BLOOMS OR WEEDS? TRANSPLANTS IN PACIFIC CRIMINAL LAW

ERIC COLVIN*

Don Paterson was a man of fierce passions: for Vanuatu, for the Pacific, and for legal education and scholarship that is firmly anchored in knowledge of the region and appreciation of both its uniqueness and its internal diversity. Conversely, he had deep distrust for 'expert' advisors from the developed world who have never immersed themselves in the regional environment. These emotions underlay his commitment to the Law School at The University of the South Pacific and his belief in its value, not only as an institution for training lawyers but also as a centre for legal scholarship and critical discourse about the shape and development of the laws and legal systems of the region. The following paper does not concern a field of law that attracted Don's scholarship but it does echo themes that motivated his own work. The paper is dedicated to his memory.

The paper explores the use of transplants in criminal law in the Pacific region. It examines some instances where problems can be seen in the fit between the transplant and the existing local law. It concludes with some suggestions for improving the process of transplanting.

INTRODUCTION

Legal reform is rarely easy when it is motivated by technical rather than political considerations. The conservatism of the legal profession can support the retention of legal rules and procedural arrangements long after their rationale has been obvious and accepted. Even when the need for reform is accepted, divergent ideas can quickly present formidable barriers to reaching agreement on the way forward.

Additional obstacles to legal reform are encountered in small island states such as those of the Pacific. These states typically lack the resources of expertise either to develop reform proposals, or to undertake appropriate consultation with stakeholders, or to subject developed proposals to critical appraisal. There are no accurate figures for the number of persons with legal qualifications in each Pacific jurisdiction but they vary from small to tiny. Postgraduate qualifications are even smaller and the number of lawyers with PhDs is miniscule. Appellate judges are often part-time appointments from the developed world who lack trial experience in the local courts.

An option for meeting the challenges faced by such jurisdictions is to transplant successful legal reforms from elsewhere. For the common law jurisdictions of the Pacific, this usually means

* Adjunct Professor, School of Law and Social Sciences, the University of the South Pacific, Professor Emeritus, Bond University.

adopting transplants from former colonial powers of the region: the United Kingdom, Australia and New Zealand. Transplanting can provide dramatic efficiencies in the law reform process. However, there are associated perils. A transplant may be unsuitable for local conditions and problems, or may provide a poor fit with local law, or may be misunderstood by those responsible for effecting it.

This paper explores some instances where recent transplants have caused difficulty for criminal law in small island jurisdictions of the Pacific with a heritage of English law, received either directly from the United Kingdom or through Australia or New Zealand. Leaving aside some micro-jurisdictions, the jurisdictions of concern are Cook Islands, Fiji, Kiribati, Nauru, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. Their populations range from Fiji with approximately 900,000 persons down to Cook Islands and Nauru with little more than 10,000 persons each. The examples that are discussed are taken from the Crimes Acts of Fiji 2009 and Nauru 2016, the Solomon Islands Penal Code (Amendment) Sexual Offences Act 2016, and the Police Powers and Duties Acts of Kiribati 2008 and Tuvalu 2009. They each involve problems of fit between the transplant and existing local law. In light of the difficulties that have sometimes been experienced, some suggestions are made for improving the process of transplanting.

TRANSPLANTS IN PACIFIC CRIMINAL LAW

Transplants of criminal law have a lengthy history in the parts of the Pacific with a heritage of English law. In much of the region, criminal law in the colonial era involved separate systems of introduced law for the expatriate population and for indigenous peoples, overlaying the continuing operation of customary law among indigenous people. National criminal statutes were introduced in the era of independence in the latter part of the twentieth century, sometimes before independence, sometimes afterwards. Most jurisdictions enacted a statute dealing with criminal responsibility and offences (called a Penal Code or Crimes Act or Criminal Offences Act) and a separate statute dealing with criminal procedure (called a Criminal Procedure Code or Act). For the purposes of this paper, these statutes will be called the 'criminal codes' and the 'criminal procedure codes', although the term 'code' is not always used in the statutes themselves. Most of them are transplants.

The statutes originally formed two main groups, depending on the colonial histories of the jurisdictions. Cook Islands and Samoa were New Zealand dependencies and followed New Zealand models of legislation.[1] Fiji, the Gilbert and Ellis Islands (now Kiribati and Tuvalu) and Solomon Islands were British dependencies and followed models of legislation developed by the British Colonial Office.[2] The British model for a code of responsibility and offences drew on a

[1] For the criminal codes, see Crimes Act 1969 (Cook Islands); Crimes Ordinance 1961 (Samoa), now replaced by Crimes Act 2013 (Samoa). These statutes are based on the Crimes Act 1961 (NZ), first enacted as the Crimes Act 1893 (NZ).

[2] For the criminal codes, see Penal Code, Cap 67 (Kiribati); Penal Code, Cap 26 (Solomon Islands); Penal Code, Cap 8 (Tuvalu). These statutes follow a model developed by the Colonial Office that was based on the Criminal

prior Australian model, that of the Criminal Code of Queensland. The Queensland Code, often called 'the Griffith Code', was originally drafted at the end of the nineteenth century by the then Chief Justice of Queensland, Sir Samuel Griffith. In revised form, it was later adopted as a model by the British Colonial Office and exported to many parts of the world, including to British territories in the Pacific. Australian authorities also imposed the Queensland Criminal Code directly on Nauru.[3] Nauru has now followed Fiji in enacting a new code on a different model: these codes are examined below.

For criminal procedure, the British Colonial Office developed its own model code which was also exported to British dependencies.[4] This had a distinctive range of detail, covering some matters that are not generally found in procedural statutes: for example, provisions on the rendering of judgments.

The differences between these models are most marked in the statutes dealing with responsibility and offences. The New Zealand Crimes Act was based on a draft code prepared for England in the late nineteenth century but never enacted there. It was designed as a partial codification of criminal law. It was intended to deal comprehensively with the conduct elements of offences but not with the question of criminal responsibility for that conduct. Fault elements were expressly included for some, but not all, particular offences. In addition, there were provisions on some, but not all, defences. The elements of particular offences and the full range of defences were to be determined in light of common law principles as well as the statutory wording of the offences. The predominant principles of the contemporary common law are subjective. They incorporate what is sometimes called an 'aware state of mind' requirement: intention or at least recklessness in the sense of foresight of a risk is generally required for a serious offence; objective negligence is rejected as a general basis for criminal responsibility. In contrast, the Griffith code was designed to make the common law redundant and therefore does include statements of general principle about responsibility. These statements of general principle are at odds with the contemporary common law because they embrace objective forms of culpability for offences against the person. For example, s 9 of the Penal Codes of Kiribati, Solomon Islands and Tuvalu provides:

> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

Code (Qld), Criminal Code Act 1899 (Qld) Schedule 1. See also the Penal Code, Cap 17 (Fiji), now replaced by the Crimes Act 2009 (Fiji).

[3] The Criminal Code (Qld), with amendments in force on 1st July, 1921, was adopted for Nauru through the Laws Repeal and Adopting Ordinance 1922-67 (Nauru) s 12.

[4] Criminal Procedure Code, Cap 21 (Fiji), now replaced by Criminal Procedure Act 2009 (Fiji); Criminal Procedure Code, Cap 17 (Kiribati); Criminal Procedure Code, Cap 4 (Solomon Islands); Criminal Procedure Code, Cap 7 (Tuvalu).

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

The statutes of Tonga and Vanuatu do not fit neatly with either of the models which have been discussed. Tonga and Vanuatu are exceptional cases in terms of both their history and their statutes. Neither country was subject to a single colonial authority. Tonga retained substantial independence and Vanuatu was ruled jointly as an Anglo-French condominium.

The Tonga Criminal Offences Act[5] is closer to the statutes which follow the New Zealand model because it does not include general statements about criminal responsibility and some of its provisions, such as those on murder, are the same as those of the New Zealand Crimes Act. However, there are also many significant differences.

Vanuatu provides a dramatic example of transplant rejection.[6] In 1973, for crimes falling within British jurisdiction, the British authorities replaced English statutory law with the model Penal Code of the Colonial Office. However, this was just a few years before the independence of Vanuatu in 1980. Following independence, a new national Penal Code was enacted.[7] This Code was based on a 'Native Criminal Code' which had been a 1962 Joint Regulation of the two condominium powers for offences committed by indigenous people against other indigenous people. The resulting Vanuatu Penal Code is unique to some extent in both substance and style. It covers matters of responsibility through statements of general principle, but in a way quite different from that of the Griffith code, adopting subjective rather than objective principles of culpability. Moreover, simplifying the law was apparently one of the objectives. The Vanuatu Penal Code is roughly one-third of the length of the Solomon Islands Penal Code or the Fiji Crimes Act. Precise comparisons are difficult because of differences of drafting style and randomness of subsequent reform initiatives and consolidation exercises. Nevertheless, the following table will give some indication of the brevity of the Vanuatu Code in comparison with the codes of its nearest neighbours.

- Vanuatu Penal Code as per 2006 Consolidation: 17,292 words; 1,066 sections.
- Solomon islands Penal Code as per 1996 Consolidation: 56,143 words; 2,442 sections.
- Fiji Crimes Act as enacted 2009: 61,526 words; 3,902 sections.

The brevity of the Vanuatu Penal Code is achieved in several ways including trusting the judiciary to reach sensible interpretations of general terms, and favouring judicial sentencing discretion over graded offences in the scheme of penal liability. The Code prefers simple definitions of a restricted range of offences, with finer gradations in culpability to be handled a matters of sentencing. For example, the field of causing death or injury to a person is covered by just three primary offences - intentional homicide, intentional assault, and unintentional harm - with gradations of penal liability according to the circumstances or consequences of the criminal conduct: see ss 106-108.

[5] Criminal Offences Act, Cap 18 (Tonga).
[6] See further, Colvin, *Criminal Law of Vanuatu* (2022) ch 1: http://paclii.org/libraries/criminal/vanuatu/.
[7] Penal Code, Cap 135 (Vanuatu).

Despite these features of the Vanuatu Code, much of its substance and terminology would be familiar to any criminal lawyer trained in the common law tradition. For example, the key general provision on criminal responsibility echoes the principles of the common law by focusing on intention and subjective recklessness. Section 6 provides:

> (2) No person shall be guilty of a criminal offence unless it is shown that he intended to do the very act which the law prohibits; recklessness in doing that act shall be equivalent to intention.
> (3) A person shall be considered to be reckless if –
> (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk; and
> (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.
> (4) A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise.
> (5) No provision of law constituting a criminal offence shall be construed as dispensing with the necessity to prove the criminal intention of the accused, unless such construction is expressly stated or arises by necessary and distinct implication.

The Criminal Procedure Code[8] of Vanuatu is less innovative than the Penal Code. Much of it copies the provisions of the model Code of the British Colonial Office. Nevertheless, the Vanuatu Code is shorter than the procedural statutes of its neighbours: 60-75% of the length of the Solomon Islands or Fiji Criminal Procedure Codes, depending on the measure of comparison. This has been achieved in part through removal of some topics covered in the neighbour jurisdictions.

In recent times, a third transplant model has emerged for a code of criminal responsibility and offences. The Australian Model Criminal Code (consolidated, 2009) was prepared under the authority of the Standing Committee of Attorneys-General of the States and Territories. The general part provided the basis for the federal Australian Crimes Act (Cth) 1995 and parts of the Code, including most of the general part on responsibility, have been adopted in new codes for Fiji and Nauru: see Crimes Act 2009 (Fiji) and Crimes Act 2016 (Nauru).

Thus, transplants are and have always been the foundation of the criminal law of much of the Pacific region. Vanuatu and Tonga are exceptions, but even they contain some transplanted elements. Despite this long history, the transplant process is not always handled as adeptly as it should be.

The Crimes Act 2009 (Fiji) and the Crimes Act 2016 (Nauru)

[8] Criminal Procedure Code, Cap 136 (Vanuatu).

A core feature of the framework of criminal responsibility at common law is the divide between so-called 'true crimes' and mere 'regulatory offences'. True crimes include such serious offences as murder or theft and comprise the bulk of the offences in general criminal codes. They require proof of a fault element, usually in the form of intention or subjective recklessness. Regulatory offences are less serious and are mainly found outside the criminal codes, in statutes dealing with specific matters. These offences generally lack fault elements. They involve 'strict liability' or 'absolute liability'. Where a distinction between these terms is drawn, strict liability permits a limited defence of reasonable mistake of fact (or, in some jurisdictions 'due diligence'); absolute liability does not. A classic description of regulatory offences was offered in the English case of *Sherras v De Rutzen* [1895] 1 QB 918 at 922, where Wright J referred to 'a class of acts which…are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty'. Similarly, in *R v Sault Ste. Marie* [1978] 2 SCR 1299, Dickson J of the Supreme Court of Canada stated at 1302-1303:

> Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like.

Despite the distinctions between true crimes and regulatory offences and between strict and absolute liability being well-established, there has long been controversy about both the rationale for these distinctions and the classification of particular offences. These controversies have largely by-passed jurisdictions with versions of the Griffith Code. This is because it is drafted on the basis that forms of objective negligence are generally appropriate for criminal liability (offences against property being exceptions). A key provision in this scheme is that creating the defence of reasonable mistake of fact. For example, s 10 of the Penal Codes of Kiribati, Solomon Islands and Tuvalu provide:

> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

This defence may be relevant to any offence which lacks a fault element, including some very serious offences such as rape. Conversely, it is not excluded for any category of offence however minor unless the exclusion is express. The defence of reasonable mistake of fact was also a key component of the criminal statutes of Fiji and Nauru prior to the introduction of the Crimes Acts of Fiji {2009) and Nauru (2016).

The introduction of the Crimes Acts of Fiji {2009) and Nauru (2016) has forced the local courts to confront the controversies and confusion that surround the common law distinctions

between true crimes and regulatory offences, and between strict and absolute liability. This is not because of the terms of the Australian Model Criminal Code itself but rather because of flaws in the process of transplanting the Code to alien soil.

The Australian Model Criminal Code attempted to eliminate the controversies and confusion by two devices: (1) making intention or recklessness default elements for offences that do not specify particular states of mind (s 2.2.11); (2) requiring express provisions for the imposition of strict or absolute liability (ss 2.2.13(1), 2.2.13(1)). Taken together, these devices had the capacity to cut through the fog that had surrounded the law of criminal responsibility at common law. The hurdle, however, was the need to amend the miriad of offences in regulatory statutes that had been understood to involve strict or absolute liability without them expressly stating this. Otherwise, these offences might have become subject to the default provision that required intention or recklessness. For example, speeding offences might have allowed a defence to a motorist who did not notice that the vehicle was exceeding the permissible limit.

It would be a massive task to preserve the status quo by amending all the regulatory statutes to expressly provide for strict or absolute liability. The Model Criminal Code therefore allowed a grace period of five years for the provisions on criminal responsibility to apply to offences outside the Code itself. The Code s 2.1.2 provides:

> (1) This Chapter applies to all offences against this Code.
> (2) On and after the day occurring 5 years after the commencement of this Chapter, this Chapter applies to all other offences.

Given the limited resources available in the Pacific region, a grace period for updating the statutes might need to be longer than five years. In the event, however, no provision for a grace period was included in either the Fiji Crimes Act or the Nauru Crimes Act.

The Fiji Act s 11 tried to tackle the problem in another way. The provisions on criminal responsibility were made applicable to all offences against the Act, and all other offences to 'the fullest extent possible'. Section 11 provides:

> (1) This Chapter applies to all offences against this Act.
> (2) All courts in criminal proceedings or trials shall apply the provisions of this Act in relation to offences under other laws to the fullest extent possible.

The Nauru Act s 11 simply makes the provisions on criminal responsibility applicable to all offences created by the Act and all other offences committed on or after the commencement of the Act, regardless of when the offences were created. The Nauru approach appears to demand intention or recklessness for a range of minor offences for which this requirement has traditionally been considered inappropriate throughout the common law world.

The Fiji approach avoids automatically excluding strict or absolute liability. For offences outside the Crimes Act, it is left to the courts to determine whether this classification is sensible in light of the character of an offence. However, in avoiding one problem, another is created. For offences outside the Crimes Act, criminal responsibility is now determined by judge-made common law rather than by the provisions of the Act. This amounts to a de-codification of a large

area of Fiji criminal law. There has been no indication that this was one of objectives of the reform process that led to the Crimes Act replacing the Penal Code. Moreover, there is no obvious justification for such a shift. The end result appears to be an accidental outcome of a reform process in which the lure of a quick solution was given priority over a careful appraisal all features of the transplant.

Solomon Islands Penal Code (Amendment) Sexual Offences Act 2016

In 2016, the Solomon Islands Penal Code was amended to introduce a package of reforms relating to sexual offences that were derived from the Australian Model Criminal Code. These reforms reflected the general path of legal development in the common law world. 'Sexual intercourse' was defined in a way which expanded the range of conduct falling within the scope of the offence of rape; offences of sexual assault were replaced with offences relating to the commission of a range of indecent acts; various offences relating to children were introduced; consent was defined as 'free and voluntary agreement'. Most of the new scheme should be relatively uncontroversial. However, among the reforms was the specification of a subjective mental element for the offences of rape and indecent act. The Australian Code generally adopts the subjective principles of the contemporary common law. However, inserting a subjective mental element into the Solomon Islands offences of rape and indecent act is at odds with the general scheme of objective criminal responsibility in the Penal Code and lacks a clear rationale.

As a result of the amendments to the Penal Code, the offences of rape and indecent act must be committed 'knowing about or being reckless as to the lack of consent': see s 136F(1)(b) and s 138(1)(b). Acting with knowledge of a circumstance is generally understood to be a form of intending that circumstance. 'Being reckless' can be an ambiguous term but in the new scheme of the Penal Code it is expressly confined to cases where a person is aware of the risk of lack of consent or gives no thought as to whether consent is present. Section 136E provides:

For this Part, a person is reckless as to another person's lack of consent if:

(a) the person is aware of a risk that the other person does not consent and it is unreasonable to take the risk; or
(b) the person does not give any thought as to whether the person is consenting.

The substance of this provision is taken from the Australian Model Criminal Code ss 5.2.6, 5.2.8. Prescribing intention or recklessness reflects the common law of rape as it was expressed in *DPP v Morgan* [1976] AC 182, [1975] 2 All ER 347: the metal element for rape is intention to have sexual intercourse without consent or recklessness with respect to the risk of lack of consent. Engaging in sex with the belief that there is consent is not recklessness, however unreasonable the belief may be in light of the circumstances. The ruling in *Morgan* was consistent with the predominant principles of the contemporary common law, which require subjective awareness of the character of conduct and reject objective negligence as a general basis for criminal responsibility. With respect to sexual offences, statutory requirements for intention or recklessness can be found under the Fiji Crimes Act where the mental elements of sexual offences are governed by the general default provisions in ss 21-22, under the Nauru Crimes Act s 20 and ss 105-106,

and in the Tonga Criminal Offences Act s 118(2). However, these provisions are part of statutes which generally adopt subjective principles of criminal responsibility.

Morgan has been a controversial decision. Indeed, the conclusion in *Morgan* about the elements of rape has been reversed by legislation in some jurisdictions. In Canada, New Zealand and Samoa, amendments to the criminal statutes now require a mistake about consent to be reasonable if it is to provide a defence.[9] In Vanuatu, the general defence of mistake of fact under the Penal Code s 12 (which applies to the offence of rape) was amended in 1989 to insert a requirement that a mistake be not only genuine but also reasonable.[10]

The Solomon Islands Penal Code, like the Australian Model Criminal Code, grants some accommodation to the critics of *Morgan* through the second part of the definition of recklessness in s 136E(b), where it is sufficient if 'the person does not give any thought as to whether the person is consenting'. It is difficult to conceive of how anyone could engage in sexual activity without giving some thought to the matter of consent. Nevertheless, the inclusion of this provision implies acceptance that there may be some instances where a blank mind would be morally equivalent to an awareness of the risk of lack of consent. Yet, a positive belief in consent insulates the person from criminal liability, regardless of that belief being unreasonable in the circumstances.

Intoxication is the most likely explanation for an unreasonable belief in the existence of consent. In some jurisdictions which follow the *Morgan* ruling, its impact is blunted by restrictions on the use of evidence of intoxication to bolster the claim for an honest albeit unreasonable belief. Traditional rules at common law confined the use of intoxication evidence to offences of 'specific intent'. However, rape and indecent assault were consigned to a category called 'general intent', where the evidence was excluded and the mental state of a defendant was assessed as if they were sober. This evidential restriction does not apply under to the Pacific versions of the Griffith Code. The Solomon Islands Penal Code s 13(4) provides:

> Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

A stupidly untenable belief in consent, explicable only because of the intoxication of its holder, has therefore become a good defence to a charge of rape or indecent act in Solomon Islands.

Despite the divergences of opinion over a mental element for sexual offences, the Solomon Islands Penal Code ss 36F(1)(b) and 138(1)(b) would fit readily within an established framework of legal doctrine based on contemporary common law principles. What is odd about these provisions is not the words used but rather their introduction into a statute with the characteristics of the Solomon Islands Penal Code.

---

[9] See Criminal Code, RSC 1985, c C-46, s 273.2(b); Crimes Act 1961 (NZ) s 128(2); Crimes Act 2013 (Samoa) s 51(3).

[10] See Penal Code (Amendment Act) No 27 of 1989 s 1: 'Section 12 of the Penal Code Act, No. 17 of 1981 (principal Act) is amended by the substitution for the words 'a genuine, even though not reasonable', of the words 'a genuine and reasonable'.'

The Solomon Islands Penal Code, like the Queensland Criminal Code from which it is derived, is designed as a complete codification of criminal law. It was intended to make the whole of the common law of criminal responsibility redundant. Moreover, its governing principles of responsibility are objective. Under the scheme of the Code, specific fault elements are included in the definitions of some offences, for example murder and theft. However, for offences which lack specific fault elements, many matters of criminal responsibility are handled by reference to certain general defences. These include the s 10, which establishes the defence of mistake of fact but only for a mistake that was reasonable:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist….

Prior to the 2016 reforms, s 10 was the applicable provision when a defendant claimed an honest albeit mistaken belief in consent to sexual interaction. The reforms introduced mental elements of knowledge or recklessness for the offences of rape and indecent act but otherwise made no change to the general scheme of objective culpability in the Penal Code. Yet, is there any good reason to allow an unreasonable mistake about consent to be a good defence to a charge relating to sexual conduct but not to, for example, a charge of assault arising from a contact sport or a fight?

In the years since the decision in *Morgan*, the merits of the ruling have been hotly debated. Its defenders argue that intention or at least subjective recklessness should be required for serious offences, on grounds of proportionality, to justify the severe punishment that conviction can bring. As the principle was expressed by McLachlin J of the Supreme Court of Canada in *R v Creighton* [1993] 3 SCR 3 at [46]: 'the moral fault of the accused must be commensurate with the gravity of the offence and its penalty.' However, not everyone accepts that proportionality is critical, or that proportionality should generally exclude objective negligence as a ground for criminal sanctions, or even that the mental element for sexual offences needs to follow general principles. Objective culpability has long been accepted for manslaughter, where liability can be based on criminal negligence. Therefore, why not for rape?

What has been missing from the general debate is any suggestion that sexual offences merit special treatment such that subjective culpability is required for them even if a criminal code adopts a general scheme of objective culpability. In the context of the Solomon Islands Code, s 136F(1)(b) and s 138(1)(b) distinguish sexual offences from manslaughter and offences relating to the causation of serious injury. Sexual offences are put on a pedestal alongside murder, which requires one of the subjective states of mind that can constitute 'malice aforethought': see ss 200, 202. However, the considerations that are usually advanced to underpin this requirement for murder – its mandatory penalty and unique stigma – do not apply to sexual offences.

The most plausible explanation for s 136F(1)(b) and s 138(1)(b) is simply that the drafters transplanted the provisions of the Australian Model Criminal Code without consideration of their suitability for the soil in which they were to be placed.

The Police Powers and Duties Acts of Kiribati (2008) and Tuvalu (2009).

A feature of much modern legislation on criminal procedure has been an expansion of the coverage of police powers and responsibilities or duties. Earlier legislation often dealt only with search warrants and powers of arrest. Modern legislation addresses topics such as warrantless 'stop and search' powers, forensic procedures, and the length of time that suspects can be detained for questioning and other investigative action without being brought before a court.

The most comprehensive statutes in the Pacific are arguably the Police Powers and Duties Acts (the 'Police Acts') of Kiribati 2008 and Tuvalu 2009. The two acts are substantially the same. One of their features is a detailed scheme for investigative arrest, under which a person can be detained for a period of time for purposes such as questioning instead of being taken before a court. This has not been permitted at common law. The common law position is that an arrest is to be made in order to bring a person before a court and that the person is to be taken before a court as soon as reasonable practicable after the arrest: see, for example, *Williams v R {*1986} 161 CLR 278, [1986] HCA 88. Incidental questioning while awaiting a court appearance is permitted but making an arrest or delaying a court appearance merely for the purpose of questioning and investigation is prohibited. Many jurisdictions including Kiribati and Tuvalu have moved away from this position by enacting legislation for investigative arrests. Unfortunately, the Kiribati and Tuvalu schemes have failed to address certain constitutional requirements in these jurisdictions.

The Police Powers and Duties Acts s 74(2) (Kiribati), s 88(2) (Tuvalu) provide that:

> [A] police officer, without a warrant, may arrest a person who the police officer suspects, on reasonable ground, has committed or is committing a felony in order to –
> (a) question the person about the offence; or
> (b) investigate the offence.

A suspect under arrest for a felony can then be detained for 'a reasonable time' to question them or to investigate the offence: s 108 (Kiribati), s 122 (Tuvalu).

There is a list in s 108(3) (Kiribati), s 122(3) (Tuvalu) of factors to be considered in deciding what is 'a reasonable time':

> (a) whether the suspect's detention is necessary for the investigation of a felony;
> (b) the number of felonies under investigation;
> (c) the seriousness and complexity of a felony under investigation;
> (d) whether the suspect has indicated a willingness to make a statement or to answer questions;
> (e) the suspect's age, physical capacity and condition, and mental capacity and condition;
> (f) for a suspect who was arrested for the felony - any time spent questioning the suspect before the arrest;
> (g) the need to delay or suspend questioning of the suspect for time out purposes.

There is also an upper time-limit for the detention specified in s 108(5) (Kiribati), s 122(5) (Tuvalu):

> (a) 24 hours; or
> (b) in the case of a suspect who is arrested after the courts close on a Friday afternoon - 72 hours.

However, the detention period can be extended for another four hours by order of a magistrate: s 109 (Kiribati), s 123 (Tuvalu).

Provision is made for 'time-outs' from questioning. The suspect can be questioned for up to four hours during the initial detention period (s 108(6)(a) (Kiribati), s 122(6)(a) (Tuvalu)) and for less than half of any extension period: s 109(10) (Kiribati), s 123(10) (Tuvalu). In addition, a suspect who is detained for six hours or more must be given reasonably sufficient food and drink: s 108(6)(b) (Kiribati), s 122(6)(b) (Tuvalu).

Such schemes have been introduced in many jurisdictions in modern times. They reflect a perceived need to balance the right of a person to liberty against the need for police to have adequate time to fully investigate a possible offence. The elaborate safeguards in Kiribati and Tuvalu are characteristic of these schemes.

The difficulty is that the Constitutions of Kiribati and Tuvalu state that, when an arrest is made because of reasonable suspicion about the commission of an offence, a person who is not released must be brought before a court 'without undue delay': Constitution s 5(3) (Kiribati), s 17(4) (Tuvalu). The Kiribati version reads:

> 5(3) Any person who is arrested or detained—
> (a) for the purpose of bringing him before a court in execution of the order of a court; or
> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Kiribati,
> and who is not released, shall be brought without undue delay before a court…

The drafting of the Tuvalu version differs in some minor ways but the substance is the same.

In the decision of the High Court of Australia in *Williams v R*,[11] phrases such as 'without delay', 'without undue delay' and as soon as is 'reasonably practicable' or 'reasonably possible' were interpreted as all having the same meaning, namely that the accused must be taken before a court as soon as is reasonably practicable. There could be a substantial delay if the accused is arrested at night or over a weekend. Moreover, police workload can affect the determination of what is reasonably practicable in a particular situation, as can distance to a court. However, a prompt appearance in court could be required if the arrest occurs during the day when a court is open. Whatever the circumstances of an arrest, a court appearance cannot be delayed for investigative purposes.

In Kiribati and Tuvalu, the statutory powers of investigative arrest and detention can only be exercised within the constraints imposed by the constitutional requirement for a court appearance

[11] *Williams v R* (1986) 161 CLR 278 at 283, 300; [1986] HCA 88, Mason and Brennan JJ at [25] and Wilson and Dawson JJ at [23].

without undue delay. The provisions of the Police Acts s 74(2) (Kiribati), s 88(2) (Tuvalu) allowing arrest for investigative purposes may be constitutionally valid. However, this requires 'reading down' the permission in s 108 (Kiribati), s 122 (Tuvalu) to detain a person for questioning or investigation so that it is subject to three sets of restrictions:

- the requirement under s 108 (Kiribati), s 122 (Tuvalu) to limit the detention to a 'reasonable time' for the questioning or investigation;
- the upper time-limits identified in the ss 108(5) - 109 (Kiribati), ss 122(5) - 123 Tuvalu); and
- the constitutional requirements for a court appearance without undue delay.

In some cases, police may be able to take full advantage of the time-periods specified in the Police Acts. In other cases, however, detention and therefore questioning will have to be curtailed to remain constitutionally permissible. The requirement for court appearance without undue delay is constitutionally entrenched and cannot be overridden by regular legislation.

Read in this way, the provisions of the Police Acts and the Constitutions may be compatible. However, their combined effect is markedly different from the similar schemes for investigative arrest elsewhere. Moreover, the Police Acts could be highly misleading when they offer a power to detain for a 'reasonable time' for questioning or investigation without also mentioning the requirement respecting court appearance 'without undue delay'. The most likely explanation of this omission is simply that legislative schemes from elsewhere were transplanted without reference to the Constitutions of the jurisdictions in which they were to be placed.

CONCLUSIONS AND SUGGESTIONS

The last half century has seen the growth of an extensive body of literature on legal transplants.[12] The focus has been on the question of how easily transplants can fit within different political and social contexts. My present concern is rather different: it is with the fit between transplants and the legal contexts in which they are placed.

My argument is not for abandoning transplants. The criminal codes of the Pacific are all wholly or partly transplants. They appear to have served the region reasonably well. There has been no movement to replace them with indigenous creations. Most reforms have been piecemeal. Moreover, where replacement codes have been enacted, as in Fiji and Nauru, one transplant has succeeded another.

Yet there is an awkward fit between some recent transplants and the existing legal landscape of their new hosts. This could occur for several reasons: adoption of external models without adequate consideration of their appropriateness; use of external consultants who are unfamiliar with the laws of the host jurisdiction; failure to check legislative recommendations carefully before they

[12] See Watson, *Legal Transplants: An Approach to Comparative Law* (1974) (2d ed 1993); Cairns, 'Watson, Walton, and the History of Legal Transplants' (2013) 41 Ga. J. Int'L & Comp. L. 638-695; Goldbach, 'Why Legal Transplants?' Annu. Rev. Law Soc. Sci. 2019. 15:583–601.

are adopted; failure to conduct adequate consultations with the local legal communities. It lies beyond the scope of this paper to propose explanations for the particular instances that have been studied. My concern is with the effect of introducing unsuitable transplants and with the scope for measures that might reduce their incidence in the future.

Unsuitable transplants are like weeds in a garden. They create a mess of the legal landscape and can make the law harder to comprehend. Messy and incomprehensible law detracts from the rule of law and any advantages it may bring of social and political stability, and economic development. The small island states of the Pacific have adopted or retained Western models of law. They deserve the versions of that law which suit local conditions including local legal conditions.

The root cause underlying the various possible explanations for unsuitable transplants is the limited human resources of small island states, in particular their small pools of legal practitioners and academics with the qualifications and abilities that are needed to handle the work of legal reform. This can generate reliance on external models and external consultants without appropriate local scrutiny of the products on offer and careful checking of their suitability.

There is no easy solution for this problem. It may well be insuperable within the confines of any single small island state. Yet the problem can be diminished by pooling resources. There are already instances of interstate cooperation in the legal sphere of the Pacific. Examples include the advisory services of the legal division of the Pacific Islands Forum Secretariat, the reform and training initiatives of the Pacific Islands Law Officers Network (PILON), and the programs of legal education at The University of the South Pacific. It is not beyond the realms of imagination to contemplate the creation of a Pacific Islands Law Reform Commission, owned by member nations, staffed with expertise from throughout the region, and able to provide good law reform services to all the small island states. The difficulties of financing, designing and operating such an agency would be formidable. Overcoming them could be an exciting enterprise and a major contribution to strengthening the rule of law in the Pacific.