

ADDITIONAL COMMENTS BY THE AUSTRALIAN DEMOCRATS

1.1 On behalf of the Australian Democrats, Senator Greig makes the following points in relation to the Bill:

Part 14 – Recovery of amounts paid under maintenance orders

1.2 The Democrats are concerned about the potential impact that an order made under proposed section 66X might have on the wellbeing of a child in relation to whom maintenance payments have been made. If a parent of the child is required to pay back large sums of money to a person who has paid maintenance but is not a parent or step-parent of the child, this is likely to have a significant financial impact on the child.

1.3 We have considered the suggestion put forward by the National Council of Single Mothers and their Children that section 66X should only apply where “it can be established, on the balance of probabilities, that the misidentification of the paying parent has knowingly and without duress involved a deliberate course of deception for the purpose of claiming child support”.

1.4 The Democrats’ concerns in relation to this suggestion are twofold. Firstly, we are concerned that it would be very difficult to establish deliberate deception and, consequently, any such amendment could potentially generate volumes of litigation. Secondly, whether or not the deliberate deception was involved, an order made under this section could still have a significant financial impact on the child.

1.5 The Democrats believe that there is a more appropriate way in which to address these issues. We believe that proposed section 66X should be amended to enable the Court to make an order for the retrospective payment of child maintenance by a person who is a parent or step-parent of the child. For example, if a mother is required to repay child maintenance to a man who the Court finds is not the father or step-father of the child, the mother could seek a retrospective payment of child maintenance from the biological father.

1.6 Such an amendment would help to alleviate any financial impact on the child as a result of a section 66X order and represents a more equitable way in which to address situations where a wrongful payment of child maintenance has been made. If an order can be made against a mother for the repayment of child maintenance which she is likely to have already spent, then the Court should also have the power to make an order for the retrospective repayment of child maintenance against the father of the child, which is not subject to the current 12 month limitation.

Recommendation 1

1.7 That proposed section 66X be amended to enable the Court, when making an order for the repayment of child maintenance by a person who is not a parent of the child, to also make an order for the retrospective repayment of child maintenance by a person who is a parent of the child.

Part 16 – Rules as to costs

1.8 The Democrats note the response of the Law Council of Australia, Family Law Section, to a possible distinction between inadvertent and deliberate non-compliance. It is clear that even if Part 16 were amended to include such a distinction, many of the other concerns expressed by the Law Council would remain.

1.9 The Democrats agree with the Law Council that fundamental costs principles should be legislated. We do not accept the argument of the Attorney-General's Department that the Family Court is in a "special position". On the contrary, the nature of the work undertaken by the Family Court makes it even more imperative that costs principles guiding the discretion of judicial officers be determined by Parliament. As the Law Council explains:

"The fundamental principles that guide the allocation of costs in Family Court proceedings are closely linked to access to justice and equity issues, and also to the welfare of individual children. It is important, for example, that poorly resourced litigants are not excluded from using the court process because they do not have the resources to apply to have an automatic costs order set aside, or that a case concerning the welfare of a child remains unresolved because a litigant does not have the means to ask that an automatic costs order be set aside"¹.

1.10 For all of the reasons provided by the Law Council, the Democrats do not believe that Part 16 should proceed, regardless of whether it is amended to take account of whether a party has inadvertently or deliberately failed to comply with procedures.

Recommendation 2

1.11 That Part 16 of the Bill not proceed.

Recommendation 3

1.12 That, subject to recommendations 1 and 2 above, as well as recommendations 1, 3 and 4 of the Chair's report, the Bill proceed.

Senator Greig

¹ Law Council of Australia, Family Law Section, *Submission 6*, p.5.