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# PREROGATIVE WRIT PROCEDURES

## REPORT OF COMMITTEE OF REVIEW

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# REVIEW OF PREROGATIVE WRIT PROCEDURES

The Commonwealth Administrative Review Committee was established in October 1968 under the chairmanship of His Honour, Mr Justice Kerr. Amongst its terms of reference were:

> 1. To consider what jurisdiction (if any) to review administrative decisions made under Commonwealth law should be exercised by the proposed Commonwealth Superior Court, by some other Federal Court or by some other Court exercising federal jurisdiction.
> 2. To consider the procedures whereby review is to be obtained.
> 3. To consider the substantive grounds for review.

This Committee is referred to in this paper as the 'Kerr Committee'.

**2.** The then Prime Minister, Mr McMahon, when presenting the Kerr Committee Report to the House of Representatives on 14 October 1971, stated that a group of three people was to be appointed to examine existing administrative discretions under Commonwealth statutes and regulations and to advise the Government as to those in respect of which it considered a review on the merits should be provided. His statement continued:

> In addition the Government has decided to ask the Attorney-General (Senator Greenwood) to institute a review of the prerogative writ procedures available in the courts. We accept the comment of the Committee that the legal grounds on which remedies can at present be obtained are limited and often complicated. The Attorney-General's review of remedies available in the courts will take place concurrently with the study I have mentioned of the existing range of administrative discretions under statute or regulation. This review should also lead to recommendations which the Government will consider.

**3.** Following upon this statement the then Attorney-General requested Mr F. J. Mahony (Deputy Secretary, Attorney-General's Department) and Mr L. J. McAuley (Assistant Deputy Crown Solicitor, Sydney) in association with the Solicitor-General, Mr R. J. Ellicott, Q.C., to prepare a paper reviewing the prerogative writ procedures available in the courts. It is to this matter that this paper is directed.

**4.** We shall deal with four matters:

(a) What are the deficiencies in the present procedures available for the judicial review of administrative decisions.

(b) What improved procedures should be adopted for the judicial review of administrative decisions.

(c) Comments on Kerr Committee recommendations.

(d) Could proposals for improved precedures for judicial review be now implemented.

**5.** We conceive it to be our task to consider these questions in the light of the relevant proposals contained in the Kerr Committee report and, having in mind Mr McMahon's statement, we propose to recommend what steps the present Government should take in relation to the reform of existing procedures for judicial review.

## (a) Deficiencies in the present procedures

**6.** It is not proposed to deal in great detail with the question of deficiencies in existing procedures. That there are deficiencies is well known and appears to have been accepted by Mr McMahon in his statement in the House when he said that he accepted the comment of the Kerr Committee that the legal grounds on which remedies can at present be obtained were limited and often complicated.

**7.** The position is summarised in the 1968 report of the Victorian Statute Law Revision Committee which considered the subject of judicial review and the prerogative writs (referred to by the Kerr Committee at p. 27 of its report). The Victorian Committee stated:

> Much has been written about the shortcomings of the prerogative writs when viewed in the light of the changed administrative structure of the Executive. It would serve little purpose to incorporate a catalogue of the various criticisms here in view of the fact that obviously they have wide acceptance. There is general agreement that the system surrounding the writs is immersed in technical procedural snares which delay, and in some instances prevent, proper review by the courts. It is not uncommon that, after lengthy legal argument, the court will hold that a particular writ is not available, and because the boundaries of each remedy are undefined (and perhaps undefinable) there are many cases which never proceed further. The historical restriction on the issue of certiorari and prohibition to bodies held to be acting in a judicial capacity may involve extensive argument in determining whether a particular body does in fact have a judicial function. Time may be consumed considering some doubt as to whether certain defects in the exercise of discretionary powers go to jurisdiction, and hence are amenable to certiorari. In terms of the individual seeking a just solution to his problem, the ramifications of judicial review by these methods are at best frustrating. The salient feature of interest to him in these proceedings — the legality of the administrative act or decision at issue — appears to be subordinate to seemingly endless legal argument as to the propriety of the method of review employed. Such exchanges will involve him in substantial costs and may not succeed in supplying him with a firm solution to his problem. In any case, a judicial consideration of the lawfulness of an administrative act or decision may not always satisfy his real need — a means of reviewing the fairness, adequacy, or impartiality of such an act or decision. Challenges by way of the prerogative writs often fall short of a satisfactory appeal because they are of limited application. A judicial review by this means cannot result in findings of fact being upset so long as there has been no misconduct, bias or wrongful application of law by the tribunal whose decision it is sought to impugn.

**8.** K. C. Davis, dealing with the position in America (*Administrative Law Treatise* (1958) Vol. 3, p. 388-389) was more picturesque. He wrote of the prerogative writ procedures:

> No branch of administrative law is more seriously in need of reform than the common law of the state courts concerning methods of judicial review. No other branch is so easy to reform.
>
> An imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system . . . The cure is easy. Establish a single, simple form of proceeding for all review of administrative action.

**9.** The deficiencies in the existing procedures and the problems that arise in deciding what remedy is appropriate are outlined in the report of the Kerr Committee in Chapter 3 (paras. 21-58, pp. 9-20). The report does not purport

to set out exhaustively the problems that arise but those to which the report draws attention make it clear that the procedures now available are completely unsatisfactory. Some of the difficulties to which attention is drawn are:

(1) There is a complex relationship between the principles of review and the remedies available.

(2) Technical limitations diminish the effectiveness of remedies which at first sight appear to be fairly comprehensive.

(3) Substantive principles are often concealed in what appear to be procedural restrictions.

(4) A person seeking relief against an administrative decision must choose the right court, an appropriate ground of attack and the proper procedure or remedy to be sought. Sometimes this will involve him in the consideration of complex questions which are dealt with in the report.

(5) Even if the person aggrieved is successful in having a decision set aside, it is not open in many cases to the court to decide the question in his favour and the matter is remitted to the administration for further consideration in accordance with law.

**10.** A perusal of the cases in which the prerogative writs have been involved shows that a great portion of the court's time is frequently taken up with argument about whether the particular remedy involved is the correct one, or whether the decision sought to be reviewed is subject to review, or whether the correct court has been chosen, rather than with the substantial matter in dispute, namely, the correctness of the decision sought to be reviewed.

**11.** Some examples of the very real difficulties that can arise in using the prerogative writs to review administrative decisions are set out in Annexure 'A' hereto.

**12.** The Kerr Committee concluded that the law relating to judicial review of administrative action is technical and complex and in need of reform simplification and legislative statement. We agree with this statement and with the Committee's comment (p. 20 para. 58):

> It is generally accepted that this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy and unnecessary. The pattern is not fully understood by most lawyers; the layman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy and the non-lawyer can never appreciate why this should be so.

**13.** It is our opinion that the Government should accept the view which, in essence, is that of the Kerr Committee, that the present law relating to the judicial review of Commonwealth administrative decisions is deficient and in need of reform and simplification and that remedial legislation should be introduced.

### (b) Improved procedures for judicial review of administrative decisions

*(a) Kerr Committee recommendations*

**14.** In dealing with the question as to improved procedures for judicial review of administrative decisions, it is convenient, first, to outline the recommendations made by the Kerr Committee in this regard.

**15.** These recommendations were made at a time when it was in doubt whether the Commonwealth would proceed with the Commonwealth Superior Court Bill. Subsequently the previous Government announced that it would not proceed with this Bill. However, we understand it is likely that the present Government will

establish a Commonwealth Superior Court and we have drawn this report on that basis. In summarising the Kerr Committee recommendations, it is convenient, for present purposes, to omit the references therein contained to a Commonwealth Administrative Court. The main recommendations (see p. 112 para. 390) are as follows:

(1) That the proposed Commonwealth Superior Court should exercise jurisdiction by way of judicial review of the decisions of Commonwealth Ministers, officials and administrative bodies.

(2) The Court should be limited in jurisdiction to judicial review on legal grounds and should not have jurisdiction to review on the merits decisions of Commonwealth Ministers, officials and administrative bodies.

(3) That there should be a simple procedure in the Court to be provided for by statute which should also set out the legal grounds upon which review may be granted.

(4) That the form of procedure for judicial review should be by simple originating summons taken out by a person aggrieved by a decision.

(5) That the grounds upon which relief may be granted by the Court should be (see also p. 77 para. 258):

- denial of natural justice
- failure to observe prescribed procedures
- want or excess of jurisdiction
- ultra vires action
- error in law
- fraud
- failure to reach a decision where there is a duty to do so and
- unreasonable delay in reaching a decision.

(6) That the Court should be able to grant relief by way of (see also p. 78 para. 263):

- an order quashing or setting aside a decision (which could include a report or recommendation — see sub-paragraph (8) hereof)
- an order restraining proceedings without jurisdiction or any breach of natural justice or any breach of procedural requirements prescribed by statute or regulation
- an order compelling the exercise of jurisdiction or observance of natural justice or statutory or regulatory procedures
- an order referring the matter back for further consideration
- a mandatory order compelling action unlawfully withheld or unreasonably delayed
- an order declaratory of the rights of the parties
- such other order as may be necessary to do justice between the parties.

These powers to grant relief are much wider than those at present available under the prerogative writs.

(7) That there should be an appeal by leave to the High Court and the Court should be authorised to state a case to the High Court on a question of law or of mixed fact of law.

(8) That judicial review of the kind recommended should include review of decisions (including in appropriate cases reports and recommendations —

see p. 76 para. 253) of Ministers, public servants, administrative tribunals and, if it is established, of the Administrative Review Tribunal recommended by the Committee, but not decisions of the Governor-General At p. 78 para. 265, the Committee stated that it may not be desirable in all cases to allow relief against a Minister because of the questions of policy involved.

(9) That a person aggrieved should be entitled to apply for and receive reasons for the decision and a person who has filed a summons should be entitled to apply for and receive such reasons and particulars of the finding of fact and of considerations taken into account in reaching the contested decision.

(10) That the Attorney-General should be entitled to intervene as of right in such proceedings.

(11) That there should be statutory provisions designed to protect the disclosure of official documents.

(12) That, in general, privative clauses i.e. provisions in statutes aimed at ousting the jurisdiction of a court to grant judicial review of an administrative decision should not be retained in Commonwealth legislation.

**16.** These are the basic recommendations of the Kerr Committee relating to judicial review. The Committee did, of course, make recommendations aimed at providing a system of review of administrative decisions on the merits which involve the establishment of an Administrative Review Tribunal, an Administrative Review Council and an office of General Counsel for Grievances. A significant emphasis in the Committee's Report was that review of administrative decisions could not, as a general rule, be obtained on the merits and that this was usually what the aggrieved citizen was seeking. It was to provide a general system of review on the merits that the establishment of the Tribunal, Council and the office of General Counsel was recommended.

**17.** Review on the merits, however, is not the same as 'judicial review'. The latter is limited to those cases where courts intervene to grant relief with respect to administrative decisions. It is in this sense that the phrase 'judicial review' is used in the Kerr Committee Report and in this report. It is not possible, under the Australian Constitution, for courts to exercise a general jurisdiction reviewing administrative decisions on the merits. In many cases review on the merits would not constitute an exercise of judicial power.

**18.** The task of considering review on the merits has been given to the committee which is under the chairmanship of Sir Henry Bland and it is not conceived to be part of our function to comment on it.

*(b) Effect of recommendations*

**19.** This committee is in general agreement with the recommendations of the Kerr Committee with regard to judicial review which, in the main, we have summarised. Those recommendations, if implemented, would in our view, resolve many of the existing problems in regard to review by courts of administrative decisions. In particular:

(1) A person aggrieved by a decision will be enabled to obtain a statement of the reasons for the decision.

(2) Procedures will be greatly simplified and, it is hoped, will be expeditious.

(3) A person aggrieved will no longer run the risk of applying for the wrong

remedy, e.g. prohibition at a time when the deciding authority is functus officio.

(4) The grounds upon which the court can grant relief will be stated with greater certainty.

(5) The present risk of choosing the wrong court in which to bring proceedings will be eliminated. This is because the court exercising supervisory judicial review is to be given jurisdiction in all instances (including those in which the High Court now has exclusive jurisdiction).

(6) The jurisdiction will be exercised by judges who should, over the years, gain considerable expertise in this area.

**20.** It is clear, of course, that for constitutional reasons, the High Court cannot be deprived of its jurisdiction to grant prerogative writs in appropriate cases. However, the establishment of a special court with simplified procedures should discourage prospective litigants from going to the High Court. Further, the existence of such a court would, no doubt, incline the High Court itself to discourage litigants from instituting proceedings in its more complex original jurisdiction.

### (c) Comments on Kerr Committee recommendations

**21.** As stated earlier, this committee is in general agreement with the scheme for judicial review proposed by the Kerr Committee and with the procedures outlined by it. The reasons for these recommendations are set out in the report and there is no point in our repeating them. There is, however, a number of matters which requires further consideration and upon which it may be helpful to make some comments.

*(a) Relief against the decisions of Ministers*

**22.** Before going on to a consideration of the extent to which decisions of Ministers should be subject to judicial review, it is important to keep in mind that the decisions in question are 'administrative decisions under Commonwealth law' (see para. 1 of the Kerr Committee terms of reference) and not, for example, political decisions.

**23.** As indicated earlier (para. 15(8) above) the Kerr Committee recommended that the legislation should provide that appropriate relief could be granted against Ministers of the Crown in relation to the exercise of discretions reposed in them by laws of the Commonwealth. It did, however, indicate that it may not be desirable in all cases to allow relief in relation to the exercise of a discretion by a Minister because of the questions of policy involved.

**24.** Therefore, one question which needs consideration by the Government, should it decide to legislate for a more simple and effective system of judicial review, is whether it should permit relief to be granted against Ministers and, if so, in what cases.

**25.** In answering this question it should be borne in mind that in the past the courts have sometimes granted relief against Ministers of the Crown in respect of the exercise of statutory discretions. For example, where the discretion is conferred on a Minister and the court regards it as having been given to him for the benefit of individual members of the public, the exercise of that discretion, according to law, has been controlled. Where, however, the discretion has been reposed in him as a servant of the Crown, the courts will not intervene. This distinction, however, is not clear and we would not recommend that it be perpetuated in legislation.

**26.** Because so many discretions are reposed by law in Ministers, it seems to us desirable that, as a general rule, an effective system of judicial review should provide for relief in respect of their exercise if the Minister acts contrary to law. This would not, of course, entitle the court to review the merits of a Minister's decision or to substitute its view for the Minister's as to how a particular discretion should be exercised. We think that it is desirable that these decisions should be subject to judicial review even though the exercise of the Minister's discretion may involve considerations of policy, or be an implementation of policy.

**27.** There may, however, be some discretions exercised by Ministers which ought not be subjected to a general system of judicial review because their policy content or other special reasons make this undesirable in the public interest. In some cases it will be found that procedures for review and perhaps judicial review, are already available. Discretions which, in our view, might be excluded would include some relating to defence, national security, relations with other countries, criminal investigation, the administration of justice and the public service.

*(b) What decisions should be excluded from review?*

**28.** The question of excluding certain decisions of Ministers from review has already been referred to above but it will also be necessary to consider the position in relation to decisions of public servants, authorities and tribunals.

**29.** Provisions for review in other countries e.g. England and New Zealand have excluded certain areas from review by a Parliamentary Commissioner or Ombudsman. These include action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters in relation to service in any office or employment under the Crown, or the exercise of the prerogative of mercy, or actions as a statutory trustee (for further examples *see* Schedule 3 of the English Parliamentary Commissioner Act 1967). However, review by an Ombudsman is not usually confined in the same way as judicial review. The role of Ombudsman should be to examine the correctness of a decision as a whole both to see that the correct legal principles have been applied and that the decision is correct on its merits whereas judicial review does not involve an examination of the correctness of the decision on its merits.

**30.** For this reason there is not the same need to exclude from judicial review all those discretions from which the Ombudsman might be excluded. It should be a cardinal rule that all officers and tribunals should act according to law. Nevertheless it will be necessary to consider whether there are some decisions of public servants, authorities and tribunals which, because of their nature, should be excluded from judicial review. For instance, it might be desirable that decisions relating to employment, given by way of example earlier in this section, might be excluded. In this connection it is to be remembered that where a decision is subject to judicial review a person making a decision can be required to state in specific terms the reasons for the decision (see paragraph 35 below). There may be special cases where a person making a decision should not be required to state reasons for his decision. One such case might relate to the acceptance of government tenders.

*(c) Decisions involving reports and recommendations*

**31.** The Kerr Committee recommended that in appropriate cases reports and recommendations should also be the subject of judicial review. What we have written in (a) and (b) with regard to excluding from judicial review certain decisions of Ministers and others will, of course, apply equally to reports and

recommendations. Subject to this, it is our opinion that reports and recommendations made or required to be made pursuant to a law of the Commonwealth or of a Territory should be the subject of judicial review.

### *(d) Powers of the Governor-General*

**32.** The Kerr Committee did not recommend review of powers exercised by the Governor-General and considered that the present law could perhaps be justified on policy grounds. Although it has at times been suggested that there should be judicial review of the Governor-General's powers (see, for example, article by P. W. Hogg 43 A.L.J. 215) this committee takes the view that there should be no such review.

### *(e) Other remedies*

**33.** In relation to some statutory discretions, provision is already made for judicial review before the courts, for example, under the taxation law. We think it is desirable that where this is the case the court exercising the jurisdiction for general judicial review should have power to decline to exercise its jurisdiction.

### *(f) Supply of reasons*

**34.** The recommendation of the Kerr Committee is that before issue of a summons, a person aggrieved or adversely affected by an administrative decision will be entitled to apply for and receive reasons for that decision. To confer such a right would clearly alter the existing law. However, it seems to us desirable that this recommendation be implemented. We think it is in the interest not only of the citizen but also of efficiency in the public service. It may also have the merit that persons who feel that they have been wronged by an administrative decision will abandon their claim when the reasons are known. The recommendation is also in accordance with the principles of open Government.

**35.** The Report also recommends that provision be made for a person who has filed a summons to apply for and receive reasons and to apply for and receive further and better particulars of the findings of fact and considerations taken into account in reaching the contested decision.

**36.** If these recommendations are implemented consideration will need to be given to measures to protect the disclosure of reasons which in the public interest should not be disclosed. We would expect that this should not be the ordinary case and that the public interest will in general only so dictate where matters of security, relationships with other countries, defence and questions of high government policy are involved. We recommend the following measures:

(1) Where reasons are sought prior to the proceedings being instituted, the responsible Minister should be empowered to certify that it is not in the public interest that the reasons or a particular reason or particular reasons be disclosed. It would be desirable to make it clear that he could so certify where to give the reasons would disclose confidential information either of the Crown or a citizen.

(2) Where proceedings have been instituted, the court should be empowered to call for a statement of reasons, to consider them privately in accordance with the present practice of the courts if a question of crown privilege arises in ordinary litigation and to decline to order the giving of reasons where it is of the opinion that it is in the public interest that they should

not be given or where it is of the opinion that it is not necessary that they be given in order to enable the applicant to obtain redress. The fact that the court would consider the matter without the applicant's counsel knowing the nature of the reasons would be a disadvantage, but it is no greater disadvantage than an applicant suffers at the moment in cases of a claim of Crown privilege.

(3) Where the court is of the opinion that reasons should be given it should be given it should have power to direct that they only be disclosed to counsel for the applicant or to a particular person on certain conditions which will protect the public interest.

**37.** In order that it be effective, the provision requiring that reasons be supplied will need careful drafting. It would not be helpful to a person aggrieved to be told simply that the decision of which he complained had been reached, e.g. because he was considered not to come within the ambit of a particular statutory provision.

**38.** In this connection, there is one further matter that should be mentioned. It is important that a decision which can be supported for reasons other than those on which it was originally based should not necessarily be upset and that the legislation should give the court power in such cases to confirm the original decision.

*(g) Grounds of judicial review*

**39.** In paragraph 15(5) above, we have set out the grounds for relief recommended by the Kerr Committee.

**40.** The grounds so stated are in a broad sense a summary of the grounds upon which the courts will intervene on an application for a prerogative writ. Each of them can be seen as a reason why the decision, if made, should have been set aside or, if not made, should be ordered to be made. A decision on any one of these grounds would not necessarily lead to an exercise of the discretion in favour of the applicant. In some cases it might do so e.g. where the only matter in issue was the correct construction of the particular statute.

**41.** In November 1972 Professor H. W. R. Wade, Professor of English Law at the University of Oxford and a leading authority in administrative law, visited Australia and in the course of discussions with the Solicitor-General and officers of the Attorney-General's Department expressed the view that it was unwise to specify particular grounds for review because this could have the effect of excluding the possibility of judicial development of additional grounds. As one possibility he suggested that there should be an open-ended ground such as 'contrary to law' leaving the court to work out the instances where it would intervene. He thought that the specification of particular grounds might give rise to an argument that because the grounds were specified no other grounds were available. Another matter which he raised was that if particular grounds were to be stated, there should be a lack of evidence ground.

**42.** We have considered the remarks of Professor Wade but we think there is some merit in specifying particular grounds on which relief may be granted. There is merit, however, in the suggestion that the grounds be, to some extent, open-ended and that the grounds should contain a special provision to cover lack of evidence.

**43.** We would recommend a provision which empowers the court to grant relief where it is of the opinion that the Minister, official or other authority is acting contrary to law. The legislation would also provide that without limiting the generality of the foregoing, the court should have power to give relief if any one

or more of specified grounds are made out. In addition to the grounds set out in the Kerr Committee Report we think it would be desirable to add another dealing with lack of evidence. This ground would need to be carefully formulated because often discretions are exercised not on legally admissible evidence but on information available to the particular officer which he accepts. It would, for instance, create considerable problems if before a statutory discretion could be exercised an officer had to have such evidence before him. The ground which Professor Wade had in mind is one which would enable relief to be granted where the fact which the officer relied upon for his decision did not exist or where the officer or tribunal was required to act on evidence admissible before it or on facts of which it might take notice and there was no such evidence or no such facts to support findings of fact made by the officer or tribunal in exercising his or its discretion.

*(h) General procedural provisions* (Para. 267)

**44.** It is suggested that the procedural provisions should provide for interrogatories or some similar machinery for eliciting facts relevant to the matter prior to the hearing. Provision might also be made for discovery and the giving of such directions by the court as appear best adapted for the just, quick, and cheap disposal of the proceedings.

*(i) Leave to commence proceedings* (Para. 254)

**45.** Under the present procedures for the granting of prerogative writs the usual course is for the applicant to apply in the first instance for an order nisi and a number of applications which are obviously doomed to failure are refused at this stage. We have given consideration to whether an applicant for review should be required to obtain leave of a judge of the court before commencing proceedings. Although this would, no doubt, have the effect of preventing some frivolous proceedings, the committee is inclined against it in view of the fact that a judge may not always be readily available to the applicant to deal with an application for leave, and because the necessity for application for leave would add to the expense of proceedings.

*(j) Proceedings in the High Court* (Para. 254)

**46.** Another question which arises is whether the procedures of the High Court in relation to the prerogative writs should be revised.

**47.** This committee recommends acceptance of the approach of the Kerr Committee, that is, that judicial review of Commonwealth administrative action should be vested primarily in a Commonwealth Superior Court, with the High Court exercising an appellate and stated case jurisdiction in relation to the decisions of that Court. It would not be possible by statute to prevent the issue of the prerogative writs out of the High Court due to the Constitution. These procedures would still be available for those who wished to make use of them. If this approach is adopted, revision of the High Court procedures is undesirable. For the reasons set out by the Kerr Committee (see p. 72 para. 241 of the Report), it is desirable that the work of supervisory review of Commonwealth administrative action should be channelled away from the High Court. Revision of procedures in the High Court at this stage would tend to attract work to that Court and the revised procedures would, of course, remain even after the Commonwealth Superior

Court had been established. This committee takes the view that there should be no revision of High Court procedures, at least at this stage.

### (d) Could proposals for improved procedures for judicial review be now implemented

**48.** We have considered the recommendations of the Kerr Committee as a whole. Although these were made with a view to recommending a comprehensive system of administrative review for the Commonwealth and, therefore, to some degree the proposals are interconnected, we do not think that the implementation of these proposals which relate to the reform of the prerogative writ procedures need await the completion of the task being undertaken by Sir Henry Bland's committee relating to review on the merits. As we understand it, Sir Henry's committee is, within the framework of the Kerr Committee's report, considering those discretions which might be made the subject of review on the merits and, therefore, consistent with the Report, sent for review either to a general Administrative Review Tribunal or some specialised tribunal. It would not be proposed to have these discretions reviewed by a court because of the constitutional limitations already mentioned.

**49.** In these circumstances, we do not think that the proposals for reforming the law in relation to judicial review of Commonwealth administrative discretions need await the implementation of the other proposals.

### Summary of recommendations

**50.** We recommend that:

(1) the Government accept the view of the Kerr Committee that the state of law relating to judicial review of administrative action is technical and complex and in need of reform, simplification and legislative statement;

(2) subject to the comments made in paragraphs 21-47 above, the Government proceed to implement those portions of the Kerr Committee's proposals relating to judicial review; and

(3) that the jurisdiction for judicial review be conferred on the proposed Commonwealth Superior Court;

(4) that the implementation of these proposals should proceed without awaiting decision on the implementation of the balance of the Report.

**51.** If the recommendations in the report are accepted the outlines of a scheme of judicial review appear to be reasonably well-settled subject only to decision on these matters:

(1) the extent to which the decisions of Ministers are to be made subject to such review,

(2) the decisions of public servants, authorities and tribunals which are to be excluded from judicial review.

It should be kept in mind that a reference in this report to a decision includes:

(1) a failure to reach a decision; and

(2) the making of or the failure to make a report or recommendation,

where the decision, report or recommendation is made or required to be made pursuant to a law of the Commonwealth or a Territory (see paragraph 253 of the Kerr Committee Report).

**52.** It would seem, however, that the drafting of the necessary legislation could proceed whilst these two matters are being considered.

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