EXPLANATORY MEMORANDUM

Organ and Tissue Donation (Potential Donor Protection) Bill 2026

A Commonwealth Bill, Commonwealth policy and Commonwealth funding Schedule

1. Outline

This package is entirely Commonwealth. It does not ask a State Parliament to move first. It uses the levers the Commonwealth already holds: the Organ and Tissue Authority Act 2008, program funding to DonateLife Agencies, and the National Health Reform Agreement 2026–31 Addendum under which the Commonwealth will pay a record contribution to public hospitals.

The legal definition of death stays in State Human Tissue Acts. What the Commonwealth does is refuse to fund a recovery that proceeds after an indication of life has been reported. That is a spending and coordination measure, not a takeover of the definition of death.

2. Why a Commonwealth instrument

A model State Bill leaves protection to eight Parliaments and a Territory legislature. Families in one jurisdiction should not have a weaker stop-rule than families in another. The Commonwealth already runs the national donation program and already pays a large share of public hospital activity. The pause belongs on that money.

DCDD is about 36 per cent of Australian deceased donors. ANZICS already requires five minutes of absent arterial pulsatility. NHMRC guidelines already name the dead donor rule. Those documents are not a statutory pause a nurse can use when retrieval logistics are in the room. The Commonwealth can make that pause a condition of payment without waiting for uniform Human Tissue amendments.

3. Structure of the package

- Commonwealth Policy CP-2026-OD-01 — for immediate ministerial adoption as a direction to the Department and the Authority.
- The Bill — creates the national donor-protection standard, amends the OTA Act, and requires the Minister to attach the standard to the NHRA.
- Schedule 1 — the operational text to be inserted in DonateLife funding agreements and sought as an NHRA addendum item.

4. Notes on clauses of the Bill

Clauses 1 to 5

Short title, commencement, objects, Crown, definitions. Clause 4 is deliberate: the Act binds the Commonwealth Crown. States are bound because they accept the condition with the money, not because the Commonwealth legislates in their place.

Clauses 6 to 9

These are the operative rules. They apply to Commonwealth-funded services. Clause 6(2) is the constitutional caution. Clause 8 is the pause. Clause 9 writes ANZICS's five-minute circulatory observation into the funded standard and states that a register tick is not authority against a living person.

Clauses 10 and 11

Clause 10 is the OTA lever. Clause 11 is the hospital-funding lever. It does not automatically cut an NHRA cheque. It requires the Minister to put the standard into the Agreement and treats a knowing breach as a safety and quality matter. That matches how the NHRA already treats safety.

Clauses 12 to 16

Reporting to the Parliament, PID Act coverage so far as Commonwealth support is involved, graduated enforcement against Agencies, concurrent operation so a stronger State law still runs, and regulations.

5. Financial impact

No new appropriation. Administrative cost only. The 2026–31 NHRA already commits record Commonwealth hospital funding. This package attaches a safety condition to funding already promised. It does not reopen the quantum.

6. Human rights

The package engages the right to life. It is protective. It is compatible with the Human Rights (Parliamentary Scrutiny) Act 2011.

7. What the package does not do

It does not introduce opt-out consent. It does not abolish DCDD. It does not move the definition of death to Canberra. It does not assert that Australian hospitals are harvesting living patients. It is a Commonwealth stop-rule for services the Commonwealth pays for.

Model Commonwealth explanatory memorandum prepared 14 September 2026.