

Federal Court of Australia

Submission: DFAT New International Development Policy

November 2022

This Submission is presented to the Australian Department of Foreign Affairs and Trade (DFAT) by the Federal Court of Australia.

The submission outlines that, to allow DFAT to meet the objectives of its new policy, including promoting a peaceful, stable and prosperous Indo-Pacific, it is important to ensure that sufficient resources are available to promote the effective development of the courts. The public confidence in the courts and the judiciary is critical to the maintenance of the rule of law. Consistent with DFAT's new policy, this is in line with the Sustainable Development Goals, particularly Goal 16: Peace, Justice and Strong Institutions.

The rule of the law is essential for the legitimacy and functionality of democratic nation states. The fragility of the rule of law in many states around the world, however, presents challenges to the region and therefore Australia's engagement internationally.

For decades, the Federal Court has supported mutual objectives to strengthen the rule of law among 50 courts; primarily across South East Asia and the Pacific, through partnership initiatives that foster respect for the law and the courts and the judiciary. Through international collaboration, we have developed significant institutional knowledge of, and relationships with, the courts in the region. These relationships and the collaborative interactions between us have resulted in benefits to those courts and the populations they serve. In order to implement DFAT's new policy, Australian State, Territory and Commonwealth courts require sufficient resources to continue contributing to the development, delivery and management of targeted rule of law related programs in the region.

How should the new policy reflect the Government's commitments to build stronger and more meaningful partnerships in our region, founded on mutual trust and respect and shared values of fairness and equality?

The Federal Court approaches the building and maintenance of partnerships with deep respect for our partners. We consider our partners' legal and operational systems, the political economies within which they operate, along with their objectives and the most efficacious and locally appropriate solutions. This approach fosters mutual respect enabling us to traverse some of the most difficult impediments in a nuanced way that is effective in each country. The Federal Court has achieved enduring successes through these partnerships and hopes to continue to do so into the future, in line with the Government's new policy.

The Australian Government's new policy would benefit from promoting:

- Initiatives that foster understanding of each partner countries' legal and social contexts; political economy; and recognition that institutions are a collective of individuals each with their own capacities and strengths which must be catered for;
- Direct peer-to-peer and institution-to-institution initiatives that foster strong partnerships;
- Multilateral partnerships enabling recipient countries to network and derive benefits from a wealth of expertise and experience;
- A reduction in the use of for-profit implementing agents, in favour of drawing on expertise, where possible, from public sector entities – and building the capacity and resources of those entities to undertake and manage developmental and cooperative initiative;

- Dismantling silos between projects and implementing agents in favour of connectivity between complimentary initiatives; and
- Including key implementing partners in the development of policies.

The Government's role in this dynamic suite of relationships would most usefully be to connect peers and like institutions in Australia and across the spectrum of countries with which the Government collaborates and cooperates. Earlier this year, the Joint Standing Committee on Foreign Affairs, Defence and Trade – Foreign Affairs and Aid Sub-Committee inquiry into strengthening Australia's relationships with countries in the Pacific region recommended that:

“to enable program certainty, and retain and attract expertise, that the Australian Government consider providing a dedicated budgeted line item to the Federal Court of Australia to directly deliver the successful judicial capacity programs in the Pacific islands region.”

By extension, it would also be beneficial to collaborate with and support state-based implementing agencies throughout the design and implementation of projects to ensure Government policy objectives are translated into robust initiatives that will deliver the desired objectives.

What key trends or challenges will shape Australia's engagement in our region and globally over the next five to 10 years? What risks and opportunities does this present for Australia's development assistance?

Key among ongoing challenges are the capacity and competence of courts to traverse:

- The fragility of the rule of law across much of the region, including the challenge of maintaining judicial independence. Strong and independent judiciaries are critical to a strong democracy. Fair and impartial application of the law is essential and instils confidence in public institutions.
- Pervasive gender inequalities and gender-based violence that continue to oppress and subjugate women, preventing them from achieving their potential.
- Access to formal courts and justice by vulnerable, marginalised and geographically dispersed populations.
- The effective prosecution of corrupt activities¹. This is a real risk not only for our regional partners' internal institutions, but it also affects business confidence and integrity of economic transactions within the region and extending to and including Australian businesses.
- The advent of cryptocurrencies and by extension, possibilities for increased money laundering.
- Porous borders and the ongoing increase in human, drug and arms trafficking.
- Institutional and social fragility which affects the implementation of any support that is provided.²
- Climate change and the protection of natural resources.

The demonstrable trends, both positive and negative, that the new policy must be cognisant of include:

- Improved governance, accountability and transparency among judiciaries.
- Australia's position as a key partner, particularly in the Pacific is increasingly difficult to maintain, particularly when the offers of assistance from other nations far exceed what the Federal Court can provide.
- The region also continues to suffer from a perennial lack of financial resources and human capital necessary to deliver justice and facilitate sustained change.

Risks: When the rule of law functions well, the safety and security of citizens improves as does investor confidence. However, when public trust and confidence in the institutions of justice is damaged, then legal institutions are less often used to resolve disputes. The rule of law remains fragile across our many of our

¹ [CPI 2021 for Asia Pacific: Grand corruption and... - Transparency.org](https://www.transparency.org/en/cpi/2021/asia-pacific)

² World Bank [Classification of Fragile and Conflict-Affected Situations \(worldbank.org\)](https://www.worldbank.org/en/regions/fragile-and-conflict-affected-situations)

neighbouring states. By way of example, we continue to witness executive interference in the judiciary,³ along with elections marred with delay, violence and allegations of corruption. Beyond these ostensible difficulties, erosion of the rule of law often occurs gradually and imperceptibly. Yet, if it is not addressed, it can be fatal to peace, justice and good public order. A functioning democracy requires as a prerequisite, strong, fair and equal application of the rule of law.

Opportunities: There exists a number of opportunities for Australia to engage internationally, capitalising on relationships developed over many years. For example, during the pandemic the Federal Court developed new ways of working, including with its international partners. Central to this was assistance to improve the accessibility of justice in many partner countries and the development of systems that allowed faster responses to issues that escalated during COVID - particularly gender and family violence. This has been extremely useful in geographically diverse and remote regions where attending court in person was always economically exclusive. It also precipitated transitions in many countries from paper-based to digital systems. Not only does this promote efficiency and accuracy, but provides the foundation for ongoing accessibility through digital transformation.

This transformation however, presents new risks related to cybersecurity – such as the attacks that recently held Vanuatu government servers and their data (including court data) to ransom. This must be addressed in order for digitisation to be considered a sustainable solution.

What lessons from Australia’s past development efforts should inform the policy? What is Australia seen to be doing comparatively well?

Lacking within the government’s current policy is justice programs delivered through direct partnerships between courts and other justice sector institutions. Further, initiatives are too short in duration to be as effective as they could be. Aid and development projects have, it is reported, generally been less effective in a cost-benefit analysis.⁴ More work needs to be done among partners who provide leading contemporary expertise and deliver measurably beneficial outcomes.

From the Federal Court’s perspective, our projects aim to be efficacious in:

- Promoting partnerships premised on trust and respect; promoting regional collegiality and sharing wisdom and experience between courts and other justice sector institutions.
- Diagnosing and responding appropriately and pragmatically to priority challenges.
- Producing measurable results in the improvement of judicial and broader justice sector governance, independence, and efficiency, competence and accessibility challenges.
- Providing long-term, responsive support to colleagues within partner courts.

How should the new policy address the role of ODA and non-ODA in supporting the development of our regional partners?

The Federal Court has the proven ability to develop and implement programs with both ODA eligible and non-ODA countries. Enabling the participation of both ODA and non-ODA countries recognises their different financial positions while acknowledging the value of the contribution non-ODA countries can make to regional programs.

Non-ODA Eligible Countries: A portion of the Federal Court’s international collaborations are among non-ODA eligible countries. The wisdom gleaned from these countries is then used to support ODA-eligible countries. It is irreplaceable.

³ [Kiribati suspends all Court of Appeal judges after row over attempts to deport High Court justice David Lambourne to Australia - ABC News](#)

⁴ [Australia’s problem with Pacific aid - Devpolicy Blog from the Development Policy Centre](#) in *Strengthening Australia’s relationships with countries in the Pacific region – ANU Development Policy Centre*;

ODA Eligible Countries: Our work often results in mutual benefit among many ODA eligible countries, rather than being seen as assistance to the ODA eligible country. As such, it may be more appropriate and respectful of each nation with which Australia collaborates to be considered a partner, not a recipient of aid. We appreciate however, that among higher-income countries, their participation will be possible, and should be encouraged through the application of domestic financing.

For those countries unable to fund collaborations from their domestic budget, adequate investment of time and money are essential to enable reform to be undertaken, take hold and become embedded through adequately enhanced knowledge, skill and changed behaviours. Fragmented programming of a short duration will continue to inhibit development towards measurable reform and the Sustainable Development Goals.

Perennial resource and capacity constraints among some partner courts mean that it will not be possible to implement complete exit strategies in all countries. With technological advances however, when paired with appropriate utilities, there is potential for existing remote support to be scaled.

What development capabilities will Australia need to respond to these challenges? How can Australia best utilise its national strengths to enhance the impact of our development program and address multidimensional vulnerabilities?

To enable Australia to meet the challenges and opportunities over the next decade it must utilise the strength of its judiciary. Australia's judiciary is highly respected and recognised globally, not only for its expertise and innovation, but also its generosity and willingness to support regional counterparts to share its wisdom and support the rule of law around the world.

Since 2004, the Federal Court has had a dedicated in-house International Programs unit, which is overseen by the Chief Justice and the International Development and Cooperation Committee of judges. It is staffed by international development experts, with deep experience in needs assessment, programme design, technical direction, leadership, management, implementation, monitoring and evaluation. The new policy should build on the progress that has already been made by the Federal Court through its International Programs unit.

Conclusion

It has been said that “the rule of law is powerful and fragile.”⁵ Many challenges and opportunities that will present themselves over the next decade as Australia engages internationally relate to the rule of law. Whether these concerns corruption, access to justice, freedom of speech, climate change and protection of natural resources, human, drug or arms trafficking or money laundering – we must be equipped to respond.

The Federal Court has proven to be effective in deploying its expertise and that of other Australian courts and technical experts to address the judicial components of broader international support and endeavours. Direct collaboration between the courts in our region has time and again yielded unparalleled, significant and cost-effective results that uphold the Sustainable Development Goals of peace, justice, equality, strong institutions and economic growth. In order to implement DFAT's new policy, sufficient resources should be placed in the development, delivery and management of targeted court-focused programs in the region.

⁵ T. W. Small (2020) [The rule of law is powerful and fragile; it's your job to protect it - The National Judicial College \(judges.org\)](https://www.judges.org.au/news/the-rule-of-law-is-powerful-and-fragile-its-your-job-to-protect-it)