

## An Open Letter to the Rt Hon Dame Helen Winkelmann

22 November 2023

Dear Chief Justice Winkelmann:

We are specialist experts in family violence and sexual violence. We are writing to you in your capacity as the Chief Justice of the Supreme Court and the head of Te Kura Kaiwhakawā / Institute of Judicial Studies to express our concern about the bench books for Family Court Judges in Aotearoa New Zealand that contain information pertaining to child safety and family violence – their scope, the process by which they are created, their contents, and the secrecy that surrounds them. We are asking you to do two things: to make the Family Court bench books and any related supplementary materials publicly available and to make the processes by which the bench books have been created and are updated transparent.

Family violence and family law bench books globally are publicly available through online, open-source platforms, which allow experts, lawmakers, and survivors to scrutinise their contents and lawyers, health practitioners, and litigants to have the benefit of a publicly funded legal resource. For example:

- The Australian *National Domestic and Family Violence Bench Book* is free and publicly available on the website of the Australasian Institute of Judicial Administration at [aija.org.au/publications/national-domestic-and-family-violence-bench-book/](http://aija.org.au/publications/national-domestic-and-family-violence-bench-book/).
- The *Victoria Family Violence Bench Book* is free and publicly available through the Judicial College of Victoria at: [www.judicialcollege.vic.edu.au/eManuals/FVBB/indexpage.htm#34143.htm](http://www.judicialcollege.vic.edu.au/eManuals/FVBB/indexpage.htm#34143.htm).
- The *Family Court Bench Book* for the United Kingdom, including *Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm*, is available through the British Judiciary at: [www.judiciary.uk/guidance-and-resources/family-court-bench-book-and-reference-cards/](http://www.judiciary.uk/guidance-and-resources/family-court-bench-book-and-reference-cards/).
- The UK also have an *Equal Treatment Bench Book*, which contains sections on domestic violence and abuse, coercive control, and marriage and divorce, which is available at: [www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/](http://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/).
- New South Wales has an *Equality Before the Law Bench Book*, available through the New South Wales Judicial Commission at: [www.judcom.nsw.gov.au/publications/benchbks/equality/index.html](http://www.judcom.nsw.gov.au/publications/benchbks/equality/index.html). It includes chapters on the treatment of women and children, including violence against women, and trauma-informed courts.
- The Canadian bench book, *Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases*, can be found through the Canadian Legal Information Institute at: [www.canlii.org/en/commentary/doc/2017CanLIIDocs2#!fragment//BQCwhgziBcwM](http://www.canlii.org/en/commentary/doc/2017CanLIIDocs2#!fragment//BQCwhgziBcwM)

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8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA.

- The *Judicial Bench Book on Violence Against Women in Commonwealth East Africa* is available through the OECD at: [www.oecd-ilibrary.org/content/publication/9781848599550-en](http://www.oecd-ilibrary.org/content/publication/9781848599550-en).
- The *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* is available at: [issat.dcaf.ch/sqi/layout/set/print/Learn/Resource-Library/Policy-and-Research-Papers/Judicial-Benchbook-Considerations-for-Domestic-Violence-Case-Evaluation-in-Bosnia-and-Herzegovina](http://issat.dcaf.ch/sqi/layout/set/print/Learn/Resource-Library/Policy-and-Research-Papers/Judicial-Benchbook-Considerations-for-Domestic-Violence-Case-Evaluation-in-Bosnia-and-Herzegovina).
- The *Albanian Judicial Benchbook on Protection Orders* is available at: [www.osce.org/albania/33044](http://www.osce.org/albania/33044).

Bench books in Aotearoa New Zealand, by contrast, are secret and privately available only to judges, in contravention of international norms surrounding open justice and access to legal information.

In its *Second Review of the Evidence Act 2006*, the Law Commission / Te Aka Matua o te Ture remarked: “We note that some overseas jurisdictions now publish their resources for the judiciary online. We consider allowing free public access to judicial resources such as bench books encourages greater transparency in the court system and improves access to justice.”

We are also concerned with the lack of transparency surrounding the authorship, creation process, and sources of information for bench books containing information relating to family violence and child safety. The materials contained in the Australian *National Domestic and Family Violence Bench Book* were compiled with input from domestic and international academic experts, judges, research institutes, domestic violence organisations, Family Violence Death Review Committees, immigration specialists, and victim/survivors, and they include victims’ lived experiences with violence. The New South Wales *Equality Before the Law Bench Book* was written by an expert in bullying and harassment under the guidance of an Advisory Committee of judges, academic experts, and lawyers with inputs from community representatives, including First Nations Peoples, religious leaders, advocates for children, women, rainbow communities, and people with disabilities, and trauma specialists.

Because the process by which bench books in Aotearoa New Zealand are created is opaque and their distribution is private, we can only speculate about the sources of information and the quality of commentary in Family Court bench books that contain information relating to family violence and child safety. We are concerned that sources of information for the Bench Book may include individuals who lack specialist skills and knowledge in family and sexual violence, who may advocate for content that undermines the safety of victim-survivors and children, or who have financial conflicts of interest. We are also concerned that the process of creating these materials did not include input from specialist practitioners or consider the lived experiences of victim/survivors and that the contents may therefore entrench and reinforce dangerous myths and misunderstandings about family violence.

We are particularly concerned with the prospect that the bench books contain materials relating to the internationally discredited construct of “parental alienation”, which is

sometimes given other labels, including the “resist and refuse dynamic”. Pseudo-psychological constructs relating to the theory of parental alienation have been rejected as lacking in scientific validity by the American Psychological Association, the American Psychiatric Association, the American Medical Association, the National Council of Juvenile and Family Court Judges in the United States, the Association of Clinical Psychologists in the UK, and the New Zealand Psychological Society. Proponents of the theory of parental alienation lobbied for its inclusion in both the Fourth and Fifth Editions of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM-4 and DSM-5)*, but the Association rejected the proposals because the syndrome lacked scientific validity.

In 2018, the United Nations Committee on the Elimination of Discrimination Against Women criticised the New Zealand Family Court for its entrenched “systemic lack of trust of and insensitivity towards women who are victims of domestic violence”, practice of awarding care of children to violent fathers, and its routine resort to “the parental alienation syndrome theory, despite the fact that it has been refuted internationally”.

In 2019, the World Health Organization removed the terms “parental alienation” and “parental estrangement” from the 11th Edition of its *International Classification of Diseases*. The WHO issued an explanatory note stating: “During the development of *ICD-11*, a decision was made not to include the concept and terminology of ‘parental alienation’ in the classification, because it is not a health care term. The term is rather used in legal contexts, generally in the context of custody disputes in divorce or other partnership dissolution.” The WHO expressly disclaimed endorsement of the term “parental alienation” due to concerns about “the misuse of the term to undermine the credibility of one parent alleging abuse as a reason for contact refusal”. They noted: “There are no evidence-based health care interventions specifically for parental alienation.”

Health organisations have refused to recognise “parental alienation” as a legitimate, evidence-based phenomenon, and human-rights organisations have criticised its use in child custody cases because of its history of tactical abuse by domestic violence perpetrators, its reliance on gender stereotypes, and the resulting threat to the safety of women and children. The United Nations Special Rapporteur on Violence Against Women and Girls recently noted:

The tendency to dismiss the history of domestic violence and abuse in custody cases extends to cases where mothers or children have brought forward credible allegations of child physical or sexual abuse. In several countries, family courts tend to judge such allegations as deliberate efforts by the mothers to manipulate their child and pull them away from their father. This supposed effort by a parent alleging abuse is often termed “parental alienation.” The term generally refers to the presumption that a child’s fear or rejection of one parent, typically the noncustodial parent, stems from the malevolent influence of the preferred, typically the custodial parent. Although these concepts lack a universal clinical or scientific definition, emerging patterns across various jurisdictions of the world indicate courts worldwide are using the concept of “parental alienation” or similar concepts explicitly or are allowing for its instrumentalization.

In April 2023, the Special Rapporteur issued her report to the Human Rights Council entitled *Custody, Violence Against Women and Violence Against Children*. The report examined the link between “the abuse of the term ‘parental alienation’ and similar pseudo-concepts” and violence against women and children. The report singled out the courts in Aotearoa New Zealand for allowing accusations of “parental alienation” to divert attention from legitimate allegations of abuse. It noted: “In New Zealand, different terms are used as ‘a strategy of plausible deniability’ to effectively introduce the pseudo-concept of parental alienation, such as ‘resist-refuse’, ‘enmeshment’, coaching or poisoning a child, gatekeeping or over-anxious mothering.” It is our understanding that the family law bench books in Aotearoa New Zealand specifically include information relating to this pseudo-scientific “resist-refuse dynamic”.

It is crucially important, as we are sure you know, that judicial training materials contain accurate, reliable information based on methodologically sound research. It is also crucial to judicial legitimacy and the fair administration of justice that court personnel and other well-connected insiders are not allowed to have unequal, *ex parte* access to judges or to influence their decision making through a process of private, un-scrutinised submission of “training materials”.

The time has come for Aotearoa New Zealand to join the rest of the world in opening its bench books to public scrutiny and ensuring that they are compiled with input from specialist practitioners in family and sexual violence rather than risking that they become a tool by which misunderstandings, stereotypes, and myths are reinforced.

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