

DISSENTING REPORT BY LABOR SENATORS

1.1 Labor Senators agree with the majority report and recommendations, except for Recommendation 2, on the grounds that Labor Senators oppose any introduction of automatic costs consequences in the Family Court.

1.2 Labor Senators oppose the introduction of automatic cost consequences on three major grounds. Firstly, there is no evidence of a need for such cost awards. Secondly, as drafted in the Bill, part 16 would not differentiate between deliberate and inadvertent non-compliance (and if it were amended to account for this, it would then undermine its original purpose of allowing automatic cost consequences). Thirdly, allowing automatic cost consequences would put the Family Court at odds with other courts such as the Federal Magistrates Court, and may discourage financially disadvantaged parties from asserting their rights or encourage them to avoid the Family Court.

1.3 Labor Senators note that there was no convincing evidence brought before the Committee of any need for the introduction of automatic cost consequences. When questioned at the hearing, the only support given by the Attorney General's Department, was essentially that the provisions of Part 16 would allow the Court to deal with a "culture of non-compliance":

[T]he Family Court considers it appropriate to facilitate changes to its rules in this area relating to cost in order to address a culture of non-compliance before the court.¹

1.4 The Law Council of Australia, Family Law Section, noted in response to this:

FLS is not aware of any empirical evidence to support the existence of a culture of non-compliance. If there is any perception that such a culture exists in the Family Court of Australia the lack of such a culture in the Federal Magistrates Court or the Federal Court of Australia may indicate that the perception is misplaced.

FLS submits that non-compliance can be adequately dealt with under the existing legislative costs provisions. It is common for judges and court officers to make orders for costs following non-compliance where fault has been properly attributed to the non-complier.²

1 *Committee Hansard*, 1 July 2004, p.22.

2 Law Council of Australia, *Submission 6A*, p.2.

1.5 As noted in the majority report, automatic costs would not discriminate between deliberate and inadvertent non-compliance. Whilst Recommendation 2 of the majority report recommends that Part 16 may proceed only if it is amended to allow for such discrimination, Labor Senators believe that attempting to require such discrimination would undermine the "automatic" aspect of any rules made under Part 16. This would also fail to address the fact that such measures undermine the traditional principle in the Family Court that a party bear their own costs.

1.6 Labor Senators are also concerned that if enacted, Part 16 would allow the Family Court to create rules that would be inconsistent with other Courts, such as the Federal Magistrates Court. This was a matter acknowledged by the Attorney-General's Department at the hearing:

It will result in a different set of cost consequences between the Family Court and the Federal Magistrates Service if the Federal Magistrates Service does not pick up any rules that might be made by the Family Court on it.³

1.7 A representative of the Department went on to confirm: "There is no other precedent within an Australian court".⁴

1.8 Labor Senators are concerned that if Part 16 were to proceed, and automatic costs consequences were to follow in the Court's rules, financially disadvantaged parties may be discouraged from using the Family Court. This may cause such parties to either not assert their rights, or to use other forums such as the Federal Magistrates Court. The Law Council of Australia, Family Law Section noted in a supplementary submission to the Committee:

It is the submission of FLS that these provisions will create a perception that the Family Court of Australia is a difficult and dangerous court for some litigants, particularly those with limited financial resources and those who find the litigious process intimidating. This may cause certain categories of litigants to use other courts.⁵

1.9 On the basis of these concerns, Labor Senators believe that part 16 of the Bill should not proceed.

Recommendation

1.10 Labor Senators recommend that Part 16 of the Bill not proceed. In relation to the rest of the Bill, Labor Senators support the majority report and recommendations.

3 *Committee Hansard*, 1 July 2004, p.22.

4 *Committee Hansard*, 1 July 2004, p.23.

5 Law Council of Australia, *Submission 6A*, p.3.

Senator the Hon. Nick Bolkus

Deputy Chair

Senator Joseph Ludwig

Senator Linda Kirk

