C O M M O N W E A L T H O F A U S T R A L I A
M O D E L N A T I O N A L P O L I C Y • S E P T E M B E R 2 0 2 6

COVENANT RIGHTS

PROTECTION AND NON-REMOVAL POLICY

A binding framework to ensure that human rights Australia has already accepted under international law cannot be extinguished, diluted, or quietly withdrawn by ordinary statute, regulation, or executive listing.

STATUS	LEGAL BASIS	CORE COMMAND
Model national policy for legislative and executive adoption	ICCPR, ICESCR, ICERD, CEDAW, CAT/OPCAT, CRC, CRPD and related instruments Australia has ratified	**Rights already accepted SHALL NOT BE REMOVED**

1. Purpose and non-negotiable command

Australia has freely chosen, by ratification, to be bound under international law by a body of human rights covenants. Ratification is not a press release. It is a legal undertaking. A State that accepts those obligations and then constructs domestic machinery that lets those same rights be listed away, redefined away, or punished as association, is in breach of the very instruments it signed.

This Policy exists because Australia still has no national Human Rights Act with real teeth, no entrenched bill of rights, and an implied constitutional freedom of political communication that is narrower than the rights Australia promised the world it would protect. Ordinary statutes and regulations can therefore appear to take rights away. This Policy forbids that appearance from becoming the reality.

The command is simple and absolute: no Commonwealth, State or Territory law, regulation, listing, direction, or automated decision may remove, nullify, or make practically unusable a right that Australia has already accepted by ratifying a human rights treaty, except under the strict, public, judicially reviewable conditions set out in this Policy.

2. The legal problem this Policy answers

Australia is a dualist State. Treaties do not become domestic law merely because they are ratified. Courts have said so for decades. Parliament has used that gap. The result is a country that lectures others on human rights while leaving its own people without a single, enforceable national catalogue of the rights it has already promised.

That gap is not theoretical. In 2026 the Commonwealth enacted the Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026, inserting Part 5.3B into the Criminal Code. That scheme allows the Executive to specify an organisation as a “prohibited hate group” by regulation, on a ministerial state of satisfaction informed by intelligence, with offences attaching to membership, support, funding and association. The High Court matter White Australia Party Inc. & Anor v The Commonwealth (M50/2026) has put the validity of that scheme in issue, including whether it impermissibly burdens the implied freedom of political communication and whether it confers judicial power on the Executive contrary to Chapter III.

Whatever the merits of any particular organisation, the architecture of the scheme is the warning. If a group can be extinguished by regulation, on classified material, without a prior judicial finding of criminal conduct, then the question is not only whether the law applies to them. The question is whether the same machinery can later be turned on any unpopular minority, religious body, protest movement, union, publisher, or political party whose size the government considers "small enough" that silencing it will not much disturb the national conversation.

That is the opposite of the structure required by the International Covenant on Civil and Political Rights. ICCPR Article 19 protects expression. Article 21 protects peaceful assembly. Article 22 protects association. Article 25 protects political participation. Article 14 protects a fair hearing. Article 2 requires an effective remedy. Restrictions are permitted only where they are provided by law, pursue a legitimate aim recognised by the Covenant, and are necessary and proportionate in a democratic society. Executive listing of political organisations on secret intelligence, with criminal consequences for mere association, fails that test unless every one of those conditions is independently and publicly satisfied.

3. Instruments Australia has ratified and which this Policy treats as the floor

This Policy treats the following instruments, to the extent Australia is a party, as the minimum content of rights that may not be removed. Dates are Australia's ratification, accession or equivalent binding act.

Instrument	Australia bound	Core protected domain
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	30 Sep 1975	Equality; racial hatred limits must still respect expression
International Covenant on Economic, Social and Cultural Rights (ICESCR)	10 Dec 1975	Work, health, education, culture; non-retrogression
International Covenant on Civil and Political Rights (ICCPR)	13 Aug 1980	Life, liberty, fair trial, expression, assembly, association, political rights
Second Optional Protocol to the ICCPR (abolition of the death penalty)	2 Oct 1990	No death penalty; no reintroduction
First Optional Protocol to the ICCPR (individual communications)	25 Sep 1991	International individual complaint pathway
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	28 Jul 1983	Equality of women in law and public life
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	8 Aug 1989	Absolute prohibition of torture; no refoulement to torture

Optional Protocol to CAT (OPCAT) — preventive inspection of places of detention	21 Dec 2017	Independent inspection; no secret detention regimes
Convention on the Rights of the Child (CRC) and relevant Optional Protocols	17 Dec 1990 / 2006–07	Best interests of the child; no sale, exploitation, or unlawful detention
Convention on the Rights of Persons with Disabilities (CRPD) and Optional Protocol	17 Jul 2008 / 2009	Equal recognition before the law; accessibility; no substituted decision-making by default
Convention on the Prevention and Punishment of the Crime of Genocide	Party	Prevention and punishment of genocide
1951 Refugee Convention and 1967 Protocol; statelessness conventions	Party	Non-refoulement; identity; protection of status
Geneva Conventions 1949 and Additional Protocols; Rome Statute of the ICC	Party	Humanitarian law; individual criminal responsibility

Australia also maintains standing invitations to UN Special Procedures and periodic reporting duties to treaty bodies. Those processes are not a substitute for domestic enforceability. They are evidence that Australia already accepts external scrutiny of the same rights this Policy now requires to be kept at home.

Reservations currently maintained under ICERD Article 4(a), ICCPR Articles 10, 14(6) and 20, CEDAW and CRC do not authorise the removal of the remaining Covenant rights. This Policy requires a public review and a presumption of withdrawal of reservations that are incompatible with the object and purpose of the treaty.

4. Operative principles — rights that appear taken away are not removed

Principle 1 — Incorporation by interpretation and inconsistency

Every Commonwealth Act, regulation, legislative instrument, and executive decision must be interpreted, so far as it is possible to do so consistently with its purpose, in a way that is compatible with the rights in the instruments listed in section 3. Where a provision cannot be so interpreted, it is, to the extent of the inconsistency, of no force or effect against a person asserting a Covenant right, unless Parliament has enacted an express, named override that satisfies Principle 6.

Principle 2 — Non-regression (non-removal)

A right that Australia has accepted by ratification may not be reduced in substance by later legislation, regulation, or policy. Measures that shrink the practical enjoyment of a Covenant right — by criminalising association, by listing organisations without a judicial finding, by expanding “harm” to include offence, by applying offences extraterritorially to speech, or by removing reasons and procedural fairness — are presumptively a prohibited regression. The presumption is rebutted only by clear proof that the measure is necessary, the least restrictive available, and time-limited.

Principle 3 — Rights attach to persons, not to the popularity or size of the group

The Covenant rights of expression, assembly, association and political participation do not shrink because a group is small, despised, or electorally hopeless. A government submission that it is easier to justify banning a smaller group because the national conversation will barely notice is incompatible with Articles 19, 22 and 25 of the ICCPR and with the implied constitutional freedom. Popularity is not

a legal criterion. Size is not a legal criterion. The test is conduct, necessity, and proportionality — applied to each person and each organisation on evidence.

Principle 4 — Conduct, not status; violence, not orthodoxy

Criminal law may punish incitement to imminent violence, true threats, and participation in a conspiracy to commit violent crime. It may not punish mere membership of a lawful political association, mere agreement with an unpopular idea, a gesture, a slogan, or speech that a reasonable member of a protected group might find offensive. “Hate crime” and “harm” must be defined no more widely than the Covenant permits. Psychological offence, social discomfort, and reputational injury to a government programme are not a lawful substitute for a pressing social need.

Principle 5 — No executive political extinction

No Minister, Governor-General in Council, police force, or intelligence agency may specify an organisation as prohibited, terrorist, extremist, or a “hate group” with the effect of criminalising membership or support, unless:

- a court exercising federal judicial power has first found, on admissible evidence and after a contested hearing, that the organisation’s purpose or activities constitute a criminal offence involving politically motivated violence or a genuine threat of such violence;
- the organisation and affected members have been given notice, the substance of the adverse case, a meaningful opportunity to answer it, and publicly usable reasons;
- classified material is summarised to the affected party at a level that permits a real defence, with a special advocate only as a last resort and never as a replacement for reasons;
- the listing expires automatically after 12 months unless a court renews it on fresh evidence; and
- the listing decision is subject to full merits and judicial review, including on questions of proportionality and compatibility with ICCPR Articles 19, 21, 22 and 25.

A regulation that lists first and litigates later is a prohibited removal of rights.

Principle 6 — Override only by named, super-majority, sunsetting statute

If Parliament considers that a Covenant right must yield in a particular case, it may do so only by an Act that:

- names the specific Covenant article and the specific domestic provision being overridden;
- states the legitimate aim in the language of the Covenant, not in slogans;
- contains an independent statement of why less restrictive means were rejected;
- is passed by an absolute majority of each House;
- sunsets in no more than two years unless re-enacted after a public review by the Parliamentary Joint Committee on Human Rights and a report of the Australian Human Rights Commission; and
- cannot be buried inside an omnibus “hate”, “safety”, “migration”, or “national security” statute.

Silence, implication, and “necessary intendment” are not an override.

Principle 7 — Procedural fairness is itself a Covenant right

ICCPR Article 14 and Article 2 require a fair hearing and an effective remedy. Removal of the duty to give reasons, reliance on a “state of satisfaction” insulated from review, closed material procedures that

the affected person can never answer, and offences that follow a person overseas solely because of citizenship, are each a removal of rights unless Principle 6 is satisfied. A person is entitled to know the case against them before the State makes association with them a crime.

Principle 8 — Effective remedy and standing

Any person whose Covenant right is engaged — including a member, donor, publisher, lawyer, or would-be associate of a listed organisation — has standing to seek a declaration, injunction, and, where loss is shown, compensation. The Australian Human Rights Commission may intervene as of right. Incompatibility with this Policy is a ground of judicial review. A statement of compatibility under the Human Rights (Parliamentary Scrutiny) Act 2011 that is false, formulaic, or silent on a Covenant article is itself reviewable.

Principle 9 — Extraterritorial reach does not strip the Covenant

If Australia criminalises the overseas conduct of its citizens, it must take the Covenant with it. A State cannot export a narrower set of rights than it promised in Geneva and New York. Speech lawful in the place where it is spoken is not converted into an Australian crime merely because an Australian passport is involved, unless the speech itself satisfies the ICCPR limitation test.

Principle 10 — Education, publication, and the end of invisible law

Every listing, every override, and every statement of compatibility must be published in full, in plain English, on a single public register within 24 hours. Secret reasons are incompatible with a democracy that claims to honour Article 19. Public servants who develop legislation must certify, by name, that they have tested the proposal against each Covenant article listed in section 3.

5. Specific protections that current schemes appear to take away

Without limiting the Covenants, the following rights are declared not removed and not removable except under Principle 6.

5.1 Freedom of expression (ICCPR Article 19)

Everyone has the right to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether orally, in writing, in print, in art, or through any other media. Restrictions are lawful only if they are provided by law and are necessary for respect of the rights or reputations of others, or for the protection of national security, public order, public health or morals — and even then only if they are proportionate and the least restrictive means. Offence is not a sufficient ground. A salute, a flag, a historical argument, or a demand for a change of government is not, without more, a crime.

5.2 Peaceful assembly (ICCPR Article 21)

The right of peaceful assembly shall be recognised. Restrictions must meet the same necessity test. Pre-emptive bans on assemblies because of anticipated offence, or because intelligence suggests some attendees hold unlawful thoughts, are a removal of the right.

5.3 Freedom of association and political parties (ICCPR Articles 22 and 25)

Everyone has the right to freedom of association with others, including the right to form and join political parties and trade unions. Article 25 guarantees the right to take part in the conduct of public affairs, to vote, and to be elected. Registration as a political party, the right to seek that registration, and the right of members to communicate a political programme cannot be extinguished by a regulation that labels

the organisation a "hate group" in the absence of a judicial finding of criminal violence. Association with unpopular speakers is not recruitment to a crime.

5.4 Fair hearing and independent courts (ICCPR Article 14; Constitution Chapter III)

Determination of rights and obligations, and of any criminal charge, belongs to a competent, independent and impartial tribunal. An executive "state of satisfaction" that an organisation is a prohibited group, followed by criminal liability for those who remain members, is an exercise of judicial power dressed as regulation. It is incompatible with Article 14 and with Chapter III. This Policy requires that incompatibility to be treated as fatal.

5.5 Equality and non-discrimination (ICCPR Article 26; ICERD; CEDAW; CRPD)

All persons are equal before the law and are entitled to equal protection. Laws that target a racial, religious, political or other group must still respect the expression and association rights of members of that group. Anti-discrimination protections do not authorise a parallel system of political outlawry.

5.6 Freedom from torture and cruel treatment; liberty (CAT; ICCPR Articles 7, 9, 10)

These rights are non-derogable in substance. Detention, conditions of detention, and any use of closed psychiatric or "deradicalisation" regimes attached to a listing must comply with CAT, OPCAT, and Articles 7, 9 and 10. OPCAT inspection cannot be postponed by declaration as a method of avoiding scrutiny.

5.7 Rights of the child and of persons with disability

A listing scheme that criminalises a parent's association, or that treats disability-related behaviour as extremism, is a removal of CRC and CRPD rights. The best interests of the child and the equal recognition of persons with disability before the law remain in force.

6. Duties of institutions

1. The Parliament must not pass a Bill that is incompatible with this Policy unless it uses the override in Principle 6. The Parliamentary Joint Committee on Human Rights must report on compatibility before the final vote, and a vote taken without that report is a procedural defect.
2. The Executive must not make a regulation, listing, or direction that has the effect of removing a Covenant right. Cabinet submissions on national security, migration, online safety, and criminal law must include a Covenant impact statement signed by the responsible Minister.
3. The Australian Federal Police, ASIO, and all State and Territory police must not treat political opinion, journalism, lawful protest, or association with a non-judicially-listed group as a predicate for investigation of "hate" or "extremism" offences.
4. Courts must apply Principles 1, 5 and 8. Where a construction that preserves a Covenant right is reasonably open, that construction is to be preferred. Where it is not open, the court should declare the incompatibility and, to the extent the Constitution permits, refuse to give the incompatible provision effect against the right-holder.
5. The Australian Human Rights Commission is to maintain the public register required by Principle 10, receive complaints of removal of Covenant rights, and have compulsory production powers against Commonwealth agencies in respect of listing files, subject only to a court-supervised public-interest immunity process.
6. States and Territories that already have Human Rights Acts (Victoria, Queensland, the Australian Capital Territory, and any jurisdiction that follows) must read those Acts together with this Policy so that the higher protection prevails.

7. What this Policy does not do

This Policy does not protect violence. It does not protect incitement to imminent violence. It does not prevent the prosecution of assault, property destruction, stalking, or true threats. It does not require any person to agree with any political programme, including programmes that are racist, antisemitic, theocratic, or otherwise contemptible. It does not prevent robust civil criticism, boycotts, or the refusal of private platforms to host speech.

What it prevents is the conversion of disagreement into outlawry by regulation. A democracy that can jail people for belonging to a small, ugly party without first proving a crime in open court has not "balanced" rights. It has removed them.

8. Implementation path

- Immediate administrative adoption by any Minister, department, or agency that chooses to bind itself pending legislation.
- Introduction of a Covenant Rights Protection Bill giving this Policy statutory force, including an interpretive rule, an inconsistency rule, a judicial-listing rule, and a named-override rule.
- Support for, and strengthening of, a national Human Rights Act so that the rights in section 3 are scheduled in one place and enforceable against the Commonwealth.
- Withdrawal or narrowing of existing treaty reservations after a 12-month public review.
- Amendment of Part 5.3B of the Criminal Code (and any successor scheme) so that no organisation can be specified as prohibited except by order of a Chapter III court after a contested hearing.
- A statutory bar on using the size or popularity of a group as a reason that a burden on political communication is easier to justify.
- Mandatory publication of reasons for any restriction on expression, assembly or association within 24 hours, with personal liability for officers who withhold reasons without a court order.

9. Closing statement

Australia told the world it accepted the Covenants. It reports to the treaty bodies. It invites Special Rapporteurs. It funds human rights diplomacy. None of that is worth the paper it is written on if, at home, a regulation can make association a crime, a definition can make offence a "hate crime", and a government can tell a court that small groups are easier to silence because fewer people will miss them.

Rights that only exist when they are fashionable are not rights. They are permissions. This Policy converts permissions back into obligations. The Covenants already did that work at the international level. The remaining task is the one Australia has deferred since the 1970s: to stop pretending that ratification without domestic enforceability is compliance.

People's rights that appear to have been taken away are not removed. They remain. This Policy is the instruction that every institution of the Commonwealth is to treat them as remaining — today, and after the next statute, and after the next listing.

E N D O F P O L I C Y

Prepared as a model instrument for civic, parliamentary and professional use.