

Inquiry into the strategic effectiveness and outcomes of Australia's aid program in the Indo-Pacific and its role in supporting our regional interests

SUBMISSION TO THE JOINT COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

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Introduction

This submission is concerned with the effectiveness and outcomes of Australia's aid program in the context of Pacific legal systems, although many of the comments are of relevance across the Indo-Pacific. More specifically, it deals with two perceived barriers to effective aid delivery. The first is legal pluralism, that is, the co-existence of two very different systems of law: state law and customary laws. The second is the failure to patriate laws in Pacific Island Countries.

Failure to Acknowledge the Existence and Importance of Legal Pluralism

Pacific legal systems are burdened with a legacy of legal pluralism, that is, the co-existence of two very different systems of law: state law and customary laws. Those systems of law operate effectively in their own spheres, but increasingly overlap. The tensions that this creates are diverse and wide ranging. They pose complex challenges for achievement of development goals. Institutional reform without acknowledgment or understanding of customary laws or legal systems is on shaky foundations, as has been frequently illustrated in recent times.¹ Many aid initiatives concentrate almost exclusively on state law. Customary laws are either entirely disregarded or, at best, treated as an inferior source of law. Where customary law is considered, superficial analysis has often resulted in findings of incompatibility between customary laws, particularly relating to customary land, and western perspectives on legal and economic imperatives. Further, the preconceptions underpinning analysis of development issues can lead to diametrically opposed views on appropriate responses. A good example can be found in the contrary views of Hughes² and Fingleton³ on the merits of registering customary land.

It is now widely agreed that many law and development programs have been 'a great disappointment'.⁴ Development practitioners often ignore the extensive scholarly literature that might assist them to navigate the problems that arise from legal pluralism. Further, country based practitioners and local NGOs are often by-passed in the development of aid programs

¹ For one example, see Jennifer Corrin Care, 'Off the Peg or Made to Measure: Is the Westminster system of government appropriate in Solomon Islands?'. (2002) 27(5) *Alternative Law Journal*, 207-211.

² Steven Gosarevski, Helen Hughes and Susan Windybank, 'Is Papua New Guinea viable with customary land ownership?' (2004) 19.3 *Pacific Economic Bulletin*, 133.

³ Jim Fingleton (ed), *Privatising Land in the Pacific: a defence of customary tenures*, Australia Institute Discussion Paper, No. 80, June 2005.

⁴ Brian Z Tamanaha, Caroline Sage and Michael Woolcock (ed), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, 2012, Cambridge University Press; Brian Z Tamanaha, 'The Primacy of Society and the Failures of Law and Development', 44(2) *Cornell International Law Journal* 209.

and their implementation. This is in spite of the fact that these persons and bodies are rich in local knowledge and are in a position to know the practical necessities for accommodation of legal pluralism into account.

On a more positive note, in recent years Australia's aid program in the Indo-Pacific has transformed from concentration on state institutions to recognition of the importance of non-state justice systems. However, the difficulties involved in engaging with non-state systems are often underestimated. Engagement with non-state justice systems requires knowledge of how things work in practice, not only from a state perspective, but also from the standpoint of communities where the systems operate. In this context, the standard guidelines on engagement may be too general to be of use. Policy briefs may also be inapplicable to customary law or fail to deal with the vital issues of community concern.

None of this is to suggest that legal pluralism should be regarded as a hurdle for development or to detract from the value of customary laws and processes. Rather it is submitted that initiatives developed under the aid program should give the customary legal system and the State legal system equal attention. Allowing the interests of the state to dominate to the exclusion of the realities facing traditional societies negatively impacts on the success of the aid program.

Failure to Patriate Laws

As an essential part of the independence process, the constitutions of Pacific Island Countries conferred autonomous lawmaking power on the local parliament. What they did not do was patriate (i.e. localise) foreign laws in place at that time. Instead, these laws, transplanted from the metropole during the colonial era, were retained in force as part of the 'existing law'. For the most part, these are English laws. However, the administration of some Pacific Island Countries was transferred by Britain to its former colonies (later dominions), New Zealand and Australia, resulting in a 'legacy' of New Zealand and Australian law, as well as British law.

The legislative provisions used by Pacific Island Countries to keep this legislation in force after independence reflect a common pattern.⁵ This model imposes a number of conditions on the reception of United Kingdom legislation, which must be:

- of 'general application';
- in force in the United Kingdom (and possibly an administering State or country) on a specified date (commonly referred to in the Pacific as 'the cut-off date'), which differs from country to country;
- in conformity with the relevant independence *Constitution*;
- in conformity with Acts of the local parliament; and
- applicable to the circumstances of the Pacific country in question.⁶

In practice, these conditions are difficult to apply; the issues which this presents for Pacific countries include:

⁵ Jennifer Corrin Care, 'Colonial Legacies?', in Jennifer Corrin Care (ed), *Sources of Law in the South Pacific*, (1997) 21 *Journal of Pacific Studies*, Suva: USP, 33, 43.

⁶ See further, Jennifer Corrin, 'Transplant Shock: The Hazards of Introducing Statutes of General Application', in Vito Breda (ed), *Legal Transplants in East Asia and Oceania*, Cambridge University Press (in press).

- **Uncertainty.** It is often impossible to tell whether a particular foreign Act applies until the courts have ruled on the point. The consequent inability of Pacific political and legal institutions to publicly and prospectively identify potentially applicable legislation raises serious questions as to whether these countries presently possess a coherent, transparent and effective legal system.
- **Antiquation.** The ‘cut-off’ dates for foreign legislation confine the content of that legislation in the past. Reforms made in the United Kingdom to potentially applicable legislation after the ‘cut-off’ date do not benefit Pacific Island Countries. Consequently, legislation identified as deficient in the United Kingdom will continue to apply in the Pacific.⁷ This antiquation also results in the application of legislation that does not conform to gender equity expectations. For example, this legislation is not couched in gender-neutral terms. Moreover, the substance is often unfavourable for women and children. A good example is the application in many Pacific countries of United Kingdom family laws predating the 1971 (UK) reforms, which do not allow for property division and fail to promote the best interests of the child.⁸
- **Institutional Impairment.** The failure to be able to identify with certainty the foreign statutes that apply in Pacific Island Countries impairs the capability of their parliaments to respond in an informed and open manner to law reform and institutional development. In turn, this hinders Australia’s aid initiatives, as the compatibility of proposed reforms with existing laws is impossible to assess. This adds another dimension to the legal pluralism problems discussed in the first part of this submission, as this foreign legislation is often incongruent with local, customs and culture. Whilst the conditions placed on reception allow foreign legislation to be rejected for that very reason, this point is rarely, if ever, argued before the courts. The very question as to whether legislation is applicable is prone to impair confidence in the legal system.

This reliance on foreign law was not intended to be permanent, but only a transitional measure, to provide a body of law until laws were made locally to take its place. The failure to patriate laws is a fundamental problem that besets legal systems of many Indo-Pacific countries and many other emergent and developing countries. In Pacific Island Countries, it could be said to undermine the whole concept of an effective legal system.

Since independence, the task of patriation has been sadly neglected. Many Pacific Island Countries lack an active legislature and so a large part of the law is still derived from foreign statutes. This is symptomatic of their institutional weakness. Arguably, it also contributes to that weakness, as the uncertainties and antiquation discussed above undermine the coherence and transparency of the legal system. Reliance on the application of these old statutes, rather than on legislation specifically designed for Pacific peoples and circumstances, is an unpleasant remnant of colonialism and perpetuates legal dependence. Given the common antipathy of local communities to the State legal system and, more generally, the fragility of the rule of law,

⁷ For example, in several Pacific countries the *Matrimonial Causes Act 1950* (UK) applies to expatriates and indigenous people married to expatriates, but was repealed in the United Kingdom in 1973: *Matrimonial Causes Act 1973* (UK).

⁸The Married Woman’s Property Act 1882 (UK) governs property claims in Pacific countries with no local legislation. See further, Jennifer Corrin Care, “‘Is it Well With the Child?’: Custody of children in small South Pacific states”. In Bill Atkin (ed), *International Survey of Family Law* (2009) New Zealand: International Society of Family Law, 469-489.

localisation of legislation is an essential part of institutional development in the Pacific. However, it has not ranked as a priority in Australia's aid program.

Suggestions for Addressing These Issues

These interrelated issues require immediate attention if Australia's aid program in the Indo-Pacific is to be effective and produce enduring outcomes. It is suggested that assistance should be designed to assist Pacific Island countries to address broad goals, such as nationhood, as opposed to limited development outcomes that may encourage a culture of dependency.

Part of the overarching problem of finding an appropriate system of governance⁹ is the question of how to find a legal system that accommodates both State and customary laws and legal systems. There are key questions that have yet to be explored, such as whether the customary system is flexible enough to allow its benefits to be retained, whilst the elements that lead to inequality and injustice are discarded. Is it possible to encourage the development of a sense of national pride, balanced with a critical attitude to aspects of culture that do not promote the common good? Solutions based on moulding customary concepts to an approximate common law equivalent are inadequate and require further consideration.

One specific task requiring immediate attention is the patriation of legislation in Pacific Island Countries. A statutory law reform program is urgently required to rid the country of the most obvious examples of inappropriate and inequitable laws. Identification of foreign laws and local laws modelled on outdated United Kingdom legislation should be a priority. A vital part of any such initiatives would be close consultation with local experts and stakeholders from the outset.

⁹ See further, Jennifer Corrin Care, 'Off the Peg or Made to Measure: Is the Westminster System of Government Appropriate in Solomon Islands?' (2002) 27(5) *Alternative Law Journal*, 207-211.