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HOUSE OF REPRESENTATIVES

**RECONCILIATION AND ABORIGINAL AND TORRES STRAIT
ISLANDER AFFAIRS LEGISLATION AMENDMENT (APPLICATION
OF CRIMINAL CODE) BILL 2001**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs,
the Honourable Philip Ruddock, MP)

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**RECONCILIATION AND ABORIGINAL AND TORRES STRAIT
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OUTLINE

This Bill amends offence and related provisions in the Reconciliation and Aboriginal and Torres Strait Islander Affairs portfolio to provide for the application of the Criminal Code.

Chapter Two of the Criminal Code, contained in the *Criminal Code Act 1995*, establishes general principles of criminal responsibility. It provides a standard approach to the formulation of Commonwealth criminal offences.

The Code will apply to all Commonwealth offence provisions from 15 December 2001. Many offence provisions in the Reconciliation and Aboriginal and Torres Strait Islander Affairs portfolio legislation were drafted without reference to the Code and their meaning and operation may change following the application of the Criminal Code. Those provisions must be harmonised with the Code in order to preserve their current meaning and operation, and to ensure compliance and consistency with the general principles of the Criminal Code.

The Bill harmonises offence and related provisions in the Reconciliation and Aboriginal and Torres Strait Islander Affairs portfolio legislation by:

- applying the Criminal Code to all offences
- clarifying whether certain offence provisions create offences of strict liability
- clarifying the physical and fault elements for certain offences, including removing and replacing inappropriate fault elements where appropriate
- ensuring that the defendant bears only an evidential burden of proof in relation to defences
- removing parts of offence provisions which duplicate the general offence provisions in the Criminal Code and
- replacing references to certain general offence provisions in the *Crimes Act 1914* with references to the equivalent provisions of the *Criminal Code*.

In addition, the Bill removes gender specific language in the *Aboriginal Councils and Associations Act 1976*, the *Aboriginal Land Rights (Northern Territory) Act 1976*, and the *Aboriginal and Torres Strait Islander (Queensland Reserves and Communities Self-Management) Act 1978*.

FINANCIAL IMPACT

The Bill makes only minor amendments to the offence provisions in the Reconciliation and Aboriginal and Torres Strait Islander Affairs portfolio legislation and is not expected to have any financial impact.

NOTES ON ITEMS

Clause 1: Short Title

This clause provides that the Act may be cited as the *Reconciliation and Aboriginal and Torres Strait Affairs Legislation Amendment (Application of Criminal Code) Act 2001*.

Clause 2: Commencement

This clause provides that the Act commences on the 28th day after the day on which the Act receives Royal Assent.

Clause 3: Schedule(s)

This clause provides that each Act specified in a Schedule to the Bill is amended or repealed as set out in the items in the Schedule concerned, and any other item in a Schedule to the Bill has effect according to its terms.

Clause 4: Application of amendments

This is a transitional clause that provides that the amendments made by the Act apply to acts and omissions that take place after the amendment commences, and clarifies that where an act or omission is alleged to have taken place between two dates, one before and one on or after the commencement of the amendments, the act or omission is alleged to have taken place before the amendment commences. In that instance, the amendments made by the Bill do not apply.

Schedule 1 – Application of the Criminal Code

Aboriginal and Torres Strait Islander Commission Act 1989

Item 1: Application of the Criminal Code

This item proposes to insert section 5A which applies Chapter 2 of the *Criminal Code* (except Part 2.5) to all offences against the Act. Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility. Part 2.5 of the *Criminal Code* (which deals with corporate criminal responsibility) does not apply to offences under the Act as the Act already contains offence provisions in relation to corporate criminal responsibility.

Items 2, 3 & 4: Section 78A

These items propose three amendments to section 78A which deals with examination of documents by the Office of Evaluation and Audit or such persons authorised by the Director of Evaluation and Audit. Firstly, item 2 removes the defence of reasonable excuse from subsection 78A(6) and item 3 recreates it in a new subsection 78A(6B). The reason for this amendment is to prevent future interpretation that the reasonable excuse element of the provision is an element of the offence and puts it beyond doubt that it is a defence to the offence.

Item 3 also adds the standard note after proposed subsection 78A(6B) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code* if a defendant relies on the reasonable excuse defence established by subsection 78A(6B).

Secondly, item 3 inserts proposed subsection 78A(6A) which applies strict liability to the offence in subsection 78A(6) of the Act. Subsection 78A(6) provides that a person who fails to answer questions or produce documents in their possession as required by the Director of Evaluation and Audit, or such person authorised by him, is guilty of an offence. Strict liability is defined in section 6.1 of the *Criminal Code* and provides that where an offence is intended to be one of strict liability, then it should be identified as such in the statute. The application of strict liability to this offence reflects the most likely way in which the current offence would be interpreted. The offence concerns an obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to answer questions or produce documents. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply.

Another factor in determining whether strict liability applies is the penalty, which in this case is relatively low (a fine not exceeding 20 penalty units). Further, the person can rely on the defence of reasonable excuse. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. Items 2 & 3 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 78A(6) creates a strict liability offence.

Finally, items 2 & 4 also delete the reference to “refuse or” in the offence. These words suggest that some fault on the part of the defendant is required and are inconsistent with the strict liability nature of the offences.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 5: Paragraphs 90(4)(a) and 191(4)(a)

This item amends paragraphs 90(4)(a) and 191(4)(a) to remove the references to sections 7, 7A and 86 of the *Crimes Act 1914*. Those sections, which deal with attempt, incitement and conspiracy will be repealed by the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000. The item replaces those references with references to the equivalent provisions in the Criminal Code (sections 11.1, 11.4 and 11.5).

Item 6: Subsection 193S(4)

Subsection 193S(4) provides that an officer of the Indigenous Land Corporation is guilty of an offence if he or she intentionally or recklessly discloses certain information or documents to any person. The current drafting of the subsection applies the fault elements of intention and recklessness (identified as “intentionally or recklessly”) to the physical element of conduct, namely disclosing the information. Following application of the *Criminal Code*, the fault element of recklessness will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Further, the fault element of intention will continue to apply to the physical element of conduct by default as provided by section 5.6 of the *Criminal Code*.

Accordingly this item proposes the deletion of “intentionally or recklessly” from this provision, as its present form in relation to recklessness would not operate in the same manner following application of the *Criminal Code*. In relation to intention, it is not necessary to specifically refer to it given the *Criminal Code*’s default fault provision (section 5.6) which will preserve the operation of the fault element of intention by applying it to all

physical elements of conduct in the subsection. It is anticipated that subsection 193S(4) will continue to operate in the same manner as at present following this amendment.

Item 7: Paragraph 198(1)(d)

This item proposes to amend paragraph 198(1)(d) which provides an offence of doing an act the purpose of which is, or the effect of which is likely to be, to influence a voter's preference in relation to any request for property or benefit for another person. The amendment proposes to convert the two physical elements of conduct (doing an act) and circumstance (that the preferences are influenced) into discrete paragraphs.

Following application of the *Criminal Code*, it is possible that future courts may variously interpret "the purpose of which is" or "the effect of which is likely to be" respectively as the physical elements of conduct and result, or as the reverse. This variation would have a profound effect on the future prosecution of offences against paragraph 198(1)(d) because physical elements of conduct and result attract different fault elements, namely intention and recklessness respectively. It follows that the provision must be reconstructed in order to clarify these matters. The correct interpretation of paragraph 198(1)(d) is that the physical element of conduct is the doing of any act and the physical element of circumstance is that the preferences are likely to be influenced, and the substituted paragraph 198(1)(d) puts this beyond doubt.

Item 8: Subsection 198(2)

This item proposes that the phrase "in order to influence or affect" in subsection 198(2) be replaced by the phrase "with the intention of influencing or affecting". The phrase "in order to" should no longer be used in offence-creating provisions because of the potential confusion which could arise as to the applicable fault element. This confusion could arise because most offences do not specify the fault element and because the phrase "in order to" could be interpreted to refer to an additional fault element of intention attaching to the physical element of conduct or denote a physical element of result which would thereby attract the default fault element of recklessness.

It follows that the phrase "in order to" has the potential to create significant confusion in interpreting offence-creating provisions to which the *Criminal Code* has been applied. If a physical element of result is intended to be part of the offence, then that should be described clearly: for example, the words "to achieve the result of" could be used in place of "in order to". Conversely, if the phrase "in order to" is meant to denote an additional fault element of intention attaching to the physical element of conduct then the phrase "with the intention of" would be better used in its stead.

In this instance, the correct interpretation of subsection 198(2) is that the defendant shall not give or promise to give property or a benefit to a person with the intention of influencing or affecting any vote, candidature, support or preferences of that person. This item proposes the appropriate amendment.

Item 9: Paragraph 198(2)(d)

This item proposes a similar amendment to item 7 above, namely, to convert the two physical elements of conduct and circumstance in paragraph 198(2)(d) into discrete paragraphs. Paragraph 198(2)(d) provides an offence of doing an act the purpose of which is, or the effect of which is likely to be, to influence a voter's preference in relation to giving or promising to give a benefit to a person. The amendment proposes to convert the two

physical elements of conduct (doing an act) and circumstance (that the preferences are influenced) into discrete paragraphs.

The correct interpretation of paragraph 198(2)(d) is that the physical element of conduct is the doing of any act and the physical element of circumstance is that the preferences are likely to be influenced. Substituted paragraph 198(2)(d) clarifies these matters by reconstructing the provision.

Item 10: Paragraph 199(9)(b)

This item amends paragraph 199(9)(b) to remove the references to sections 5, 7, 7A & 86 of the *Crimes Act 1914*. Those sections, which deal with aiding and abetting, attempt, incitement and conspiracy, will be repealed by the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000. The item replaces those references with references to the equivalent provisions in the Criminal Code (sections 11.1, 11.2, 11.4 & 11.5).

Aboriginal and Torres Strait Islander (Queensland Reserves and Communities Self-Management) Act 1978

Item 11: Application of the Criminal Code

This item proposes to insert section 4A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Items 12 & 13: Subsection 10(11)

These items propose to amend subsection 10(11) which provides that in proceedings for the offence of contravening by-laws, it is a defence if the person charged proves that he was not aware of the by-laws.

Item 12 proposes to amend subsection 10(11) by deleting “charged proves that he”. Those words suggest that the defendant currently bears the legal burden of proving this defence. The Criminal Code envisages that a defendant should only bear an evidential burden in relation to a defence. Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matters exist or do not exist (as the case may be).

Item 13 proposes to add the standard note after subsection 10(11) stating that the defendant bears an evidential burden in relation to the matters in subsection 10(11). These items make it clear that the defendant only bears an evidential burden in relation to the defence, which is consistent with Criminal Code policy.

Aboriginal Councils and Associations Act 1976

Item 14: Application of the Criminal Code

This item proposes to insert section 3A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Items 15, 16 & 17: Subsection 30(11)

These items propose to amend subsection 30(11) of the Act, which provides a defence to a contravention of a by-law if the person proves that the by-law had not been brought to his attention.

Item 15 proposes to amend subsection 30(11) by deleting “the person charged proves that” from the provision. Those words suggest that the defendant currently bears the legal burden of proving this defence. The Criminal Code envisages that a defendant should only bear an evidential burden in relation to a defence. Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matters exist or do not exist (as the case may be).

Item 16 proposes a consequential amendment to subsection 30(11) by deleting “his attention” and substituting “the attention of the person charged”. This amendment is necessary to clarify the provision as a result of the proposed amendment by item 15.

Item 17 proposes to add the standard note after subsection 30(11) stating that the defendant bears an evidential burden in relation to the matters in subsection 30(11). These items make it clear that the defendant only bears an evidential burden in relation to the defence, which is consistent with Criminal Code policy.

Item 18: After subsection 35(1)

This item inserts proposed subsection 35(1A) which applies strict liability to the offence in subsection 35(1) of the Act. Subsection 35(1) provides a penalty of \$50 where an Aboriginal Council alters its rules and does not provide a copy of the alterations to the Registrar within 6 weeks after making the alteration. This offence is an administrative obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law. Item 18 is not intended to create a new strict liability offence, but is instead merely intended to make it clear that subsection 35(1) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 19 & 20: Section 38

These items propose three amendments to section 38 which deals with the accounts, records and financial statements of Aboriginal Councils.

Firstly, item 19 removes the defence of reasonable excuse from subsection 38(7) and item 20 recreates it in a new paragraph 38(9)(a). The reason for this amendment is to prevent future interpretation that the reasonable excuse element of the provision is an element of the offence and puts it beyond doubt that it is a defence to the offence.

Secondly, item 20 also repeals the current subsection 38(8) which provides a defence if the person did not aid, abet or was not knowingly concerned in the contravention. There is a conflict between the current subsection and section 11.2 of the *Criminal Code* (which deals with the offence of aiding and abetting) because they place a burden of proof on different parties. As the aiding and abetting offences essentially concern knowledge, subsection 38(8) has been replaced with a defence relating to lack of knowledge at proposed new paragraph 38(9)(b). This amendment is designed to avoid inconsistency between the Act and the *Criminal Code* and it is considered that the defence will continue to operate in the same

manner as at present following the amendment. Item 20 also adds the standard note after proposed subsection 38(9) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Thirdly, item 20 substitutes a new subsection 38(8) which applies strict liability to the offence in subsection 38(7) of the Act. Subsection 38(7) provides that if an Aboriginal Council fails to keep accounts and records and prepare reports, and provide the Registrar with a copy of a report, or fails to make accounts and records available to the Registrar, each councillor is guilty of an offence. The offence carries a maximum fine of \$200. This offence is an administrative obligation with a small penalty to which the defence of reasonable excuse applies and is therefore the type of offence where strict liability is applied under the existing law. [See items 2, 3 & 4 for further information in relation to strict liability offences.] Items 19 & 20 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 38(7) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 21 & 22: Section 39

These items propose two amendments to section 39 which deals with the examination of the documents of an Aboriginal Council by a person authorised by the Registrar.

Firstly, item 21 removes the defence of reasonable excuse from subsection 39(5) and item 22 recreates it in a new paragraph 39(6A). The reason for this amendment is to prevent future interpretation that the reasonable excuse element of the provision is an element of the offence and puts it beyond doubt that it is a defence to the offence.

Item 22 also adds the standard note after proposed subsection 39(6A) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Secondly, item 22 inserts a new subsection 39(6) which applies strict liability to the offence in subsection 39(5) of the Act. Subsection 39(5) provides that if a person fails to answer questions or produce documents as required by the authorised person, that person is guilty of an offence. The offence carries a maximum fine of \$200. This offence attracts a small penalty to which the defence of reasonable excuse applies and is therefore the type of offence where strict liability is applied under the existing law. [See items 2, 3 & 4 for further information in relation to strict liability offences.] Items 21 & 22 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 39(5) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 23: Subsection 52(1)

This item inserts proposed subsection 52(1A) which applies strict liability to the offence in subsection 52(1) of the Act. Subsection 52(1) provides a penalty of \$50 where an Aboriginal Association alters its objects and does not provide a copy of the alterations to the Registrar within 6 weeks after making the alterations. This offence is an administrative obligation with a low penalty and is therefore the type of offence where strict liability is applied under the

existing law. Item 23 is not intended to create a new strict liability offence, but is instead merely intended to make it clear that subsection 52(1) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 24: Subsection 53(3)

This item inserts proposed subsection 53(3A) which applies strict liability to the offence in subsection 53(3) of the Act. Subsection 53(3) provides a penalty of \$50 where an Aboriginal Association changes its name and does not provide the Registrar with notice in writing of the change. This offence is an administrative obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law. Item 24 is not intended to create a new strict liability offence, but is instead merely intended to make it clear that subsection 53(3) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 25: Subsection 54(1)

This item inserts proposed subsection 54(1A) which applies strict liability to the offence in subsection 54(1) of the Act. Subsection 54(1) provides a penalty of \$50 where an Aboriginal Association alters its rules and does not provide a copy of the alterations to the Registrar within 6 weeks after making the alteration. This offence is an administrative obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law. Item 25 is not intended to create a new strict liability offence, but is instead merely intended to make it clear that subsection 54(1) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 26: Subsection 58(2)

This item inserts proposed subsection 58(2A) which applies strict liability to the offence in subsection 58(2) of the Act. Subsection 58(2) provides a penalty of \$200 where the public officer of an Aboriginal Association does not take action to ensure that the Association's register of members is kept open for inspection at all reasonable times. This offence is an administrative obligation with a small penalty and is therefore the type of offence where strict liability is applied under the existing law. Item 26 is not intended to create a new strict liability offence, but is instead merely intended to make it clear that subsection 58(2) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 27 & 28: Section 58

These items propose three amendments to section 58 which deals with the keeping of a Register of members by the public officer of an Aboriginal Association.

Firstly, item 27 removes the defence of reasonable excuse from subsection 58(5) and item 28 recreates it in a new paragraph 58(7)(a). The reason for this amendment is to prevent future

interpretation that the reasonable excuse element of the provision is an element of the offence and puts it beyond doubt that it is a defence to the offence.

Secondly, item 28 also repeals the current subsection 58(6) which provides a defence if the person did not aid, abet or was not knowingly concerned in the contravention. There is a conflict between subsection 58(6) and section 11.2 of the *Criminal Code* (which deals with the offence of aiding and abetting) because they place a burden of proof on different parties. As the aiding and abetting offences essentially concern knowledge, subsection 58(6) has been replaced with a defence relating to lack of knowledge at proposed new paragraph 58(7)(b). This amendment is designed to avoid inconsistency between the Act and the *Criminal Code* and it is considered that the defence will continue to operate in the same manner as at present following the amendment. Item 28 also adds the standard note after proposed subsection 58(7) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Thirdly, item 28 substitutes a new subsection 58(6) which applies strict liability to the offence in subsection 58(5) of the Act. Subsection 58(5) provides that if a Governing Committee of an Aboriginal Association fails to provide the Registrar with a list of the members of the Association each year, and as requested, each member of the Committee is guilty of an offence. The offence carries a maximum fine of \$200. This offence attracts a small penalty to which the defence of reasonable excuse applies and is therefore the type of offence where strict liability is applied under the existing law. [See items 2, 3 & 4 for further information in relation to strict liability offences.] Items 27 & 28 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 58(5) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 29 & 30: Section 59

These items propose three amendments to section 59 which deals with the accounts, records and financial statements of Aboriginal Associations.

Firstly, item 29 removes the defence of reasonable excuse from subsection 59(7) and item 30 recreates it in a new paragraph 59(9)(a). The reason for this amendment is to prevent future interpretation that the reasonable excuse element of the provision is an element of the offence and puts it beyond doubt that it is a defence to the offence.

Secondly, item 30 also repeals the current subsection 59(8) which provides a defence if the person did not aid, abet or was not knowingly concerned in the contravention. There is a conflict between the current subsection and section 11.2 of the *Criminal Code* (which deals with the offence of aiding and abetting) because they place a burden of proof on different parties. As the aiding and abetting offences essentially concern knowledge, subsection 59(8) has been replaced with a defence relating to lack of knowledge at proposed new paragraph 59(9)(b). This amendment is designed to avoid inconsistency between the Act and the *Criminal Code* and it is considered that the defence will continue to operate in the same manner as at present following the amendment. Item 30 also adds the standard note after proposed subsection 59(9) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Thirdly, item 30 substitutes a new subsection 59(8) which applies strict liability to the offence in subsection 59(7) of the Act. Subsection 59(7) provides that if the Governing

Committee of an Aboriginal Association fails to keep accounts and records and prepare reports, and provide the Registrar with a copy of a report, or fails to make accounts and records available to the Registrar, each Committee member is guilty of an offence. The offence carries a maximum fine of \$200. This offence attracts a small penalty to which the defence of reasonable excuse applies and is therefore the type of offence where strict liability is applied under the existing law. [See items 2, 3 & 4 for further information in relation to strict liability offences.] Items 29 & 30 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 59(7) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 31: Section 59A

This item inserts proposed subsection 59A(3) which applies strict liability to the offence in subsection 59A(2) of the Act. Subsection 59A(2) provides a penalty of \$200 where an Aboriginal Association fails to comply with such requirements as to record keeping, accounts and reporting which the Registrar may impose where an exemption from compliance with section 59 requirements has been granted. This offence is an administrative obligation with a small penalty and is therefore the type of offence where strict liability is applied under the existing law. This item is not intended to create a new strict liability offence, but is instead merely intended to make it clear that subsection 59A(2) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 32 & 33: Section 60

These items propose two amendments to section 60 which deals with examination of the documents of an Aboriginal Association by a person authorised by the Registrar.

Firstly, item 32 removes the defence of reasonable excuse from subsection 60(5) and item 33 recreates it in a new paragraph 60(6A). The reason for this amendment is to prevent future interpretation that the reasonable excuse element of the provision is an element of the offence and puts it beyond doubt that it is a defence to the offence.

Item 33 also adds the standard note after proposed subsection 60(6A) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Secondly, item 33 substitutes a new subsection 60(6) which applies strict liability to the offence in subsection 60(5) of the Act. Subsection 60(5) provides that if a person fails to answer questions or produce documents as required by the authorised person, that person is guilty of an offence. The offence carries a maximum fine of \$200. This offence attracts a small penalty to which the defence of reasonable excuse applies and is therefore the type of offence where strict liability is applied under the existing law. [See items 2, 3 & 4 for further information in relation to strict liability offences.] Items 32 & 33 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 60(5) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 34: Subsection 64(2)

This item inserts proposed subsection 64(2A) which applies strict liability to the offence in subsection 64(2) of the Act. Subsection 64(2) provides a penalty of \$50 where an Aboriginal Association resolves to voluntarily wind up, and does not lodge a notice in the prescribed form with the Registrar within 3 weeks after passing the resolution. This offence is an administrative obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law. This item is not intended to create a new strict liability offence, but is instead merely intended to make it clear that subsection 64(2) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 35 & 36: Section 69

These items propose two amendments to section 69 which deals with investigation of Aboriginal corporations by the Registrar.

Firstly, item 35 removes the defence of reasonable excuse from subsection 69(1) and item 36 recreates it in a new subsection 69(3). The reason for this amendment is to prevent future interpretation that the reasonable excuse element of the provision is an element of the offence and puts it beyond doubt that it is a defence to the offence. Item 35 also deletes the reference to “refuse or” in the offence. These words suggest that some fault on the part of the defendant is required and are inconsistent with the strict liability nature of the offence.

Item 36 also adds the standard note after proposed subsection 69(3) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Secondly, item 36 substitutes a new subsection 69(2) which applies strict liability to the offence in subsection 69(1) of the Act. Subsection 69(1) provides a penalty of \$200 where a person fails to attend before the Registrar, or to answer a question or produce a document when so required by the Registrar. This offence attracts a small penalty to which the defence of reasonable excuse applies and is therefore the type of offence where strict liability is applied under the existing law. [See items 2, 3 & 4 for further information in relation to strict liability offences.] Items 35 & 36 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 69(1) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after proposed subsection 69(2).

Aboriginal Land Grant (Jervis Bay Territory) Act 1986

Item 37: Application of the Criminal Code

This item proposes to insert section 3A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Item 38: Subsections 48(3) and (4)

This item proposes to amend subsections 48(3) and (4) which deal with protection of significant sites on Aboriginal land.

This item proposes three amendments to subsections 48(3) and (4). Firstly, it removes the specific defence of lawful authority, together with the exception that the person is an Aboriginal member of the Community or is authorised by the Council, from subsection 48(3) and recreates it in a new subsection 48(3B). The reason for this amendment is to prevent future interpretation that any of those defences and exceptions are elements of the offence and put it beyond doubt that they are defences and exceptions to the offence. This item also adds the standard note after proposed subsection 48(3B) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Secondly, this item proposes to amend subsections 48(3) and (4) by converting the physical elements of conduct, circumstance and result into discrete paragraphs. In subsection (3), the physical elements concerned are that: (a) the person enters or remains in a place; (b) a declaration under subsection (1), namely that the place is a significant place, is in force in relation to the place; (c) a sign is displayed in relation to the place and, (d) the sign is displayed under subsection (2). The rationale for this amendment is to render the two physical elements of circumstance at (b) & (d) into a form better placed for the application of strict liability.

In subsection (4), the physical elements are that: (a) a person does an act; (b) the act results in damage or disturbance to a place; (c) a declaration under subsection (1) is in force in relation to the place; (d) a sign is displayed in relation to the place; and, (e) the sign is displayed under subsection (2). As with the proposed amendment to subsection (3), the rationale for this amendment is to render the two physical elements of circumstance at (c) & (e) into a form better placed for the application of strict liability.

The third amendment proposed by this item is to insert subsections 48(3A) and 48(4A) which provide that, for the purposes of offences against subsections 48(3) and (4) respectively, strict liability is applied to two particular physical elements of circumstance. These elements are that a declaration under subsection (1) is in force in relation to the place, and that a sign displayed is displayed under subsection (2). These physical elements of circumstance are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by absence of the subject fault.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after proposed subsections 48(3A) & (4A).

Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987

Item 39: Application of the Criminal Code

This item proposes to insert section 4A which applies Chapter 2 of the *Criminal Code* (except Part 2.5) to all offences against the Act. Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility. Part 2.5 of the *Criminal Code* (which deals with corporate criminal responsibility) does not apply to offences under the Act as the Act already contains offence provisions in relation to corporate criminal responsibility.

Item 40: Paragraph 30(1)(b)

This item proposes to amend paragraph 30(1)(b) which provides that a person shall not, under the authority of a mining tenement granted, renewed or extended on or after the day of vesting of land in an Aboriginal corporation, enter the land for the purpose of carrying out any mining operation.

The proposed amendment is that the phrase “for the purpose” in paragraph 30(1)(b) be replaced by the phrase “with the intention”. The phrase “for the purpose” should no longer be used in offence-creating provisions because of the potential confusion which could arise as to the applicable fault element. This confusion could arise because most offences do not specify the fault element and because the phrase “for the purpose” could be interpreted to refer to an additional fault element of intention attaching to the physical element of conduct or denote a physical element of result which would thereby attract the default fault element of recklessness.

In this instance, the correct interpretation of paragraph 30(1)(b) is that the defendant enters land with the intention of carrying out any mining operation. It does not require the result of carrying out mining operations as that is anticipated by paragraph 30(1)(a) of the Act which provides that a person shall not carry out any mining operation on the relevant land. This item proposes the appropriate amendment.

Item 41: Section 35

This item proposes to amend section 35 which provides that a person shall not, without the consent of the Minister, give or offer, or agree to give or offer any payment (not being payment as provided by agreement under the Act) for the purposes of obtaining the Aboriginal corporation’s permission to carry out mining operations on the relevant land.

The proposed amendment is that the phrase “for the purposes of” in section 35 be replaced by the phrase “with the intention of”. The phrase “for the purpose of” can have a broad meaning and should no longer be used in offence-creating provisions because of the potential confusion which could arise as to the applicable fault element. This confusion could arise because most offences do not specify the fault element and because the phrase “for the purpose of” could be interpreted to refer to either an additional fault element of intention attaching to the physical element of conduct or denote a physical element of result which would thereby attract the default fault element of recklessness.

In this instance, the correct interpretation of section 35 is that the defendant gives or agrees to give consideration to the corporation with the intention of obtaining permission to mine. This item proposes the appropriate amendment.

Aboriginal Land Rights (Northern Territory) Act 1976

Item 42: Application of the Criminal Code

This item proposes to insert section 3D which applies Chapter 2 of the *Criminal Code* (except Part 2.5) to all offences against the Act. Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility. Part 2.5 of the *Criminal Code* (which deals with corporate criminal responsibility) does not apply to offences under the Act as the Act already contains offence provisions in relation to corporate criminal responsibility.

Item 43: Subsection 23E(4)

This item proposes to amend subsection 23E(4) which deals with secrecy of information acquired by persons from members of a Land Council, staff of a Land Council or persons authorised by a Land Council and communicated or divulged to another person.

This item proposes three amendments to section 23E. Firstly, it removes the exception to the offence (applicable where information is divulged for the purpose of advising the Minister in connection with the Act) from subsection 23E(4) and recreates it in a new subsection 23E(4B). The reason for this amendment is to prevent future interpretation that the exception is an element of the offence and put it beyond doubt that it is an exception to the offence. This item also adds the standard note after proposed subsection 23E(4B) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Secondly, this item proposes to repeal subsection 23E(4) and substitute a new subsection 23E(4) which converts the physical elements of conduct and circumstance into discrete paragraphs. The physical elements concerned are that information is communicated to a person (the first person) in accordance with the section; the information is communicated by a second person; the second person acquired the information because of his or her membership, employment or activities for the Land Council; the information concerns the affairs of a third person; and, the first person makes a record of or divulges the information to any other persons. The rationale for this amendment is to render the physical elements of circumstance at paragraphs (a), (b) & (c) into a form better placed for the application of strict liability.

The third amendment proposed by this item is to insert subsection 23E(4A) which provides that, for the purposes of offences against subsections 23E(4), strict liability is applied to the three physical elements of circumstance at paragraphs (a) to (c). These elements are that information is communicated to a person (the first person) in accordance with the Act; the information is communicated by a second person; and, the second person acquired the information because of his or her membership, employment or activities for the Land Council. These physical elements of circumstance are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by absence of the subject fault.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after proposed subsection 23E(4A).

Items 44 & 45: Section 54

These items propose two amendments to section 54 which deals with the Aboriginal Land Commissioner's power to require persons to answer questions and produce documents.

Firstly, item 44 removes the defence of lawful excuse from subsection 54(6). Reliance may instead be placed upon the general defence of lawful excuse, which has been inserted into the *Criminal Code* as section 10.5 by clause 7 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. The specific lawful excuse defence in subsection 54(6) would duplicate section 10.5 and would be unnecessary.

Item 44 also deletes the reference to “refuse or” in the offence. These words suggest that some fault on the part of the defendant is required and are inconsistent with the strict liability nature of the offence.

Secondly, item 45 substitutes a new subsection 54(7) which applies strict liability to the offence in subsection 54(6) of the Act. Subsection 54(6) provides a penalty of \$1,000 where a person fails to attend before the Commissioner, to be sworn or make an affirmation, or to answer a question or produce a document when so required by the Commissioner. Given the nature of the offence, and the relatively small penalty involved, it is the type of offence where strict liability is applied under the existing law. [See items 2, 3 & 4 for further information in relation to strict liability offences.] Items 44 & 45 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 54(6) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after proposed subsection 54(7).

Items 46 & 47: Section 54A

These items propose two amendments to section 54A which deals with examination of persons under oath or affirmation who wish to give information or documents to the Aboriginal Land Commissioner.

Firstly, item 46 removes the defence of lawful excuse from subsection 54A(2). Reliance may instead be placed upon the general defence of lawful excuse, which has been inserted into the *Criminal Code* as section 10.5 by clause 7 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. The specific lawful excuse defence in subsection 54A(2) would duplicate section 10.5 and would be unnecessary.

Item 46 also deletes the reference to “refuse or” in the offence. These words suggest that some fault on the part of the defendant is required and are inconsistent with the strict liability nature of the offence.

Secondly, item 47 substitutes a new subsection 54A(2A) which applies strict liability to the offence in subsection 54A(2) of the Act. Subsection 54A(2) provides a penalty of \$1,000 where a person fails to answer a question put to him by the Commissioner in the course of an examination under oath or affirmation. Given the nature of the offence, and the relatively small penalty involved, it is the type of offence where strict liability is applied under the existing law. [See items 2, 3 & 4 for further information in relation to strict liability offences.] Items 46 & 47 are not intended to create a new strict liability offence, but are instead merely intended to make it clear that subsection 54A(2) creates a strict liability offence.

The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after proposed subsection 54A(2A).

Item 48: Subsection 54AA(3)

This item proposes to amend section 54AA which deals with restrictions on the publication of, or access to, information provided to the Commissioner.

Subsection 54AA(3) provides that where the Commissioner has given a direction restricting the persons who may be in the vicinity of the place where the information is to be provided, it is an offence for a person to knowingly contravene or fail to comply with that direction.

Following the application of the *Criminal Code*, the fault element of knowledge (or “knowingly”) will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct. Applying “knowingly” to a physical element of conduct in the pre-*Criminal Code* environment is equivalent to applying the *Criminal Code* fault element of intention.

Accordingly, this item proposes to amend subsection 54AA(3) by replacing “knowingly” with the appropriate and equivalent fault element, namely “intentionally”. It is considered that subsection 54AA(3) will continue to operate in the same manner as at present following this amendment.

Items 49 & 50: Section 69

These items propose to amend section 69 which deals with protection of sacred sites.

These items propose one amendment to section 69. Item 49 removes the specific lawful authority defence (except in the performance of functions under this Act or otherwise in accordance with the Act or a law of the Northern Territory) from subsection 69(1) and item 50 recreates it in a new subsection 69(2A). The reason for this amendment is to prevent future interpretation that the defence is an element of the offence and put it beyond doubt that it is a defence to the offence. This item also adds the standard note after proposed subsection 69(2A) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Items 51 & 52: Section 70

These items propose to amend section 70 which deals with entry on Aboriginal land.

These items propose one amendment to section 70. Item 51 removes the specific lawful authority defence (except in the performance of functions under this Act or otherwise in accordance with the Act or a law of the Northern Territory) from subsection 70(1) and item 52 recreates it in a new subsection 70(2A). The reason for this amendment is to prevent future interpretation that the defence is an element of the offence and put it beyond doubt that it is a defence to the offence. This item also adds the standard note after proposed subsection 70(2A) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code*.

Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989

Item 53: Application of the Criminal Code

This item proposes to insert section 3A which applies Chapter 2 of the *Criminal Code* (except Part 2.5) to all offences against the Act. Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility. Part 2.5 of the *Criminal Code* (which deals with corporate criminal responsibility) does not apply to offences under the Act as the Act already contains offence provisions in relation to corporate criminal responsibility.

Item 54: Paragraph 47(9)(b)

This item amends paragraph 47(9)(b) to remove the references to sections 5, 7, 7A & 86 of the *Crimes Act 1914*. Those sections, which deal with aiding and abetting, attempt, incitement and conspiracy, will be repealed by the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000. The item replaces those references with

references to the equivalent provisions in the Criminal Code (sections 11.1, 11.2, 11.4 & 11.5).

Schedule 2 Other Amendments

Aboriginal and Torres Strait Islander (Queensland Reserves and Communities Self-Management) Act 1978

Items 1 to 6

These items amend various sections in the Act to replace gender specific words with gender neutral words.

Aboriginal Councils and Associations Act 1976

Items 7 to 85

These items amend various sections in the Act to replace gender specific words with gender neutral words.

Aboriginal Land Rights (Northern Territory) Act 1976

Items 86 to 162

These items amend various sections in the Act to replace gender specific words with gender neutral words.