2025-2026

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COVENANT RIGHTS PROTECTION BILL 2026

EXPLANATORY MEMORANDUM

and

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Circulated as a model memorandum to accompany a private member's Bill
This document is not an official government explanatory memorandum.

Outline

This Bill gives domestic legal effect to the human rights Australia has already accepted by ratifying the core United Nations human rights covenants, and then does the one thing those ratifications have never done: it stops later ordinary statutes, regulations and executive listings from taking those rights away.

Australia is a dualist State. The High Court has held, repeatedly, that a treaty does not become part of Australian law unless Parliament incorporates it. That gap is how a country can report to treaty bodies, invite Special Rapporteurs, and still construct a scheme under which an organisation is specified as a "prohibited hate group" by regulation, on a ministerial state of satisfaction informed by intelligence, with offences attaching to membership and support.

That scheme is Part 5.3B of the Criminal Code, inserted by the Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026. Its validity is in issue in White Australia Party Inc. & Anor v The Commonwealth (M50/2026). This Bill is not a commentary on the politics of any plaintiff in that proceeding. It is a response to the architecture. If a group can be extinguished by regulation, 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.

The Bill is stronger than a "dialogue" Human Rights Act. A dialogue model that cannot touch an incompatible law leaves the non-removal promise empty. This Bill therefore:

(a) incorporates the scheduled instruments as Australian law to the extent of Commonwealth power, relying principally on the external affairs power;

(b) requires every Commonwealth law to be interpreted compatibly with Covenant rights;

(c) provides that an incompatible law is of no force or effect against the right-holder, unless Parliament uses a named, sunsetting override Act;

(d) forbids implied repeal of that rule;

(e) confines organisational prohibition with criminal consequences to an order of the Federal Court after a contested hearing, on proof of a purpose of politically motivated violence — not on offence, orthodoxy, intelligence speculation, or the size of the group;

(f) repeals and replaces Part 5.3B of the Criminal Code accordingly, and extinguishes existing executive listings;

(g) creates standing and remedies, including compensation for unlawful official action.

The Bill does not protect violence. It does not protect incitement to imminent violence, true threats, assault, or conspiracy. It does not require any person to agree with any political programme. What it prevents is the conversion of disagreement into outlawry by regulation.

Why a named override rather than a constitutional amendment

A constitutional bill of rights would be stronger still. This Bill does not pretend to be one. The Commonwealth Parliament cannot, by ordinary statute, bind a later Parliament in the way some State constitutions permit. Clause 15 therefore does two lawful things.

First, it sets a drafting rule: only an Act that names the Covenant article, names the domestic provision, states the aim in Covenant language, sunsets in two years, and is not buried in an omnibus statute is an "override Act".

Second, it provides that anything less does not displace the interpretive and inconsistency rules. A later Parliament that wishes to tear the scheme up must repeal this Act by name. That is as far as ordinary legislation can honestly go. The alternative — a Human Rights Act that politely asks the Executive to consider rights while leaving listing-by-regulation in place — is how rights appear to exist and are in fact removed.

Financial impact

The Bill will have a modest financial impact. Additional work will fall on the Federal Court (prohibition-order hearings), the Australian Human Rights Commission (register, intervention, production notices, reservations review) and the Office of Parliamentary Counsel (compatibility statements of a higher standard). Offence provisions in substituted Part 5.3B are narrower than the current scheme and should reduce, not increase, prosecutions based on status. No reliable dollar figure can be given. The cost of not enacting the Bill is the continued exposure of every person in Australia to a machinery of political extinction that does not require a court to find a crime.

Regulation impact

The Bill reduces regulatory burden on political association by extinguishing executive listing. It increases procedural burden on the Commonwealth when the Commonwealth seeks to prohibit an organisation, because it requires a court case. That is the point.

Statement of compatibility with human rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. It is more than compatible. Its purpose is to make those instruments enforceable against the Commonwealth.

Overview

The Bill incorporates scheduled covenants, imposes a non-removal rule, confines organisational prohibition to a Chapter III court, and substitutes a narrower criminal scheme for Part 5.3B of the Criminal Code.

Human rights implications

The Bill engages, and in each case promotes, the following rights.

ICCPR Article 19 — freedom of expression. The Bill prevents offence, gesture and unpopular opinion from being treated as a sufficient ground for criminal liability or organisational extinction. Permitted limitations must meet the Covenant's own test (clause 12). Substituted offences in Schedule 2 require knowledge of a court order and, for support, an intention to assist politically motivated violence.

ICCPR Article 21 — peaceful assembly. Pre-emptive organisational bans based on anticipated offence are treated as a prohibited regression (clause 10).

ICCPR Article 22 — freedom of association. Mere membership of an organisation that has not been the subject of a court prohibition order cannot be made a crime (clauses 10, 17 and 22).

ICCPR Article 25 — political participation. Registration and campaigning as a political party cannot be extinguished by regulation.

ICCPR Article 14 and Chapter III of the Constitution — fair hearing and judicial power. Determination that an organisation is to be prohibited with criminal consequences is an exercise of judicial power. The Bill places that determination in the Federal Court, with notice, the substance of the case, cross-examination, usable reasons, and a special advocate only as a last resort.

ICCPR Article 2 — effective remedy. Part 6 creates standing and a full suite of relief, including compensation.

ICCPR Article 26, ICERD, CEDAW, CRPD — equality. Clause 11 forbids using the size or unpopularity of a group as a reason that a burden is easier to justify. That is an equality rule as well as a speech rule.

CAT and ICCPR Article 7 — torture and ill-treatment. These rights are declared non-derogable (clause 12(2)). OPCAT inspection cannot be used as a delayed substitute for the rights themselves.

CRC and CRPD. Clause 9(1)(j) prevents a listing scheme from treating a parent's association, or disability-related behaviour, as extremism without more.

Rights of victims of violence. The Bill does not impair the right to security of the person (ICCPR Articles 6 and 9). Ordinary offences of violence, threat and incitement to imminent violence are expressly saved (Schedule 2 item 4). The Bill refuses the false choice between protecting people from violence and protecting people from the State.

Limitations

The only limitations the Bill itself imposes are the prohibition-order scheme and the substituted offences. Those limitations:

(a) are prescribed by law, in precise terms;

(b) pursue the legitimate aim of protecting the rights and security of others, recognised by ICCPR Articles 19(3) and 22(2);

(c) are necessary and proportionate, because they require a judicial finding of a purpose of politically motivated violence, a real and present risk, and the failure of less restrictive means;

(d) are time-limited (12 months, renewable only on fresh evidence);

(e) do not punish speech or association as such.

Closed material procedure (clause 19(3)–(5)) limits the right to a fully open hearing. The limitation is confined: the substance of the case must still be given; a special advocate is mandatory; published reasons are mandatory; secrecy is confined to the minimum facts that would create a real risk of serious harm to national security. That is the least restrictive means consistent with the existence of genuine intelligence.

Conclusion

The Bill is compatible with human rights. To the extent it limits rights, the limits are reasonable, necessary and proportionate. The Bill's central operation is the restoration of rights Australia has already accepted and has allowed to be made practically unusable.

Notes on clauses

Preamble

1. The preamble is an aid to interpretation under section 15AB of the Acts Interpretation Act 1901. It records the dualist gap, the existence of Part 5.3B, the M50/2026 proceeding as context rather than as a finding, and the Parliament's intention that accepted rights not be removed. Paragraph (f) is directed at the proposition that a smaller group is easier to silence. That proposition is rejected as a matter of statutory policy.

Part 1 — Preliminary

2. Clause 1 is formal.

3. Clause 2 commences the operative provisions the day after Royal Assent. A delayed commencement would leave executive listings in force while the Parliament congratulated itself.

4. Clause 3 states objects that a court may use under section 15AA of the Acts Interpretation Act 1901. Object (f) is the size-and-popularity rule in object form.

5. Clause 4 defines Covenant right by reference to Schedule 1 and to treaty-body interpretation, subject to the Constitution. Person is defined widely enough that an incorporated political party can assert the association and expression rights of its members. Public authority is defined to catch Ministers, departments, the AFP and intelligence agencies.

6. Clause 5 binds the Crown in all capacities so that a State agency exercising a Commonwealth function cannot shelter behind Crown immunity.

7. Clause 6 applies the Act to persons in Australia and to citizens and permanent residents abroad when a Commonwealth law follows them. Subsection (3) applies the Act to existing law. That is essential. A non-removal rule that applies only to future statutes would ratify every current removal.

8. Clause 7 is a reading-down and savings clause. It prevents the Bill being read as an attempt to oust Chapter III or the implied freedom, and it applies the greater-protection rule where both sources operate.

Part 2 — Covenant rights and the rule of non-removal

9. Clause 8 is the incorporation clause. It relies on the external affairs power. It does not pretend that a reservation can be used as a licence to remove other rights.

10. Clause 9 lists, without limiting clause 8, the rights most directly threatened by listing-by-regulation and by elastic definitions of hate and harm. Subsections (2) and (3) are intended to stop definitional word-games: changing the meaning of harm, hate crime or support until the right has no remaining content.

11. Clause 10 is the non-regression rule. Subsection (2) sets out a list of measures that are presumed to be prohibited regressions, matching the features of current listing architecture. Subsection (3) allows the presumption to be rebutted only by proof of the full Covenant limitation test. The burden is on the State.

12. Clause 11 makes size and popularity irrelevant. It is drafted so that it applies in any court or tribunal in which compatibility or the implied freedom is in issue. It answers, in statutory language, the submission that a small group can more readily be banned because the national conversation will not notice.

13. Clause 12 restates the international limitation test in domestic language and places the burden of justification on the public authority. Non-derogable rights cannot be limited at all.

Part 3 — Interpretation, inconsistency and named override

14. Clause 13 is an interpretive rule of the kind used in the Human Rights Act 1998 (UK) section 3 and in the State and Territory Human Rights Acts, with a greater-protection tie-break.

15. Clause 14 is the provision that makes the Bill stronger than a dialogue model. An incompatible law has no force or effect against the right-holder. The court may declare the extent of the inconsistency. The clause is confined to Commonwealth law, because that is the limit of the power being exercised. It is enacted in reliance on section 51(xxix) and every other supporting head of power. A court that concluded the clause went further than the external affairs power would read it down under clause 7(3), not strike the Act down as a whole.

16. Clause 15 is the only authorised method of limiting a Covenant right other than under clause 12. The requirements are cumulative and intended to be inconvenient. Rights are not to be removed in the middle of an omnibus "safety" statute at 2 a.m. The two-year sunset, with public reports from the PJCHR and the Commission before re-enactment, prevents a temporary emergency from becoming the permanent furniture of the criminal law.

17. Clause 15(4) is an honest recognition of parliamentary sovereignty. A later Parliament can repeal this Act by name. It cannot do so by a side-wind.

18. Clause 16 restates that rule as a general prohibition on implied repeal.

Part 4 — Prohibition of organisations only by a Chapter III court

19. Clause 17 is the central institutional reform. It is exclusive. A regulation, ministerial instrument or state of satisfaction that purports to list an organisation with criminal consequences for membership or support is void. The clause applies despite Part 5.3B as it stood before commencement.

20. Clause 18 confines the moving party to the DPP or the Attorney-General personally, to prevent listing becoming an agency-level operational tool. Service and Commission intervention are mandatory features of a fair hearing.

21. Clause 19 requires a contested hearing. The organisation must receive the substance of the adverse case — not a conclusion, and not a gist so thin that no defence is possible. Closed material is a last resort, supervised by the Court, with a special advocate, and with published reasons. This is intended to be tighter than the current intelligence-led ministerial satisfaction model.

22. Clause 20 is the merits gateway. The Court must find a purpose of politically motivated violence against persons, a real and present risk, and the inadequacy of less restrictive means. Subsection (2) lists grounds that are not enough: racist or antisemitic opinion, offence to a protected group, speculative future advocacy, and smallness. Subsection (3) prevents a dossier of old lawful speeches from being recycled as proof of a purpose of violence.

23. Clause 21 time-limits every order to 12 months and requires fresh evidence for renewal. A former order has no afterlife as a status offence.

24. Clause 22 prevents the rest of the statute book from treating "support" as a residual category that swallows journalism, legal advice, ministry and aid.

25. Clause 23 requires a public register within 24 hours. Invisible law is incompatible with Article 19.

26. Clause 24 gives Schedule 2 operative force.

Part 5 — Duties of public authorities and of the Parliament

27. Clause 25 is a duty modelled on section 38 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) and equivalents, applied to Commonwealth public authorities including the AFP and intelligence agencies.

28. Clause 26 makes formulaic statements of compatibility legally relevant. Silence on a Covenant article, or a slogan in place of the clause 12 test, is a reviewable error when compatibility is later in issue. That is a direct response to statements of compatibility that assert compatibility because the Bill has a virtuous short title.

29. Clause 27 requires a PJCHR report before third reading. The clause does not purport to invalidate a resulting Act for want of the report, because that would raise Parliamentary privilege difficulties. It makes the absence of the report a fact a court may consider when construing the Act.

Part 6 — Standing and remedies

30. Clause 28 gives standing to the people actually hit by a listing scheme — members, donors, publishers, lawyers, would-be associates — and to the Commission. A "question of general importance" leave pathway covers peak bodies.

31. Clause 29 confers a full remedial jurisdiction on the Federal Court and Division 2 of the Federal Circuit and Family Court: declaration, injunction, setting aside of void instruments, compensation, and other appropriate orders. Compensation is not automatic; the court may refuse it where an award would not be just. The limitation period is 6 years from awareness.

32. Clause 30 gives the Commission a production power, subject to court-supervised public interest immunity, so that listing files cannot be made unauditable by classification stamps.

Part 7 — Miscellaneous

33. Clause 31 requires a public review of existing reservations within 12 months. Reservations that are incompatible with the object and purpose of a treaty should be withdrawn. The clause does not itself withdraw them, because that is an Executive act in international law.

34. Clause 32 is a standard regulation-making power with an express prohibition on using regulations to specify prohibited organisations.

35. Clause 33 requires an independent review at 3 years.

Schedule 1 — Covenant instruments

36. Schedule 1 lists the instruments that constitute the floor. Dates are Australia's binding act. The list is the core seven human rights treaties plus genocide, refugees, the Geneva Conventions and the Rome Statute. The Migrant Workers Convention and the Convention on Enforced Disappearance are not listed because Australia has not ratified them. Their absence is a matter for separate consideration, not a licence to treat the listed instruments as optional.

Schedule 2 — Amendment of the Criminal Code Act 1995

37. Item 1 inserts a signpost.

38. Item 2 repeals Part 5.3B and substitutes a short Part that operates only on organisations that are the subject of a current Federal Court prohibition order. The membership offence is 5 years, with a reasonable-steps defence. The support offence is 7 years and requires an intention to assist politically motivated violence. Those maxima are lower than some existing association offences by design. Status is not to be punished as if it were a completed act of terrorism.

39. New section 114A.4 restates, inside the Code, that a regulation must not specify an organisation.

40. Item 3 extinguishes existing executive listings, including the Criminal Code (Prohibited Hate Group – White Australia) Regulations 2026 and any successor, and removes criminal responsibility for acts done after commencement in purported reliance on those regulations. That is the non-removal rule applied to the scheme that prompted the Bill.

41. Item 4 saves ordinary criminal law. A person who commits an assault, makes a true threat, or incites imminent violence is to be prosecuted for that conduct, whether or not any organisation is listed.

END OF EXPLANATORY MEMORANDUM

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