THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FREE SPEECH BILL 2026

EXPLANATORY MEMORANDUM

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Revision 2 · 27 September 2026 · EM-FS 2026/01

Explains the newly prepared Bill and its interaction with the Digital Harm Prevention package.

Coordinated drafting basis

One general rights test. One set of specific online categories. Child-only restrictions preserve lawful adult access. Government moderation demands require valid statutory notices, with reasons, records and review.

Provenance and purpose

1. The accompanying Free Speech Bill is newly prepared from the existing Free Speech Policy and its earlier explanatory memorandum. No original bill text was supplied. This memorandum explains the actual new text and replaces the earlier memorandum's descriptions where they differ.

2. The Bill creates a statutory opinion and expression framework, administrative compatibility requirements, an intentional incitement offence, protections for specified expression, a constitutional-proposal process, an advisory Council, and application rules concerning racial-discrimination, security and migration law. Its online provisions coordinate with the separate Digital Harm Prevention Bill.

3. The policy's broader national positions are retained. The Bill does not itself alter the Constitution, repeal every restriction on expression or establish that every policy assertion is existing law. It is a consultation draft requiring parliamentary counsel settlement before introduction.

General outline

4. The general rights test requires clear and accessible law, a permitted purpose, necessity, proportionality and an evidenced connection between expression, threat and restriction. Holding an opinion is protected. Expression may be restricted only within the stated conditions.

5. The central coordination change is replacement of the earlier three-category eSafety limit with references to the Digital Harm Prevention statutory lists and safeguards. Civil child-access duties do not have to prove criminal incitement, but must satisfy their own statutory elements and the general rights test.

6. The closed child-protection list concerns X18+ or sexually explicit Refused Classification material and unclassified equivalents; suicide or serious self-harm method instruction; eating-disorder method instruction; and instruction or direct encouragement of an indictable offence by a child. The list remains closed. It does not justify general removal from lawful adult access.

7. The separate illegal-material list covers the specified Class 1, exploitation, pro-terror, intimate-image and serious-offence categories. The term is a regulatory label, not a new general criminal offence. Pro-terror material must meet the companion Bill's independently criminal production or distribution definition; disagreement or praise alone is not a new opinion offence.

8. Government content demands use one formal-notice scheme in proposed section 43M of the Online Safety Act 2021. Attempted informal demands are prohibited and recorded whether complied with or refused. The knowing misrepresentation offence, quarterly provider reports and annual Commissioner report are created once in the Digital Harm Prevention Bill and referenced here.

9. Commencement works in either order. The general rights provisions can commence first without substituting an unavailable online list. The specific coordination items activate only when the companion Part 3A is in force. If the companion Act never commences, those items remain uncommenced.

Financial and regulation impact

10. The Council, court remedies, reporting and reviews entail costs that have not been independently estimated. The Bill creates no standing appropriation. Referendum campaign funding would require a later appropriation; equal terms are required if such funding is provided.

11. The online reporting obligations are not duplicated. Compliance with the companion scheme fulfils this Bill's coordination requirement. No new licence or universal identity-checking system is created and social-media minimum-age requirements are not amended by Schedule 4.

12. The proposed repeal of sections 18C and 18D may change caseload and enforcement activity, but no quantitative saving is assumed. Transitional protection preserves the application of both sections to proceedings already commenced, including the former exemptions, while barring new proceedings after commencement.

Statement of compatibility with human rights

13. This assessment is prepared in the form contemplated by the Human Rights (Parliamentary Scrutiny) Act 2011. It is a reasoned account of the proposal, not an authoritative determination of treaty compliance.

14. The Bill engages ICCPR Articles 19 (opinion and expression), 20 (specified incitement and war propaganda), 21 (peaceful assembly), 22 (association), 14 (fair hearing), 17 (privacy) and 24 (children). The coordinated child protections also engage Articles 19 and 34 of the Convention on the Rights of the Child.

15. Sections 8 to 10 protect opinion and expression and limit governmental restrictions. The new incitement offence requires intent, likelihood and a direct and immediate connection. Those elements constrain criminalisation of offensive or unpopular speech. The maximum penalty remains subject to ordinary sentencing law.

16. Repeal of racial-vilification provisions and narrowing listing and migration grounds may reduce existing protections against discriminatory abuse. The policy response is a precisely defined incitement offence and preservation of independent violence and threat offences. Whether this replacement adequately protects equality and affected communities requires substantive scrutiny; the memorandum does not treat free-expression promotion alone as a complete answer to that question.

17. The Article 20 reference does not make incitement the only permissible restriction under Article 19(3). Rights, reputation, public health and child protection may justify distinct measures if their statutory elements and proportionality are demonstrated. Sections 7, 10, 11 and 22 expressly prevent the earlier incitement-only language from disabling the companion civil duties.

18. Child-access duties are preventative. The decision-maker may assess a defined category and the way it is supplied, without waiting for individual injury. Lawful adult access, privacy, non-instructional reporting and recovery discussion remain protected. Listing alone is not conclusive proof of proportionality.

19. The security safeguards protect adults' procedural rights and exclude compulsory questioning of children under 18. Limits on source-identifying warrants and intelligence-based decisions retain judicial scrutiny while allowing lawful protection of sensitive evidence.

20. Court remedies, tribunal review and reasons promote accountability. Certificates are not binding on courts. Parliamentary procedure remains under each House's control; a procedural failure does not invalidate an enacted law under the new scrutiny provision.

21. The scheme is intended to promote the identified rights through precise limits and review, but constitutional coverage, incitement definitions, equality impacts and proportionality remain matters for legal and parliamentary scrutiny before introduction.

Notes on clauses

Clause 1 - Short title

22. The proposed Act is the Free Speech Act 2026.

Clause 2 - Commencement

23. General rights, administrative machinery, protected expression, the Council and specified Schedules commence the day after Assent. The incitement offence and Schedules 2 and 5 commence 28 days after Assent. Schedule 4's operative coordination items await both that Act and the Digital Harm Prevention Part. This prevents references to a nonexistent list from disabling existing enforcement.

24. The constitutional text is a proposal for later introduction, not an immediate constitutional alteration. Section 128 of the Constitution continues to govern approval.

Clauses 3 and 4 - Objects and definitions

25. Objects reflect the policy programme. Expression is defined widely. A speech restriction is identified by practical or intended effect, so an informal governmental demand cannot avoid scrutiny simply by being called voluntary. The definitions distinguish the specific online scheme from general rights.

Clauses 5 and 6 - Crown and constitutional basis

26. The Crown is bound within Commonwealth legislative competence. The external-affairs and other available powers support their respective applications; the implied freedom remains a limit. The clause does not conclusively settle the reach of Commonwealth power over State speech laws.

Clause 7 - Other laws

27. The general standard applies to inconsistent Commonwealth speech restrictions, subject to constitutional limits and later legislation. State and Territory displacement is confined to available constitutional power. Independent violence, exploitation and intimate-image offences are not silently repealed.

28. Subsection (4) states cumulative operation with Digital Harm Prevention. Neither package is a blanket override. Policies and memorandums cannot supply coercive power missing from operative legislation.

Clause 8 - Opinion

29. Opinion is protected independently of its expression. The clause prohibits punishment for thought and compelled ideological assent. Lawful evidence requirements must still meet the Constitution and the Act; this is not a general immunity from evidence relevant to an independently unlawful act.

Clause 9 - Expression

30. The right extends across media and frontiers. Offence, shock, disturbance, unpopularity or criticism alone does not remove protection. Restrictions operate only to the extent justified under clause 10.

Clause 10 - Rights test

31. The test requires all stated conditions, not a balancing recital. A decision-maker identifies a permitted purpose, threat, connection and least intrusive effective response. Child-risk prevention can be demonstrated by a defined category and delivery context rather than proof of completed injury.

32. A label such as social cohesion or hate is not a freestanding justification. It may describe context, but must be tied to a permitted purpose and evidence. No ministerial certificate conclusively proves compatibility.

Clause 11 - Article 20

33. The clause recognises the treaty's incitement and war-propaganda provisions without creating an unspecified offence. Clause 18 creates the Bill's particular incitement offence. Independent offences or civil child protections keep their own elements and must satisfy the general test.

Clause 12 - Remedies

34. Affected persons may seek declarations and injunctions in the named federal courts within jurisdiction. No automatic damages or new criminal remedy is created. Council participation requires both consent and leave. Merits and constitutional review are preserved; review does not itself stay a valid notice.

Clauses 13 and 14 - Certificates and administrative reasons

35. A Government Bill certificate must explain the text, purpose, threat, alternatives and protection of opinion. Administrative measures require equivalent reasons. A compliant Digital Harm Prevention notice meets the form requirement without a duplicate certificate.

36. Urgent statutory action does not require a separate ministerial certificate where the stated exception applies, but still requires its own reasons, power, category and review safeguards. Informal demands are not made valid by urgency.

Clauses 15 to 17 - Parliamentary and drafting controls

37. The Minister refers the Bill to the Parliamentary Joint Committee on Human Rights and, following an adverse majority report, seeks a full sitting day's consideration in each House. This is a duty on the executive to seek arrangements, not a purported judicial direction to Parliament.

38. Drafting finalisation requires the certificate. A single document can satisfy both this Act and the existing parliamentary-scrutiny Act. Courts do not acquire a veto over debate or validity based on parliamentary procedural compliance.

Clauses 18 and 19 - Incitement offence and definition

39. The offence requires public advocacy of national, racial or religious hatred, incitement as defined, and specific intent. The maximum is five years' imprisonment. Recklessness does not replace the intent element and absolute liability is excluded.

40. Incitement requires likelihood and a direct and immediate connection to discriminatory, hostile or violent conduct. Private dislike is not hostile conduct. Mere insult, quotation, reporting, criticism or association does not of itself establish the offence. The prosecution bears the criminal burden.

41. The added definitions of hostility and discrimination make the reconstructed Bill's operative threshold more concrete than the earlier memorandum's shorthand. Their final formulation and interaction with existing Commonwealth offences require close legal scrutiny.

Clauses 20 and 21 - Prosecution and existing offences

42. Written CDPP consent and published guidance provide procedural safeguards without proving guilt or directing judicial outcomes. Violence and threat offences remain. Ordinary alternative-charge and double-jeopardy principles prevent double punishment for the same conduct.

Clause 22 - Protected expression

43. Journalism, academic research, protest, religion, satire, art and political communication receive a presumption. Independent elements and the rights test can rebut it. The incitement threshold applies to the new incitement offence, not indiscriminately to every separate crime or civil child duty.

44. This is a necessary alignment change: a religious or journalistic label cannot immunise independently established child-sexual exploitation or non-consensual intimate imagery. Conversely, a viewpoint cannot be treated as a harm category merely because it is disliked.

Clauses 23 to 25 - Sources, symbols and protest

45. Source-identifying warrants require a superior-court judge under an existing power, necessity, alternatives and public-interest scrutiny. The clause does not create a warrant power. Notice exceptions require justified risks. Mere symbols, noise, offence or criticism do not alone supply an offence or protest-restriction ground.

Clauses 26 to 28 - Constitutional proposal

46. Within six months the Minister must introduce the proposed guarantee or certified no-less-protective wording and seek an inquiry. Neither House is compelled to pass it. Public campaign funding, if appropriated, is on equal terms, and the question is kept separate from unrelated alterations.

Clauses 29 and 30 - Council

47. A five-member part-time Council reports, advises and may intervene with consent. It has no takedown, listing, compulsory-investigation or penalty power. Terms, selection reasons, conflicts and removal grounds are specified. Lawful disagreement is not a removal ground. Ordinary appropriations govern support.

Clauses 31 and 32 - Review

48. The Minister requests an independent security review and must arrange a three-year review including the interaction of the two packages. The Minister cannot dictate the independent review's findings. Tabling and justified redaction requirements support scrutiny.

Clauses 33 to 38 - Miscellaneous

49. Intelligence reliance does not itself exclude judicial review. The constitutional-introduction duty cannot be delegated. Regulations cannot create offences or restricted categories. The Crown is not prosecuted, but individual officers are not immunised. Just-terms protection and prospective application complete the scheme.

Notes on Schedules

Schedule 1 - Racial Discrimination Act

50. Sections 18C and 18D are repealed prospectively, with both saved for proceedings already commenced. No new section 18C proceeding may begin after commencement, including for earlier conduct. Final judgments are not vacated. Costs remain for the court under ordinary rules. This resolves the original policy/memorandum mismatch about retaining exemptions during pending proceedings.

Schedule 2 - Speech and status review

51. A provision-by-provision review of the specified 2026 Act is required within 90 days. The draft uses the source memorandum's inoperative-after-tabling mechanism, subject to both Houses resolving to continue a provision. The general rights test and Constitution remain applicable regardless of that resolution.

52. Listing based merely on lawful advocacy is excluded; the stated violence-purpose threshold applies. Protected expression and criminal proof safeguards are preserved. This unusual review mechanism needs counsel settlement against the final compiled provisions and parliamentary procedure; the memorandum does not present it as a completed line-by-line repeal schedule.

Schedule 3 - ASIO

53. The application rules confine new questioning warrants to the listed security heads, protect lawful expression, provide silence and legal assistance in the stated circumstances, exclude under-18s, require judicial detention authority and preserve the existing sunset without extending it.

54. The Schedule limits powers; it does not create a new detention or warrant jurisdiction. Existing warrants cannot authorise conduct inconsistent with the safeguards after commencement. University-related decisions receive reasons and review subject to lawful protection of sensitive evidence. These provisions require settlement against the current ASIO Act before introduction.

Schedule 4 - Online safety coordination

55. Item 1 identifies the relationship and supersedes the earlier memorandum's three-category description. Items 2 and 3 recognise the companion lists, child-only restrictions, independent statutory elements and cumulative rights protections. The list is not reproduced as a competing definition.

56. Item 4 adopts one formal-notice, attempted-request, offence and reporting scheme. Logging never authorises a demand. Valid urgent notices retain their clock; reasons and review remain. There is no second offence or duplicate report.

57. Item 5 preserves reasonable systems, systemic-failure rules, court penalties, confined notice power, review, provider information limits and the ranking choice. The systemic-failure defence concerns material duties, not a general exemption from feed-choice obligations. Ordinary end-users' records need independent judicial authority under existing law.

58. Item 6 prevents an order-of-enactment gap. Before the companion provisions commence, existing schemes remain subject to the general rights standard. After both commence, neither is a blanket override and no void notice is revived. Minimum-age legislation is not amended.

Schedule 5 - Migration

59. Lawful expression described as hate-motivated conduct is not a standalone adverse ground. Independent criminality and unrelated lawful grounds remain subject to their elements and fairness. The Schedule does not automatically grant a visa or reopen a final decision. Its application-rule form requires counsel settlement against the compiled Migration Act.

Schedule 6 - Proposed constitutional text

60. The proposed guarantee includes opinion, expression, the permitted limitation test and governmental application. It has no constitutional force unless adopted under section 128. Placement is for the separate Constitution Alteration Bill; the earlier section-128A placeholder is not treated as settled.

Schedule 7 - Parliamentary scrutiny

61. Proposed section 8A adds the five questions to the existing statement process. The existing rules that statements do not bind courts and procedural failures do not invalidate enacted laws are preserved. This corrects any implication that a certificate itself decides validity.

Implementation and matters for settlement

62. The coordinated online provisions are aligned in text, but the new Free Speech Bill remains a consultation draft. Before introduction, parliamentary counsel should settle Commonwealth coverage of State laws, the review mechanism in Schedule 2, exact consequential amendments for ASIO and migration provisions, the incitement threshold, court jurisdiction and procedural implementation, and the constitutional proposal.

63. The policies retain their substantive political positions; historical claims in source commentary have not all been independently reverified. The present memorandum explains the operative revised text and avoids treating those claims as a substitute for statutory drafting.

Sources and companion documents

Human Rights (Parliamentary Scrutiny) Act 2011, section 8(4)-(5): https://www.legislation.gov.au/C2011A00186/latest/text

Online Safety Act 2021, latest compilation consulted C2026C00396: https://www.legislation.gov.au/C2021A00076/latest/text

Australian Security Intelligence Organisation Amendment Act (No. 2) 2026: https://www.legislation.gov.au/C2026A00081/asmade

ICCPR and General Comment No. 34: https://www.ohchr.org/sites/default/files/english/bodies/hrc/docs/gc34.pdf

Free Speech Policy FS-P 2026/01 revision 2; Free Speech Bill FS-B 2026/01 revision 2; Digital Harm Prevention policy, Bill and EM-DHP 2026/01, all revision 2.

End of EM-FS 2026/01, coordinated revision 2.