Dissenting report—Ms Nicola Roxon MP

Summary of dissenting report

When the draft Bill was first released I put out a statement in my capacity as the Shadow Attorney-General outlining the five principles against which the Bill should be measured.

Those principles were that:

1. the 'best interests of the child' remain the paramount consideration in resolving all parenting disputes;
2. the family law system is able to ensure the safety of children and parents from violence and abuse;
3. the system is fair to both mothers and fathers;
4. disputes can be dealt with according to the particular needs of each case, rather than adopting simplistic one-size-fits-all solutions; and
5. without compromising the above, that the system is responsive, accessible and affordable.

Unfortunately, participation in this Committee has not assured me that the changes proposed in the draft Bill are consistent with these principles.

There are so many changes proposed to the 'best interests of the child test' that it is hard to see if it will remain paramount—and paramount over the rights and desires of any parent.

My most serious concerns relate to the second and third principles.

I am certain that this draft Bill is missing opportunities to improve the responsiveness of the family law system to family violence and abuse, and I fear it could in fact make matters worse.

I also worry that, in attempting to address the bad outcomes that have been experienced by some non-resident parents in the family law system, the

Government has not looked at ways to address the difficulties experienced by many resident parents. In fact, some of the changes could add to these problems.

It is about time the parenting debate was broadened to look at the wider needs of families in meeting the demands of caring for their children—either as an intact family, or after separation. My report expands upon the urgent need to broaden the debate about shared parenting to embrace a concept involves much more than merely changes to the family law system.

As far as the fourth and fifth principles are concerned, meeting them will depend on the effectiveness of the Family Relationship Centre roll-out. Although the FRC plan is attractive, it is an ambitious project. It is inevitable that it will face implementation problems in areas such as choice of locations, accreditation of staff, development of protocols for screening violence cases and even basic physical security. None of these problems are insurmountable, but they will rely on the Government's careful management.

The Committee did not receive assurances that the Government even recognises these potential problems, let alone that it had developed strategies to identify and solve them. It now seems that the Government intends to rort the FRC roll out for party-political purposes, which totally undermines the hope for careful and responsible implementation of the program for the benefit of families.

Given the following, I dissent from the Report and reserve my position on the draft Bill.

Background

As a parliamentarian, I strongly support the committee system of the Parliament and the opportunity it provides to examine complex issues and reach agreement across party groups. Unfortunately, the value of committee work is undermined if, as in this case, unrealistic timeframes are set by the Government.

I accept that this Report reflects a hard-working committee's genuine attempt to make constructive recommendations to government. A number of members put in particular effort to make the Report a useful one, within the constraints of time and the terms of reference. I have contributed to the Report in this light.

In addition to the unreasonable timeframe, the Committee's ability to analyse the Bill was limited by the Government's failure to answer even the most basic questions about their implementation plans. The success of these changes depends on the proper and adequate roll out the Family Relationship Centres.

Two days before this Committee was due to report the reason for the Government's secrecy on implementation became clear—they are treating implementation as a party-political issue, not a public policy issue. A new committee of only Coalition members, most of whom hold marginal seats, has now been set up to oversee the development of selection and performance criteria for the Centres. This is totally inappropriate and a shocking conflict of interest. It is a sure sign that pork-barrelling is to be given a higher priority than genuine family needs.

The Attorney-General has further insulted this Committee by already producing and distributing material promoting changes proposed in the draft Bill as if a supportive Committee report and Parliamentary approval for his Bill was a foregone conclusion. It is a contemptuous way to treat a Committee and will particularly embarrass Government members who, I know, took this task seriously.

In these circumstances, I must express my reservations about the Government's Bill and its handling of the family law reform agenda.

As the Shadow Attorney-General, I expressly reserve my right in the other parliamentary and public forums to revisit and, perhaps reject, both a range of provisions in the draft Bill and the Committee recommendations.

Introduction

The draft Bill under consideration is extremely complex, heavily contested and covers an important area of law affecting many thousands of families.

I am particularly concerned about how families blighted by violence will be affected by the cumulative impact of changes proposed in the draft Bill and in a number of the Committee's Recommendations. Throughout this process, constant assertions have been made about the lack of research and evidence surrounding the level of violence in the community. But the Government persists in ignoring research by its own funded research bodies—such as Partnerships Against Domestic Violence and the Australian Family and Domestic Violence Clearinghouse—and then takes steps that run counter to the research that does exist.

I am increasingly concerned that the developing concept of shared parenting is being created in a contextual vacuum. The proposals to insert this concept into the law are made with a mind to some of the hardest cases. But nothing is being done to help promote the concept before family breakdown. Further, in the manner proposed in the draft Bill and in some cases made worse by the Committee's recommendations, I am concerned that the idea of shared parenting responsibility has returned to a debate about time rather than decision making, and appears to

be developing as a one-way street, with rights for non-resident parents and responsibilities for resident parents. I discuss this in more detail below.

There are also significant risks that the draft Bill would increase, not decrease litigation. Importantly, many changes in the Bill will only be effective, and work fairly, if other government plans are fully and properly implemented. It is frustrating to be asked to comment on the Bill and the legal requirements that it will create without any assurance that necessary preconditions, such as proper service delivery, will be adequately delivered.

In this dissenting report I set out my concerns relating to:

- the timeframe the Committee had to consider the exposure draft
- the narrowness of the debate about shared parenting and its implications
- family violence, and
- some reservations about specific Committee recommendations.

Timeframe

The inadequacy of this Report, and the need for my dissenting report, stem largely from the Government's unrealistic timing demands.

The Government took eighteen months from the tabling of the first report, *Every Picture Tells a Story*, to draft and release the *Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005.* On referring the exposure draft here, it demanded that the Committee call for submissions, hold public hearings and draft a report in just seven weeks.

This extremely short period made it very hard for interested organisations and community members to put in thoughtful and detailed submissions. It made it next to impossible for Committee members to be thoroughly prepared and briefed for each hearing. Hearing dates were set at such short notice that not all members could attend. Even with the best will in the world and hours of hard work from the secretariat, it is unavoidable that proper attention has not been given to the detail of all submissions—some of which were still being received as we were trying to draft the recommendations.

Just as importantly, there has not been enough time to extensively debate and carefully consider each of the recommendations and properly explore their impact.

While some recommendations deal with implementation issues and other matters not in the draft Bill itself, most of them reflect our collective attempts to help redraft and shape complex provisions of the *Family Law Act*. The provisions are often highly technical. Nonetheless, in practice their consequences could be vast.

There has been no opportunity to seek advice on the possible unintended consequences of our recommendations.

In some instances, while I agree with the thrust of the recommendations, I am conscious that our proposals were not put to us in submissions and that others have not had the opportunity to address them. Good examples of this are Recommendation 9—which would insert an objective element into the fear of the apprehension of violence in the definition of family violence—and Recommendation 36—which seeks to provide a principle that proceedings will be conducted in a way that provides a safeguard for children in violent families using the less adversarial process proposed in the Bill. In these circumstances, although our recommendations seem sensible or attractive, they may have unforeseen consequences. Further discussion and public consultation might highlight problems or benefits in these approaches that Committee members did not consider.

These complaints about the rushed and incomplete processes would have been enough to justify my reservations. Nonetheless, I also have some serious substantive concerns about the Bill and the Committee's Report which I detail below.

The broader shared parenting debate

I strongly support the social change in recent decades that has seen more fathers play an active and substantial role in the parenting of their children. In my view, more can and should be done to encourage genuinely shared parenting for the benefit of children, as well as mums and dads. Unfortunately, most of the public debate has been about family law and tends to focus on the impact of this phenomenon on separated families. In fact, the issue is far more complex and needs more support and attention generally, including in intact families. Constructive shared parenting arrangements when a family is intact no doubt make it easier to share parenting if the family separates. I also think it is not too much to hope that better shared parenting in intact families would reduce some of the stressors that cause family breakdown.

To the frustration of many mums and dads, the Howard Government has given very little attention to removing the barriers and constraints on shared parenting at the "front end". Among other things, these barriers include the lack of family friendly working conditions for both men and women and tax incentives that only apply if one parent ceases work, not if both work part-time. If the Government is serious about shared parenting—for both intact and separated families— there is much more that can be done outside family law, for example in workplaces or tax reform. Parental leave and carers leave, for example, need to be more broadly available. The Government needs to ensure that family friendly options that do

exist, like those in the recent AIRC decision, survive the proposed industrial relations reforms. I suspect that more parents consider work to be the main obstacle to fulfilling their parenting responsibilities, rather than unco-operative ex-partners, but the Government has taken no action, or has plans to makes things worse, in these other areas.

The Government's attention has focussed only on changing the law at the "back end", when relationships have already fallen apart. This has skewed the debate so that the broad concept of shared parenting has narrowed to be almost exclusively concerned with non-resident parents who want more responsibility for their children after separation. These are legitimate desires and there are important issues to be addressed. But shared parenting should be a broader concept. For example, the flip-side of this problem should also be considered. What do we do to assist those parents who struggle to get their ex-partners to take more responsibility for their children? The Bill ignores this issue altogether.

Shared parenting is to be supported, but it has to be a two way street. The Government seems to assume that the only impediment to shared parenting is difficult residential parents. In doing so, they have ignored the many residential parents who would like to see their ex-partners take a more active role in parenting.

In fact, shared parental responsibility has become a bit of a misnomer as the debate seems more focussed on 'rights' than on 'responsibilities'. At its worst, too narrow a view of shared parenting allows non-resident parents to pick and choose the responsibilities they want to exercise in their relationships with their children. They might, for example, consistently fail to turn up for their allotted contact, but nonetheless stand on their right to decide what school the child attends. No doubt most non-resident parents have a more reasonable attitude to shared parenting. The Bill, however, only looks at the issue from the perspective of non-resident parents dealing with difficult resident parents, but fails to consider the opposite scenario.

Because of this, the Committee's recommendations to encourage the genuine sharing of responsibility for children are very limited. There is an uncomfortable silence in our Report over the obligations all parents should have to a child. Piece-by-piece many of the changes are fine, but when they are put together it is clear that the Bill fails to present a whole or balanced picture that meets the needs of the varied family structures within our community.

I have reservations that these changes may increasingly mean that the resident parent will have their lives totally constrained by the demand for all manner of matters to be consented to by their ex-partner, while there is no comparable constraint on the non-resident partner. The result is a reform full of rights for non-residential parents, but short on responsibilities.

If we take the example of a mother with primary residence of the child, the law gives her no way of requiring more involvement from the father. Yet these changes would give the non-resident father the right to demand full consultation (and possibly the right of veto) over where she lives and who she lives with. In trying to address the legitimate interests of those fathers who want more involvement with their children, we may be creating huge problems for those separated families where the father refuses to take more responsibility for the child but wants to continue to exercise ongoing control over the mother's life.

It goes totally unacknowledged that many residential parents would like their ex-partners to take on more responsibility and care for their children. None of the changes in the draft Bill or in the Committee Report support, encourage or require a non-resident parent to do so.

A good example is the troublesome debate over where a parent resides. The proposed Bill would make it more difficult for a resident parent to freely choose where they live with the child, but there is no complementary obligation on a non-resident parent to reside in a convenient location to ensure contact can easily continue.

The problem is also evident in the changes proposed to the compliance regime (see, for example, discussion at 5.14 and 5.62). These are all focussed on penalties for the parent who denies another contact but Bill and Committee have given no consideration, for example, to providing recourse against a non-resident parent who persistently fails to turn up for contact.

The nub of my concern is that the Government's approach to family law, and to some extent the tone of the Committee's Report, is disproportionately concerned with the plight of non-resident parents and considers shared responsibility as a one way street. Although I have no doubt that some non-resident parents have suffered unjust outcomes through the family law system, and it is right that we should consider solutions that would iron out these problems, it is erroneous to assume that non-resident parents have been the only ones to suffer bad outcomes. The danger of this assumption is that we design lop-sided solutions, rather than designing a system that is fair to both mums and dads.

There is also danger in seeing family law reform as a tug-of-war between resident and non-resident parents. We need to avoid a mindset that assumes that solutions to problems faced by one group are met by imposing more rules, restrictions and penalties on the other. If this happens we lose sight of the paramount objective of family law—to ensure the best interests of children are met.

Violence (in a vacuum) – and allegations of violence

I am similarly uncomfortable that we have left unaddressed the very real concerns over the capacity of the Family Law Act and the Family Court to help protect people from family violence. Some of the changes recommended in this Report do emphasise the need to put higher priority on safety and these proposals are very welcome. Other changes need State and Territory co-operation and are rightly beyond the scope of this inquiry.

But there is an uneasy implication, from the extensive attention given to the issue in the Bill and the Report, that false allegations of violence are our primary concern. My main concern is to protect people from harm and to ensure any changes we recommend improve the capacity of the law to do this, or at the very least do not make the situation worse.

I cannot share the conclusions of the Committee that the proposed changes do not increase the risk of family violence or abuse (see para 2.95 shared parenting; 2.204 friendly parent provision and 2.210 violence orders). We simply have insufficient evidence to reach these conclusions.

In fact, I believe there is substantial risk that the Bill prioritises meaningful relationships with parents over safety of children. The Committee's conclusions that the Bill is adequate in these areas are made, in a number of instances, on the basis of scant or no evidence at all.

I am extremely conscious that the Committee did not draw on any expert advice about violence (even from the Commonwealth-funded Australian Family and Domestic Violence Clearinghouse) and relied only on the submissions put to us. Often these submissions were in direct conflict.

The Committee sensibly rejected the urgings of some submissions to narrow the definition of violence to 'serious' violence. This would have sent the terrible message that some violence in families is acceptable when it simply is not. We must be totally clear about this.

The Committee does, however, recommend a change to the definition of family violence which adds an objective component to the apprehension of fear (Paras 2.110 – 2.120 Recommendation 9). Whilst I understand the argument for changing the definition (and it is vastly preferably to other submissions) it was not a change proposed in the Bill and we have not had the benefit of the community's view on this question. It would be a major change and should not be undertaken without further consultation and expert advice, particularly on the ways in which fear and manipulation can be used in violent relationships. I am not convinced, as the Committee is at para 2.109, that the existing 'reasonable grounds' test in Schedule 1 is inadequate and needs this further change.

The Government has missed this opportunity to use the reform process as an opportunity to consider new ways to improve the family law system's ability to deal with family violence. For example, I would urge them to consider an expansion of the definition of violence to include those situations where a child witnesses or is exposed to violence. The Law Council and Queensland Law Society made submissions to this effect (para 2.113). This would also be consistent with Recommendation 18.

I want to clearly state for the record that I do not accept that false allegations are made in large numbers of cases, and the evidence before us made clear that it was indeed rare. I believe there is too much focus by the Government and in the Report on a very small number of cases and too little attention is given to the handling of matters where there is violence.

I understand the devastation and injustice caused by false allegations and see the argument for introducing protections to make sure such allegations are not made lightly or maliciously. But we have a competing challenge to ensure we do not make it harder for people to disclose violence. Under-reporting is already an established and recognised problem and I would not wish to support any change that might provide a further disincentive to people to raise their legitimate fears or concerns about violence or abuse.

In determining the best interests of the child, the importance that the Court be informed of concerns about violence or abuse cannot be understated.

Concerns relating to specific recommendations

In addition to these major concerns, I also want to address a number of other specific matters that arise in the Report.

Chapter 2 recommendations:

The original FCAC Report rejected the presumption of 50/50 joint custody but proposed 'equal shared parenting responsibility'—a concept that embraced shared decision-making affecting the child, not time. The Government response, and the proposed Bill, use the term 'joint parental responsibility'. Recommendation 1 wants to return to the use of the term 'equal'. I have reservations about whether this term has a different meaning and whether, along with other changes recommended by the Committee, this might imply a shift of emphasis to time rather than responsibility. The Government should seek and provide advice on the meaning of both terms before adopting this Recommendation.

I am also concerned that, if adopted, the provisions will create unrealistic expectations and feed an incorrect assumption that the Committee embraces a

presumption of equal time with both parents. Recommendation 1, in combination with a number of other recommendations (for example, 3 and 4) which remove references to 'time' and 'substantial time', emphasise my fear that the Committee might be recommending changes that return to the presumption of equal time spent with each parent by accident (or stealth), even though this was rejected by the original committee and we were instructed not to reopen this debate in our terms of reference.

Unlike the rest of the Committee, I remain concerned that the new s 65DAC (and definition in s 60D(1)) will increase litigation over which "major long term issues" demand consultation and agreement between the parties. In essence, this leaves every resident parent at risk of an ex-spouse controlling or contesting a large range of issues affecting their parenting and living arrangements. Although the Report discussion acknowledges this risk, and deals with one such risk by recommending the addition of a note that excludes decisions parents make about new partners, I do not believe this is adequate. We received advice on a similar provision that a note would have no legal effect. I am of the view that the definition in s 60D(1)(e) should be limited to questions of location, as originally recommended by the FCAC and agreed by the Government. Even if my view is accepted I am concerned at the 'one way street' model of shared parenting this sets up, as discussed above in more general terms.

In this context, Recommendation 40 is also problematic. It leaves open the door to parties bringing compliance applications for minor or trivial matters and has the scope to exacerbate the amount of litigation in this area, not reduce it. I prefer the Government's position to leave this unchanged rather than the Committee recommendation.

As I have already mentioned, I fear the Committee was unduly concerned about false allegations of violence despite the evidence of many witnesses (and particularly the court) that they are rare. I do not support the call for more funding to be provided to prosecute perjury in family law matters (para 2.126). I disagree with the Committee's focus and conclusions on false allegations of violence and prefer the Government's views in the exposure draft Bill. Para 2.128 explains the Government's reason for not proceeding with a costs measure was that it might discourage people raising genuine instances of violence and abuse. I share this concern and cannot support Recommendation 10—although I acknowledge it is an attempt to grapple with a particularly difficult problem.

In stark contrast to this, the Committee does not recommend changes that would acknowledge the circumstances in which withholding contact might be justified on safety grounds (see argument at 5.62) and declines to make a recommendation that penalties should be available if a contravention application is found to be without substance or made for the purpose of harassment.

Paras 2.175-2.176 and 2.180-2.191 discuss the 'best interest of the child test'. I support safety being given priority over all other matters, but I do not support the two-tiered approach proposed in the Bill and persuasively argued against by the Court (who, after all, have to apply the test). The 'best interests of the child test' is, correctly, the central and paramount principle in family law. If it is to be a workable test it should be as clear and unambiguous as possible. I share the fears of the Law Council and Chief Justice Bryant that the two-tiered test might unduly complicate the test.

Chapter 3 and 8

The Government's plan to resolve more matters out of court is a good one, but requires proper implementation and funding of programs not covered by the *Family Law Act* or the draft Bill being considered. To some extent we are putting the cart before the horse to approve changes to the law and simply trust that the Government delivers on the service side.

The critical issue here is to ensure that the Family Relationship Centre program is rolled out in time, but with due consideration to the many implementation problems it can be expected to face.

Even the Department of Family and Community Services expresses concern about the ambitious timetable for introducing compulsory dispute resolution reliant on a full (and successful) roll out of the FRCs. There is enormous uncertainty about how FRCs will be funded, tendered, staffed and managed (see paras 8.8-8.16). The Government has been quite contemptuous of the Committee in this regard, providing virtually no information to the Committee on the details.

Worryingly, key issues—such as accreditation of FRCs and protocols for screening for violence to ensure inappropriate matters are not forced into conciliation—are not dealt with in the draft Bill and only fleetingly in the Report. We were told accreditation standards for FRCs are to be developed but nothing has been given to the Committee (see paras 3.5, 3.190-3.211). Recommendation 32 calls for proper accreditation for FRCs and I urge the Government to work with the industry and get proper accreditation systems in place prior to the roll out commencing.

In fact, on the very last day of the Committee considering this Bill, MPs received a letter advising that the Attorney has set up a Government backbench committee to oversee selection and performance criteria of FRCs. Such a partisan approach is bizarre and not a good foundation for overseeing the establishment and quality control of these important services. Quality control and protocols for screening for violence are hardly the sort of matters that should be left to the Coalition backbench to determine.

The provision of three hours free consultations is assumed, but nothing in the draft Bill refers to this or makes exceptions to compulsory attendance if free services are not available. Recommendation 21 is one option that might better

address these concerns than the provision in the draft Bill, and has the virtue of making the process clearer. However, as with other recommendations, it has not been discussed more broadly. These are not minor matters and should be dealt with before compulsory dispute resolution is required.

If screening is not adequately conducted, families at risk will be forced into inappropriate face-to-face meetings. This is central to whether this system can work and it is a shame that the Committee makes no recommendation on it (see para 8.28-8.32). If the exceptions do not work clearly, an additional layer of litigation will blossom (para 3.46). It is inadequate that the Committee cannot form a conclusion about how, under the Bill, the Court would deal with matters involving violence that come before it (see para 3.30). Other changes recommended by the Committee that go to this point may not be accepted by Government. If there is no confidence in how the exception will work, the compulsory process should not be supported.

I note, also, that the Government did not accept the original FCAC recommendation to include "entrenched conflict" as an exemption to compulsory dispute resolution, but it should have and it would be desirable if it revisited this issue.

We should not make it a legal requirement to attend dispute resolution before a system is in place that people can use. Recommendation 25 attempts to address this issue by linking the commencement provisions to the number of services set up. This is an improvement on the draft Bill, but may still create the practical problem that users of the system may not know when each phase is in place. Further, establishment of the centres might not be enough to lay the groundwork for Phases 2 and 3. The inevitable teething problems that FRCs will face might also be grounds for delaying the implementation of the remaining phases. It would be preferable to only pass laws about Phase 1 at this stage and amend the Act as successful piloting occurs and the roll out is completed.

Chapter 4

While the shift to a less adversarial approach in family law matters involving children is generally supported, including by me, the Committee expresses reservations about a number of aspects of the change and how it will work. Many of these issues would be better answered if the Government waited until the review of the Children's Cases Pilot was complete. The Government has dragged its feet on so many other matters, it seems odd to then rush these significant changes through before proper results to come in from the pilot program.

In Recommendation 37 the Committee proposes a narrowing of the exceptions to cases in "exceptional circumstances". I'm not convinced this is warranted.

Advertising the changes – Recommendation 58

The draft Bill proposes significant changes to the operation of the family law system and there can be no doubt that informing people of the changes is a pre-requisite to making them work.

However, I am very wary of giving the Government *carte blanche* to determine the cost, content and style of the advertising campaign. The Howard Government has a track record of promoting new initiatives in a partisan manner, more concerned to the present the Coalition in a positive light than provide useful information to citizens.

The Government continues to refuse to implement proper guidelines for the expenditure of taxpayers' money on Government advertising campaigns.

Given this record, without seeing content of advertising material, I cannot in good conscience make a recommendation which urges further expenditure of tax-payers' money on advertisements that neither I, nor the Parliament, has seen or has control over.

Ms Nicola Roxon MP