



Anglican Church Diocese of Sydney

24 February 2023

Family Law Reform
Attorney-General's Department
Submitted via email: FamilyLawReform@ag.gov.au

Submission on the draft Family Law Amendment Bill 2023

1. Who are we?

This submission is on behalf of Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 267 parishes and various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917* (NSW) and the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW). These bodies include 40 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our State, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.

2. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

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3. Introduction

We make a submission on the Family Law Amendment Bill 2023 Exposure Draft that addresses proposed amendments to the framework for making parenting orders in Schedule 1, with its redraft of objects and questions of “best interest” factors.

4. The Diocese supports consideration the more detailed submission of Professor Patrick Parkinson AM, on the draft Bill, which has been shared with us.¹

¹ “Family Law Amendment Bill 2023 Exposure Draft: Submission to Attorney-General’s Department, by Patrick Parkinson AM, Emeritus Professor of Law, University of Queensland; Special Counsel, Watts McCray Lawyers. PDF supplied by the author.

5. We also note that Professor Parkinson is broadly in support of most aspects of the draft Bill. The Diocese understands the desire for simplification in this complex and costly area of Family Law.
6. However, although we support many aspects of the Bill, along with Professor Parkinson we do not believe any significant case has been made for removing the affirmation of children's right to know, be cared for by, and spend time with, both their parents, except when it would be contrary to their best interests. We believe the removal of references in the Act to the importance of both parents in children's lives, subject to the need to protect the child and others from harm, is a serious mistake, which is being made without adequate justification. We commend to you the revised wording Professor Parkinson has suggested for sections 60CC and 60CD.
7. **A Christian Approach to Family Life and the Needs of Children**
 Although much more could be said, several paragraphs from a recent report from the Sydney Anglican Diocesan Doctrine Commission, "On the Need of Children for a Mother and a Father" helpfully outlines some basic Christian thinking on God's pattern for the nurture of children (emphasis added).

"4. The one-flesh union of husband and wife is the biological and relational sphere in which children are rightly brought into the world and nurtured. The covenant of marriage is divinely intended to provide a stable and enduring context for the raising of children (Mal 2:15). Marriage does not necessarily result in offspring, but where there are offspring it is intended that this should occur in the context of a marriage. One of the purposes of marriage is that children may be raised by their biological mother and father – a mother and father who are committed to each other for life, and who love their child with a godly love.

5. God's intent is that children experience the care and nurture of both mother and father (together representing God as his image bearers) who have made an exclusive, lifelong commitment to each other that unites the two biological sexes (male and female) from different genetic families. This is marriage. It is in this relational context that children are born and find a home in the world.

*6. For children, growing up entails physical, intellectual, emotional, and spiritual maturation. The Scriptures make clear that the responsibility to nurture children in each of these domains belongs to both mothers and fathers (e.g., Prov 29:3, 15, 17; Eph 6:1-4). **For children, the experience of relating to parents of both the same and opposite sex is profoundly formative, especially as they discover and develop their own identity. In a context where both sexes are valued and celebrated, children also learn to appreciate and respect those of the opposite sex.**"²*
8. We draw particular attention to the material in bold in the citation above, which indicates how good it is that, ordinarily, a child would experience the formative care and nurture of both its parents, a mother and a father, as much as possible.

² Anglican Diocese of Sydney "On the Need of Children for a Mother and a Father: A Report by the Sydney Diocesan Doctrine Commission" (2020). Accessed 20 February 2023
<https://www.sds.asn.au/sites/default/files/DocComm.Need%20of%20Children%20for%20Mother%20and%20Father%20-16%20June%202020.pdf>

9. The Doctrine Commission paper also indicates a deep awareness that the care of children with its own parents is not always possible, as it briefly outlines some “principles for the care of children” in our fallen world, as follows.

“9. The Bible recognises that in our fallen world the experience of family does not always conform to the biblical pattern. For a range of reasons – whether birth outside of marriage, or the death, incapacity or extreme poverty of parents, or the breakdown of marital relationships, or neglect or abuse by parents – children are not always raised in a stable family with a mother and father. In this broken and sin-cursed world, the family experience of many children falls far short of the ideal.

10. Vulnerable children are precious to God. The Lord is “the father to the fatherless, a defender of widows [... who] sets the lonely in families” (Ps 68:5-6). The same divine concern is also seen in Jesus’ tender care expressed toward children: “Let the little children come to me and do not hinder them” (Matt 19:14). God’s compassion for vulnerable children is manifest in his commands to his people to look after orphans (e.g., Deut 10:18-19, 24:17, 19; Prov 23:10; cf. Ezek 22:1-2, 6-7; Jas 1:27). This is both an expression of our love for our neighbours and our love for God, who himself loves and helps the vulnerable (Ps 10:14). God’s people must seek to provide the best care possible when it is necessary for a child to be raised outside the context of their biological family unit.

11. Optimal care is modelled on the pattern described above – it involves intimate mothering and fathering in a domestic context (even if the ‘mother’ and ‘father’ are not the child’s biological parents), where physical, emotional, intellectual and spiritual nurture can occur. The welfare of the child must be paramount – the focus must always be a child’s need to have parents, not an adult’s need to be a parent.”³

10. Therefore, in the case of the breakdown of marital relationships, we support the making, under Family Law, of parenting arrangements that make paramount the welfare and best interests of the child.
11. However we also argue that, ordinarily, these “best interests” should, wherever possible, continue to include the opportunity to have a “meaningful relationship with both of the child’s parents”.
12. The Diocese takes family and domestic violence very seriously. In 2018, our Synod approved the “Sydney Anglican Policy on Responding to Domestic Abuse”. This document sets out both policy and good practice as an “expression of the Church’s commitment to address and respond effectively to domestic abuse”.
13. Although the focus of this policy is abuse between current or former spouses, the policy underlines the importance of protecting children, for example.
- “1.1.3 The primary focus of this Policy is abusive or intimidating behaviour inflicted by an adult against a current or former spouse or partner. However,*

³ *Ibid.* Note that this Doctrine Commission report particularly gave attention to questions regarding foster care and adoption, but much of its commentary is also relevant to the question of parenting in the case of the breakdown the marriage of a child’s parents.

for a child to witness abuse between intimate partners is a form of child abuse. Any abuse involving children should follow child protection procedures.

1.4.4 Working in partnership with vulnerable adults and children, statutory authorities and specialist agencies is essential in promoting the welfare of any child or adult suffering abuse.

1.9.4 When domestic abuse in marriage is reported, then separation of the spouses for the sake of the safety of a victim and any children is an appropriate step to be taken and should never be discouraged (Proverbs 27:12; 1 Corinthians 7:10-11)”⁴

14. Therefore we support the principle that, in the making of parental orders in the case of marital breakdown, neither children, nor others persons, such as a child’s mother, should be or remain at risk of domestic abuse or family violence.

15. Discussion of the Current Law

We note that the principle that any parenting orders should only be made in the best interests of the child is already clearly enshrined in section 60CA of the Family Law Act 1975 as it stands.

16. In addition, we note that existing section 60CG instructs the Court to consider the risk of family violence, and any order it makes should not expose any person to an unacceptable risk of family violence, to the extent it is possible to do so consistently with the paramount consideration of the child’s best interests.

17. We note that section 60CC states in subsection (2) that the “primary considerations” in determining what is in a child’s “best interests” are: “(a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.”

18. We note that the current law is consistent with Article 9.3 of the UN Convention on the Rights of the Child:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

19. We acknowledge that there is a fine balancing act required in assessing how the two “primary considerations” above may interact. We can understand how consideration of the importance of having a meaningful relationship with both parents may be argued by some as ‘trumping’ the right of another person (such as the mother) not to be exposed to the risk of family violence.

20. However section 4AB, subsection (3) currently indicates that “For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.” Therefore, we submit that if

⁴ Anglican Diocese of Sydney, “Responding to Domestic Abuse: Policy and Good Practice Guidelines” (2018). Accessed February 20, 2023. <https://safeministry.org.au/wp-content/uploads/Responding-to-Domestic-Abuse-Policy-Guidelines-and-Resources.pdf>

another person such as the child's mother is exposed to an unacceptable risk of family violence by a parenting order, then it should already be clear that this is a breach of section 60CC (2)(b), since it violates the second of the two "primary considerations".

21. Supporting Professor Parkinson's submission

As noted above, we support the more detailed submission on the draft Bill, by Professor Patrick Parkinson AM, and commend his key recommendations to the Attorney General's Department and to the Government, especially with respect to the elements which we now reproduce.

22. We quote Professor Parkinson's summary in full, emphasis added:

*I support most aspects of this Bill, but Schedule 1, amending the core elements of the law on parenting after separation, goes very far beyond what is necessary and justified in order to remedy perceived deficiencies in the current law. A case has been made to remove the presumption of equal shared parental responsibility and with it, the requirement for courts to consider an equal time order, whether or not either party is seeking it. A case has also been made for simplification. **However, no-one has made a case for removing elements of the law which have existed without any controversy since 1995, such as affirming children's right to know and be cared for by both their parents and to spend time on a regular basis with both parents and others significant to them, except when it would be contrary to their best interests.** Nor has the case been made for removing almost every other reference in the Act to the importance of both parents in children's lives, subject to the need to protect the child and others from harm.*

This submission draws attention to the extent to which the Exposure Draft represents a reversal of almost everything agreed by an almost unanimous Parliament only a few years ago after one of the biggest public inquiries in recent history, and without any coherent justification being advanced. It proposes, at pp.17-19, a far less radical approach which will meet the objectives of the Government and address the identified deficiencies in the law without 'throwing out the baby with the bathwater' or unnecessarily reigniting another gender war, and without risking, as this Bill does, an increase in litigation and conflict between parents.

23. In his "preliminary observations", Professor Parkinson argues, *inter alia*, (again, emphasis added)"

If Parliament says, in one decade, that it is important to try to retain the involvement of both parents in children's lives after separation in the absence of violence or abuse, then little more than a decade later, it strips out almost every reference to the importance of both parents in children's lives and repeals provisions about how this should translate into parenting arrangements after separation, that U-turn in messaging is not without consequences. And there will be adverse consequences – for parents, for children, for courts, and for social cohesion. [...]

What are these deletions? Well, if this moves beyond the Exposure Draft stage to a Bill, the Government will be saying that it no longer believes it is important:

- *To ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the child's best interests*
- *That children have the right to know and be cared for by both their parents;*
- *That children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives);*
- *That parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and*
- *That parents should agree about the future parenting of their children.*

*These are all statements currently contained in s.60B of the Act which sets out the objects and principles for parenting after separation. **There is a common theme in all these deletions – the removal of an emphasis on the importance of both parents in children's lives, subject to the need to protect them and their carers from violence or abuse.** The deletions also remove statements concerning the rights of children, which have stood in the law, without controversy, for over 27 years.*

24. In regard to the issue of family violence, Professor Parkinson questions whether the notion that legislation which gives emphasis to the importance of both parents in a child's life makes it easier for violent men to insist on a role in parenting is really supported by the evidence base, as opposed to anecdotal evidence from advocacy groups and consultations. He argues as follows:

Reforms over the last few years, and not least the roll-out of the Lighthouse Project, have greatly improved the courts' capacity to address issues of family violence, and this can be done without going back to a situation where there is a de facto preference for sole maternal care.

It is possible to balance the need to exclude a few men from any involvement in parenting their children, while protecting the right of a child to be known and cared for by both parents in the majority of cases, making orders as needed to address a risk of post-separation violence. It should be recognised also, that the overwhelming evidence from research is that a substantial proportion of both mothers and fathers who have separated make claims of physical violence or emotional abuse against the other, and so any reform of the law needs to be more sophisticated and nuanced than to be premised on an assumption that almost all perpetrators are male and almost all victims are female.

25. Professor Parkinson notes the AIFS review of the 2006 Family Law Reforms reported that "The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals." He then observes little depth of analysis in the ALRC's review of the existing legislation:

One of the most striking aspects of both the Discussion Paper and the final report is that relatively little attention appears to have been paid to the vast body of empirical research which was done on the outcomes of the 2006 and 2011 reforms.

26. Professor Parkinson adds (with footnoting not reproduced here):
The picture from the massive study conducted by the AIFS on the 2006 reforms was generally positive. The research team found that overall, the 2006 reforms to the family law system were working well, although there were some difficulties and challenges. Most parents reported that they were satisfied with the parenting arrangements. Most indicated that they communicated with each other on issues concerning their child once a week or more often, although that level of communication had diminished somewhat by the second wave of interviews a year later. The report on the wave 2 interviews with parents indicated that most parents considered that their arrangements were flexible and worked well for each parent and the child. Other research indicates that shared care arrangements are the least likely parenting arrangement to have resulted from litigation, according to mothers' reports.
27. In regard to proposed changes to section 60CC(2)(e), which he suggests may be the only surviving reference in Part VII to the significance of having both parents involved in a child's life, he comments:
So when the exposure draft drops the word 'meaningful' before the word 'relationship' the assumption must be that the Parliament no longer thinks that a child needs a meaningful relationship – any sort of relationship is the most that the law should aspire to. I am sure this is not what the ALRC intended, but it is a consequence of deleting a word already enacted and which has been the subject of much helpful judicial interpretation.
28. Professor Parkinson demonstrates that it is possible to find wording that looks to the best interests of the child, subject to its safety from family violence, in a way that also continues to note, ordinarily, the benefit to a child for a *meaningful* relationship with both parents, alongside the safety of any who will have parental responsibility.
29. Professor Parkinson also provides some moderate suggestions in his suggested form of words for section 60CD, that would allow both parents, as far as practical, to be involved regularly in the child's life, subject to the child's best interests, and to the priority of protecting all persons from family violence.
30. **Conclusion**
In summary, we endorse and commend consideration of the revised wording Professor Parkinson has suggested for sections 60CC and 60CD. We believe such wording would be consistent with God's intent that children ordinarily experience the care and nurture of both mother and father wherever possible, even in cases of marital breakdown, subject to the paramount welfare and safety of the child, and without compromising the safety of any who are to be involved in giving parental care.

We thank the Attorney-General's Department for the opportunity to make this submission.

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Anglican Church Diocese of Sydney
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