

## CHAPTER 4: INFLUENCES ON CONSULTATION

### 1. INTRODUCTION

One of the major goals of this thesis is to explain why the LC and the ALRC consult as they do. The Commissions, like every organisation, have been shaped by environment, circumstance and history. This chapter introduces these influences on consultation and establishes a framework for the comparative description of the Commissions' processes that follows. The impact that these factors have on consultation is often very subtle. On the whole, only a small number of interviewees explicitly identified and discussed more than one of the factors that were driving their Commissions' consultation. Nevertheless, these influences have a significant impact on the way in which the LC and the ALRC consult.

The first part of this chapter explores the influences that have caused the Commissions to consult differently. The LC's expert model of consultation has already been contrasted with the ALRC's more inclusive approach and these two models, as well as other differences that are described in the chapters that follow, can be traced to a number of influences that are explored here. The second part of this chapter considers those factors that influenced the Commissions' consultation but did not produce a difference in approach. Although the focus of this thesis is on why the Commissions are different, it is also important to acknowledge that many of the influences on consultation are common to both the LC and the ALRC. The institutions are similar in many respects so this is not surprising.

The third and final influence on consultation explored is the relationship that the Commissions have with their most important consultee: their Government. This relationship is critical because of the control that Government has over what projects the Commissions are able to undertake and most importantly, whether their reports become law or not. This power makes Government an important consultee and one that requires special consideration.

### 2. CONTRASTING INFLUENCES

#### 2.1 History

History is the factor that has had the greatest influence on the difference in approach to the consultation of the LC and the ALRC. Indeed, the impact of history still can be seen today as over time a culture of consultation has become embedded firmly at both institutions. Consultation is now accepted without question as a standard part of the law reform process. This means that the practices of the past remain influential as both sets of interviewees acknowledged that there were times when consultation was simply being done as it had in the past, without further evaluation as to whether or not it was the best way to consult.

But these past practices must start somewhere and it is back at the Commissions' beginnings where the influence of history set the LC and the ALRC on different paths. The LC's history begins, under the guidance of Lord Scarman as the first Chairman, with the suggestion that it invented the concept of the consultation document.<sup>1</sup> Whether or not it was the creator of this technique, the LC was at least one of the pioneers of this relatively novel approach to consultation. These LC documents seem to have started life as internal working papers that were produced just to assist the Commissioners' debate. In fact, for this reason, LC consultation documents were called working papers for quite some time. However, these internal documents were shown to a few people outside the Commission whose comments were found to be useful. The documents were given an increasingly wide circulation and before long, they were officially published and became publicly available. Although consultation papers are now more detailed and circulated more widely, the primary method of Scarman's LC remains the most important part of the Commission's consultation process today.

The ALRC's approach to consultation was different from the start. Justice Kirby, the first Chairman, said that the Australian institution was a 'child of the LC'<sup>2</sup> but that he developed the LC's approach differently and consulted more widely and on a national basis. Kirby gave four reasons for his new approach, the first two of which were that the ALRC was given different topics and that Australia had a different type of society both in terms of its people and its system of Government. These two reasons are dealt with below separately because although their roots lie very much in the past, they still have an ongoing impact on the ALRC's consultation.

Kirby's third reason for taking a broader approach was his views on who should be consulted.<sup>3</sup> He 'didn't believe that lawyers or judges or officials or so called "informed people" had the monopoly on wisdom.'<sup>4</sup> He also realised that the law affects ordinary people and not just lawyers, so he decided to extend the consultation dialogue to a wider group of people. In part, this perspective was informed by some quite personal considerations:

'There was also a personal matter. Because I am a homosexual man, I had a very clear understanding that the law is sometimes unjust. It is unjust to decent, honourable, hard-working and good people. This

<sup>1</sup> Scarman *Law Reforms in a Democratic Society* (4<sup>th</sup> Jawaharlal Nehru Memorial Lecture, National New Delhi 1985), 49-50; WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber Edmonton 1986) 338. A number of interviewees were also of this view, although LCB Gower, who was one of the first Law Commissioners appointed, is less sure. (LCB Gower 'Reflections on Law Reform' (1973) 23 U of Toronto LJ 257, 263)

<sup>2</sup> Interview with Justice Michael Kirby (11 August 2000, Sydney)

<sup>3</sup> Obviously, there is also a range of other factors that had varying influences on this early unique Australian direction. For example, Kirby himself identifies the impact of the views of Professor Julius Stone. (JMD Kirby 'Law Reform and "Ministering to Justice"' in A Blackshield (ed) *Legal Change: Essays in Honour of Julius Stone* (Butterworths Sydney 1983))

<sup>4</sup> Interview with Justice Michael Kirby (11 August 2000, Sydney)

brought home to me (more than perhaps it would to other Law Commissioners) the importance of getting beyond the legal paradigm.<sup>5</sup>

Kirby also felt that getting beyond this legal paradigm was particularly important because most lawyers are generally quite conservative and often need pushing to embrace change. Momentum for reform often comes from outside the law so looking for views other than just the legal 'experts' was regarded as both useful and important.<sup>6</sup> Accordingly, Kirby's efforts to involve the ordinary citizen prompted the use of various techniques such as holding public hearings and seeking a profile amongst the wider community. Finally, Kirby's fourth reason for consult widely was a desire to establish a profile for the ALRC and thereby secure its ongoing institutional future. A Commission with a strong and visible profile created through wide consultation and lots of media publicity was less likely to be abolished.<sup>7</sup>

The different paths taken by the two Commissions and their consultation models today can be linked to their first Chairmen, and particularly to Justice Kirby. Some interviewees made this connection explicitly, especially those from Australia who referred to the 'Kirby method' of consultation.<sup>8</sup> The ALRC itself acknowledges that it 'continues to implement the methods and the participatory approach to law reform which were Justice Kirby's initiatives.'<sup>9</sup> This also accords with the comments of Kirby himself who acknowledged that the ALRC's broader consultation was based on his views about who should be involved.

Elizabeth Evatt, a former ALRC President who is also in the unique position of having worked under Scarman at the LC, said of the first Chairmen that 'their roles were parallel but slightly different'.<sup>10</sup> She said that Lord Scarman was very highly respected by lawyers and politicians and that ensured the LC had a profile in legal, political and Parliamentary circles. Justice Kirby, on the other hand, was still relatively young (which is something that he himself noted) and did not have Scarman's stature. However, he was an excellent communicator and was able to reach beyond legal and political circles to the wider public. These characteristics of the two Chairmen are still features of the LC and the ALRC today.

## 2.2 Project Topics

The topic that a Commission investigates has a significant impact on the consultation that is done and this is another reason for the difference in the

<sup>5</sup> Correspondence with Justice Michael Kirby (20 May 2003)

<sup>6</sup> Correspondence with Justice Michael Kirby (20 May 2003)

<sup>7</sup> Also discussed in Correspondence with Justice Michael Kirby (20 May 2003)

<sup>8</sup> This connection is also made in the literature. For example, P Handford 'The Changing Face of Law Reform' (1999) 73 Australian LJ 503, 506; WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber Edmonton 1986) 120; House of Representatives Standing Committee on Legal and Constitutional Affairs *Law Reform: The Challenge Continues* (Australian Government Publishing Service Canberra 1994), 16 whose conclusion was based on the ALRC's own submission to this inquiry.

<sup>9</sup> ALRC 20 Years of Law Reform: *The History* (ALRC Sydney 1995) 10.

<sup>10</sup> Interview with Ms Elizabeth Evatt (18 July 2001, London)

two Commissions' approach. Interviewees made a broad distinction between topics that are legal and technical (a few used the term 'lawyers' law') and those that are more social and policy oriented. This distinction between topics that are 'legal' and those that are 'social' is not part of a formal process undertaken during work at the Commissions. Rather the extent to which a topic is regarded as being more or less legal or social is a factor that has an informal (and perhaps even sometimes subconscious) influence on staff and Commissioners in deciding what sort of consultation they should be doing on a particular project. There are some dangers in allowing such a vague classification to influence the sort of consultation that takes place but defining these terms is a near impossible task.

Interviewees did not try to define this difference and instead most relied on using examples. A common LC approach was to contrast its policy oriented *Divorce* report<sup>11</sup> with the technical issues in the Commission's *Perpetuities and Excessive Accumulations* project.<sup>12</sup> Likewise, some ALRC interviewees compared the Commission's specialist *Marine Insurance* project<sup>13</sup> with *Equality*<sup>14</sup> which ventured into the controversial issue of sex discrimination. Both sets of interviewees seemed to have a similar sense of what topics would be considered legal and what would be social, although their approach was based more on intuition than clear criteria. The problem is, though, that the boundaries between what is legal and what is social are blurred. A few LC interviewees said they had seen the distinction collapse very quickly at times. What was supposed to be clear and simple technical law actually had some significant but hidden policy issues.<sup>15</sup>

The literature also notes the difficulty in differentiating between the concept of legal topics and social topics. North writes: "'Lawyers' law' is a meaningless phrase; it does no more than indicate that the policy is obscured by the jargon of the law."<sup>16</sup> Most writers concluded that it was not possible to distinguish accurately between the two although some do so in general terms for the purpose of discussion.<sup>17</sup> This thesis will take the same approach and put forward some basic criteria, consistent with how interviewees addressed the issue, to distinguish between legal and social topics. The focus here is to

<sup>11</sup> LC *Family Law: The Ground for Divorce* (Law Com No 192, 1990)

<sup>12</sup> LC *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No 251, 1998)

<sup>13</sup> ALRC *Review of the Marine Insurance Act 1909* (Report No 91, 2001)

<sup>14</sup> ALRC *Equality Before the Law* (Report No 69, 1994)

<sup>15</sup> That seemingly technical matters often raise policy issues is also noted in JM Arden 'Law and Law Reform: Are We Ready for the Twenty-First Century' (1998) 20 Liverpool LR 163, 185 and SM Cretney 'The Politics of Law Reform - A View from the Inside' (1985) 48 MLR 493, 500-503.

<sup>16</sup> PM North 'The Law Commission - Methods and Stresses' (1981) 3 Liverpool LR 5, 13. See also AL Diamond 'The Law Commission and Government Departments' in G Zellick (ed) *The Law Commission and Law Reform* (Sweet & Maxwell London 1988) 23-25.

<sup>17</sup> WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber Edmonton 1986) 9-14 surveys much of the literature on the topic. It has a good discussion of the issue as does JL Scarman *Law Reform: The New Pattern* (The Lindsay Memorial Lectures, Routledge & Paul London 1968), 26-30. See also JH Farrar *Law Reform and the Law Commission* (Sweet and Maxwell London 1974) 2. The difficulties of defining the term 'lawyers' law' (which is a common focus in this debate) are discussed well also in AL Diamond 'Law Reform and the Legal Profession' (1977) 51 Australian LJ 396, 400-402.

compare the projects of the LC and the ALRC so these concepts need only be defined sufficiently clearly to be useful for contrasting one Commission's work with the other. In this thesis, legal topics are those that are primarily technical and require limited political judgments while social topics address significant policy issues and are likely to arouse some political controversy or interest.

Whether a project is 'social' or 'legal' affects the consultation that needs to be done. Social topics are more likely to be controversial, or at least of wider interest to a larger group of people, so more consultation and quite broad consultation is needed. For more legal matters, limited consultation with interested lawyers and experts might be considered enough. But this conclusion was generally reached only on a domestic level, that is, when comparing different projects done by the one Commission. However, this finding may also be extended and be applied when comparing the two Commissions. In general, the projects considered by the LC are different from those undertaken by the ALRC and therefore so is their consultation.

Nearly all of the LC interviewees thought that their Commission considered mainly legal topics.<sup>18</sup> There are a number of significant counter-examples such as the projects on *Divorce* and *Sharing Homes*<sup>19</sup> that were highly controversial, but generally the English Commission's work has a distinctly legal flavour.<sup>20</sup> By contrast, most ALRC interviewees thought that the Australian Commission tended to deal with more social topics.<sup>21</sup> This was even more so during the early-mid 1990s when the ALRC was given references of almost pure social policy. One interviewee said that during this period they saw themselves 'as much working in policy development as working in law reform.' Again, there are some counter-examples, particularly during the mid-late 1990s when the ALRC was referred a lot more technical legal subjects; but overall, the Australian Commission generally deals with topics that have a high social policy content. Justice Kirby specifically made this comparison of the LC and the ALRC himself as he thought that in England, many of the ALRC's social topics would have been dealt with by a body that specifically included non legal expertise.<sup>22</sup>

Although this comparison relies heavily on generalisations for which there are a number of exceptions, this characterisation by interviewees of their Commissions' projects is correct. This assessment is also supported by the literature. Hurlburt, for example, notes that the ALRC has differed from other LRCs in that it has been referred 'much unsettled social policy and difficult

<sup>18</sup> See also WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber Edmonton 1986) 65-66.

<sup>19</sup> LC *Sharing Homes: A Discussion Paper* (Law Com 278, 2002)

<sup>20</sup> See also WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber Edmonton 1986) 65 and PM North 'Law Reform: The Consultation Process' (1982) 6 Trent LJ 19, 19. Hurlburt notes the counter-examples, primarily in the field of family law, but says that otherwise the LC has dealt with mainly technical law.

<sup>21</sup> This is confirmed in a couple of Kirby's writings. See JMD Kirby *Reform the Law* (Oxford University Press Melbourne 1983) 54-55 and JMD Kirby 'The Politics of Achieving Law Reform' (1988) 11 Adelaide LR 315, 315-316.

<sup>22</sup> This conclusion is supported by Scarman. (JL Scarman 'Interview with the Chairman on Retirement' (1973) 70 Law Society's Gazette 1345, 1345)

social facts and legal subjects'.<sup>23</sup> Therefore, because the LC and the ALRC deal with different types of projects, their consultation is different. The ALRC's more social topics are addressed better by using the Commission's inclusive model of consultation while the LC's more legal topics mean that the expert model is more appropriate. Justice Kirby said that his initial decision to consult differently from the LC was partly because of the different work that his Commission did.

Because the types of projects that each Commission considers has such a strong influence on their different consultation styles, it is worth exploring why this difference exists. One factor that is partly responsible is the different ways that the two Commissions receive their work. The added freedom that the LC has to write its own Programme may actually narrow the work that it does because it is conscious of only choosing projects that are appropriate for a LC. Appropriateness (the 'suitability factor') is part of the formal criteria that the LC has devised to guide which projects it chooses.<sup>24</sup> This 'suitability factor' includes considering whether the topic is predominantly legal and whether political judgments would be needed.<sup>25</sup> A number of LC interviewees also mentioned avoiding topics that are likely to be controversial or involve party politics because they would not be implemented. This avoidance of politics and controversy seems to have been an assumed part of the LC model. This was the intention of the Commission's founders (despite its mandate to consider 'all the law')<sup>26</sup> and it was also the approach of the first Chairman.<sup>27</sup>

The ALRC, on the other hand, is relieved of the burden of deciding whether a topic is appropriate because, although it does suggest potential projects, its work is referred by the Government. It is suggested that the Australian Commission would not have been so bold as to give itself some of the projects that it has been referred. This view is confirmed by Kirby, who in an interview with Hurlburt, said that the Government made some references to the ALRC that the Commission, being entirely composed of lawyers, might not have had the courage to select for itself.<sup>28</sup>

Another factor contributing to the ALRC dealing with more social topics is that the Commission was seen as a 'too hard basket' for those topics that were too difficult or too sensitive for Government.<sup>29</sup> One of the common reasons why

<sup>23</sup> WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber/Edmonton 1986) 120. See also ALRC 20 Years of Law Reform: *The History* (ALRC Sydney 1995) 28, 42 and M Zander *The Law-Making Process* (5<sup>th</sup> edn Butterworths London 1999) 419.

<sup>24</sup> LC Eighth Programme of Law Reform (Law Com 274, 2001) 3.

<sup>25</sup> LC Eighth Programme of Law Reform (Law Com 274, 2001) 3-4. See also JM Arden 'The Work of the Law Commission' (2000) 53 Current Legal Problems 559, 560 and 563.

<sup>26</sup> WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber/Edmonton 1986) 258.

<sup>27</sup> WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber/Edmonton 1986) 259. See also JL Scarman *Law Reform: The New Pattern* (The Lindsay Memorial Lectures, Routledge & Paul London 1968) 12-15, 25.

<sup>28</sup> WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber/Edmonton 1986) 112 referring to an interview with Kirby on 9 November 1982.

<sup>29</sup> A Parliamentary Committee evaluating the ALRC in 1994 concluded that 'the Commission has demonstrated an ability and a capacity not enjoyed by other bodies to undertake difficult

these projects were too hard was because of the social policy issues that they raised. The LC does not see itself this way, nor is it used for this purpose by Government. Perhaps with the exception of the LC's family law work,<sup>30</sup> it is not where the sensitive or difficult issues are addressed. Related to this role of the 'too hard basket' is that the ALRC has an established methodology of thoroughly examining an area that includes doing wide consultation. This meant it is given the topics that demand that sort of treatment. This thorough methodology was initially adopted by Kirby because it was the most appropriate way to deal with the social topics that his ALRC had been given. However, it has become a self-perpetuating cycle as this is now the reason why these social topics are referred to the ALRC. The Attorney-General's Department has identified the Commission's thorough methodology as a factor to consider when deciding what references to give.<sup>31</sup>

Another reason for the two LRCs doing different types of projects relates to their interests and expertise, and also that of their Governments. It was suggested by a couple of ALRC interviewees that successive Australian Governments have had an interest in social law reform, some of which was referred to the Commission. The impact of the Government's views is well illustrated by the number of more legal references the Commission received during the mid-late 1990s as this reflected the more legal interests of the then Attorney-General.<sup>32</sup> Other more social references were also driven by the interests of the ALRC Commissioners themselves.<sup>33</sup>

Also contributing to the difference in the two Commissions' topics is the availability of law to reform. This is an issue for the ALRC whose work is primarily limited to Commonwealth law. Some difficulties were reported in finding areas of law to investigate as there was a sense that most of the major work in Commonwealth areas had already been done, much of it by the

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and long term projects.' (House of Representatives Standing Committee on Legal and Constitutional Affairs *Law Reform: The Challenge Continues* (Australian Government Publishing Service Canberra 1994), 87) Hurlburt noted that this was the role that the ALRC's founders had envisaged. (WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber Edmonton 1986) 261) See also JMD Kirby 'Law Reform and Ministering to Justice' in A Blackshield (ed) *Legal Change: Essays in Honour of Julius Stone* (Butterworths Sydney 1983) 217.

<sup>30</sup> Although the Law Commission was very keen, certainly in its early work on family law, to avoid the suggestion that it was engaged in political judgments. The Commission accordingly presented itself as 'a group of disinterested legal technicians', although the reality was somewhat different as the Commission did have definite views on family law reform. (SM Creney *Law, Law Reform and the Family* (Clarendon Press Oxford 1998) 60-63)

<sup>31</sup> This was stated in a submission made by the Attorney-General's Department to the House of Representatives Standing Committee on Legal and Constitutional Affairs *Law Reform: The Challenge Continues* (Australian Government Publishing Service Canberra 1994) 83.

<sup>32</sup> His emphasis on more technical references was also revealed in Government correspondence. (ALRC *New Reference Development* (ALRC File No 21/99, Part 1, 10 March 1999))

<sup>33</sup> See also ALRC *20 Years of Law Reform: The History* (ALRC Sydney 1995) 28. Expertise of Commissioners is also relevant at the LC with it being one of its formal criteria when writing its Programme. (LC *Eighth Programme of Law Reform* (Law Com 274, 2001) 3) This second criterion refers to the 'availability of resources' and it includes not only the expertise of the Commission but also its financial resources. The third and final criterion the LC applies when writing its Programme is the importance of the suggested project.

ALRC. It was even suggested that occasionally the Commission had been given 'make work' projects to keep it occupied. The existence of other competing law reform bodies, such as the Family Law Council or the Administrative Review Council, was also an issue for ALRC interviewees.<sup>34</sup> This competition further depleted the already limited areas of law that the Australian Commission could reform. This lack of law to reform was seen as contributing to the ALRC's shift towards almost pure social policy in the early-mid 1990s.

For both sets of interviewees, the consultation that is done on each project depends heavily on the topic that is being investigated. This point was made when considering the projects done by each Commission but more importantly, the same can be said when comparing the two LRCs and the areas of law they examine. A comparison of the LC's more legal topics and the ALRC's more social topics helps understand why the Australian Commission adopted the inclusive model of consultation while its English counterpart favoured the expert model. This difference in approach can be traced to a number of factors, some of which are historical, including how the Commissions' receive their work, constitutional limitations and their perception (and their Government's) of their role in the reform process.

### **2.3 Generalist Commissions**

Linked with the type of projects that the two Commissions consider is their role as generalist bodies. Both the LC and the ALRC are directed to keep the law as a whole under review so they do not specialise in one particular area. Indeed, subject to the SSCA's veto and the need for a reference respectively, the LC and the ALRC conceivably could investigate any legal issue that falls within their jurisdiction. This wide mandate can be contrasted with other reform bodies that are established to consider reform in particular fields of law such as Australia's Family Law Council. This means that both Commissions undertake projects in areas of law in which they do not have specific expertise. Accordingly, consultation is very important for getting the information and experience that they need.

The LC, however, is less of a generalist body than the ALRC and this is an influence that contributes to the two Commissions having different consultation styles. The LC operates using teams and they consider a number of projects from within a particular field of law. This means that the LC is more likely to have some kind of expertise already established for a project and more importantly, an awareness of the relevant consultees in the field, including pre-existing relationships with some of them. The ALRC, on the other hand, creates a new division for each project and it has examined a very

<sup>34</sup> It was also noted as one of the factors relevant for the Attorney-General's Department when considering whether the ALRC should be given a reference. (House of Representatives Standing Committee on Legal and Constitutional Affairs *Law Reform: The Challenge Continues* (Australian Government Publishing Service Canberra 1994) 83)



wide range of topics.<sup>35</sup> Except when it has been given serial references (which have been rare), the Australian Commission has had to work hard to identify the necessary consultees each time. This may be one reason why the Australian Commission does broader consultation. If it is new to a field, it may cast its net widely to ensure that it reaches all of the relevant consultees. It also has a greater need to try and gather as much expertise as it can.

The key reason for this difference lies with how the two Commissions receive their work. The LC structured itself into a number of teams and can write its Programme with that in mind. The ALRC, on the other hand, relies on the Government to give it work. It has input into that decision but cannot produce a steady flow of work in one particular area. Another reason for the difference is a lack of topics for the ALRC to consider that was discussed above. Evatt thought that the ALRC was referred a number of diverse and specialist topics because that was about all that was left to give to the Commission.

## 2.4 The Constitutions

Differences in the Constitutions of England and Australia influence how their two LRCs consult. The original 'Kirby method' involved visiting different parts of the country and this was driven by a Kirby's awareness that unlike England, Australia had a federal political system. A modest number of ALRC interviewees from the modern era also linked Australia's federalism with the need to consult nationally or as one person put it: to not be 'Sydney-centric'. For example, Evatt makes this point well: 'The fact that it [the ALRC] is a federal body affects the way that it does its consultation because it is more or less obliged to go around the traps. It is always important to show up in every State or Territory ...'<sup>36</sup>

Two motivations for a national approach to consultation were identified. One was the political importance of being seen to be involving the entire nation. Part of this relates to the difficult relationship that federalism creates between Commonwealth and State Governments, particularly in the Commission's early days. This relationship is less problematic when State Governments and State bodies are fully involved through consultation. The second factor motivating this national consultation is the value of learning about the law as it works in different parts of Australia. Federalism means that the law in different States can develop independently. One State can seem 'like a different planet' from another so it is important to factor these differences into any final recommendations.

This national consultation is also more of an issue because the ALRC was established in Sydney rather than Canberra, the nation's capital. This makes it important to prove that it is a national body and not Sydney-centric. The

<sup>35</sup> The Australian Commission itself also emphasises its own generalist nature. (ALRC *Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs* (Vol 2, 29 October 1993) 8-9) See also D Weisbrot 'Comment' (1999) 75 Reform 1, 67.

<sup>36</sup> Interview with Ms Elizabeth Evatt (18 July 2001, London). North was another who saw the law and discussed it in the context of public hearings. (PM North 'Law Reform: The Consultation Process' (1982) 6 Trent LJ 19, 28)

whereabouts of the ALRC is still a contentious issue today: it was discussed by a few interviewees with particular passion. Any criticism of its location would have been far greater if the Commission had not been very clear in its commitment to being a national body. The issue of the Commission's location also has important implications for its relationship with Government and so is discussed below further.

The LC's consultation is different because it operates within a unitary system of Government and so does not have this same obligation to consult nationally.<sup>37</sup> Accordingly, the English Commission has not sought specifically to consult in different parts of the country and does not have a programme of travel like its Australian counterpart. The focus is on finding expertise and this means that consultation tends to involve those mainly from London and the South East of England. The one exception to this was the consistent involvement of the Scottish LC, particularly when the two Commissions were working on joint projects where consultation was done on both sides of the border.

## 2.5 Society and Geography

A further influence on consultation is that England and Australia are different in terms of their society. It is acknowledged at the outset that this discussion of societal differences is based only on comments from the interviews and observations from the law reform literature. However, despite this limited data, it is suggested that the following conclusions are relatively accurate.<sup>38</sup> One of the reasons why Kirby chose to do broader consultation at the early ALRC was because he thought that 'Australia is a different society from the United Kingdom - it is less class stratified, it is more democratic.'<sup>39</sup> He felt that his inclusive approach to consultation was part of the ALRC being 'a body in tune with the different social, cultural values of a different and younger society.'<sup>40</sup> A couple of senior interviewees from both Commissions agreed that societal differences informed what was appropriate in terms of consultation.

Geography is also a factor. Australia is a lot bigger than England and Wales and this contributes to various regions in Australia developing differently. This again creates a need for the ALRC to consult throughout the country. As Lord Justice Brooke, a former LC Chairman, observed: 'a massive federation' and 'a compact little island' have different consultation needs.<sup>41</sup>

<sup>37</sup> See also PM North 'Law Reform: The Consultation Process' (1982) 6 Trent LJ 19, 28. Although one English Government interviewee speculated that devolution may bring to the United Kingdom some of the characteristics of a federal state.

<sup>38</sup> But even if they are not accurate, these comments are still very valuable because they indicate some of the factors that are informing the decisions being made by Commissioners and staff in relation to consultation.

<sup>39</sup> Interview with Justice Michael Kirby (11 August 2000, Sydney)

<sup>40</sup> Interview with Justice Michael Kirby (11 August 2000, Sydney). Indeed, Kirby suggests that this inclusive approach was part of a wider political trend at the time towards increased openness in public administration, especially at the federal level. (Correspondence with Justice Michael Kirby (21 August 2000))

<sup>41</sup> Again, see also PM North 'Law Reform: The Consultation Process' (1982) 6 Trent LJ 19, 28.

## **2.6 Conclusion**

The LC and the ALRC consult differently employing the expert and inclusive models of consultation respectively. To understand these differences, it is important to know where they came from and what continuing influences there are. The most important factor contributing to these different approaches is the history of the two Commissions. The central role of the past is evidenced by the fact that both bodies continue to consult in much the same way as they did when they were founded. An important part of this is the influence of the Commissions' first Chairmen. This is particularly the case for the ALRC's Justice Kirby whose personal vision of an inclusive body is an important reason why today's Commission consults so widely. Current ALRC staff and Commissioners still refer to the 'Kirby method'.

There are also continuing influences that sustain these differences in consultation. Most of them are, though, based in the Commissions' histories. One continuing influence is that the Australian Commission's more social topics demand consultation with wider sections of the community. Societal differences also make it more appropriate for the ALRC to involve broader interests. A further continuing influence is the different systems of Government. A unitary system does not require the LC to consult throughout England and Wales but Australia's federalism makes national consultation important.

A final influence is that the ALRC is more of a generalist body than the LC. This may contribute to make its consultation broader but its main impact is that the Australian Commission has to work harder at its consultation. These are the reasons why the LC and the ALRC consult differently. However, this is only part of the picture of why the Commissions consult as they do. There are also other influences, not specifically related to any differences between the two Commissions, that shape how their consultation is done. These 'similar influences' are also critical to understanding the later description of the consultation process and so are discussed next.

## **3. SIMILAR INFLUENCES**

### **3.1 Composition of Commissions**

The Commissioners and staff themselves through their personalities, abilities and beliefs have an influence the Commissions' consultation. A person's commitment to consulting and his or her views on its value affect how much consultation is done and the weight that it is given. Some people also held personal views about what sorts of people are worth consulting. Interviewees as a whole said they were committed to consultation although there were a few reports of a small number of people who lacked interest. Some adjustment is made for the likelihood that interviewees would emphasise the importance of consultation, but overall, it is likely that the Commissioners and staff at both Commissions support consultation and engage with the process genuinely.

The influence of these personal factors is greater at the ALRC for two reasons. Firstly, it uses more consultation methods than the LC so the choice to not use some of them or alter how they are employed allows for greater personal influence. The second and more important reason is that the Australian Commission does more oral consultation than its English counterpart. Face to face discussions are affected more by personal factors than written interaction, which generally is scrutinised by the Commission as a whole first. This second reason prompted a few ALRC interviewees to raise the issue of the ability of staff and Commissioners to consult effectively. A few concerns were expressed that the occasional person lacked the personal skills needed to consult.

Another feature of both Commissions' composition that influences consultation is that they are led and staffed entirely by lawyers (apart from those providing corporate support).<sup>42</sup> This makes consultation a greater imperative because it is the only way to access non-legal input.<sup>43</sup> However, an issue of greater importance not identified by interviewees is that the Commissions' legal composition is one of the reasons why the LC and the ALRC consult so many lawyers. Many consultees are reached through personal contacts and understandably, the professional networks of lawyers are found more often in the legal field.

The same can also be said of lawyers from different branches of the profession and both sets of interviewees realised the benefits of this. Whether they are barristers, solicitors, academics or judges, people bring to their Commission a network of contacts, and therefore potential consultees, that tends to be drawn mainly from their branch of the profession. This is one reason why a mixture of professional backgrounds amongst the Commissioners is favoured.<sup>44</sup> Lord Justice Brooke agrees: 'The LC's success was that it was a body of high quality lawyers drawn from different backgrounds with a mix of experience from the practising field and the field of academic law with really good links to experts – not necessarily lawyers – in the particular field of study.'<sup>45</sup> The LC's Commissioners have traditionally included a judge, two academics, a barrister and a solicitor although its ability to draw on that breadth of contacts may now be hampered by the fact that it is currently only served by judicial and academic Commissioners.<sup>46</sup>

Of particular interest in this context is the issue of judicial appointments to the Commissions and whether they should be headed by a judge. The LC has always been chaired by a judge but the ALRC has had a non-judicial

<sup>42</sup> Although the ALRC has occasionally appointed non-lawyers as part-time Commissioners. (see Chapter 2)

<sup>43</sup> L Scarman *Law Reforms in a Democratic Society* (4<sup>th</sup> Jawaharlal Nehru Memorial Lecture, National New Delhi 1985), 47.

<sup>44</sup> See also JL Scarman 'Interview with the Chairman on his Retirement' (1973) 70 *Law Society's Gazette* 1345, 1354 and A Martin *Methods of Law Reform* (Inaugural Lecture at University of Southampton, Camelot Press Southampton 1967) 14-15. Cf R Deech 'Law Reform: The Choice of Method' (1969) 47 *Canadian Bar Review* 395, 404, 418.

<sup>45</sup> Interview with Lord Justice Brooke (15 May 2001, London)

<sup>46</sup> Although note that one of the current Commissioners practised as a barrister in a part-time capacity prior to his appointment. (see Chapter 2)

President since 1994. This has implications for consultation because a judge may bring a set of contacts, particularly judicial contacts, that might otherwise be inaccessible. A judicial head also influences consultation in other ways. It was suggested that consultees, again particularly judicial consultees, are more likely to respond to consultation if their views are sought by a judge. The increased status of a body headed by a member of the judiciary was also thought to result in more responses. It is likely that the ALRC has lost status without its judicial head although so far there does not seem to be any tangible impact on its consultation. For example, the Australian Commission has not had any difficulty getting judges to participate in its process.<sup>47</sup> However, the impact of the decision to not appoint judicial Presidents may be felt in the long term.

Another aspect of the LRCs and their composition that influences consultation is the terms on which people are appointed. An issue at the LC is the difference between staff who are appointed as civil servants and Commissioners who are not. This means that only Commissioners are free to discuss current LC thinking frankly or give tentative views. As civil servants, staff members can only receive opinions. One result of this is that LC Commissioners will have more personal contact with the Commission's seminars and informal meetings where more interactive consultation, as opposed to the mere receipt of views, takes place. This was not an issue for ALRC interviewees as its staff are not fettered in this way. They have never been public servants, despite traditionally being on parallel terms and conditions.

Both Commissions also have particular staff positions that improve their ability to consult. The LC and the ALRC each have at least one person whose responsibilities include dealing with media issues like publicity for projects and their website. The specific expertise these appointments bring helps the LRCs generate more interest in their projects and reach more potential consultees. The ALRC has gone one step further on a handful of references and actually appointed someone specifically to organise consultation for that project. This was done only when additional funding allowed and when the particular topic required special communication skills that the Commission did not have. The best example is the ALRC's *Multiculturalism*<sup>48</sup> where consulting ethnic minorities was an important part of the project. This innovation was commented on positively by the few interviewees who worked on these references.

A final influence on consultation is not only the actual composition of a LRC, but how often that composition changes. Generally, the staff and Commissioners at both Commissions do not stay very long so usually there is

<sup>47</sup> For example, in one project, ALRC *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report No 92, 2001), the Advisory Committee who assist the ALRC includes five Justices of the Federal Court, one from the Family Court, two from State Supreme Courts and two former Justices of the High Court, one of whom was Chief Justice.

<sup>48</sup> ALRC *Multiculturalism and the Law* (Report No 57, 1992). This is also probably the first time that such an appointment was made.

steady influx of new people. However, contrary to this trend, by the early-mid 1990s, there was a suggestion from a number of Australian interviewees that the ALRC had become stagnant. Their view was that this was due to insufficient turn over in personnel and was compounded by a lack of management. The suggestion was that senior long-term staff were running the Commission and it had become very entrenched in how it operated, including its consultation. It was suggested that this situation improved, however, with the arrival of new staff from diverse backgrounds and with new ideas. It was also assisted by the appointment of Mr Alan Rose as President who was described by one interviewee as 'the catalyst'. He restructured the Commission so that there were fewer senior positions and also created a culture where new methods of consultation were tried.<sup>49</sup>

### 3.2 Other Influences

There are also a number of other, although smaller, influences on consultation. One is changes in the political and societal climate in which it occurs. Consulting has become an increasingly important part of decision making in Government and political circles. A culture of consultation has always existed at both Commissions (see Chapter 2) but this shift towards its increased importance was also felt by the LC and the ALRC. This was linked by a few senior LC interviewees with society becoming more populist since the Commission was first established as people became more informed and more powerful. This meant that topics that used to be regarded as uncontroversial have now become more politicised. In this climate, consultation and consensus are very important.

Limited financial resources is another major factor affecting consultation. To consult properly costs a lot of money. A common theme amongst interviewees was that they would like to do more consultation but their Commission couldn't afford it. Both Commissions looked for ways to reduce costs while maintaining accessibility and the LC, in particular, identified its website as being an important strategy to achieve this. Another related influence on the Commissions' consultation is limits on time, especially for the ALRC whose terms of reference generally include a deadline for reporting.

The profile of a LRC also affects its consultation, and especially who is consulted because people are more interested in contributing to a body that is well known. This relationship is cyclical as a LRC's consultation influences its profile as well. The ALRC was generally thought to have had quite a high profile throughout its career. There was some disagreement amongst LC interviewees as to the profile of the English Commission but this is probably due to changes over different eras. In the early 1990s, the LC was well known in the legal profession but not beyond.<sup>50</sup> However, after Chairmanship of Lord Justice Brooke, the LC's profile was thought to have increased such that it was known better by Government, Parliament and to some extent, the general

<sup>49</sup> A similar restructure at the LC in the 1980s, but this was not linked with its consultation.

<sup>50</sup> The low profile of the LC was also referred to by M Blair 'Additional Comments' in G Zellick (ed) *The Law Commission and Law Reform* (Sweet & Maxwell London 1988) 73.

public. A related influence on consultation is the reputation of a LRC. Both Commissions were judged to have good reputations and this helped them attract the interest and expertise of consultees.

Another influence on consultation is the experience of a Commission as to what methods or approaches were effective. A Commission learns from its consultation experiences of the past. A classic example of learning from experience is the ALRC's *Multiculturalism* project. A couple of innovations were trialled in this reference with success, which led to the Commission using these same techniques in later projects. One innovation was the appointment of a member of staff whose specific responsibility was to organise consultation. This was found to be useful so when additional funding was available on other projects, the ALRC created a similar position. Another innovation, discussed further in Chapter 6, was a more systematic approach to processing the responses to consultation that were received.

## **4. RELATIONSHIP WITH GOVERNMENT**

### **4.1 Introduction**

Government is probably a LRC's most important consultee. It controls what topics a Commission considers and it makes the final decision on whether the resulting reports become law. It is also common for some part of Government to have existing expertise in the area being considered. This means that the relationship that a Commission has with this consultee is critical to its success. This issue is dealt with in this chapter because how a Commission interacts with its most important consultee is obviously a significant influence on consultation. It begins by discussing those factors that influence the relationship between a Commission and its Government, the most important one being the constitutional function it fulfils. It then turns to consider the actual relationship the two Commissions have with their Governments, before concluding with the problem of getting Government to engage with Commission consultation exercises.

Only a few interviewees discussed what they meant by 'Government'. Most used the term quite broadly and impliedly included both the Civil Service and Ministers. Although there is a lot of overlap between the needs and interests of these two groups, there are also some differences and they were generally not identified. One of the Government interviewees noted the complexity of a LRC's relationship with both the Minister and the Civil Service because a Commission reports to the Minister but discusses its work primarily with the Civil Service. These particular issues are flagged below as they arise.

### **4.2 Influences on Relationship**

#### **4.2.1 Constitutional Role**

The key aspects of the relationship between a LRC and its Government are embedded in the constitutional role of the Commission. This role was discussed in Chapter 2 and the tension created by a body being both advisory

and independent was identified. As has been already noted, the LRCs' independence is regarded as being the most important feature of their relationship with Government. This was particularly so for the LC: one English interviewee commented that independence was 'ingrained as part of the mental outlook of the Law Commission' while a few others linked it closely to the Commission's sense of its own identity.<sup>51</sup>

A LRC can be independent in a number of ways, although almost none of interviewees distinguished between them. One type of independence is a LRC's freedom to choose the topics that it considers. A second type is what nearly all of the interviewees seemed to mean when they used the term 'independent': the freedom of a LRC to recommend whatever reform solution it thinks best. A third type of independence is the freedom that comes from feeling secure about the future existence of your Commission. The type of independence that is focused on here is the one that interviewees usually meant: the freedom of a LRC to reach its own decisions. The other two types of independence are considered only when relevant to this and the freedom of a Commission to choose its work is discussed in full in Chapter 8.

Part of a LRC's independence means that the Commissions' recommendations are not determined by Government or its policies. These matters may be taken into account but the final decision rests with the Commission itself. This independence has a few implications for a LRC's consultation. Firstly, it means that the Commission can consult whom it wants.<sup>52</sup> An LRC independent from Government is also likely to be more approachable for consultees.<sup>53</sup> Being separate from Government means that people could be more frank in their views and they are also more likely to feel that they are actually being listened to. A final implication is that consultees are more likely to give their time and expertise generously to an independent Commission than they would to Government.

But the Commissions are not absolutely independent from Government and there are some factors that challenge their autonomy. The major challenge to the ALRC's independence has been concerns about politicisation in the mid-late 1990s. Some interviewees felt that the Government was partly responsible for politicising the Commission as it was attempting to maintain tighter control over a body pushing for policy change in which the Government was not interested. Other interviewees felt that the politicisation seemed to come from the ALRC itself. There was some criticism of the President during this time and although he denied it, a number of interviewees suggested that he had engaged in party politics. It is not necessary to apportion responsibility but it is clear that the ALRC did become politicised. A

<sup>51</sup> For an interesting discussion of the possible legal bases for the LC's independence, see H Beynon *Independent Advice on Legislation* (DPhil Oxford University, 1982) 88-91.

<sup>52</sup> A minor infringement on this independence in terms of the ALRC has been the trend in the 1990s for that Commission's terms of reference to list, albeit in very broad terms, who has to be consulted.

<sup>53</sup> See also P Handford 'The Changing Face of Law Reform' (1999) 73 Australian LJ 503, 508; House of Representatives Standing Committee on Legal and Constitutional Affairs *Law Reform: The Challenge Continues* (Australian Government Publishing Service Canberra 1994) 60.



public conflict between an independent Commission and a Government over issues of social policy, regardless of who is responsible, inevitably drags the Commission into the political arena.

These concerns about politicisation may be linked with who leads the Commission. Leaving aside the particular people involved in this controversy, it is less likely that the ALRC would have become politicised to the same extent under a judicial President. Firstly, it is more likely that a judge would shy away from political controversy. Kirby said that the dignity of judicial office made him conscious of avoiding party politics.<sup>54</sup> Secondly, a Government is more likely to approach a Commission like the ALRC with its concerns more gently if it had been dealing with a judicial President. This can be contrasted with the LC where it is suggested that the judicial chair in England underpins the Commission's independence and distance from Government.<sup>55</sup>

Another factor that challenges the independence of the LRCs is that they rely on their Governments for funding.<sup>56</sup> There was some suggestion that tension between the ALRC and its Government may have been responsible for the recent trend in funding cuts. This can challenge not only the freedom of a Commission to reach its own decisions but can also threaten its independence in a different way in that it undermines a Commission's security in its future.

One former ALRC Commissioner noted another challenge to the independence of the Australian Commission. The ALRC relies on its Government to keep it employed by referring it projects and this meant that the Commission tended to feel 'more of a supplicant' in this relationship. It was suggested that the ALRC was 'always on the go to show that law reform is still valid and wondering whether there were any more topics within the federal Constitutional power that you haven't looked at yet.' The possibility of running out of work affected the ALRC's independence in the 'sense of its continuity and its faith in the future'.<sup>57</sup> This was contrasted with the LC whose approved Programme is so big that running out of work and becoming defunct are not genuine concerns.

<sup>54</sup> This may have also been an issue in the early days of the Commission. (SD Ross *Politics of Law Reform* (Penguin Books Ringwood 1982) 76-77)

<sup>55</sup> NS Marsh 'Law Reform in the United Kingdom: A New Institutional Approach' (1971-1972) 13 William and Mary LR 263, 276. See also G Palmer *Evaluation of the Law Commission* (Chen & Palmer Wellington 2000) 55 which outlines a table of the factors that support and detract from the independence of the New Zealand LC, but compare H Beynon *Independent Advice on Legislation* (DPhil Oxford University, 1982) 89.

<sup>56</sup> Also noted in P Handford 'The Changing Face of Law Reform' (1999) 73 Australian LJ 503, 508.

<sup>57</sup> Becoming defunct through neglect is more than a theoretical possibility. The New South Wales LRC, which also relies on Government references, was not given any new references between 1988 and 1990 and had real concerns about whether it could continue to exist. (New South Wales LRC *Annual Report - 25th Anniversary Report* (1991) 19-22; P Handford 'The Changing Face of Law Reform' (1999) 73 Australian LJ 503, 511)

A final factor counter balancing a LRC's independence is another aspect of its constitutional role: it is an advisory body.<sup>58</sup> This means that it relies on the agreement of Government before its work becomes law. This can sway a Commission to produce recommendations that are 'acceptable' rather than exercise its free judgment. It is interesting to note that this challenge to independence comes from the Commissions themselves. Both LRCs, in addition to asserting their independence, said that they were practical bodies and wanted to produce recommendations that were capable of implementation. This balancing exercise has a significant impact on the LRCs when writing their proposals and this is discussed in Chapter 7.

In addition to balancing a Commission's independence, a few interviewees rightly noted that being an advisory body also has implications for its relationship with Government. A Commission's primary function is to advise the Government and to provide it with all the information that is needed to make a decision on an issue. This aspect of the LRCs' constitutional role was what led an interviewee to comment that their Commission was still part of the 'Government machine.'

#### 4.2.2 Other Factors

The LRCs' constitutional role is the major influence on the relationship that they have with their Government. There are, however, other important factors that also play a role. One of these is the extent to which the Civil Service feels that a LRC is 'stepping on its turf'.<sup>59</sup> A classic example from England is the traditionally poor relationship that the LC has had with the Home Office who saw the Commission as an interloper.<sup>60</sup> Whether a LRC gets this negative reception from the Civil Service depends partly on the background of the people working both at the Commission and at the Government. Cross pollination of staff between the two bodies helps avoid negative opinions about the other and also brings a useful networks of contacts. The two LRCs, being the smaller organisations, nearly always have some staff from the Civil Service, although the changing composition of the Commissions' staff discussed in Chapter 2 means that there are fewer today than in the past.

The ALRC went one step further and has had a number of former public servants in high level positions including one as President and a couple of Deputy Presidents. This was useful because it brought contacts with Departments, in Government and in politics as well as an understanding of how the Government machine worked. This should also have improved the Commission's relationship with Government. Unfortunately, this was not

<sup>58</sup> Although two LC interviewees thought that being merely an advisory body could actually foster a Commission's independence. They suggested that being one step removed from the final decision meant that the Commission is less constrained by the political and other pressures that bind Governments.

<sup>59</sup> In the case of the LC, see also AL Diamond 'The Law Commission and Government Departments' in G Zedlick (ed) *The Law Commission and Law Reform* (Sweet & Maxwell London 1988).

<sup>60</sup> See for example, SM Cretney 'The Politics of Law Reform - A View from the Inside' (1985) 48 MLR 493, 509-510.

always the case and during the Presidency of a former public servant, relations with Government were at their poorest.

Another factor identified as affecting a LRC's relationship with Government is the personalities involved.<sup>61</sup> The personal chemistry between the people in the LRCs and their Ministers and the Civil Service affects their institutional relationship. Some interviewees thought that the breakdown between the ALRC and its Government was exacerbated by the conflict in personalities of the different people involved. Establishing good personal relationships with Government is more difficult for the ALRC because its topics are so wide ranging. This means that the Commission works with different parts of the Public Service on each project so longer term working relationships are more difficult to form. This is less of a problem for the LC as its teams work in established fields of law.

An influence on a LRCs' relationship with its Government is the location of the Commission. This is not a problem for the LC as it is based in London with its Government. However, the ALRC's location is a more contentious issue. It was originally established in Sydney and has remained there ever since. At the time of its foundation, the Commission said that its intention was to be based in Canberra.<sup>62</sup> However, it could not get an office there so it located in Sydney temporarily with the intention of moving within five years.<sup>63</sup> The move never eventuated although there have been two periods when a second Canberra office was opened, firstly between 1983 and 1987 and later from 1994 to 1999.

Being located in Sydney made the ALRC's relationship with its Government more difficult. The experience of the most recent Canberra office adds weight to this view as a local presence was said to have fostered better relations with Government, particularly the Public Service. In spite of this, a majority of interviewees who addressed the issue of location thought that the ALRC should be based in Sydney. It has the biggest population and more of the leaders in various fields than anywhere else in Australia and this is critical for such a strongly consultative body. Canberra is seen as being far too bureaucratic and removed from ordinary people. A smaller number of people thought that the ALRC should be in Canberra.<sup>64</sup> The main reason was to promote a good relationship with Government although there is also the view that national bodies should be based in the nation's capital.

### 4.3 The Actual Relationship

<sup>61</sup> See also Hurlburt who, for example, identifies that an insecure and timid Minister is more likely to be threatened by a LRC report (WH Hurlburt *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber Edmonton 1986) 386) and House of Representatives Standing Committee on Legal and Constitutional Affairs *Law Reform: The Challenge Continues* (Australian Government Publishing Service Canberra 1994) 115.

<sup>62</sup> ALRC Annual Report (Report No 3, 1975) 31.

<sup>63</sup> ALRC Annual Report (Report No 3, 1975) 31.

<sup>64</sup> See also ALRC Annual Report (Report No 3, 1975) 31-32. The early Commission thought it was obvious that the ALRC should be based in Canberra and pre-empted the arguments that interviewees gave.

Having considered the factors that influence the relationship that the LC and the ALRC have with their Governments, how these factors fit together and the actual experience of two LRCs is examined. The LC's relationship with its Government has varied depending on the Department and also the LC team. Generally, the relationship between the LC and the Department for Constitutional Affairs has been good. In particular, the relationship with the Family Law team at the LC was very good and this is reflected to some extent in the high level of implementation that the team achieved.<sup>65</sup> This positive institutional relationship was partly underpinned by the good personal relationship that Lady Justice Hale and some of her predecessors had with the Government.

Traditionally, relations with the Home Office were not as good. This was partly due to a perception that the LC was 'stepping on its turf' and partly because the Home Office had other more pressing political priorities. This distance also has historical roots because the Criminal Law Revision Committee or the Home Office's own research unit traditionally investigated those matters of greater Ministerial interest while the LC was more remote from the Department doing work on its Criminal Code. Difficulties in this relationship are reflected in the Criminal Law team's poor record of getting its reports implemented. This improved when Mr Justice Silber, who became Commissioner of this team, and Lord Justice Brooke as Chairman worked hard on this relationship and eventually brought the LC 'in from the cold'.<sup>66</sup> They secured introductions to the policy makers with whom productive relationships were established. This period also saw the Criminal Law team become more focused on doing projects that were useful to the Government.<sup>67</sup> However, despite this improvement, at least some difficulties in the relationship with the Home Office remain.

The LC also covers areas of law that fall within the portfolio of other Departments. For example, the now defunct Company and Commercial Law team worked very closely with the Department of Trade and Industry. The terms of the Programme item that allowed the LC to work in this area actually required the Commission to get Departmental approval prior to undertaking a project.<sup>68</sup> The Property and Trust Law team is also collaborating more closely with Government after some initial distance. It recently completed a joint project *Land Registration for the Twenty-First Century* with Her Majesty's Land Registry that was very successful in that most of its recommendations were implemented and very quickly.<sup>69</sup>

Overall, with the exception of the Home Office, the LC seems to have had a good relationship with the Government. This is fostered, in part, by the

<sup>65</sup> This is to some extent confirmed in SM Cretney 'The Politics of Law Reform - A View from the Inside' (1985) 48 MLR 493, 510.

<sup>66</sup> Interview with Lord Justice Brooke (15 May 2001, London)

<sup>67</sup> Examples include LC *Offences of Dishonesty: Money Transfers* (Law Com No 243, 1996) and LC *Legislating the Criminal Code: The Year and a Day Rule in Homicide* (Law Com No 230, 1994)

<sup>68</sup> LC *Sixth Programme of Law Reform* (Law Com No 234, 1995) 36.

<sup>69</sup> LC *Land Registration for the Twenty-First Century* (Law Com 271, 2001) largely implemented by Land Registration Act 2002 (UK).

ongoing contact between the two. The LC has traditionally had regular meetings (at least annually but usually more frequently) with both Ministers and civil servants from the Department for Constitutional Affairs and other Departments. These meetings are to discuss the LC's work generally to date and reports that are yet to be implemented. There are also more informal ongoing dialogues and Departments are consulted during projects.

A recent development seems to be an increased level of contact and a closer relationship between the LC and Government.<sup>70</sup> This trend started when Lord Justice Brooke became Chairman as he was very interested in having the Commission connect more closely with Government (and other bodies). His successors all fostered this closer relationship and in particular, this seemed to flourish under the former Chairman, Lord Justice Carnwath. It was under his Chairmanship that a further development took place: the establishment of the Ministerial Committee on Law Reform. This Committee is discussed in more detail in Chapter 8 but its main function is to help choose new LC projects that have high level Government approval and interest. It also aims to facilitate the implementation of outstanding reports. This Committee was an initiative of the previous Lord Chancellor who was keen on a closer relationship with the LC.

The ALRC has not been as successful in its relationship with Government.<sup>71</sup> Throughout its early history, the Australian Commission seems to have struggled to establish a good relationship with the Public Service. Mr Stephen Mason, a long serving ALRC Secretary and later Commissioner, thought that this came to a head in the mid 1980s. ALRC reports were not seen as an answer to a problem by the Attorney-General's Department but as a problem themselves that needed further processing and consultation. The ALRC was seen as being outside of the Government machine and the excessive time the Commission took to report meant that its recommendations, when they were finally completed, did not fit within the Government's reform programme. In short, the ALRC was not fulfilling its advisory role. Mason said the Commission then became more focused on this part of its function. It re-evaluated its relationship with Government and decided to try and ensure that its work was more relevant to the Government's reform programme.<sup>72</sup> He thought that since this shift in the mid 1980s, the ALRC had been successful in working more closely with the Government and fulfilling its proper advisory role in the Government's reform programme.

Relations became troubled again, however, and during the mid-late 1990s, the relationship between the ALRC and the Government became strained and eventually broke down. The reasons for these difficulties have already been

<sup>70</sup> LC Eighth Programme of Law Reform (Law Com 274, 2001) 52.

<sup>71</sup> The ALRC is not the only Commission with these difficulties. Its neighbour, the New Zealand Law Commission, has also struggled in its relationship with Government. The need for improvement in this relationship was one of the key findings of a recent evaluation of the New Zealand Commission. (G Palmer *Evaluation of the Law Commission* (Chen & Palmer Wellington 2000))

<sup>72</sup> In its 1986 Annual Report, the ALRC set out its view of what areas should be in this programme of reform and the Commission's role within it. (ALRC *Annual Report* (Report No 34 1986))

discussed. Usually, the Commission has regular meetings with the Attorney-General, his advisors and the Department to discuss general matters. In addition, there is usually ongoing contact between the Attorney-General's Department and the ALRC at all levels, and indeed the Commission generally consults a number of different Departments during its projects. However, at one point during this time, a breach occurred and communication between the President of the ALRC and the then Attorney-General stopped. This also affected relations and communication between the lower levels of the Department (and the Government in general) and the Commission. The ALRC has now restored its relationship with the Government. The Commission was very conscious of the need to create a positive environment and has worked very hard to achieve this. It is suggested though, that the ALRC will never achieve a very close relationship while it is based in a different city from its Government.

In terms of the issue of independence, it is clear that both Commissions are substantially independent. Again, the type of independence that is focused on here is the freedom to recommend solutions without interference. Both Governments at times disagreed with the views of their LRCs, but interviewees did not report them seeking to influence Commission decisions inappropriately.<sup>73</sup> Another potential challenge to independence that was identified was the Commissions themselves and their desire to have their reports implemented. Although both LRCs make adjustments to their proposals to ensure that they are capable of implementation, the extent to which this happens does not seem to undermine their independence.

When comparing the independence of the two Commissions, the LC seems to have slightly more autonomy than the ALRC in reaching its own decisions. In spite of the recent trend towards a more collaborative approach with Government, its independence was emphasised very strongly by LC interviewees. In any event, this collaboration is directed mainly towards identifying appropriate projects for the Commission to undertake rather than the decision making within those projects. This greater LC independence is consistent with concerns noted above about the ALRC being 'more of a supplicant' in its relationship with Government due to the need for a reference. The former ALRC Commissioner who made this point earlier also points to the relatively low level membership of the Commission, including the absence of a judicial chair, as weakening the Australian Commission's independence.

A final issue relevant to the ALRC's relationship with, and independence from, the Government is its role in making submissions to other reform bodies. Whether the ALRC is permitted to take this role was the subject of much recent controversy.<sup>74</sup> It began with the ALRC making a submission that was

<sup>73</sup> The Parliamentary Committee that investigated the ALRC in 1994 concluded that its 'reasonable operational independence has been honoured.' (House of Representatives Standing Committee on Legal and Constitutional Affairs *Law Reform: The Challenge Continues* (Australian Government Publishing Service Canberra 1994) 115)

<sup>74</sup> This issue is mentioned only briefly to shed light on discussion of the relationships above because it is outside the ALRC's major function of producing reports and also it was not highlighted as an important issue by the interviewees.

contrary to Government policy to a Parliamentary Committee dealing with native title. This prompted the Attorney-General's Department to contact the Commission and discuss its decision to become involved in that inquiry. The ALRC then decided to withdraw its submission. This had a significant impact on the relationship between the two because it was the key event that really ignited tensions between the ALRC and the Government. There was a claim that the ALRC, as a witness before a Parliamentary Committee, had been interfered with. Related to this is, of course, the issue of the Commission's independence.<sup>75</sup>

Whether the ALRC's independence in this context was compromised is difficult to gauge. The answer to this question probably depends on whether or when the ALRC is entitled to make submissions to other bodies. If the ALRC has acted beyond its statutory powers, then the Government is entitled to raise the issue with the Commission. If not, the Government has acted inappropriately in trying to curtail a Commission pursuing its functions. The few interviewees who commented on the issue were either non committal or of differing views. The Australian Senate's Legal and Constitutional Committee was referred the matter to consider but the issue quickly became politically unimportant. A change in the ALRC's personnel and the development of a protocol dealing with when the Commission is able to make an external submission meant that it was no longer controversial. The Committee's reference remained on its books for about five years before it finally reported that the matter need 'not proceed further.'<sup>76</sup>

#### **4.4 Encouraging Government to Consult**

Part of the relationship that a LRC has with its Government is the extent to which its Departments are prepared to consult with the Commission on its projects. In general, both the LC and the ALRC found it difficult to engage their Government Departments in consultation.<sup>77</sup> One LC Commissioner said that 'they tended to want to keep their powder dry.' The main reason for this is that Departments do not want to commit themselves before they and the Minister have seen the report, even though a Departmental submission could

<sup>75</sup> For the ALRC's view on this series of events, see ALRC *Annual Report* (Report No 86, 1998) 19-21.

<sup>76</sup> Senate Legal and Constitutional Committee 'Powers and Functions of the Australian Law Reform Commission: Final Report' (20 March 2003) available at [http://www.apl.gov.au/senate/committee/legcon\\_cte/alrc/report/report.pdf](http://www.apl.gov.au/senate/committee/legcon_cte/alrc/report/report.pdf) (17 November 2003) The claim that the ALRC had been improperly interfered was also investigated by the Australian Senate Committee of Privileges. (Senate Committee of Privileges *Possible Improper Interference with a Potential Witness Before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* (Australian Government Publishing Service Canberra 1998)) It concluded that there was no interference with witnesses.

<sup>77</sup> North also discusses the difficulties the LC had in getting Government to engage in consultation. (PM North 'Law Reform: The Consultation Process' (1982) 6 Trent LJ 19, 28-30; PM North 'The Law Commission - Methods and Stresses' (1981) 3 Liverpool LR 5, 9-10) See also L Hooson 'Reform of the Legislative Process in the Light of the Law Commissions' Work' (1983) 17 The Law Teacher 67, 69, although of a more moderate view in SM Cretny 'The Politics of Law Reform - A View from the Inside' (1985) 48 MLR 493, 507.



not bind them or the Minister. Other reasons included that they are too busy and that they know there is still a further final round of consultation to come.

A couple of Australian interviewees discussed whether it was appropriate for a Department to be involved in the ALRC's consultation and make a formal submission. Mr David Edwards, a former Deputy Secretary of the Attorney-General's Department and later Deputy President of the ALRC, thought that it was entirely appropriate and indeed very important for the Department to consult.<sup>78</sup> During his time as Deputy Secretary, the Department would generally make formal submissions to the ALRC. He recognised that a submission cannot bind the Minister, but Edwards distinguished between giving information and analysis and giving an actual opinion on policy. By contrast, the next Deputy Secretary disagreed and thought it was inappropriate for the Department to consult and in particular, make a formal submission. This would have the Department acting as though it were any other interest group trying to influence an ALRC report which is incompatible with its role as advisor to the Government. Accordingly, the Department stopped making formal submissions to the ALRC.

### 5 CONCLUSION

This chapter explored those influences that shape the consultation of the LC and the ALRC. Some of these influences are subtle and were not identified by many interviewees. However, their impact is often significant, and in some cases central to how a Commission consults. This is illustrated best by the reasons why the LC and the ALRC consult differently. Different influences on the two Commissions have meant that relatively similar bodies have taken quite divergent approaches to consultation.

Ascertaining these influences that set the two Commissions on different consultation paths was the primary goal of this chapter and a number of factors were identified. The two most important contrasting influences are the histories of the two Commissions and the different types of projects they consider. Although interviewees emphasised the impact of project topic, the Commissions' histories is the more important of the two influences. This is illustrated best when the Commissions undertake atypical projects. The LC does not consult as broadly as the ALRC would when it considers more social projects while the Australian Commission, when consulting on technical legal subjects, does not take as focused approach as the LC would. Although the project topic has a significant influence, history has created different cultures at both Commissions that determine their general approach to consultation. There is flexibility in this approach so the project topic can alter what consultation occurs, but history and culture have established a framework within which the Commissions' consult.

History is also the most important contrasting influence because a number of the other influences that shaped the differences in the Commissions'

<sup>78</sup> This was also the view of Senate Standing Committee on Constitutional and Legal Affairs *Reforming the Law* (Australian Government Publishing Service Canberra 1979) 29.



consultation are derived, at least in part, from the past. For example, the types of projects that the ALRC receives today are linked with its past expertise in dealing with these sorts of topics. The impact that Australia's federal system and the nature of Australian society have on consultation is also based in the ALRC's early days. Of particular importance when considering the influence of history is the impression that two leading individuals have had on their Commissions. An important part of the history of the LC and the ALRC is the personal impact of the first Chairmen, and in particular, that of Justice Kirby. His influence on the ALRC's consultation process is discussed at a number of points throughout this thesis.

This chapter, in its second section, also considered other more general influences on consultation that are not specifically related to explaining the differences between the LC and the ALRC. The most important of these is the impact of the Commission's staff and Commissioners as their personal attributes, beliefs and abilities have a significant impact on the consultation that occurs. However, the influence of history intrudes again and limits the impact that an individual's personal characteristics can have. The culture discussed above has established a framework within which consultation must occur and this restricts the scope of an individualised approach.

The third goal of this chapter was to explore the relationship that the LRCs have with their most important consultee: Government. The Government influences what topics a Commission can consider, whether the resulting proposals become law and Government also often has significant expertise in the area being examined. So this relationship has a critical influence on the consultation that takes place with Government. Although there are a number of factors that influence this relationship, such as the Commissions' constitutional role and their physical location, the most important is personal relationships. The quality of relations between individuals at the Commissions and in Government, whether good or bad, was reflected in their institutional relationship at various times.

Looking at the influences on consultation as a whole, two trends emerge. The first is the importance of history. The culture of consultation is the most important influence in terms of why the Commissions consult differently and it is also relevant to the second section of this chapter that considered the more general influences on consultation. The second trend is the impact that people or personal factors have had. The consultation of both the LC and the ALRC is influenced still today by their first Chairmen. Further, people's individual characteristics were noted as being a significant influence on consultation, and personal relationships were the key factor underpinning the success or failure of the Commissions' relations with their Government.

The goal of this chapter was to identify the influences on consultation and, in particular, those factors that led to the LC and the ALRC adopting the expert and inclusive models of consultation respectively. These contrasting influences have been identified and a preliminary explanation of some of the major differences in the Commissions' approach to consultation has been put forward. This, however, is only the start. The remainder of this thesis seeks to

Describe the consultation of the LC and the ALRC and, using the framework of contrasting influences outlined here, explore how and why the Commissions consult differently.