

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN LAW REFORM COMMISSION BILL 1996

AUSTRALIAN LAW REFORM COMMISSION (REPEAL, TRANSITIONAL AND  
MISCELLANEOUS) BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General and Minister for Justice, The Hon Daryl  
Williams AM QC, MP)





## AUSTRALIAN LAW REFORM COMMISSION BILL 1996

### AUSTRALIAN LAW REFORM COMMISSION (REPEAL, TRANSITIONAL AND MISCELLANEOUS) BILL 1996

#### GENERAL OUTLINE

These are Bills for Acts to repeal and replace the *Law Reform Commission Act 1973* (LRC Act 1973) with new legislation to reconstitute and modernise the Australian Law Reform Commission and to deal with transitional and consequential matters arising therefrom.

In 1993-94 the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Standing Committee) undertook an inquiry into the role and function of the Law Reform Commission (the Commission). The inquiry was a comprehensive review of all aspects of the Commission's operations. The report of the Standing Committee, entitled *Law Reform: The Challenge Continues* was tabled in Parliament on May 1994.

The Standing Committee report included a recommendation that the LRC Act 1973 be re-drafted in accordance with modern drafting styles and a range of specific recommendations for other amendments to the LRC Act.

The Bills repeal and replace the LRC Act 1973, give effect to the legislative changes recommended by the Standing Committee and modernise the legislation relating to the Commission to make it consistent with enabling legislation for other independent statutory authorities.

Most significantly, the Bills:

- formally change the name of the Commission to the 'Australian Law Reform Commission';

- require the Commission to consider proposals for complementary laws between the Commonwealth, States and Territories, to have regard to such of Australia's international treaty obligations as are relevant, and to take into account the implications of its recommendations on lowering the costs of justice;

- enable the Commission to appoint consultants;

- clarify the role of the Deputy President and provide for the appointment of an acting President in the President's absence or when the office of President is vacant;
- provide for the establishment of a Board of Management comprising the President, Deputy President and full time members, confer chief executive officer powers on the President or the President's delegate and confer appropriate powers on the full Commission or a delegate of the full Commission;
- provide members and staff with immunity from civil action, the cause of which necessarily or reasonably arises in the course of duties being honestly undertaken before the Commission.

**FINANCIAL IMPACT STATEMENT**

There will be no additional financial obligations imposed on the Commonwealth by these Bills.

## NOTES ON CLAUSES

### AUSTRALIAN LAW REFORM COMMISSION BILL 1996

#### Part 1 — PRELIMINARY

##### Clause 1 - Short Title

The Bill, when enacted, will be known as the *Australian Law Reform Commission Act 1996*.

##### Clause 2 - Commencement

Subject to subclause 2(2) the Act will commence on Proclamation.

Subclause 2(2) provides that the Act will commence six months after it receives the Royal Assent if the date of commencement is not fixed at an earlier time by Proclamation.

##### Clause 3 - Definitions

Clause 3 defines terms used in the Bill. Most of the terms are defined in the same manner as they are in the *LRC Act 1973*. New terms defined include "Board" and "Board member" to support provisions of the Bill establishing a new management structure for the Commission.

##### Clause 4 - Extension to external Territories

This clause extends the application of the proposed Act to all the External Territories.

#### Part 2 — ESTABLISHMENT AND CONSTITUTION OF THE COMMISSION

##### Clause 5 - Establishment of the Commission

This clause establishes the Australian Law Reform Commission as a body corporate which may sue or be sued in its corporate name and requires judicial notice to be taken of the Commission's seal on any document.

##### Clause 6 - Constitution of the Commission

This clause provides that the Commission consists of the President, Deputy President and at least 4 other members.

##### Clause 7 - Appointment of members

This clause provides for all members of the Commission to be appointed by the Governor-General and sets out criteria for appointment. Subject to drafting improvements, this clause is the same as the provisions relating to appointment criteria in section 12 of the *LRC Act 1973*.

### **Clause 8 - Full-time and part-time appointments**

This clause provides that the President and Deputy President must be appointed as full-time members and the other members must be appointed either as full-time or part-time members. Under clause 29 of the Bill the full-time members of the Commission constitute the Board of Management which manages the Commission.

### **Clause 9 - Durations, terms and conditions of appointments**

This clause provides that members hold office for the term, not longer than seven years, and subject to the terms and conditions specified in their instrument of appointment. Members are eligible for reappointment. Subject to drafting improvements, this clause is substantially the same as subsection 12(6) and 12(7) of the *LRC Act 1973*.

### **Clause 10 - Appointment and service not to affect a tenure or rights of judicial office holders**

Subject to drafting improvements, this clause is substantially the same as section 13 of the *LRC Act 1973*.

### **Clause 11 - Arrangements for appointment of State and Territory judges**

Clause 11 allows the Governor-General to enter arrangements with the Governor of a State to appoint a judge of the Supreme Court of a State as a member of the Commission.

The clause is substantially the same as section 14 of the *LRC Act 1973* but subclause 11(2) also permits the Attorney-General to enter into arrangements with the Chief Minister of a Territory for the appointment of a judge of a Territory Supreme Court.

### **Clause 12 - Deputy President to act as President**

Clauses 12 provides that the Deputy President is to act as President in the President's absence or when the office of President is vacant and provides for the Deputy President remuneration's and allowances while acting in that position.

### **Clause 13 - Acting appointments: President and Deputy President**

Clause 13 permits the Attorney-General to appoint a full-time member as acting President or Deputy President. A full-time member can only be appointed to act as President if the Deputy President is not able to act as President.

This power to make acting appointments may be needed where, during a vacancy in the office of President, the Deputy President is acting as President but is overseas or otherwise absent from duty for short periods

### **Clause 14 - Acting appointments: full-time members**

Clause 14 permits the Attorney-General to appoint part-time members to act as full-time members of the Commission for limited periods of time. This will

enable the Commission to use the full-time services of a part-time Commissioner where this becomes advantageous at a certain stages in the conduct of law reform references or where there is a unexpected vacancy in a Division. It is convenient for short-term appointments, of the type described above, to be made by the Attorney-General.

#### **Clause 15 - Directions to perform duties on a full-time basis**

Clause 15 enables the Attorney-General to direct a part-time member to perform his or her duties on a full-time basis and is needed for operational reasons.

#### **Clause 16 - Remuneration and allowances**

This clause provides for the remuneration and allowances of members of the Commission and, subject to drafting improvements, is substantially the same as section 16 of the *LRC Act 1973*.

#### **Clause 17 - Termination of appointments**

Clause 17 provides that the Governor-General may terminate a member's appointment for misbehaviour, physical or mental incapacity, insolvency, failure to disclose pecuniary interests as required by clauses 33 or 39 of the Bill, or for engaging in paid employment without the Attorney-General's approval.

These provisions do not apply to judicial members of the Commission whose appointments may be terminated only if he or she ceases to hold federal judicial office or the office of judge of the Supreme Court of a State or Territory.

#### **Clause 18 - Resignations**

This clause, which is substantially the same as section 18 of the *LRC Act 1973*, enables a member to resign by writing to the Governor-General.

#### **Clause 19 - Leave of absence for full-time members**

This clause provides that leave of absence for the President of the Commission may be granted by the Attorney-General. The President may grant leave to the other full-time members of the Commission.

### **Part 3 — THE COMMISSION'S FUNCTIONS, POWERS AND REPORTS**

#### **Clause 20 - Reference to the Commission**

This clause provides for the Attorney-General to refer a law reform project (a "reference") to the Commission. Under this clause the Attorney-General may also alter the terms of a reference or direct the Commission to deal with references in a particular order.

This clause is substantially the same as provisions relating to references in section 6 of the *LRC Act 1973*.

### **Clause 21 - The Commission's functions**

This clause sets out the Commission's functions in relation to references. The clause extends the Commission's existing functions under subsection 6(1) of the *LRC Act 1973* in two ways.

First, subclause 21(1)(a)(v) provides that it is a function of the Commission to review laws for the purposes of developing and reforming the law particularly by providing improved access to justice.

Secondly, subclause 21(1)(d) provides that it is a function of the Commission to consider proposals for complementary Commonwealth, State and Territory laws.

### **Clause 22 - Interim reports**

Subject to drafting improvements, this clause is substantially the same as section 10 of the *LRC Act 1973*. It enables the Commission to submit interim reports on references.

### **Clause 23 - Reports to be tabled**

Subject to drafting improvements, this clause is substantially the same as section 37 of the *LRC Act 1973*, which requires all reports to be tabled before both Houses of the Parliament.

### **Clause 24 - How the Commission is to perform its functions**

This clause sets out matters to which the Commission must have regard in performing its functions. The clause provides for two additional matters not provided for under section 7 of the *LRC Act 1973*.

First, subclause 24(1)(c) provides that, in performing its functions, the Commission must have regard to all of Australia's relevant international obligations.

Secondly, subclause 24(1)(d) provides that, in formulating its recommendations, the Commission must have regard to any effect they might have on the costs of access to justice.

### **Clause 25 - The Commission's powers**

Subject to drafting improvements, this clause is substantially the same as section 8 of the *LRC Act 1973*. It enables the Commission to do everything necessary in connection with the performance of its functions.

### **Clause 26 - Commission to comply with certain requirements and directions**

Subject to drafting improvements, subclause 26(1) and subclause 26(2) dealing with the provision of information to the Parliament are substantially the same as section 9 of the *LRC Act 1973*.



Subclause 26(3) requires the Commission to comply with a direction of the Attorney-General about the order in which it is to deal with references or to make an interim report.

## **Part 4— MANAGEMENT, MEETINGS AND STAFF**

### **Division 1 — Management structure**

#### **Clause 27 - Board of Management**

This clause establishes a Board of Management of the Commission.

#### **Clause 28 - Function and powers of the Board**

Subclause 28(1) gives the Board the function of managing the Commission and ensuring that it performs its functions in a proper, efficient and effective manner and subclause 28(2) confers the necessary powers for that purpose.

Subclause 28(3) makes it clear that anything that the Board does in the Commission's name or on its behalf is taken to be done by the Commission.

#### **Clause 29 - Constitution of the Board**

This clause provides that the Board consists of the President, Deputy President and the other full-time members of the Commission.

#### **Clause 30 - Meetings of the Board**

This clause sets out the basic procedural requirements for meetings of the Board.

#### **Clause 31 - Conduct of meetings**

This clause provides for the Board to regulate its proceedings as it thinks fit and requires the Board to keep minutes.

#### **Clause 32 - Delegations by the Board**

This clause provides for delegations by the Board to one of its members and for the exercise of its powers by the delegate.

#### **Clause 33 - Members must disclose certain interests**

This clause requires members of the Board to disclose pecuniary interests in matters under consideration by the Board. Failure to comply with this clause, without reasonable excuse, is ground for termination of a member's appointment under subclause 17(2)(b).

#### **Clause 34 - President to be Chief Executive Officer**

Subclause 34(1) constitutes the President as the Chief Executive Officer of the Commission.

Subclause 34(2) makes it clear that anything that the President does in the Commission's name or on its behalf when acting as Chief Executive Officer and in accordance with the Board's directions is taken to be done by the Commission.

#### **Clause 35 - Delegations by the President**

This clause provides for delegations from the President to a member or employee of the Commission.

### **Division 2 — Meetings and proceedings of the Commission**

#### **Clause 36 - Meetings of the Commission**

This clause sets out the basic procedural requirements for meetings of the full Commission. Subject to drafting improvements and to subclause 36(2) this clause is substantially the same as section 20 of the *LRC Act 1973*.

Subclause 36(2) requires the President to convene a meeting on receiving a request to do so signed by at least 3 other members.

#### **Clause 37 - Conduct of meetings**

This clause provides for the Commission to regulate its proceedings as it thinks fit and requires the Commission to keep minutes.

#### **Clause 38 - Commission may inform itself in any way**

Subject to drafting improvements, this clause which enables the Commission to inform itself in any way it thinks fit, is substantially the same as section 28 of the *LRC Act 1973*.

#### **Clause 39 - Members must disclose pecuniary interests**

This clause requires members of the Commission to disclose pecuniary interests in matters under consideration by the Board. Failure to comply with this clause, without reasonable excuse, is ground for termination of a member's appointment under subclause 17(2)(b).

### **Division 3 — Divisions of the Commission**

#### **Clause 40 - Establishment of Divisions**

#### **Clause 41 - Meetings of a Division**

Clauses 40 and 41 provide for the Commission to establish a Division of the Commission for the purposes of a reference and for basic procedural requirements for meetings of Divisions.

These clauses are, subject to drafting improvements, substantially the same as provisions of sections 21 and 27 of the *LRC Act 1973*.

**Clause 42 - Conduct of meetings**

This clause enables the Commission to regulate its proceedings as it thinks fit and requires that it must keep minutes.

**Division 4 — Staff and consultants****Clause 43 - Appointment of staff**

Subclause 43(1) provides for the appointment of employees by the President with the approval of the Attorney-General.

Subclause 43(2) provides that the terms and conditions of employment are to be determined by the Board with the Attorney-General's approval.

These provisions continue the employment regime under the *LRC Act 1973* that is separate and independent from the Australian Public Service.

**Clause 44 - Commission may engage consultants**

This clause provides that the Commission may engage consultants to the Commission and that the terms and conditions of engagement to be as determined by the Commission and approved by the Board.

It contrasts with section 23 of the *LRC Act 1973* which provides that the President, with the approval of the Attorney-General, may appoint consultants to the Commission. That provision of the *LRC Act 1973* is inconsistent with the powers of other statutory authorities which are able to appoint consultants without Ministerial approval.

**Part 5 — FINANCE****Clause 45 - Money payable to the Commission**

Subject to drafting improvements, this clause is substantially the same as section 29 of the *LRC Act 1973*. It deals with the appropriation of money by the Parliament, the giving of directions by the Minister for Finance, the need for the Commission to prepare and submit estimates and the obligation not to expend money except in accordance with estimates.

**Clause 46 - Purchase and disposal of assets**

Subject to drafting improvements, this clause which requires the Attorney-General's approval for certain asset acquisitions and disposals, is substantially the same as section 30 of the *LRC Act 1973*. However, the monetary limits for acquisition of assets, entry into contracts and disposal of property without Ministerial approval are increased to \$250,000.

**Clause 47 - Application of Commission's money**

Subject to drafting improvements, this clause is substantially the same as section 32 of the *LRC Act 1973*. It requires the Commission to apply its money only to the discharge of obligations and liabilities and the payment of salaries and allowances under the Act.

**Clause 48 - Application of Division 3 of Part XI of Audit Act**

This clause is the same as section 33 of the *LRC Act 1973* in declaring the Commission to be a public authority to which the *Audit Act 1901* applies.

**Clause 49 - Exemption from taxation**

This clause exempts the Commission from taxation and is the same as section 36 of the *LRC Act 1973*.

**Part 6 — MISCELLANEOUS****Clause 50 - Protection from civil actions**

This clause provides the Commission, its members and employees with immunity from civil action, the cause of which necessarily or reasonably arises in the course of duties being honestly undertaken before the Commission.

**Clause 51 - Regulations**

Subject to drafting improvements, this clause is substantially the same as section 38 of the *LRC Act 1973*.

**AUSTRALIAN LAW REFORM COMMISSION (REPEAL, TRANSITIONAL AND MISCELLANEOUS) BILL 1996****Part 1 — PRELIMINARY****Clause 1 - Short title**

The Bill, when enacted, will be known as the *Australian Law Reform Commission (Repeal, Transitional and Miscellaneous) Act 1996*.

**Clause 2 - Commencement**

Subclause 2(1) provides that, subject to subclause 2(2) and 2(3), the Act will commence on the same day as the *Australian Law Reform Commission Act 1996* (*ALRC Act*).

Subclause 2(2) and subclause 2(3) provide for the commencement date for amendments to the *ALRC Act* that either refer to the *Commonwealth Authorities and Companies Act 1996* (*CAC Act*) or that implement revised accountability arrangements for Commonwealth authorities associated with the *CAC Act*.

These amendments, which are set out in Schedule 1 of the Bill will come into effect immediately after the commencement of the *ALRC Act* or the *CAC Act*, whichever commences last.

**Clause 3 - Schedules**

This clause operates to give formal effect to the amendments and repeals set out in Schedules to the Bill.

## Part 2 — TRANSITIONAL

Part 2 of the Bill contains transitional and savings provisions to enable the operations of the Law Reform Commission established by the *LRC Act 1973* (the LRC) to be continued by the reconstituted Commission established by the *ALRC Act* (the ALRC).

### Clause 4 - Interpretation

Clause 4 defines terms used in the Bill.

### Clause 5 - President, Deputy President and other members

Clause 5 contains transitional provisions saving the existing appointments of the President, Deputy President and other members of the LRC.

### Clause 6 - Transfer of LRC staff to ALRC

### Clause 7 - Transfer of LRC assets and liabilities to ALRC

Clauses 6 and 7 provide for the transfer of staff and assets and liabilities from the LRC to the ALRC.

### Clause 8 - LRC instruments

### Clause 9 - Pending proceedings

Clause 8 saves instruments to which the LRC is a party and substitutes the ALRC as party to those instruments. Clause 9 substitutes the ALRC for the LRC in any pending legal proceedings.

### Clause 10 - Continuation of references, directions and requirements

Clause 10 provides that references and directions given by the Attorney-General to the LRC continue to have effect as if made to the ALRC. The ALRC must also comply with any outstanding requests for information made under section 6 of the *LRC Act 1973*.

### Clause 11 - Regulations

This clause enables regulations to be made for the purposes of the Bill. In particular regulations can be made in relation to transitional matters.

## Schedule 1 — Amendment of the Australian Law Reform Commission Act 1996

Schedule 1 contains amendments to the *ALRC Act* to take account of the possible enactment of the *CAC Act*.

### Item 1 - Paragraph 17(2)(b)

This is an amendment to take account of the possible enactment of provisions of the *CAC Act* dealing with disclosure of material personal interests. Failure by a member of the Commission to comply with these provisions of the *CAC Act* is made ground for termination of appointment.

**Item 2 - After subsection 17(3)**

This is an amendment to take account of the possible enactment of provisions of the *CAC Act* dealing with the financial and other reporting requirements placed on directors of Commonwealth authorities. Failure by a member of the Commission to comply with these provisions of the *CAC Act* is made ground for termination of appointment.

**Item 3 - Subsection 17(4)**

This amendment is consequential to the amendment in Item 2 and is required so that these provisions relating to termination of appointment do not apply to judicial members of the Commission.

**Item 4 - Section 26**

This is an amendment to take account of the possible enactment of provisions in the *CAC Act* dealing with compliance with the general policy of the Government.

The amendment provides that this obligation imposed by the *CAC Act* is not affected by the requirements placed on the Commission in the *ALRC Act* to comply with certain requirements and directions from a House of Parliament, a Parliamentary Committee and the Attorney-General.

**Item 5 - Section 31**

This is an amendment to take account of the possible enactment of provisions in the *CAC Act* dealing with the conduct of meetings of directors of Commonwealth authorities. The effect of the amendment is that the Board's discretion to regulate its proceedings as it thinks fit is subject to the *CAC Act*.

**Item 6 - Section 33**

This is an amendment to take account of the possible enactment of provisions in the *CAC Act* dealing with disclosure of material personal interests.

**Item 7 - Subsections 45(3), (4) and (5)**

This is an amendment to take account of the possible enactment of provisions in the *CAC Act* dealing with estimates of expenditure by Commonwealth authorities.

**Item 8 - Section 47**

This is an amendment to take account of the possible enactment of provisions in the *CAC Act* dealing with banking and investment by Commonwealth authorities other than government business enterprises or statutory marketing authorities. The amendment provides that the Commission is not prevented from investing surplus money in accordance with the *CAC Act*.

**Item 9 - Section 48**

This is an amendment to take account of the possible enactment of the *CAC Act* as the main legislation dealing with accountability arrangements for Commonwealth authorities.

**Schedule 2 — Amendment or repeal of other Acts**

***Administration Appeals Tribunal Act 1975***

**Item 1 - Paragraphs 49(1)(a) and (b)**

**Item 2 - Paragraph 49(1)(c)**

Items 1 and 2 are consequential amendments to provide for the President of the ALRC to be a member of the Administrative Review Council.

***Law Reform Commission Act 1973***

**Item 3**

This clause repeals the *LRC Act 1973*.

