



PACIFIC JUDICIAL DEVELOPMENT PROGRAMME

PJDP Phase 2: Options Paper - PJDP Institutionalisation and Governance

Briefing Note for Discussion

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ABBREVIATIONS

- IFC - International Finance Corporation
- MFAT - Ministry of Foreign Affairs and Trade
- MSC/MU - Federal Court of Australia's management unit
- PICs - Pacific Island Countries
- PJDP - Pacific Judicial Development Programme



1.0 INTRODUCTION

Background: After 12 years of implementation, PJDP/PJEP is reaching a crossroads. The current Pacific Judicial Development Programme (PJDP), Phase 2, is scheduled to end in July 2012, with a possible extension till July 2013. The present funder, the Ministry of Foreign Affairs and Trade (MFAT) of New Zealand, is currently reviewing its entire foreign assistance program, and among the many decisions to be made are whether 1) it will continue with any judicial work and 2) if it does, whether this or any other regional program will be included. A negative decision on either count would not necessarily imply dissatisfaction with PJDP, but rather its inconsistency with the funder's new priorities.

PJDP participants (the Pacific Islands Countries [PICs]) cannot alter the funder's priorities, but they could influence the two key decisions by making a strong case for the importance of the program. Alternatively, they could take the same case to other potential funders - most likely AusAID which is doing its own justice programme review and which has several bi-lateral and regional projects already in existence. However, proceeding with either option implies a (re)statement of programme goals for the future. Presumably after 12 years the programme has achieved many of its initial objectives and thus must be justified on the basis of either a next stage of the same objectives or a new set. Although not quite in these terms, the consultant was asked to explore several aspects of this situation, and more specifically the following themes.

- Sustainability (i.e. survival) of PJDP at both the regional and local levels.
- Programme governance, management, and ongoing administration
- Potential funding models and
- Possible linkages with and modalities for institutionalising (i.e. making it a permanent feature of) judicial development within existing regional organisation/s or institution/s

On the assumption that the programme's survival only makes sense if the "beneficiaries" value it, one conclusion of the options paper is that the PICs should be involved in the discussion of all these topics.

A Note on Funders' Criteria for Programme Support: Before addressing the four themes, this issue merits attention. The situation for programming foreign assistance has changed in recent years, and funders increasingly link their decisions to the following criteria:

- **Definition of objectives which links them to some higher order problems.** Funders have their own notion of which higher order problems interest them, but in general they refer to goals like poverty reduction, economic growth, citizen security (from crime, internal violent conflict, etc), or the advancement of certain basic rights.
- **Likelihood that the programme will actually produce improvements** to its immediate targets (e.g. judicial performance) and to these big issues. A frequent problem is that while the promised improvements are worthwhile, the proposed activities seem unlikely to achieve them.
- **Cost effectiveness** of the proposed programme and methods. Is this the best way to bring about the improvements, or could the same ends be achieved more effectively and efficiently by other means (and even by other types of programmes)? A good counter example? The Mexican court automation project that promised to reduce traffic congestion in Mexico City!
- **Additive value of the programme** - what it is doing is both necessary and does not duplicate what other donors are financing. Inter-donor coordination is one thing; out and out redundancy is another.
- **Participants' commitment to the programme** and the likelihood that they will support the changes after the programme has ended. Funders no longer focus only on "demand" from potential beneficiaries but rather want to be assured this and the other four criteria are met. This also implies substantial participation of beneficiaries in program design to ensure they are in agreement with the answers in all five areas.



Funders realise, or should realise that a relatively small program, like PJDP, cannot “fix the world,” but they still need to use these criteria in making their decisions. Here those promoting a program can help by laying out an explanation of how smaller activities contribute to a larger goal, or how they foresee them developing beyond the life of the current project. It is usually advisable to begin with the problem (possibly as a judicial issue, but then linked to its impact on society), not the proposed activity, and then explain how the activity will contribute to its resolution.

Judicial issues that seem most relevant for PICs (and can be most easily justified in terms of “global impacts”) include delays and access for the formal and some hybrid courts, biased decision making in both the formal courts and customary mechanisms, and inadequate linkages between formal and customary dispute resolution systems.

As a concrete example of the above, one judicial problem might be delays in resolving cases. Its larger societal impacts (why it is important) are obstacles to economic transactions (because contracts are not enforced rapidly), lower levels of protection for the vulnerable (as their complaints are not attended quickly) and escalation of social conflicts (because unsatisfied parties may take the law into their own hands). To address delay (and so enhance the judiciary’s contribution to resolving the big problems), the proposed activity is the development of a simple case tracking system which allows judges to monitor their caseloads and identify what is falling behind. Related measures might include Supreme Court monitoring of results (to spur judges to keep up), reorganization of courtroom staff, more efficient scheduling of hearings, a less permissive policy on adjournments, and enforcement of deadlines for parties’ submission of documents.

2.0 DISCUSSION OF THE FOUR THEMATIC TOPICS AND OF THE OPTIONS

Regional versus National Sustainability of Programme (Impacts): The question was posed without mentioning impacts, but where impacts are not defined, sustainability becomes irrelevant - what is being sustained? Thus an initial prerequisite - not an option - is for the parties to the programme to reach a *mutual* agreement on its goals, results, and how they will be measured. The challenge varies depending on which of three temporal scenarios prevails:

- **PJDP ending July 2012** - definition of objectives/impacts/results is a retrospective exercise and will not change projected activities. While the PICs should be involved, its purpose is solely to close out the programme well. While not preferred by donors, results for many activities will have to be outputs (e.g. 2 ethics codes drafted) not impacts (e.g. improvement in quality of judgments as a consequence of ethics codes).
- **PJDP is extended to July 2013 and then ends** - same purpose as above, but with more time all parties could reprogram some actions to produce more impacts and enhance post-programme sustainability.
- **PJDP ends in July 2012 or 2013, but a follow-on programme is authorised** - here a wider range of objectives, results, and activities could be included, but donor criteria should be incorporated from the start and results should be impacts not outputs.

As regards the further definition of regional or national impacts, four options were identified for consideration. They are most relevant for the third scenario - a follow-up programme - but could also be used to define objectives and outputs/impacts for scenarios 1 and 2.

- **Option 1** - focus on improvements made in individual PICs, assuming that not all PICs will be equally affected. Some activities (general courses) will reach them all, but the new activities in particular will focus on a few, possibly privileging countries lacking their own bilateral programmes or similar alternative sources of funding



- **Option 2** - focus on national impacts as above, but work with sub-regional groupings which at least in theory would cut costs and allow more activities to be delivered at the country level. Note: the economic savings are not a given, but should be verified.
- **Option 3** - focus on regional impacts by combining an emphasis on creating a regional forum for discussions of problems and models, capacity building in strategic planning, and the development of pilot activities (financed through the programme and through bi-lateral projects) as models for the other PICs to apply.
- **Option 4 (regionalisation lite)** - return to an emphasis on training, but spend the remaining time developing training capacity within the national judiciaries rather than on the delivery of courses.

There is a difference between a regional programme, and a regional approach to programming. Options 3 and 4 come closer to the former and options 1 and 2 are more typical of the latter. Both can be justified, but regional approaches to programming often overlap with bi-lateral efforts (e.g. the Law and Justice Programmes financed by AusAID in several PICs) and other regional programmes (AusAID gender and gender violence programmes; new World Bank and International Finance Corporation (IFC) work on alternative dispute resolution and customary dispute resolution), thus violating the additive rule.

In reviewing these options and their internal variations, PICs might consider the following questions:

- Can justice sector needs be defined regionally?
- If so, what are they and how can they be linked to the “larger” goals of interest to donors?
- How can a modest sized regional program meet them? Is your country interested in receiving and contributing (by dint of the level of effort required) to the results?
- Do you, as a representative of your country, believe there is a justification for a third stage PJDP/PJEP and if so, what is it?
- Is your answer consistent with the donor criteria mentioned above?
- Would it make more sense for MFAT, AusAID or any other donor to focus on bilateral as opposed to regional work? If so, would your country benefit or not?

Governance, Management, and Administration: There are problems in all three areas. The governance system (with its reliance on the Programme Executive Committee and the National Coordinators) is insufficiently representative and a poor forum for region-wide discussion of problems and solutions. The two-part management (MFAT and the Federal Court of Australia’s management unit [MSC/MU]) seems to incorporate competing visions of programme objectives and indicators of success. The donor parties need to reach a realistic agreement and invite discussion by the PICs or start the process by asking the PICs what they think. Administration is fine where it is, but a longer programme should consider regionalising its location to increase regional ownership and make use of local talent. That said, the “options” in each area are:

- **Governance** - leave as is at present, but if a post PJDP follow-up is considered, the governance structure should be revised to ensure better representation of all participating countries and a more active role for the National Coordinators.
- **Management** - for PJDP, Phase II, MFAT and the MSC/MU should agree on impact targets in a form 1) compatible with the short timeframe and 2) acceptable to the PICs. For a third programme, there needs to be a more focused meeting of the minds (donor participants and participating countries) to ensure everyone agrees on a set of targets (and thus activities) and on the strategy and timeline for advancing them.
- **Administration** - this can be left as is if the programme will only last another 12 or 24 months. If there is a follow-on programme, a gradual transfer of the MSC/MU to a regional location and the addition of a full-time director are recommended.



Possible linkages to other regional institutions: The three principal options are:

- **Leave as is** - recommended if the programme will end soon.
- **Create a separate regional headquarters** - not recommended even if the programme continues through a third phase because of costs and lack of post-programme sustainability.
- **Place the programme within an existing regional institution** - recommended only if a follow-up program is implemented and if a suitable location can be found.

Funding Sources: The announced donor exodus from justice work in the region may be exaggerated, but the trend is evident. Thus, the best sources of funding will remain New Zealand and Australia. Both are active in police work, and in the provision of expatriate judges, but only Australia retains an interest in supporting a variety of bi-lateral and regional programmes relating to justice (and not just security). Conceivably it could become interested in a PJDP successor as a complement to its other programmes. Or New Zealand could retain the lead, but this would function best if it were willing to promote closer coordination with the Australian work. A regional programme that promotes exchanges, models, and discussions is feasible *only if national programmes are in sync*. Otherwise participants lose interest or the programme becomes very expensive because, as in Latin America, it needs to fund national-level pilots. Being in sync also means recognising comparative advantages and not trying to duplicate, for example, support to gender or to IFC court-annexed mediation programmes.

3.0 ADDITIONAL ISSUES

Coordination of assistance programmes: This remains the weak flank of donor programmes universally. It is not only a problem as regards projects sponsored by different donors, but also different agencies of the same donor country. This suggests an additional role for a regional programme as a clearing house on donor and country-sponsored reforms. Whatever the future of PJDP, but especially if it expands beyond a training focus, it will have to organise itself to reach out to other donors and to other agencies of the country/ies funding programmes.

Structural obstacles to judicial planning: The placement of judicial administration within the executive branch is already drawing criticism, both among the PICs and within Australia and New Zealand. Vanuatu provides a positive example. Its Court successfully captured the administrative offices, and the Chief Justice and the Registrar now collaborate in preparing development strategies. In other countries, the traditional division has occasionally supported a judicial decision not to plan, leaving that to executive administrative offices which nonetheless are careful not to tread into judicial territory. While done in the name of judicial independence, an “independent” judiciary which takes no responsibility for improving its performance is not a judiciary that serves its citizens well. The other face of independence - accountability - deserves far more attention. What PJDP can do about this is unclear, but it would appear to be a topic for “regionalisation.”

Use of expatriate judges: The situation is complicated by the widespread use of expatriate judges, and especially non-resident ones, another factor which affects but is not influenced by PJDP. Since the practice is separately supported by both New Zealand and Australia, as well as by most PICs, it is up to those parties to do any reevaluation. Although recognising the arguments in its favour (more impartial and higher quality decision making), it is hard to identify its contribution to the development of independent *national* systems. A good expatriate judge should be looking to work him/herself out of a job, as some of them are, but there are others who do not see this as their responsibility, and some who reportedly are preferred by governments because they are more predictably susceptible to political pressures than are local appointees. There is already some resistance to the use of expatriate judges in a few countries (where interviewees complained that there were adequately prepared local candidates). This may be a topic for discussion in a regional forum, but its assessment is most appropriate for donor agencies - as part of the question of what they mean by fostering local development.