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Creating and Defining a Scope of Practice for Forensic Psychology

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Introduction

I am an Associate Professor at Waipapa Taumata Rau / the University of Auckland where I lecture Evidence Law, Psychiatry and the Law, and Miscarriages of Justice. I am on the review board of *Psychiatry, Psychology, and Law*. Prior to joining the faculty at the University of Auckland four years ago, I was an Associate Professor at the University of Oregon School of Law for ten years, where I lectured scientific evidence and mental health law. I also lectured in a part-time capacity in the Forensic Psychiatry Fellowship Program in the Department of Psychiatry at Oregon Health Sciences University. I research and write extensively in forensic science and forensic psychiatry and psychology and, specifically, the role that unreliable expert evidence plays in securing miscarriages of justice. I have attached my CV to this submission for your reference.

Creating a Scope of Practice for Forensic Psychology

I strongly support the proposal to introduce forensic psychology as a scope of practice. I am concerned that registered clinical psychologists are currently practicing beyond the scope of clinical psychology by performing forensic evaluations and giving expert evidence without the required skills, or accompanying ethical obligations, for good forensic practice.

The theoretical, ethical, legal, moral, and professional foundations for forensic psychology are different than for other psychology specialties, particularly clinical psychology. Providing psychological expertise to judicial systems, performing assessments in anticipation of litigation, forming psycho-legal opinions, writing court reports, and offering expert evidence require a different set of skills than clinical practice. Forensic psychologists must possess and demonstrate knowledge of the legal system and the rights of participants, the scientific foundation for expert evidence, and the scientific bases of teaching and research. They must consider the impact of their personal beliefs and experiences on their ability to practice in a competent and impartial manner and take remedial steps to prevent those biases from affecting their expert opinions. They must guard against the misuse of their services in the justice system. They must differentiate clearly between their observations, inferences, and conclusions.

Psychologists do not typically receive the specialised training required to be competent in forensic practice in their basic education and supervision. For that reason, it is increasingly the norm internationally for forensic psychologists to be regulated as a subspecialty. The American Board of Professional Psychology requires specialist board certification for forensic psychologists. Most forensic experts certified by the ABPP are diplomates of either forensic or clinical psychology with at least 200 hours of didactic training in forensic psychology. The American Board of Professional Neuropsychology also conducts a rigorous credentials review and administers an orally examined, competency-based assessment before certifying forensic neuropsychologists.

The American Psychological Association promulgates *Specialty Guidelines for Forensic Psychologists*. The Guidelines include specialised responsibilities that exist only in forensic psychology, including duties of integrity (resisting partisan pressures to provide services in ways that might tend to be misleading or inaccurate) and impartiality and fairness (recognising

the adversarial nature of the legal system and weighing all data, opinions, and rival hypotheses impartially, and avoiding partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact). The Guidelines require forensic psychologists to use assessment techniques whose validity and reliability have been established for use with members of the population assessed.

The courts in Aotearoa New Zealand largely rely on Schedule 4 of the High Court Rules, which set forth the obligations of expert witnesses generally. These obligations are not specific to psychologists and do not include considerations of methodology. They cannot substitute for regulation of the subspecialty of forensic psychology by this Board. On the contrary, the courts regularly express a concern that, if they regulate forensic psychologists too strictly, they will not agree to provide reports for the courts. Scarcity cannot justify looking the other way on methodological failures.

Defining the Scope of Forensic Psychology

It is crucially important that the Board define the scope of forensic psychology to include not only evaluators who work in the criminal courts but also those who work in the civil and family courts. Whenever the scientific, technical, or specialised knowledge of psychology is applied to the law and used to assist in resolving legal, contractual, and/or administrative disputes, it should be within the scope of practice for forensic psychology. The new scope of practice should cover forensic practice not just in the narrow sense of the criminal-justice system (fitness and insanity evaluations, risk assessments, correctional psychology) but also assessments performed for child-protection and private custody litigation under section 178 of the Oranga Tamariki Act 1989 and section 133 of the Care of Children Act 2004.

While forensic psychologists who practice in the criminal-justice system tend to be relatively proficient at self-regulation because they are often trained and employed institutionally (for example, by Forensic Mental Health Services or the Department of Corrections), forensic psychologists who practice in the Family Court have no standards or regulation as forensic practitioners. They work in private practice and are responsible for securing their own training and supervision. Most are solo practitioners, and all are clinical psychologists.

The only practice guidelines governing forensic psychologists who provide expert evidence in the Family Court is a Practice Note for Specialist Report Writers promulgated by the Principal Family Court Judge. The Family Court maintains a list of specialist report writers, which is composed by Family Court personnel (a case-flow manager, a Family Court Judge, and two “experienced report writers”). The criteria for inclusion are that a report writer be a registered psychologist, a member of either the New Zealand Psychological Society or New Zealand College of Clinical Psychologists, and have “five years of clinical experience or its equivalent”. They must demonstrate evidence of competency in a list of knowledge and skills, but **none** of the required skills involve the forensic application of psychology to legal determinations or specialised understanding of the dynamics of family violence or the impact of intimate partner violence on children. There is no requirement that a report writer have any training, education, or experience in **forensic** psychology. In fact, the word “forensic” appears nowhere in the sixteen-page Practice Note.

Under the Practice Note, the Family Court “should deal with most complaints involving psychologists as part of its jurisdiction to regulate its own processes”. The Practice Note explicitly contemplates that the Family Court should deal with complaints relating to psychologists’ “methodology”.

This lack of meaningful professional regulation by a psychology board with the competency to assess the quality of forensic practice is concerning. With all due respect to the Family Court, judges are not competent to assess and regulate the competency of forensic psychologists, and they certainly cannot evaluate their methodology. “Experience” cannot substitute for expertise, which is sorely lacking in this community of practitioners. Forensic psychology as a sub-specialty has a history of insularity, poor quality of professional practice, and failure to acknowledge and respect the rights of individuals who are subject to court evaluations. The circular nature of the selection and regulation of court report writers has created a situation in which the fox is watching the methodology of the hen house.

I am particularly concerned about the lack of meaningful regulation of the methodology and professionalism of Family Court psychologists because my research into expert evidence in the Family Court has revealed a community of practitioners awash in pseudo-science and an indefensible lack of as-applied validity of their techniques. The court report writers fail to demonstrate even the most basic level of proficiency in the forensic application of psychology to legal questions. They do not appear to understand basic forensic concepts like external, internal, foundational, and as-applied validity, the difference between correlation and causation, confounding, generalisability and ecological validity, and, most importantly, what forensic neuroscientists call the “G2i problem” – the inability to divine causation in an individual case from group data in correlational studies.

One of the most concerning examples of these methodological failures involves evidence relating to so-called “parental alienation” (PA), which is deeply enmeshed in the culture of the Family Court and promoted by court psychologists. While the practitioners in the Family Court have largely abandoned the terminology of PA, they have not abandoned its syndrome reasoning. These psychologists regularly opine that a child has been subjected to interference and undermining of a relationship with one parent through the behaviour of the second parent **merely because** the child expresses either rejection of a form of contact with the first parent or a preference for the second and they do so in cases in which the rejected parent has inflicted family violence on the child and/or their protective parent. There is no validation for the claim that this can be done reliably – that one parent’s invisible conduct (or sometimes even subconscious thoughts) can be detected solely through the existence of a child’s custodial preferences. More concerning, court psychologists regularly opine that a parent who has experienced intimate partner violence has “alienated” a child from a parent who has inflicted family violence because the child expresses fear of unsupervised contact with perpetrator without addressing the obvious confounding variable in any such assessment – the violent parents’ use of violence. I believe that this unreliable evidence has been able to run amok in the Family Court because none of the experienced report writers, who not only offer evidence but also select and regulate their colleagues, have any specialised training or expertise in **forensic** psychology, family violence, or trauma-informed practice.

The testimony surrounding PA (or the “refuse and resist dynamic”, “unconscious maternal messages”, or a distorted understanding of some form of apparently pathological “cognitive

dissonance”, which are increasingly the deceptive terminology used to hide the origins in PA of psychologists’ predominant philosophical orientation) has become ideological. As PA has been discredited and rejected as lacking a scientific basis by the World Health Organization, the American Psychiatric Association, the American Psychological Association, and the New Zealand Psychological Society, among others, court report writers who continue to hold folkloric beliefs in its existence and their ability to identify and “treat” it with reliability have become more entrenched in their partisan defence of the phenomenon. They have changed the terminology but hunkered down and retained the debunked construct.

Unfortunately, this is a common occurrence across forensic sub-disciplines. My research focuses not only on forensic psychiatry and psychology but also on forensic sciences like forensic chemistry and analysis of trace evidence. After unreliable forensic-science evidence played a role in securing many of the first several hundred false convictions that later led to DNA exonerations in the United States, the American Congress asked the National Research Council of the National Academy of Sciences (NRC) to evaluate the use of forensic-science evidence in criminal trials. This resulted in the 2009 publication of the NRC’s scathing report, *Strengthening Forensic Science in the United States: a Path Forward*.¹ The NRC Report was critical of all the traditional forensic sciences whose evidence is routinely in use in criminal trials around the world, other than single-source forensic DNA analysis.² It was critical of the absence of controlling standards, validation studies, and controls to eliminate the contamination of forensic analysts’ subjective decision making by contextually biasing information.³ It was also critical of the way that forensic analysts communicated their results in testimony, employing terminology that was inconsistent and misleading (“inclusion,” “match,” “identification,” “individualization,” “to the exclusion of all others”) and inflating interpretive claims beyond the limits of what scientific validation did exist.⁴ Similar methodological and ethical problems have flourished in the forensic practice of psychologists in the New Zealand Family Court.

Furthermore, my research demonstrates that many pseudo-scientific and unreliable applications of psychology in forensic evaluations in the Family Court involve gender bias. The court report writers refer to “maternal gatekeeping” as a pathological phenomenon – not **parental** gatekeeping. While there are psychological phenomenon that have gendered expression (for example, there is research that suggests that subtypes of narcissistic personality disorder are gendered in their occurrence, that autism spectrum disorder is more common in boys than girls, or that the average age of onset of schizophrenia is different for men and women), any phenomenon that is applied in a such an overtly gendered way – particularly in forensic application – must be viewed with scepticism. The subjective and standardless nature of the “techniques” employed by forensic psychologists in court reports

¹ National Research Council, National Academy of Sciences, *Strengthening Forensic Science in the United States: a Path Forward* (2009).

² At 7-8.

³ At 6 (“Often there are no standard protocols governing forensic practice in a given discipline. And, even when protocols are in place . . . they often are vague and not enforced in any meaningful way.”).

⁴ At 185-86.

begs for implicit associations and cognitive biases to creep into decision making in ways that result in discrimination.

In 2018, in its Concluding Observations to New Zealand's Eighth Periodic Review, the United Nations Committee on the Elimination of Discrimination Against Women found that the Family Court systemically discriminated against women who were victims of domestic violence because it "routinely resort[ed] to the parental alienation syndrome theory, despite the fact that it has been refuted internationally". The Committee recommended that Aotearoa New Zealand take steps to limit the usage of PA theory in private custody proceedings. In other words, the unreliability and lack of appropriate regulation of forensic psychology in the Family Court has become so systemic that it constitutes a violation of women's and children's human rights.

Issues relating to the need to regulate psychologists who perform evaluations and give evidence in family courts is a global one. In 2021, the Association of Clinical Psychologists in the UK (ACP-UK) issued a report about how to protect participants from poor psychological practice in the family court.⁵ They note:

[N]on-registered / non-regulated psychologists are undertaking work for which they do not have the necessary qualifications and experience. This can have devastating consequences, particularly in the family court. ACP-UK is aware of several cases in which "psychological experts" who are not HCPC registered have suggested inappropriate diagnoses and made recommendations for children to be removed from their mothers based on these diagnoses.⁶

The latter sentence relating to "inappropriate diagnoses" and "recommendations for children to be removed from their mothers" describes the use of theories stemming from the construct of "parental alienation" to recommend removal of children from victim mothers for placement with violent fathers.

More recently, in 2023, the UN Special Rapporteur on Violence Against Women and Girls issued a report entitled *Custody, Violence Against Women and Violence Against Children* examining the ways in which family courts around the world refer to "parental alienation" or similar "pseudo-concepts" in child custody cases, ignoring histories of domestic violence and exposing victims to double victimisation. The report found: "Allegations of domestic violence tend to receive insufficient scrutiny by courts and to trigger problematic assumptions, for example that it causes little harm to the mother or child and that it ceases with separation." (para 12) It specifically 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." (para 47)

In sum, judges and lawyers in an adversarial system of justice, who have no training in or understanding of scientific methodologies, are not competent to regulate the "expert"

⁵ ACP-UK, *The Protection of the Public in the Family Courts*, December 2021.

⁶ At 2.

psychologists who offer testimony in the Family Court. I hope that the Board will step in and create a system to regulate the forensic subspecialty of psychology, particularly in the Family Court.

Recognition of Prior Learning

I urge the Board to exercise caution regarding the proposal for a Recognition of Prior Learning endorsement. On-the-job training not only cannot substitute for evidence-based knowledge, but it often displaces it. Those who are practicing forensic psychology probably view further training as unnecessary because they already consider themselves to be experts and therefore in a position to render expert opinions without additional specialised knowledge, but clinical psychology is a generic credential, and it does not signify special competence to apply research evidence to forensic situations.

The poor practices of clinical psychologists currently performing forensic evaluations, particularly in the Family Court, are deeply entrenched. Court psychologists nearly universally lack specialised expertise in the dynamics of family violence and its impact on child safety. For example, court reports almost never include a demonstrated understanding of adverse childhood experiences (ACEs) and their long-term impact on psychosocial wellbeing. These are crucial competencies that any registered forensic practitioner evaluating children's best interests must have.

Because of the insular, self-selecting, and self-regulating nature of the list of Family Court report writers, court psychologists have failed to regulate themselves. Instead, methodological errors and gender bias have been replicated across their community, further entrenching the lack of as-applied validity to the evaluations that they perform.

In this context, extensive on-the-job training and experience is likely a sign of poor practice rather than competency. It is crucially important that "prior learning" entail a demonstration of evidence-based best practices and not merely anecdotal, intuitive learning from practice. This must include specialist competency in family violence, ACEs, and trauma-informed practice.

Conclusion

Globally, psychology boards have finally begun to regulate this poor practice. For example, in *In Re: Head*,⁷ the Oregon Board of Psychology (OBP) initiated a disciplinary action against Jacqueline Head, a registered psychologist, for unprofessional conduct. The disciplinary action arose out of Dr Head's conduct in proceedings in the family court. The family court contracted with Dr Head to provide "reunification therapy" between a father and children and write reports on its progress. In 2020, Dr Head sent a letter to the father's lawyer indicating that the children suffered from PA. In reliance on Dr Head's representations, the family court made findings that the children were "alienated". Dr Head recommended that the father and the

⁷ Jacqueline J. Head, Case No. 2020-035 (Or. Bd. of Psych. 8 July 2022), at: obop.us.thentiacloud.net/webs/obop/register/#/profile/jacqueline%20head/0/0/10/6074cfe7b952d62dd40514ab.

children attend a PA reunification workshop and that the children be placed in the father's custody for six months after the workshop to remedy their "alienation". This is a recommendation that court psychologists in the New Zealand Family Court routinely make.

Fortunately, the family court in Oregon rejected Dr Head's recommendation regarding the PA workshop and discharged her as the reunification therapist. The OPB found that Dr Head's conduct violated four ethical standards for psychologists: the duty to avoid harm, cooperation with other professionals, having an adequate basis for scientific and professional judgments, and having an adequate basis for assessment, all ethical requirements for psychologists in Aotearoa New Zealand.

The OPB found that Dr Head violated the duty to avoid harm because she failed to establish that attending the reunification workshop would not be harmful to the children based on their unique therapeutic histories and needs. The Board found that Dr Head violated the duty to cooperate with other professionals when she failed to consult with the children's existing therapist to gain her professional perspective. This is also common practice in Aotearoa New Zealand, where psychologists in the Family Court refer derogatorily to specialist trauma counsellors working with victims of family violence as "allied professionals" (a reference to their belief that these specialist practitioners are "allied" with victim/survivor women who "alienate" children from violent fathers).

The OPB found that Dr Head violated the duty to have an adequate basis for her scientific and professional judgments by referring to "parental alienation" as if it were a diagnosis, "a representation which is not established scientific or professional knowledge within the field of psychology" because the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association* (DSM-5) did not recognize PA. The Board found that Dr Head violated her duty to have an adequate basis for her assessment of the children when she made evaluations and recommendations to the court with insufficient information to substantiate her representation that they suffered from PA when it was not listed in the DSM-5 "and it is therefore not possible to diagnose individuals with that condition." The Board concluded that Dr Head's failures constituted unprofessional conduct because her recommendation that the family attend the PA workshop "constituted a danger to the children's emotional health or safety because it would have resulted in them being forced to attend a four-day workshop held at a distance location where they would experience pressure to retract, give up, or overcome their emotional experiences of distance, anger or hurt regarding [their father], which could result in emotional harm to them." This type of unregulated and unvalidated "reunification therapy" is regularly recommended by court psychologists in Aotearoa New Zealand even though the WHO has found that it lacks a

scientific basis⁸ and it has been banned in other jurisdictions because of the harm that it does to children who have experienced family violence.⁹

The court system and the families being assessed in Aotearoa New Zealand deserve a form of credentialing that legitimately assures them that a court psychologist has adequate training and expertise to define them as a forensic expert. Rigorous regulation of the subspecialty of forensic psychology by the Board, requiring targeted, formalised training and education, is the only adequate means of confirming court psychologists' claims to expertise, assuring competency, and protecting the public, and particularly vulnerable children and victims of family violence, from poor forensic practice.

I have attached to this submission three of my recent publications relating to the need to regulate forensic practice in the Family Court, particularly given the prevalence of the pseudo-science of "parental alienation" amongst court psychologists, for your further reference.

⁸ In 2019, the WHO removed the terms "parental alienation" and "parental estrangement" from the eleventh edition of the *International Classification of Diseases*. They 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".

⁹ For example, last year, California mandated specialised training in intimate partner violence and its effect on child safety for family-court personnel and outlawed traumatic "reunification therapies" in the wake of several high-profile murders of children by violent fathers who were given custody of them after court evaluators opined that they had been alienated by their victim mothers and recommended unsupervised visits with their fathers. Vivan Chow & Rick Chambers, "'Piqui's Law' Passed after SoCal Boy Murdered by Father in Custody Battle", *KTLA News*, 15 September 2023, at: <https://ktla.com/news/local-news/lawmakers-pass-piquis-law-to-protect-children-from-abusive-parents/>.



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