Date introduced: 18 September 1985
House: House of Representatives
Presented by: The Hon. Lionel Bowen, M.P., Attorney-General

DIGEST OF BILL

Purpose

To repeal sub-section 69(3) of the Judiciary Act 1903 (the Principal Act).

Background

Sub-section 69(3) of the Principal Act provides:

"Any person committed for trial for an offence against the laws of the Commonwealth may at any time within fourteen days after committal and before the jury is sworn apply to a Justice in Chambers or to a Judge of the Supreme Court of a State for the appointment of counsel for his defence. If it be found to the satisfaction of the Justice or Judge that such person is without adequate means to provide defence for himself, and that it is desirable in the interests of justice that such an appointment should be made, the Justice or Judge shall certify this to the Attorney-General, who may if he thinks fit thereupon cause arrangements to be made for the defence of the accused person. Upon committal the person committed shall be supplied with a copy of this sub-section".

The sub-section was included in the Principal Act before Legal Aid schemes were introduced and was designed to enable poor people to engage legal representation. Since the establishment of Commonwealth funded legal aid in 1977 this need has largely vanished. The sub-section has remained in existence and was recently described by a Supreme Court judge as an 'historical anachronism'.[1] The sub-section has rarely been used and, until recently, it was
thought that the Attorney-General had a discretion to refuse arrangements for the person's defence unless he thought it fit to do so even though a Judge had certified that the person was without adequate means to provide a defence.

This view was changed in the recent Federal Court case of Maher v The Attorney-General decided in Brisbane on 3 May 1985. Mr Maher had been charged with a number of offences against Commonwealth law in connection with the 'bottom of the harbour' tax avoidance scheme. After being refused legal aid, Mr Maher sought and obtained a certificate under sub-section 69(3) of the Principal Act. The Attorney-General refused to make arrangements for his defence on the ground that Mr Maher could pay his costs from 'another source'.[2] Mr Maher sought a review of this decision in the Federal Court and was successful. The trial judge gave the following reasons:

Upon its proper construction, the sub-section in my opinion withdraws from question by [the Attorney-General] that which is certified to have been found, so that the exercise by the respondent of the discretionary power cannot lawfully be influenced by a finding contradictory of that which has been certified, or by a lack of satisfaction or persuasion as to that which has been certified.[3]

In effect, this decision removed the Attorney-General's discretion so that once a certificate is granted, the Attorney-General must arrange for the defence of the person to whom the certificate was granted. The provision of defence under the Principal Act has proved to be very expensive. It was recently announced that assistance granted to Mr Maher totalled $108,724.64.[4] As well, two other certificates have been granted and it is estimated that the cost in one of these cases could approach $1 million.[5]

The use of sub-section 69(3) of the Principal Act has enabled some people who fall outside the legal aid guidelines to receive Commonwealth assistance for their defence. The Government was also concerned that the use of sub-section 69(3) would enable people to by-pass the legal aid bodies and place the decision of assistance in the hands of the judiciary rather than administrative bodies. Similar provisions in New South Wales, Queensland and Victorian legislation have recently been repealed.
Main Provisions

The Bill will come into operation on the day it receives the Royal Assent (clause 2).

Sub-section 69(3) is omitted from the Principal Act by sub-clause 3(1). Persons who have made an application before the Bill commences to operate will not be affected (sub-clause 3(2)).

For further information, if required, contact the Law and Government Group.

References

3. Ibid., p.5.
4. As announced by a spokesman for the Attorney-General and reported in the Canberra Times on 25 October 1985.

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