for example, Legislative Council Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into the Victorian Government’s COVID-19 contact tracing system and testing regime*, December 2020. Evidence was received from the Australian Chief Scientist and the Commonwealth Department of Health. See also House of Representatives Standing Committee on Employment, Education and Training, Parliament of Australia, Canberra, *Inquiry into the use of generative artificial intelligence in the Australian education system*, August 2024. Evidence has been received from the South Australian and Tasmanian Departments of Education.

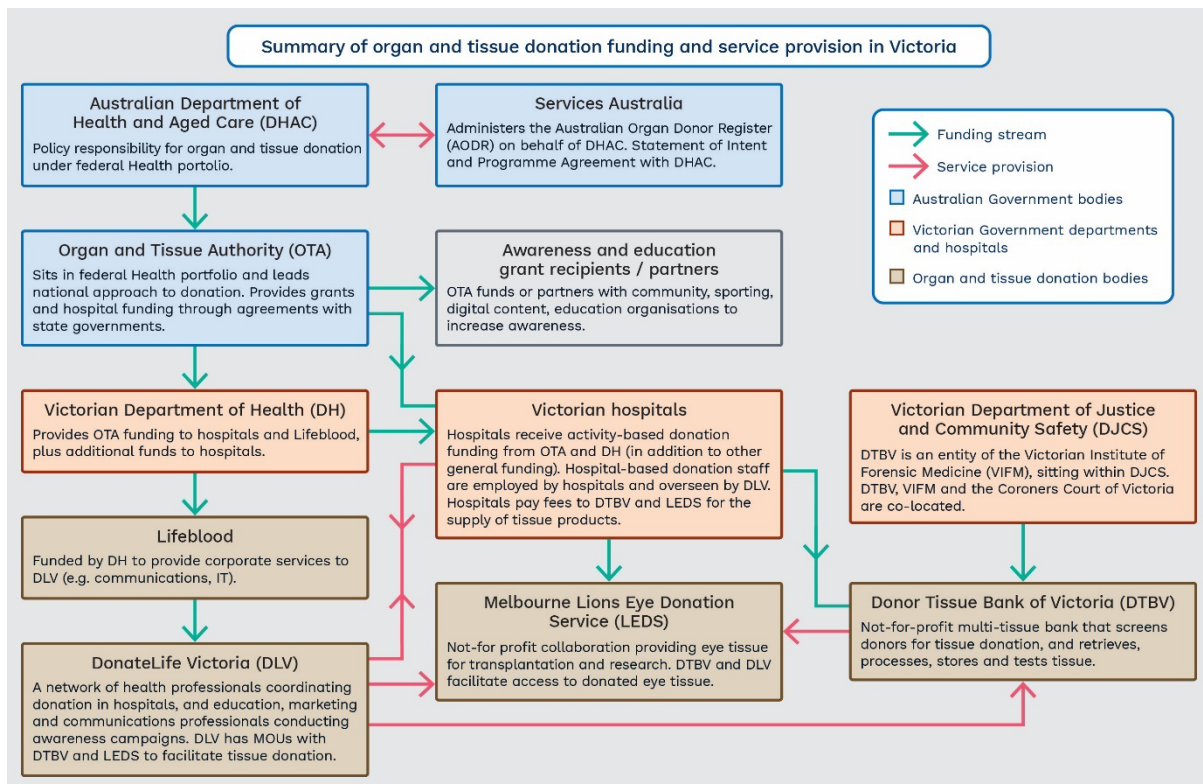
²⁹ Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors*, March 2024.

³⁰ Organ and Tissue Authority, Submission No 31 to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors, 2023*; Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 23 June 2023 (Lucinda Barry, Helen Opdam, Mark McDonald and Brianna Elms, Organ and Tissue Authority).

³¹ Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 31 July 2023, p. 15 (Louise McKinlay, Victorian Department of Health).

³² Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors: Register and talk about it*, March 2024, p. 28.

Figure 1 Summary of organ and tissue donation funding and service provision in Victoria



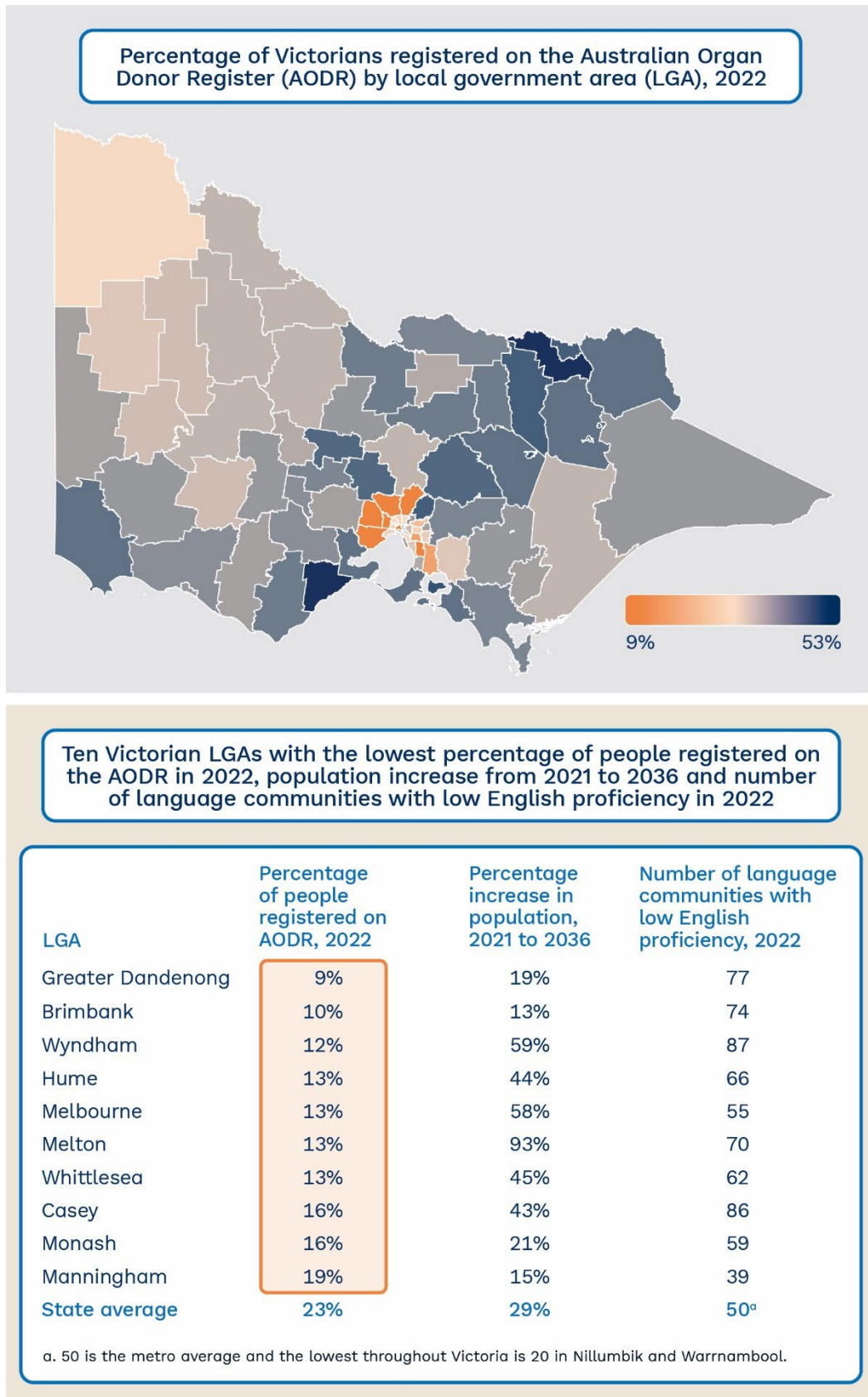
The Commonwealth Department of Health and Aged Care, that collaborates with Services Australia to administer the Australian Organ Donor Register (AODR), did not appear at a public hearing but instead provided responses to the Committee’s written questions on notice.³³ The details provided about complications in the transfer of state-based Victorian driver licence donor registration records to the AODR was critical to the inquiry. The granular data that was provided about Victorian donor registrations by local government area (LGA) also allowed the Committee to conduct analysis to inform suggestions for targeted awareness campaigns. This included comparing registration rates by LGA against cultural and language diversity and estimated population growth.³⁴ Figure 2 was used by the Committee in its final report to demonstrate these findings.³⁵

³³ Commonwealth Department of Health and Aged Care, Responses to written questions on notice to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 15 August 2023.

³⁴ Commonwealth Department of Health and Aged Care, Follow up to responses to written questions on notice to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 13 September 2023, pp. 5-7.

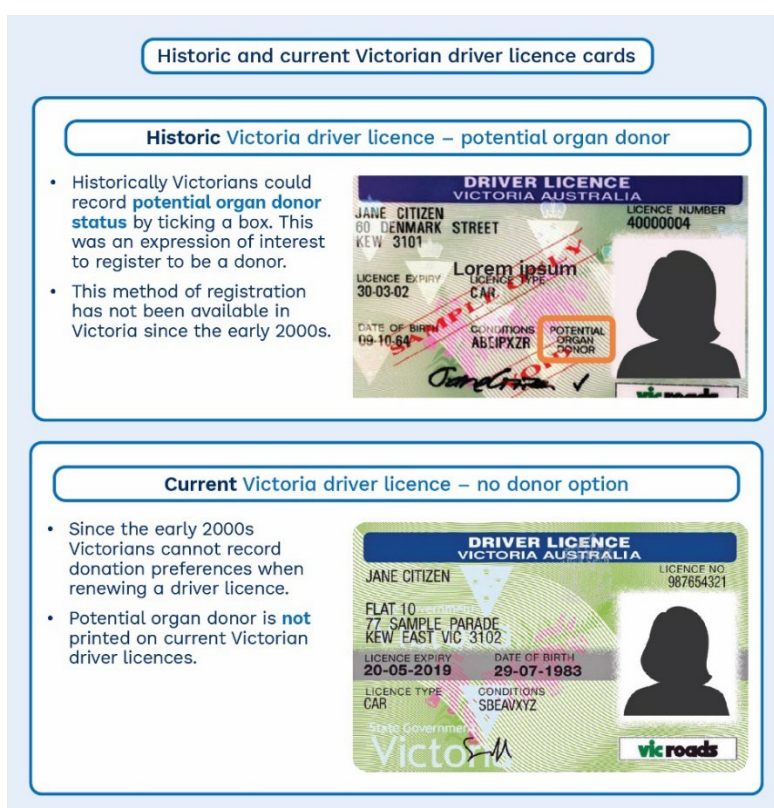
³⁵ Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors: Register and talk about it*, March 2024, p. 117.

Figure 2 AODR registration rates by Victorian LGA against cultural and language diversity and estimates population growth



The Victorian Departments of Health, and Transport and Planning provided written submissions and state government officials appeared at public hearings. Both departments provided detailed information about historic and current donor registration practices in Victoria and identified opportunities for improvement.³⁶ Evidence from the Victorian Department of Transport and Planning about the transfer of state-based Victorian driver licence donor registration records to the AODR was necessary to supplement the evidence received from the Commonwealth Department of Health and Aged Care.³⁷ Collating this evidence put the Committee in the best position possible to scrutinise past government action and shed light on the cause of Victoria’s comparably low donor registration rate—the focus of the Committee’s inquiry. Figure 3 was used by the Committee in its final report to share information about the Victorian driver licence donor registration method.³⁸

Figure 3 Historic and current Victorian driver licence organ donor registration methods



³⁶ Victorian Department of Health, Submission No 42 to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 2023; Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 31 July 2023 (Louise McKinlay, Victorian Department of Health); Victorian Department of Transport and Planning, Submission No 42 to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 2023; Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 11 September 2023 (Jacqui Sampson and Tim Mitchell, Victorian Department of Transport and Planning).

³⁷ Victorian Department of Transport and Planning, Responses to questions taken on notice to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 28 September 2023, p. 1.

³⁸ Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors: Register and talk about it*, March 2024, p. 52.

The Victorian Department of Government Services did not appear at a public hearing but provided responses to the Committee’s written questions on notice about digital opportunities to increase donor registrations. This included useful information about best practice for web and app opportunities to increase donor registrations.³⁹

The South Australian Department for Health and Wellbeing also did not appear at a public hearing but provided information to the Committee that could be published about their approach to donor registration through a state-based driver licence system.⁴⁰ This allowed the Committee to question government officials from Victoria about the feasibility of implementing a driver licence model for registration similar to that which operates in South Australia.⁴¹ Figure 4 was used by the Committee in its final report to show how intention to be an organ donor is recorded on a person’s driver licence on South Australia.⁴²

Figure 4 Driver licence organ donor registration method available in South Australia



This voluntary cooperation by Commonwealth, Victorian and South Australian government officials resulted in the Committee obtaining evidence directly relevant to the topic of their inquiry. Where this occurs, a parliamentary committee can determine where to concentrate attention and workshop legislative options in a politically safe environment because they are dealing with relevant information from government officials that is shared in a ‘solutions-focused’ environment, rather than a defensive ‘avoiding blame’ type environment.

The ability for the Victorian Legislative Assembly’s Standing Committee on Legal and Social Issues to fulfil its role in conducting its inquiry would have been limited without the voluntary cooperation of the executive—but instead the Committee was able to consider positive and fit for purpose recommendations for future action. Among other things, the Committee recommended that the Victorian Government scope the capability of the State’s driver licence system to allow Victorians to

³⁹ Victorian Department of Government Services, Responses to written questions on notice to Legislative Assembly, Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 26 October 2023, p. 4.

⁴⁰ Written correspondence to Legislative Assembly, Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 19 July 2023, 1-2 (Fay Jenkins, Acting Chief Public Health Officer, South Australian Department for Health and Wellbeing).

⁴¹ Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 11 September 2023, 6-9 (Jacqui Sampson and Tim Mitchell, Victorian Department of Transport and Planning). Victorian Department of Transport and Planning, public hearing, 11 September 2023.

⁴² Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors: Register and talk about it*, March 2024, p. 48.

register on the AODR when applying or renewing a driver licence.⁴³ The Government response to the Committee's report is expected in late September 2024.⁴⁴

MISSED OPPORTUNITIES WHERE THERE IS A LACK OF VOLUNTARY EXECUTIVE COOPERATION

Where government officials with knowledge relevant to a parliamentary committee inquiry refuse to voluntarily provide evidence, opportunities to maximise the outcomes of the inquiry are diminished.

While committee reports are a public record of an inquiry, it is rare for these reports to include details about a lack of executive cooperation. However, the Australian Parliament's Joint Standing Committee on Public Works' 1953 inquiry into the proposed erection of the Commonwealth Administrative Centre in Melbourne provides an example.⁴⁵ The Centre at the heart of this inquiry was to provide office space for a growing number of Victorian staff working for Commonwealth Government departments in Melbourne, with the full project to allow for future expansion at scale. The inquiry considered present office accommodation, the plan for the Centre and various other sites.⁴⁶

Several Victorian government officials gave evidence to the Committee, including from the then-Victorian Departments of Postmaster-Generals and Public Works.⁴⁷ Evidence from Victorian government officials from the then-Postmaster-Generals Department revealed that the planned Centre would not accommodate the department's employees, who were to remain in their present office but would likely require a new site in 8 to 10 years.⁴⁸ This information was supplemented by evidence from Victorian government officials from the then Public Works Department who 'submitted sketch plans and models' of a possible development that could provide such facilities in the future, if required.⁴⁹ But the Committee's final report records:

Considerable disappointment is expressed by the Committee at the action taken at the highest governmental level to prevent a Victorian State Government official from giving evidence before the Committee. In an endeavour to co-operate with the State and to ensure that the Commonwealth proposals were in every way desirable, and also in order to secure technical advice from a State expert, an opportunity was presented to a State official to give evidence. It is regretted that, although the official concerned was willing to appear, his superiors were of opinion that it was not necessary for him to appear, and

⁴³ Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors: Register and talk about it*, March 2024, p. 70.

⁴⁴ Department of the Legislative Assembly, Parliament of Victoria, 'Legislative Assembly Legal and Social Issues Committee: Inquiry into increasing the number of registered organ and tissue donors'. Accessed at: <https://www.parliament.vic.gov.au/organtissuedonor-reports>.

⁴⁵ Joint Standing Committee on Public Works, Parliament of Australia, Canberra, *Inquiry into the Erection of a Commonwealth Administration Centre (First stage) at Melbourne, Victoria*, 2 December 1953.

⁴⁶ Joint Standing Committee on Public Works, Parliament of Australia, *Inquiry into the Erection of a Commonwealth Administration Centre (First stage) at Melbourne, Victoria*, 2 December 1953, pp. 8-10.

⁴⁷ Joint Standing Committee on Public Works, Parliament of Australia, *Inquiry into the Erection of a Commonwealth Administration Centre (First stage) at Melbourne, Victoria*, 2 December 1953, pp. 5-6, 9; V H Arnold, *Victorian Year-Book 1952-53 and 1953-54* (No 73). Melbourne: Commonwealth Bureau of Census and Statistics, Victoria Office, pp. 158, 491.

⁴⁸ Joint Standing Committee on Public Works, Parliament of Australia, *Inquiry into the Erection of a Commonwealth Administration Centre (First stage) at Melbourne, Victoria*, 2 December 1953, p. 7.

⁴⁹ Joint Standing Committee on Public Works, Parliament of Australia, *Inquiry into the Erection of a Commonwealth Administration Centre (First stage) at Melbourne, Victoria*, 2 December 1953, pp. 6-7.

refused permission for him to do so. This is surprising as it has been the custom of the State Public Works Committee to call Commonwealth officials in its inquiries. The Committee considered it undesirable to magnify the incident into a matter of major importance, and decided not to use the legal authority in its Act, but it feels that the State has lost an opportunity of assisting in a scheme which is of the greatest importance to its citizens future.⁵⁰

In this instance the Solicitor-General advised the Committee ‘against making a test case by summoning a State official’ because their power to do so was ‘so doubtful’.⁵¹ This applies equally to Commonwealth government officials refusing to provide evidence to state committees. However, as mentioned above, the scope of the powers of parliamentary committees to call for and compel witnesses and documents outside their jurisdiction is not explored in this paper.

Another more recent example where there is a public record of government officials not accepting an invitation to provide evidence to a parliamentary committee inquiry comes from the current Victorian Select Committee into the 2026 Commonwealth Games Bid. This Committee was set up by the Legislative Council to inquire into the governance, probity and procurement processes followed by the Victorian Government in bidding for the 2026 Commonwealth Games and the impacts of the subsequent termination of the contract to host the Games.⁵² While several ministers from the Victorian Legislative Council as well as Victorian government officials from various state authorities and departments provided evidence to the inquiry, many declined the Committee’s requests to contribute.⁵³

Following the declined requests, the Committee published a statement that notes three former Victorian ministers declined the Committee’s invitation to appear at a public hearing for the inquiry. This includes the former Minister for Commonwealth Games Delivery who is a current member of the Legislative Assembly and has since become the State Premier, and two former members of the Legislative Assembly.⁵⁴ In this context, it is noted that ‘[t]he power to send for persons, documents and other things is subject to an exception for members, documents and other things belonging to other Houses of Parliament... including members who are also Ministers’.⁵⁵ This means that the

⁵⁰ Joint Standing Committee on Public Works, Parliament of Australia, *Inquiry into the Erection of a Commonwealth Administration Centre (First stage) at Melbourne, Victoria*, 2 December 1953, p. 33.

⁵¹ D R Elder and P E Fowler (7th ed), *House of Representatives Practice*. Canberra: Commonwealth of Australia, 2018, p. 701, quoting opinion by Solicitor-General, to the Secretary of the Parliamentary Standing Committee on Public Works, dated 16 September 1953.

⁵² Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, *Inquiry into the 2026 Commonwealth Games Bid*, 2023 (ongoing).

⁵³ Evidence to Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, 26 October 2023 (Hon Shaun Leane MLC, Hon Harriet Shing MLV); Parliament of Victoria, ‘News: Government MPs quizzed about Games cancellation’. Accessed at: <https://www.parliament.vic.gov.au/news/economy/commgameshearings>.

⁵⁴ Parliament of Victoria, Select Committee on the 2026 Commonwealth Games Bid, ‘Inquiry into the 2026 Commonwealth Games Bid: Statement by the Committee on Invitations sent to Hon Jacinta Allan MP, Hon Daniel Andrews and Hon. Martin Pakula’ Accessed at: <https://www.parliament.vic.gov.au/48e9d0/contentassets/8a1a842a93aa4ce088e66978eb22f160/sccgb---statment-26-october-2023.pdf>.

⁵⁵ Greg Taylor, *The Constitution of Victoria*. Sydney: The Federation Press, 2006, p. 276. As noted in the ‘Scope and key terms’ part of this paper, the scope of the power of parliamentary committees to compel witnesses and documents in the course of an inquiry, including those specific to the Select Committee on the 2026 Commonwealth Games Bid, will not be discussed in this paper.

process a Committee follows to request a Minister provide evidence to an Inquiry depends on the House of Parliament the member belongs to.

For current members of the Victorian Parliament these processes are clear. Committees can request a member of their own House to provide evidence. If the member refuses, this gets reported to the House. To request a member from the other House, a motion needs to be first passed in one House to send a message to the other House, granting leave for the Member to attend and provide evidence.⁵⁶ In this case, the Legislative Council agreed to send the message but the Legislative Assembly denied leave for the Member to attend and provide evidence.⁵⁷ For former members of the Victorian Parliament the process is murky. In this case, the former members of the Legislative Assembly argued that since the Committee was requesting that they attend to provide evidence in their capacity as former Ministers and former members of the Legislative Assembly, they had the same protections as if they were current members of the Legislative Assembly.⁵⁸

The Committee also sought written information from the Victorian Government in relation to the Commonwealth Games, including responses to questions on notice, document requests and a summons for papers and documents.⁵⁹ The Victorian Government has claimed executive privilege in relation to a significant proportion of the information requested—meaning the information requested could not be provided because the Victorian Government’s assessment of the documents considered them broadly prejudicial to the public interest.⁶⁰ The Committee is using its website to publish information requests and summons for documents, and the status of the Victorian Government’s answers to them.⁶¹

The Committee has also published two interim reports. The first includes a chapter on the ‘significant barriers’ faced by the Committee ‘in accessing key information about the 2026 Commonwealth Games from the Victorian Government and key individuals with knowledge of the Games’.⁶² Among other things, the interim report finds:

⁵⁶ Legislative Council, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, 2022, O 17.02, Legislative Assembly, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, January 2024, O 187.

⁵⁷ Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Interim report*, April 2024, p. 6.

⁵⁸ Parliament of Victoria, Select Committee on the 2026 Commonwealth Games Bid, ‘Inquiry into the 2026 Commonwealth Games Bid: Other documents (Correspondence from Hon. Daniel Andrews Response to Hearing Request)’. Accessed at: https://www.parliament.vic.gov.au/4a6874/contentassets/5fd9bf66ffb44e44b69c7def90904618/20231016-andrews-response-to-hearing-request_redacted.pdf; Parliament of Victoria, Select Committee on the 2026 Commonwealth Games Bid, ‘Inquiry into the 2026 Commonwealth Games Bid: Other documents (Correspondence from Hon. Martin Pakula Response to Hearing Request)’. Accessed at: https://www.parliament.vic.gov.au/4a6875/contentassets/0d720e9f7e8b427093c738f136aaaf79/20231016-pakula-response-to-hearing-request_redacted.pdf.

⁵⁹ Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Interim report*, April 2024, p. 11.

⁶⁰ Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Interim report*, April 2024, p. 11.

⁶¹ Parliament of Victoria, Select Committee on the 2026 Commonwealth Games Bid, ‘Inquiry into the 2026 Commonwealth Games Bid: Other documents (Information requests and summons for documents)’. Accessed at: <https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-the-2026-commonwealth-games-bid/other-documents>.

⁶² Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Interim report*, April 2024, pp. 1, 5.

The Committee has exhausted most avenues open to it in obtaining certain documents from the Victorian Government relevant to its Inquiry, for which the Government has made a claim of executive privilege. For the matter to be progressed further a production of documents motion would need to be agreed upon by the House. A motion at least in line with the Committee's summons for all documents held by the Department of Jobs, Skills, Industry and Regions, the Department of Premier and Cabinet and the Department of Treasury and Finance, or their predecessors, that relate to briefings provided by the Departments to a Minister or Ministers, would assist the Committee in this regard.⁶³

Following this, the Committee Chair moved a production of documents motion in the Legislative Council, seeking Victorian Government documents that had been the subject of claims of executive privilege. This motion was agreed to, but the Victorian Government has subsequently not provided the requested documents or followed the process required to claim executive privilege on the requested documents⁶⁴—instead, providing a schedule identifying the documents over which executive privilege is claimed.⁶⁵ The Committee's second interim report titled 'Failure to provide documents under Legislative Council Standing Orders' notes this non-compliance and states:

These documents are relevant to the Committee's Inquiry and the Government's failure to engage with the process for claiming executive privilege, including the process for disputing the validity of a claim of executive privilege, may impede the Committee's ability to properly carry out its functions as set out in its Terms of Reference.⁶⁶

The report goes on to emphasise how 'the Government's own self-assessment of Executive privilege without independent review is [among other things]... a direct impediment on the Committee's ability to conduct a thorough and transparent inquiry'.⁶⁷ Subsequent to this report tabling, a motion requiring the documents listed in the schedule to be lodged with the Clerk to permit an independent examination over the claims of executive privilege was agreed to.⁶⁸ In support of the motion the Chair of the Committee explained:

... it is the role of this committee to firstly get to the bottom of what has happened with the decision-making processes, and a lot of that involves looking at documents by government and also through public hearings, submissions and this sort of thing. But I also share the view, and I hope all the other committee members share the view, that we can ultimately form recommendations in the final report that will prevent this sort of thing

⁶³ Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Interim report*, April 2024, p. 17.

⁶⁴ Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Failure to provide documents under Legislative Council Standing Orders (Second interim report)*, September 2024, pp. 1-4.

⁶⁵ Tabled documents, Parliament of Victoria, *Production of documents: 2026 Commonwealth Games bid (Schedule of documents)*, tabled in the Legislative Council 18 June 2024, released on a non-sitting day 31 May 2024. Accessed at: <https://www.parliament.vic.gov.au/parliamentary-activity/taled-documents-database/taled-document-details/8245>.

⁶⁶ Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Failure to provide documents under Legislative Council Standing Orders (Second interim report)*, September 2024, p. 1.

⁶⁷ Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Failure to provide documents under Legislative Council Standing Orders (Second interim report)*, September 2024, p. 2.

⁶⁸ David Davis MLC, Parliament of Victoria, *Proof Hansard*, Legislative Council, 11 September 2024. Accessed at: <https://www.parliament.vic.gov.au/parliamentary-activity/hansard/hansard-details/HANSARD-974425065-28109#12>.

happening again. I hope that the government and the opposition agree with that. We have wasted a vast amount of taxpayers money here on what has happened, and there has clearly been a failure. It is my sincere view that if this committee can provide useful and actionable recommendations that the government could follow which would help prevent something like this ever happening again in the future, then I think the committee will have done some good work. That is exactly what I intend to do. But in order to do that good work, we need to see some of these documents.⁶⁹

Regardless of what eventuates in this circumstance, the Committee is still tasked with scrutinising the conduct and performance of the executive and any decisions they may have made in a ministerial capacity relevant to the inquiry's subject matter. In this scenario it appears the Committee may be limited in its capacity to hold the executive to account if it is not able to obtain the evidence required to scrutinise past government actions in relation to the Commonwealth Games bid.

These examples demonstrate how a lack of voluntary cooperation in a parliamentary committee inquiry limits the ability of a committee to maximise inquiry outcomes.⁷⁰ When contrasted to the positive example above, which involves a very different substantive issue—one that is about 'how can we make a system better for people', rather than one that is about 'blame for things going wrong'—we see a parliamentary committee may be left with no choice but to rely upon the executive as the only body who has access to the relevant information. However, the need for access to government officials and information is critical in both cases.

THE ADDED RISKS WHERE RESPONSIBILITIES FOR THE SUBJECT MATTER ARE SHARED

At federation there was a clear intent that some powers would be shared between the Commonwealth and the States. However, the complexity of accountability in modern governance arrangements presents a challenge for parliamentary committee inquiries that traverse subject matter that involve shared responsibilities and powers—presenting a high-risk scenario dependent on voluntary cooperation:

The very nature of government projects means whole-of-government initiatives are often considered necessary and expedient. Such initiatives, however, make it more problematic to determine which department, and therefore which Minister, is responsible. This can make it difficult for Parliament and its committees to focus their inquiries, and allows ministers to avoid responsibility by blaming other departments or even organisations in another jurisdiction altogether (such as the states).⁷¹

This problem is compounded for parliamentary committees by government guidelines that have been issued for government officials that set out a process that is to be followed for determining executive involvement in parliamentary committee inquiries.

⁶⁹ David Limbrick MLC, Parliament of Victoria, *Proof Hansard*, Legislative Council, 11 September 2024. Accessed at: <https://www.parliament.vic.gov.au/parliamentary-activity/hansard/hansard-details/HANSARD-974425065-28109#12>.

⁷⁰ It is noted that individual members of committees occasionally use public hearings as an opportunity to put on the public record instances where witnesses, including government officials, have been reluctant to accept an invitation to provide evidence. See for example, Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 20 July 2021 (David Southwick MP, Lisa Lynch, Royal Women's Hospital (Melbourne)), p. 4.

⁷¹ Gabrielle Appleby, Alexander Reilly and Laura Grenfell (3rd ed), *Australian Public Law*. Australia and New Zealand: Oxford University Press, 22 October 2018, pp. 297-298.

The Australian Department of Prime Minister and Cabinet has issued guidelines which apply to the making of submissions or appearing as a witness before a parliamentary committee.⁷² These guidelines make specific provision for requests to the Commonwealth to appear before or make a submission to a state parliamentary inquiry. The guidelines state:

[O]fficials should be aware that it would be rare for Commonwealth officials to participate in such [state] inquiries ... However, there may be cases where, after consulting the minister about the request, it is considered to be in the Commonwealth's interests to participate. Officials should not participate in any state or territory parliamentary inquiry without consulting the minister.⁷³

This means the ability of Commonwealth government officials to participate in state parliamentary committee inquiries appears to be limited to circumstances that are 'in the Commonwealth's interests'. Like the Commonwealth, the States also have guidelines.⁷⁴ For example, the Victorian Government has issued guidelines to assist public officials involved in parliamentary committee inquiries. Of relevance in Victoria's guidelines for submissions and responses to inquiries, is that after obtaining ministerial endorsement, a government body must write to the Secretary of the Department of Premier and Cabinet seeking further approval to make a submission and advise, among other things:

the issues of substantial importance that the inquiry will canvass, and the reasons why making a submission or response would be of strategic value to the Victorian Government; ... [and] the sensitivity of the topic to be discussed and any risks posed by the submission or response, particularly with respect to likely stakeholder or community reactions ...⁷⁵

It therefore appears that a Victorian government official's ability to voluntarily participate in a parliamentary committee inquiry is limited to circumstances that 'would be of strategic value to the Victorian Government' and 'any risks' such a contribution would pose. The Victorian guidelines do not provide examples to assist in understanding how 'strategic value' or 'risks' are to be interpreted.

Where responsibilities for the subject matter of a parliamentary committee inquiry are shared between the Commonwealth and the States, the risk of the executive not voluntarily cooperating to provide relevant evidence is exacerbated by government guidelines that appear to limit contributions to those that serve the interests of the respective government of the day, not the

⁷² Australian Department of the Prime Minister and Cabinet, 'Government guidelines for official witnesses before parliamentary committees and related matters (February 2015)'. Accessed at: https://www.pmc.gov.au/sites/default/files/resource/download/Gov_Guidelines_for_Official_Witnesses_Feb_2015.pdf.

⁷³ Australian Department of the Prime Minister and Cabinet, 'Government guidelines for official witnesses before parliamentary committees and related matters (February 2015)'. Accessed at: https://www.pmc.gov.au/sites/default/files/resource/download/Gov_Guidelines_for_Official_Witnesses_Feb_2015.pdf, p. 25.

⁷⁴ See, for example, New South Wales Department of Premier and Cabinet, 'C2011-27 Guidelines for Appearing Before Parliamentary Committees (October 2011)'. Accessed at: <https://arp.nsw.gov.au/c2011-27-guidelines-appearing-parliamentary-committees/>; Government of Western Australia, Public Service Commission, 'Public sector officers providing evidence to parliamentary committees: Guidance—Information for public sector officers providing evidence to parliamentary committees either through written submissions or by appearing as witnesses at committee hearings (10 May 2023)'. Accessed at: <https://www.wa.gov.au/government/publications/public-sector-officers-providing-evidence-parliamentary-committees>.

⁷⁵ Victorian Department of Premier and Cabinet, 'Guidelines for Victorian Government Submissions and Responses to Inquiries (May 2016)', pp 5-6. Accessed at: <https://content.vic.gov.au/sites/default/files/2018-09/Guidelines-for-Victorian-Government-Submissions-and-Responses-to-Inquiries.pdf>.

federation of Australia or the Australian public as a whole. Of course, this argument is based on good governance and accountability to the Australian taxpayer and voter. Others may subscribe to the pure representative democracy view of the interests of the Australian public and perhaps argue that the ability of an opposition, greens or independent dominated parliamentary committee to question a government official about policy issues that are not priorities for the majority of the Australian public would be a waste of time and money.

WHAT'S AT STAKE?

Parliamentary committees have been established to undertake inquiries into matters of public interest and are a key mechanism to holding the executive to account. To perform their role, parliamentary committees have powers to compel evidence during an inquiry. While the conduct of parliamentary committee inquiries varies between different jurisdictions, in most instances, and especially in inquiries that traverse subject matters where the Commonwealth and the States share service delivery responsibility, reliance on voluntary executive cooperation appears to be an accepted practice.

There are justifiable reasons, including legal ones, that must be taken into account when considering the reasonableness of a decision for the executive not to contribute to a particular parliamentary committee inquiry. But without a public record of what is going on 'behind the scenes' in an inquiry, it is impossible to assess whether parliamentary committees are keeping their 'promise' to hold the executive to account and putting themselves in the best position possible to deliver optimal policy and legislative outcomes.

While publishing parliamentary committee statements where the executive refuse to provide evidence or decline an invitation to appear at a public hearing as part of an inquiry assists with transparency and accountability, it does not acquit the 'promise' of holding the executive accountable. As more whole-of-government initiatives eventuate, the importance of executive cooperation to parliamentary committee inquiries cannot be underestimated. For this reason, to manage expectations of what parliamentary committees can deliver when it comes to executive accountability in the current landscape, there is a pressing need for the apparent parliamentary committee practice of relying on executive cooperation (and the government guidelines that restrict the circumstances for executive participation) in parliamentary inquiries to be reviewed.