BOOK REVIEW

Youth Justice in Aotearoa New Zealand: Law, Policy and Critique

Alison Cleland and Khylee Quince

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I INTRODUCTION

Covering the law, policy and critique of a distinct area such as youth justice might be thought of as optimistic in just 280 pages, but this is exactly what Alison Cleland and Khylee Quince attempt in their recent book, *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique*.[1] A an evaluation of the "fitness for purpose" of New Zealand's youth justice system, the book utilises Māori and international human rights frameworks for assessing the "success" of the status quo.[2] In doing so, the authors provide an important, albeit brief, critical perspective of an area where New Zealand is often complacently assumed to be a progressive leader.

Cleland and Quince carefully examine the premises underlying the system and the way in which it operates to highlight the areas that they see as needing development. The book uniquely examines disparities between Western individualised human rights constructs and the collective rights prioritised by Māori. It is essential to understand the conflict between these views given the centrality of the child and human rights-based approaches in the Children, Young Persons, and Their Families Act 1989 (the Act).

The book's major contribution is its demonstration of the ongoing negotiation required in New Zealand law and policy-making between the Eurocentric legal system and growing desires to integrate Māori values. While the 1989 Act sought to incorporate Māori perspectives, the authors' analysis helps articulate the problematic and tokenistic approach taken to it. Inevitably, Cleland and Quince's book leads to wider questions over whether synthesis of these approaches is a valuable goal, or whether it continues to muffle the need for Māori autonomy and self-governance. *Youth Justice* presents a strongly argued case for policy reform.

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1 Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis, Wellington, 2014).

2 At 1.

II REVIEW OF CHAPTERS

"Ki te kahore he whakakitenga ka ngaro te iwi [—] *Without foresight or vision the people will be lost*".[3] Chapter one begins with these words and sets out the visions or standards that the authors seek to test the youth justice system against. The first, international human rights, is understandably dominated by the influence of the United Nations Convention on the Rights of the Child (UNCROC) and its three key principles: non-discrimination, that the best interests of the child shall be a primary consideration in all matters affecting the child or young person and the importance of the voices of children and young people.[4] The second is the Treaty of Waitangi and Māori interests, with models of Māori well-being developed in health and education contexts used as benchmarks.[5]

Chapter two continues this contextual exploration by examining the sociological construction of "youth". As in the previous chapter, the authors directly compare Western and Māori understandings of youth; here, they seek explicitly to highlight the effect of New Zealand's colonial heritage in shaping legal understandings of "youth".[6] The dichotomy between the UNCROC-style approach, which prioritises the rights of the individual child, is contrasted with the collective understanding of offending promoted in Māori culture, in which "the child is not readily divisible from the whānau, hapū and iwi."[7] That this belief was challenged and undermined by colonialism is not shied away from and neither is the inherent implication that the current law continues this "colonisation" by assuming a Western view of the child and family. The well-explained analysis of these different approaches to child welfare and criminology inform subsequent chapters. Although these policy chapters seem slightly isolated from the law, their theoretical contribution to the book is significant.

Chapter three provides an in-depth analysis of the governing Act, centred around five strands of the "youth justice legislative cloak".[8] These are identified as diversion, Māori self-determination, child and young people's rights, welfare and restorative justice. Again, the authors take a historical view in assessing the development of each strand. While helpful in giving context, the overview and explanatory nature of this chapter means that the many fascinating topics and contemporary issues raised are only briefly analysed. The selected strands highlight the policy-based nature of youth justice and the clear ideologies on which it has developed. The identification of diversion as a key desired outcome (tied to beliefs that preventing young people entering the criminal justice system is a prima facie good), while supported by this reviewer, is a premise some may dispute.

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3 At 1.

4 See United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), preamble, arts 2, 3 and 12.

5 At 9–11.

6 At 20.

7 At 32.

8 At 51.

Analysis of the links between welfare, Māori self-determination and the youth justice system again demonstrates the difficulties of achieving progress and consensus in the sector, given its strong links to wide areas of policy well beyond the criminal justice system. It is also evident that insufficient scholarly work has been completed on the Act and its effects, with many key conclusions drawn authoritatively from a 1993 report.[9]

The actual operation of the Act is examined in chapter four, which also identifies the numerous personnel involved in the youth justice system. While much of this chapter is descriptive, the explanation of the complex and crowded youth justice system is clear and coherent. As well as explaining the various actors, the authors canvass the expansive process and information rights granted to youth offenders, including specific, age-appropriate explanations of the process at each step by the police officers involved.[10] Interestingly, the Act requires only "reasonable compliance" with this scheme of rights.[11] While it is understandable that, as Fisher J has stated, "[i]t is not the letter of the rules which matters but whether in substance the youth [understands]"[12] that is relevant, this is a delicate balance. In practice, a youth's support person may offer advice that is against the child's best interests, such as advising them to plead guilty.[13] Although this would be considered a fulfilment of the support person's role, it seems to create contradictory protections and illusory "support".

The authors also bring out the tension between the dual roles of the youth justice system as a criminal system and as a filtering system for care and protection orders and the provision of social services.[14] These blurred roles are emphasised carefully, and the authors' examination of the case law and the legislative history is a valuable contribution to these areas.

Chapter five is devoted entirely to Family Group Conferences, a "lynchpin" of the youth justice system, and its uniqueness to New Zealand. Family Group Conferences (FGCs) are used in New Zealand as the primary means of dealing with youth offenders, rather than the corollary process they assume in other countries.[15] FGCs draw together the victim, youth or child and their family, as well as many of the actors discussed in chapter four, with the aim of negotiating an appropriate "plan" for the offender's punishment and rehabilitation. FGCs pose interesting quandaries for traditional criminal and public law perspectives, flagged by the authors. Not only do FGCs mean that offenders' punishment is not certain before the crime is committed, and like offenders (even having committed the same offence) will not be treated alike, the process also bears similarities to an outsourced private law style of self-governance — without the authority of

9 At 58. See Gabrielle M Maxwell and Allison Morris *Family, Victims and Culture: Youth Justice In New Zealand* (Social Policy Agency, Wellington, 1993).

10 *Youth Justice in Aotearoa New Zealand*, above n 1, at 100–101.

11 Section 224.

12 *R v Irwin* [1992] 3 NZLR 119 (HC) at 126.

13 *R v S* (1997) 15 CRNZ 214 (CA).

14 *Youth Justice in Aotearoa New Zealand*, above n 1, at 107.

15 At 135.

judges as external, neutral arbiters.[16] The broad gamut of critiques contained in this chapter are deserving of more in-depth analysis.

The identified areas of cultural clash are dealt with more expansively by the authors. Their in-depth knowledge and insight is clear in the unpacking of the differing forms of apologising and signalling apology in Māori and Pākehā cultures: Māori culture is a "shame" culture, signalled through a bowed head and lack of eye contact, and adopted as a collective, whereas Pākehā expectations of an apology will often require more direct eye contact and expression of personal liability.[17] This is just one example demonstrating the dissonance between expectations and realities of the FGC system for Māori despite FGCs' goals of cultural appropriateness and romanticised connections between collective restorative practices and indigenous peoples.[18] The authors expertly unpack the stereotypes leading to such views. In doing so, they argue that Māori offenders' difficulty in engaging in restorative processes is inescapably linked to colonisation.

The authors' focus in chapter six moves away from cultural inadequacies to particular challenges in balancing interests within the system, specifically, mental impairment, offending by children and serious and persistent offending. Again it is clear that there is a lack of legislative response to existing scholarship: in relation to child offenders, the major work is a 1995 study, and Cleland and Quince state, "evidence suggests that discussion and legal and policy initiatives in Aotearoa New Zealand ... have hardly moved on [since then]".[19] The authors are highly critical of developments towards more punitive approaches for younger offenders, including recent lowering of the age of criminal responsibility,[20] and the lack of social services and support systems for child offenders, the mentally ill and persistent offenders.[21] Their detailed assessment makes clear that the tendencies toward populist "tough on crime" stances have stifled the development of wider social intervention programmes for youth offenders. Although there may be savings in the short-term, rising rates of mental illness, alcohol and drug addiction and the inability of serious offenders to properly reintegrate without intensive support suggests that, in the end, this misuse of the criminal justice system will reap negative outcomes. Cleland and Quince deal with these sombre realities with care and detail both the consequences and proposed solutions, leaving few excuses for non-implementation.

Chapter seven deals briefly with principles involved in conviction, sentencing and other orders made by the courts in relation to each young offender. Given the nature of FGCs and the interest in restorative justice, there is a necessarily limited ability to generalise. Regardless of these

16 At 165.
17 At 153–156.
18 At 175.
19 At 203.
20 See Children, Young Persons, and Their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010.
21 *Youth Justice in Aotearoa New Zealand*, above n 1, at 209.

limitations, this chapter canvasses a variety of outcomes from case law. Of particular interest is the discussion of the principles applied to youth who have been transferred to the District or High Court for sentencing. The authors incisively criticise the reasoning of the leading Court of Appeal judgment, which given the limited number of Youth Court originating cases taken to the Court of Appeal, seems unlikely to be changed without legislative intervention.[22]

The authors conclude with analysis of significant new initiatives. The development of Ngā Kooti Rangatahi, based on reconnecting with Māori identity as a support structure, but open to all youth, is particularly promising and will benefit from extended examination in the future.[23] Alternative fora for monitoring FGC plans alleviate some concerns about the standard youth justice process by requiring courts to convene on marae, involving local kaumātua in the process and offering cultural interventions as a part of rehabilitation (such as kapa haka, waka ama or te reo training).[24] Cleland and Quince point out, astutely, that some of the reason for this success may lie in the system's focus on young people's potential and moving forward.[25] To the extent that people of all ages have the capacity to change and grow, there is no reason the wisdoms applied here to young people could not be taken as an ethos for the whole of the criminal justice system.

The concluding section of the book makes broad calls for reform, review and an ongoing holistic approach to dealing with the needs of children and young people. The analysis and policy suggestions are well justified throughout the book, backed up with statistical evidence and sharp analysis. The authors do not back away from the inescapable conclusions of their work, such as the need for greater funding for child and young persons' support services.[26] The persuasive strength of many final recommendations is likely to lie with the readers' political identification with the underlying premises outlined in the early chapters of the book and reiterated throughout. However, some conclusions will be universal: the centrality of involving youth, their whānau and their communities in the youth justice system and the importance of having a strong system to deal with New Zealand's youth are undisputed. He aha te mea nui o te ao? He tāngata, he tāngata, he tāngata. What is the most important thing in the world? It is people, it is people, it is people. The authors' suggestions require the centrality of people — both youth and the wider community — in the youth justice sector.

22 At 243. See *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868.
23 *Youth Justice in Aotearoa New Zealand*, at 249.
24 At 252.
25 At 263.
26 At 264.

III CONCLUSION

It is the opinion of this reviewer that this work is an important one for Aotearoa. It crystallises in an accessible form many of the key problems with the current youth justice system. Though at times the brevity and explanatory nature of the work comes at the cost of depth and discussion, the text has much to add for policy-makers seeking well-argued perspectives, and students seeking an overview of the system. Crucially, it highlights the importance of seeking genuine input from stakeholders like Māori, particularly where Māori and Pasifika youth are high users of the youth justice system. That so many conflicts exist between the system as set up and Māori and Pasifika values signals a disappointing approach to criminal justice policy, and to policy-making generally. It might be hoped and expected that, given nearly 20 years have passed since the Children, Young Persons, and Their Families Act became law, further reforms will address this. Whether such reforms will eventuate may depend on the political climate, and an overall swing against the penal populism that too often dominates mainstream justice policy discussion.