Criminal Code Amendment (State Sponsors of Terrorism) Bill 2025[1]

Purpose	This bill seeks to amend the *Criminal Code Act 1995* to enable the Commonwealth to list foreign state entities as state sponsors of terrorism; introduces new criminal offences relating to state sponsors of terrorism; and makes consequential amendments to various Acts in relation to state terrorist acts, including extending the application of Part 5.3 of the Criminal Code to the new offences.
Portfolio	Attorney-General
Introduced	House of Representatives on 8 October 2025
Bill status	Before the House of Representatives

Undue trespass on personal rights and liberties

Coercive powers

Broad discretionary powers[2]

1.1 The *Criminal Code Act 1995* (Criminal Code) does not presently allow for the listing of foreign states, or state entities, as terrorist organisations.[3] Schedule 1 of the bill seeks to insert proposed Part 5.3A in the Criminal Code in relation to state sponsors of terrorism. The bill would authorise the Governor-General to list, by regulation, a 'foreign state entity' (including a foreign national or subnational government or authority) as a 'state sponsor of terrorism'.

1.2 As a precondition to the making of such regulations, the Australian Federal Police (AFP) minister must be satisfied on reasonable grounds that the foreign state entity, or a member of that entity, has directly or indirectly engaged in, prepared, planned, assisted or fostered the doing of a terrorist act that was targeted at Australia, or has advocated the doing of a terrorist act that was targeted at Australia (whether or not the terrorist act occurs).[4] The AFP minister must also have obtained the Foreign Affairs minister's written agreement to the entity being specified as a state sponsor of

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Criminal Code Amendment (State Sponsors of Terrorism) Bill 2025, *Scrutiny Digest 6 of 2025*; [2025] AUSStaCSBSD 68.

2 Schedule 2, items 1-6. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (ii).

3 Division 102, *Criminal Code*.

4 Schedule 1, item 1, proposed section 110.3(3).

terrorism and have arranged for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.[5]

1.3 The bill also seeks to introduce new offences applicable to 'state terrorist acts'[6] and persons who would seek to assist or support such acts.[7] Further, Schedule 2 of the bill would amend Part 5.3 of the Criminal Code to provide that various measures, including control orders, preventative detention orders and post sentence orders, may be applied to state sponsors of terrorism and state terrorist acts.

Extension of broad coercive powers to 'state terrorist acts'

1.4 Items 1 to 6 of Schedule 2 of the bill would incorporate references to 'state terrorist acts' in Part 5.3 of the Criminal Code, which would authorise the application of the following measures to acts involving a state sponsor of terrorism:

- the control order regime, which allows courts to impose conditions on a person without charge, restricting their movement, associations or activities in the community for up to 12 months;[8]
- the preventative detention order regime, which authorises the detention of a person in custody for up to 48 hours if it is suspected, on reasonable grounds, that they are preparing to engage in a terrorist act;[9] and
- post-sentence orders (being continuing detention orders and extended supervision orders), which allow a terrorist offender who poses an unacceptable risk of committing terrorist offences to continue to be held in detention after the conclusion of their sentence or released subject to supervision conditions.[10]

1.5 The committee's terms of reference require it to consider whether provisions of a bill trespass unduly on personal rights and liberties.[11] Consistent with this mandate, the committee has previously raised scrutiny concerns regarding these broad coercive powers, which the committee has repeatedly recognised are extraordinary in nature. The committee has identified multiple scrutiny concerns in

5 Schedule 1, item 1, proposed subsection 110.3(4).

6 'State terrorist act' would be defined as 'a terrorist act engaged in by a state sponsor of terrorism or a member of a state sponsor of terrorism.'

7 Schedule 1, item 1, proposed Divisions 111 and 112.

8 *Criminal Code Act 1995*, Part 3, Division 104.

9 *Criminal Code Act 1995*, Part 3, Division 105.

10 *Criminal Code Act 1995*, Part 3, Division 105A.

11 See, for example, Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 10 of 2023* (6 September 2023), pp. 1–6; Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 12 of 2023* (18 October 2023), pp. 62–65; and Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2022* (28 September 2022), pp. 4–6.

relation to control orders[12] and preventative detention orders,[13] along with various other aspects of the measures proposed now to be applied to state sponsored terrorism.[14]

1.6 That this bill proposes to broaden the application of these measures therefore raises the same underlying scrutiny concerns, which have not been revisited in the explanatory materials. These concerns are heightened to the extent they were initially, in part, justified as temporary measures. In light of the committee's longstanding view that such regimes constitute extraordinary powers, the committee considers any extension of the scope of conduct and offences to which they may apply requires close scrutiny.

1.7 In relation to the current bill, the explanatory memorandum indicates that it is essential to extend these measures to state terrorist acts to enable equivalent powers for law enforcement to respond to and prevent state terrorist acts and terrorist acts alike.[15] It states:

> This is a preventative mechanism available to law enforcement to protect the community from terrorist acts.
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> In recognition of the fact that the harm that could eventuate from a state terrorist act is equivalent to a terrorist act, it is essential that law enforcement have equivalent powers at their disposal to respond to and prevent a state terrorist act in the same manner as a terrorist act.[16]

1.8 While acknowledging the commensurate risk of significant harm posed by state sponsored terrorism and equal need for effective counter-terrorism responses in this context, the committee reiterates that aspects of these measures substantially depart from traditional approaches to the criminal law and the presumption of innocence, particularly in giving coercive powers to detain and restrain persons who may not have been convicted of, or even charged with, a criminal offence.

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12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2023* (6 September 2023) p. 2; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2022* (28 September 2022), pp. 4–6; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2021* (11 August 2021), pp. 1–4; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018* (20 June 2018), pp. 13–16.

13 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 7 of 2016* (12 October 2016) p. 20; Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016* (9 November 2016), pp. 468–487.

14 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016* (9 November 2016) pp. 468–487.

15 Explanatory memorandum, pp. 61–62.

16 Explanatory memorandum, pp. 61–62.

Consequential amendments

1.9 Schedule 3 of the bill proposes consequential amendments to various legislation to apply powers under these Acts to the new offences in Part 5.3A. Specifically, the bill seeks to amend:

- the *Australian Citizenship Act 2007* to permit a court to revoke the Australian citizenship of a person who is convicted of a new Part 5.3A offence (which would be captured in the amended definition of 'serious offence' for the purposes of citizenship cessation orders);[17]
- the definition of 'politically motivated violence' in the *Australian Security Intelligence Organisation Act 1979*, which would serve to extend the compulsory questioning powers to the new Part 5.3A offences;[18]
- the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* to apply the temporary exclusion order scheme to state terrorist acts and state sponsors of terrorism;[19]
- the *Crimes Act 1914* to include 'a state terrorist act' within the definition of a terrorist act.[20] The presumption against bail under that Act would consequently apply to the proposed offences;[21]
- existing offences in the Criminal Code, including offences of advocating the doing of a terrorist act; publicly displaying a prohibited symbol; abhorrent violent conduct and violent extremist material, to apply them to a state terrorist act or a state sponsor of terrorism;[22]
- the *Surveillance Devices Act 2004* to permit law enforcement officers to apply to a court for emergency authorisations for the use of a surveillance device when investigating the proposed offences;[23] and
- the *Telecommunications (Interception and Access) Act 1979* to capture the proposed offences within the definition of 'serious offence', which enable agencies to apply to a court for warrants authorising interception of telecommunications and/or access to stored communications for the

17 Schedule 3, items 3 and 4.

18 Schedule 3, item 8. The definition of 'adult questioning matter' and 'minor questioning matter' in section 34A of the *Australian Security Intelligence Organisation Act 1979* includes 'politically motivated violence'. Section 34B provides that a compulsory questioning warrant may be requested in relation to an adult questioning matter and a minor questioning matter.

19 Schedule 3, items 9–15.

20 Schedule 3 items 16 and 17.

21 *Crimes Act 1914*, section 15AA

22 Schedule 3, items 26–43. Schedule 4, items 5 and 6 also amend the *Criminal Code Act 1995* in relation to offences prohibiting the public display of prohibited symbols.

23 Schedule 3, items 68 and 69.

investigation of Part 5.3A offences in respect of control orders and supervision orders (both interim and extended).[24]

1.10 The committee has also previously raised scrutiny concerns, including the potential for undue trespass on personal rights and liberties, in relation to several of these measures (or the broader frameworks that underpin their operation).[25]

1.11 As this bill expands the operation of measures, about which the committee has expressed serious concerns, the committee draws these concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of doing so.

Freedom of expression

Undue trespass on personal rights and liberties[26]

1.12 This bill seeks to expand the definition of prohibited terrorist organisation symbols in subsection 80.2E(3) of the Criminal Code to capture symbols used by a state sponsor of terrorism, or members of a state sponsor of terrorism, to identify the state sponsor of terrorism or any of its parts.[27] This would, in turn, expand the scope of conduct which would be considered an offence under sections 80.2HA and 80.2JA of the Criminal Code; that is, causing a prohibited symbol to be displayed in a public place or trading in goods that depict or contain a prohibited symbol respectively. The maximum penalty for an offence under section 80.2HA is 5 years imprisonment, while the maximum penalty under section 80.2JA is 12 months imprisonment.

1.13 The committee notes at the outset, as it did during its earlier examination of these offences in *Scrutiny Digest 9 of 2023*, that the offences seek to restrict forms of expression and, as such, may unduly trespass on freedom of expression. In particular, the committee previously expressed scrutiny concerns regarding these offences with respect to a lack of clarity as to exactly which symbols may be prohibited in practice given these provisions do not define or specify prohibited symbols.[28] The committee has previously noted that such ambiguity may cause difficulties for law enforcement

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24 Schedule 3, items 70 and 71.

25 See for example Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2024* (28 February 2024), pp. 64–66; *Scrutiny Digest 16 of 2023* (7 December 2023), p. 4; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2020* (16 October 2020), pp. 18–20; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2019* (17 October 2019) pp. 5–15.

26 Schedule 2, item 29, subsection 80.2E(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

27 Schedule 2, item 29, subsection 80.2E(3).

28 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 9 of 2023* (9 August 2023), pp. 2-3.

bodies that are empowered to enforce the offences or otherwise issue directions under other parts of the Criminal Code.[29]

1.14 The explanatory materials relevantly provide:

> 362. Paragraph 80.2E(3)(c) is intended to capture symbols that a state sponsor of terrorism, or its members, use to identify the state sponsor of terrorism, or a part of it. It is intended to capture symbols that are inextricably linked with a state sponsor of terrorism, being an entity that has engaged in, supported or advocated, terrorist acts targeted at Australia.
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> 363. Depending on the structure of the state sponsor of terrorism, specific symbols may be used to identify discrete parts of the entity, such as a military wing, which differ from the symbol(s) used to identify the organisation as a whole. The definition ensure that symbols used to identify the foreign state entity as a whole, or a part of the foreign state entity, are captured by the definition.
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> 364. The symbol may be used to identify a state sponsor of terrorism by the state sponsor itself or by its members, in a range of media, contexts and formats including but not limited to promotional or recruitment material, telecommunication exchanges between members, public statements or propaganda. It is intended that the term 'symbol' be interpreted as a visual representation, for example, an image, emblem or icon.
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> 365. The legislation does not specify particular symbols of state sponsors of terrorism for the purpose of the definition in subsection 80.2E(3). This is to ensure that the offences cannot be easily circumvented by the state sponsor of terrorism changing their symbol to avoid criminality.
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> 366. Paragraph 80.2E(3)(d) is intended to recognise that there may be some variations in the ways in which state sponsor of terrorism symbols are depicted. The legislation is not intended to be so prescriptive in defining these symbols as to exclude variations from being captured by the provisions, where they would be recognised by the public as being symbols used by a state sponsor of terrorism. This could include any figure, drawing, symbol, pattern or design substantially similar to a state sponsor of terrorism symbol and capable of being reasonably recognised as a modified version of one of those symbols. This includes circumstances in which an individual could seek to avoid criminal liability under subdivision CA of Division 80 by slightly altering a prohibited terrorist organisation symbol before engaging in conduct that would be otherwise prohibited.[30]

1.15 The explanatory memorandum indicates that prescribing particular symbols associated with state sponsors of terrorism is not considered appropriate as doing so would enable such entities to evade criminal liability by changing their symbol.

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29 For example, a direction made by police officers to cease displaying a prohibited symbol under section 80.2M of the *Criminal Code Act 1995*.

30 Explanatory memorandum, p. 74.

Although the committee acknowledges this explanation, it considers that the lack of clear guidance as to which symbols are prohibited may make it difficult for a person to understand whether certain conduct would constitute an offence and hamper enforcement. For example, a person may employ commonly used symbols that carry obscure or coded meanings in reference to a state sponsor of terrorism. In such circumstances, where the relevant symbol carries multiple or layered meanings, and the offence provisions do not clearly specify the symbols that may attract criminal liability, it is unclear to the committee how essential elements of this offence as set out in subsections 80.2HA(3), (4), or (7) could be established objectively. Broadly, these are that the public display of the symbol would be reasonably regarded as advocating or inciting hatred against a racial, religious or cultural group.[31]

1.16 Accordingly, the uncertainty, breadth and consequences of these offences may impact on the predictability and guidance provided by the law, undermining fundamental rule of law principles. The committee's concerns are further heightened where, as is the case here, the offences in subsections 80.2H and 80.2HA of the Criminal Code are subject to mandatory minimum terms of imprisonment as set out in items 1A and 1B in the table at section 16AAA of the *Crimes Act 1914*. Given the substantial penalties that would apply to the expanded offences, the committee notes that the matters outlined ought to have been set out with greater specificity.

1.17 The committee reiterates its concern regarding mandatory minimum sentences as previously discussed in the context of these offences[32] that such minimums fetter judicial discretion and may result in the imposition of sentences of imprisonment that are disproportionate to the offence in the circumstances. Typically, offences will carry maximum penalties determined by Parliament, leaving to the courts the discretion to impose a sentence up to that maximum. Courts must consider whether a particular case meets the threshold for imposing a term of incarceration and what the appropriate term is by taking into account and balancing the purposes and principles of sentencing and how they apply to the circumstances of the offending and the accused.

1.18 Mandatory minimum sentences constrain the exercise of judicial discretion and deprive a court of the ability to adequately consider the culpability of a particular defendant. At common law, it is understood that the purpose of a criminal sentence is that it reflects the objective seriousness of the offence committed and that there must

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31 *Criminal Code Act 1995*, subsections 80.2HA(3), (4) and (7).

32 See the committee's comments on the Criminal Code Amendment (Hate Crimes) Bill 2024 in Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 2 of 2025* (9 August 2023), pp. 22–24. See also the committee's previous comments regarding mandatory minimums in the following: Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 13 of 2001* (20 September 2001), p 8; *Alert Digest 3 of 2010* (10 March 2010), p. 2; *Alert Digest 10 of 2014* (27 August 2014), p. 10; *Alert Digest 4 of 2015* (25 March 2015), p. 11; *Scrutiny Digest 13 of 2017* (15 November 2017), pp. 76–79; *Scrutiny Digest 6 of 2019* (18 September 2019), pp. 3–4; *Scrutiny Digest 2 of 2022* (18 March 2022) p. 33; and *Scrutiny Digest 15 of 2023* (29 November 2023), p. 14.

be a reasonable proportionality to the circumstances of the offending.[33] As mandatory sentences fail to account for individual circumstances, this could lead to detention that is disproportionate and arbitrary.

1.19 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the expansion of the offences with regard to the public display and trading of prohibited terrorist organisation symbols to state sponsors of terrorism.

Reversal of the evidential burden of proof[34]

1.20 A number of offences proposed in Schedule 1, item 1 of the bill contain offence-specific defences in relation to which the defendant would bear an evidential burden of proof. These include:

- proposed section 111.4 – an offence of possessing things connected with state terrorist acts with a maximum penalty of 15 years imprisonment for doing so knowingly and 10 years imprisonment where reckless;
- proposed section 111.5 – an offence of collecting or making documents likely to facilitate state terrorist acts with a maximum penalty of 15 years imprisonment for doing so knowingly and 10 years imprisonment where reckless;
- proposed section 111.8 – an offence of possessing things connected with terrorist acts with a maximum penalty of 15 years imprisonment for doing so knowingly and 10 years imprisonment where reckless; and
- proposed section 111.9 – an offence of collecting or making documents likely to facilitate terrorist acts with a maximum penalty of 15 years imprisonment for doing so knowingly and 10 years imprisonment where reckless.

1.21 Each of these offences provide exceptions (offence-specific defences) to the relevant offence, stating that the offence does not apply where the relevant action was not intended to facilitate preparation for, the engagement of an entity in, or assistance in a state terrorist act.[35]

1.22 Proposed sections 112.4 and 112.7 also seek to reverse the evidential burden of proof in relation to the following offences:

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33 *Veen v The Queen* (No 2) (1988) 164 CLR 465 at p. 477.

34 Schedule 1, item 1. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

35 Schedule 1, item 1, proposed subsections 111.4(5), 111.5(5), 111.8(5), and 111.9(5).

- proposed section 112.4 – an offence of providing, receiving or participating in training involving a state sponsor of terrorism with a maximum penalty of 25 years imprisonment; and
- proposed section 112.7 – an offence of associating with state sponsors of terrorism with a maximum penalty of 3 years imprisonment.

1.23 Proposed subsections 112.4(4) and 112.7(4) provide offence-specific defences stating that these offences do not apply unless the person is reckless as to the fact that the entity they engaged with is a state sponsor of terrorism. Proposed subsection 112.7(5) also provides, in relation to the offence of associating with a state sponsor of terrorism, a number of exceptions outlining acceptable relationships or circumstances in which a person may associate with a person who is a member of, or who promotes the activities of, a state sponsor of terrorism.[36] Further, proposed subsection 112.7(6) also provides that the offence does not apply to the extent that it infringes on any constitutional doctrine of implied freedom of political communication.

1.24 A defendant bears an evidential burden in relation to these defences.

1.25 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.26 While, in these instances, the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed subsections 111.4(5), 111.5(5), 111.8(5), 111.9(5), 112.4(4), 112.7(4), and 112.7(6) have not been addressed in the explanatory materials.

1.27 The explanatory memorandum does contain an explanation in relation to proposed subsection 112.7(5):[37]

> 201. The defendant would bear the evidentiary burden in relation to these defences. The Guide to Framing Commonwealth Offences sets out circumstances in which an offence- specific defence is appropriate. These include where it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The Guide also provides such defences may be appropriate where the matter is peculiarly within the knowledge of the defendant.
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> 202. In relation to paragraph 112.7(5)(a), the fact that a person is a close family member, and the nature of the engagement related to a matter of

[36] Schedule 1, item 1, proposed subsection 112.7(5).

[37] Explanatory memorandum, p. 53.

> family or domestic concern would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. This is particularly so when the person's cultural background is taken into account.
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> 203. In relation to paragraph 112.7(5)(b), the nature of, and any interactions that occur as part of, religious worship are private matters that are not readily accessible to the public. Therefore, it would be far easier and less costly for the defendant to establish these matters as it is peculiarly within their knowledge.
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> 204. In relation to paragraph 112.7(5)(c), the purpose of the provision of the aid is peculiarly within the knowledge of the defendant, and significantly more costly and difficult for the prosecution to disprove.
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> 205. In relation to paragraph 112.7(5)(d), due to protections associated with legal professional privilege, the defendant is more appropriately placed to discharge the evidential burden in relation to the fact of, and nature of, their engagement with their client.

1.28 The committee acknowledges that the explanatory memorandum provides some explanation in respect of the defences in proposed subsection 112.7(5) and the need for the reversal of the burden. However, as the justification provided is high level and general in nature, it is not apparent that such matters are peculiarly within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish the matters than for the defendant to establish them.

1.29 As the explanatory materials do not adequately address this issue, the committee requests that an addendum to the explanatory memorandum containing a more detailed justification as to why it is proposed to use the offence-specific defences (which reverse the evidential burden of proof)in proposed subsections 111.4(5), 111.5(5), 111.8(5), 111.9(5), 112.4(4), and 112.7(4) to 112.7(6) be tabled in Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.[38]

1.30 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the use of offence-specific defences reversing the evidential burden of proof in the proposed provisions.

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[38] See section 15AB of the *Acts Interpretation Act 1901*.

Reversal of the legal burden of proof[39]

1.31 Schedule 1, item 1, proposed section 112.2 would establish an offence of intentionally and knowingly being a member of a foreign state entity that is a state sponsor of terrorism, which carries a maximum penalty of 10 years imprisonment. Proposed subsection 112.2(2) proposes introducing a defence to this offence, to provide that the offence of intentionally being a member of a foreign state entity that the person knows to be a state sponsor of terrorism does not apply where the person proves that they took all reasonable steps to cease to be a member of the entity as soon as practicable after they knew the entity was a state sponsor of terrorism.

1.32 Further, schedule 1, item 1, proposed section 112.5(1) and (2) would create offences of intentionally receiving, collecting or making available funds from, for, or to a state sponsor of terrorism – knowingly or recklessly – which carry a maximum penalty of 25 imprisonment and 15 years imprisonment respectively. Proposed section 112.5(4) proposes introducing a defence to provide that neither offence applies in relation to the person's receipt of funds from the foreign state entity where the person proves that they received the funds solely for the purpose of providing:

- legal representation for a person in proceedings relating to the Division containing the offence; or
- legal advice or legal representation in connection with the question of whether the entity is a state sponsor of terrorism; or
- assistance to the entity for it to comply with a law of the Commonwealth or a State or Territory.

1.33 For each offence, a legal burden of proof is proposed to be placed on the defendant, ensuring that the defendant would need to prove, on the balance of probabilities, that they took all reasonable steps to cease being a member or that they received funds from the foreign state entity for the purposes specified above.

1.34 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove one or more elements of an offence, interfere with this common law right. As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of people affected being the paramount consideration.

1.35 With respect to proposed section 112.2(2), the explanatory memorandum for the bill relevantly states:

[39] Schedule 1, item 1. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

> Subsection 112.2(2) provides that the offence does not apply if the person proves that, as soon as practicable after learning the entity was a state sponsor of terrorism, they took all reasonable steps to cease to be a member of the entity. The defendant would bear the evidentiary burden in relation to this exception. This is appropriate as when the person learnt of the status of the foreign state entity and the subsequent steps taken by the individual would be peculiarly within the knowledge of the defendant and significantly more costly and difficult for the prosecution to establish.[40]

1.36 The explanatory memorandum states in relation to proposed section 112.5 that:

> The defendant would bear the evidentiary burden in respect of these defences.[41]

1.37 The committee notes that the explanatory memorandum appears to incorrectly suggest that these provisions impose an evidential burden on the defendant, which does not accurately state the effect of the bill or reflect the explanatory note following each subsection. Although the explanatory memorandum presents a justification for reversing the evidential burden of proof in the context of proposed section 112.2, the committee does not consider that this justification adequately establishes why it is necessary to reverse the legal burden of proof, noting the impact of doing so on the presumption of innocence. In the absence of such justification, the committee is concerned that the proposed reversal of the legal burden is likely to unduly infringe on the personal rights and liberties of individuals.

1.38 The committee requests that an addendum to the explanatory memorandum containing a justification for the reversal of the legal burden of proof in proposed subsections 112.2(2) and 112.5(4) be tabled in Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.[42]

Delegated legislation modifying or exempting primary legislation[43]

1.39 Item 1 of Schedule 1, proposed section 110.9 seeks to provide that regulations may modify the operation of proposed Part 5.3A such that provisions of the Part would not apply to a matter that is dealt with by a law of a State or Territory as specified in those regulations, or to ensure no inconsistency arises with a specified State or

40 Explanatory memorandum, p. 46.

41 Explanatory memorandum, p. 49.

42 See section 15AB of the *Acts Interpretation Act 1901*.

43 Schedule 1, item 1, proposed section 110.9. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

Territory Law. The regulations could also exclude the application of the Part to specified persons, bodies, or circumstances.

1.40 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.41 The committee notes that the Australian Law Reform Commission (ALRC), in its *Review of the Legislative Framework for Corporations and Financial Services Regulation*,[44] sets out some helpful guidance as to when delegated legislation should be permitted to override or modify the operation of an Act. It states that it should only be done in exceptional circumstances where there is a strong need or benefit in doing so, the empowering provision is as circumscribed as possible, and there are sufficient safeguards in place to reflect the significance of the power. The ALRC also set out some criteria in relation to when it may be appropriate to delegate a power of exclusion or exemption.[45]

1.42 The committee will also have concerns about provisions that enable delegated legislation to exempt persons or entities from the operation of primary legislation. These provisions have the effect of limiting, or in some cases removing, parliamentary scrutiny. Consequently, the committee will be concerned about provisions of this kind—particularly where they permit exemptions or modifications that apply to a broad range of entities or legislative provisions—and expects a justification for the use of such provisions to be included in the explanatory memorandum.

1.43 The committee considers that the explanatory memorandum does not include an explanation of why it is appropriate in this instance that delegated legislation be allowed to modify the operation of the proposed Part 5.3A. It is also noted that the explanatory memorandum does not identify any legislative safeguard to ensure that proposed section 110.9 is used appropriately.[46] The committee is accordingly concerned that regulations made pursuant to proposed section 110.9(1)(a) would be capable of disapplying proposed section 110.8, which provides protection against a

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44 Australian Law Reform Commission, Report 141, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (November 2023)

45 Australian Law Reform Commission, Report 141, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (November 2023), Appendix D, pp. 298–301. See also Andrew Edgar, *Regulation-Making in the United Kingdom and Australia: Democratic Legitimacy, Safeguards and Executive Aggrandisement*, Hart (2023), pp. 162–165.

46 Explanatory memorandum p. 34.

person being tried or punished twice in respect of equivalent offences under both Commonwealth and State and Territory Laws without disapplying the remainder of the provisions of proposed Part 5.3A.

The committee requests that an addendum to the explanatory memorandum containing a justification addressing the following matters be tabled in Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation:[47]

- **why it is appropriate to allow delegated legislation to modify the operation of proposed Part 5.3A of *Criminal Code Act 1995*; and**
- **whether there are legislative safeguards in place to ensure that such provisions are used appropriately.**

[47] See section 15AB of the *Acts Interpretation Act 1901*.