Marine Protected Areas Policy and Legislation Gap Analysis: Fiji Islands

Erika J Techera, LLB (Hons), M Env Law, LLM
Shauna Troniak, BA, LLB

IUCN Regional Office for Oceania

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Available from: IUCN Regional Office for Oceania
5 Ma'afu Street, Suva, Fiji
Tel +679 331 9084
oceania@iucn.org
www.iucn.org/oceania

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FOREWORD

This legislative and policy gap analysis was prepared on behalf of the IUCN Regional Office for Oceania, at the request of the WWF Fiji Country Programme.

The report was co-authored by IUCN Commission on Environmental Law member, Ms Erika Techera, and IUCN Legal Research Intern, Ms Shauna Troniak.

Ms Techera is a senior lecturer with the Macquarie University Centre for Environmental Law in Sydney, Australia. She lectures in environmental and marine biodiversity law and has a specialist research interest in the recognition of customary law and community-based conservation in the South Pacific. She has recently completed her PhD thesis on the topic '*The Role of Customary Law in Community-based Marine Management in the South Pacific*'.

Ms Troniak completed a three month legal internship with the IUCN Regional Office for Oceania in 2008. During her internship, she undertook significant research on legal issues related to community-based management of marine resources in Fiji, including a series of interviews with key stakeholders. She has previously worked with the International Institute for Sustainable Development in Winnipeg, the University of Quebec in Ottawa, and the World Bank in Washington, DC.

In this report, the authors provide a thoughtful analysis of key legal and policy issues associated with the establishment of marine protected areas in Fiji, with a particular emphasis on the role of local communities in the management of coastal marine resources. In particular, the authors recommend:

- harmonisation of existing laws and policies to improve administration and reduce fragmentation;
- amendments to fisheries legislation to allow greater community involvement in designation and management of inshore marine protected areas;
- adoption of comprehensive protected area legislation to support the establishment of inshore and offshore marine protected areas; and
- strengthening the locally management marine area (LMMA) network in Fiji.

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Pepe Clarke
Legal Advisor
IUCN Regional Office for Oceania

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Erika J Techera
Senior Lecturer, Macquarie University Centre for Environmental Law
Member, IUCN Commission on Environmental Law

Shauna Troniak
Legal Research Intern, IUCN Regional Office for Oceania

EXECUTIVE SUMMARY

1. The Fiji Islands is a country rich in marine biodiversity. Fiji is also home to a large Indigenous population with a powerful heritage which is culturally and spiritually connected with the ocean. Many Indigenous people continue to live a largely traditional lifestyle adhering to customary laws and practices.

2. The fisheries sector is a significant contributor to both the national economy and local livelihoods. Therefore, marine resources must be sustainably managed to care for the ecosystems and also the livelihoods which depend upon them. Marine Protected Areas (MPAs) are an important management tool for Fiji in the quest to protect its inshore and offshore ocean environment.

3. To date there have been few state controlled MPAs designated in Fiji although legislation provides for this. In relation to offshore waters, the declaration of suitable areas is relatively straightforward. However, the situation with respect to inshore marine areas is complicated by the issue of Indigenous customary fishing rights. Nevertheless, by far the most significant inroads to date, in marine protected area management, have been made by local communities through the establishment of Locally Managed Marine Areas (LMMAs). By combining these with the designation of offshore MPAs, it would be possible to achieve much greater biodiversity and ecosystem management of the marine environment.

4. This report identifies four key areas where there are significant legislative and policy gaps: Firstly, is the lack of any comprehensive protected area management legislation. Best practice indicates that such laws should be implemented to provide for integrated and networked areas.

5. The second issue relates generally to legislative and policy fragmentation. Greater harmonisation is needed, not only in respect of the legal provisions relating to MPAs, but also their administration.

6. Thirdly, the *Fisheries Act* and Regulations. Amendments could be made to existing laws to increase community participation in the identification, designation and management of fisheries MPAs as well as the delegation of greater enforcement powers. Consideration should be given to regulations specifically for offshore MPAs.

7. Lastly, it is evident that LMMAs can contribute to integrated coastal zone management. However, at present these areas are not formally recognised and there is no legal authority to enforce the management plans. Whilst the Fijian Government has proposed strategies and programmes to overcome this, other mechanisms must be investigated to broadly strengthen the LMMA system.

8. Several options are proposed for legislative reform. A key issue is that any new legislation must meet international standards but also have the support of local communities including the Indigenous peoples who have worked so hard to establish the voluntary LMMAs.

1. INTRODUCTION

1.1 Geographic and historical background to the Fiji Islands

The country known as Fiji Islands is located in the south-west Pacific Ocean. It is comprised of over 322 islands.[1] The total land area covers approximately 18,000km^2 spread over 1.3 million km^2 of South Pacific Ocean.[2] Thus more than 98% of Fijian territory is ocean. The majority of the Fiji Islands are volcanic in origin, although the group contains no active volcanoes. These islands are characterised by high central mountain ranges, with several large rivers leading down to coastal plains, then beaches and mangrove swamps surrounded by shallow water and coral reefs.[3]

The waters of the Fiji Islands contain 3.12% of the World's coral reefs[4] including *Cakaulevu*, the Great Sea Reef, the third largest in the world. Marine life includes over 390 known species of coral and 1200 varieties of fish of which 7 are endemic.[5] Fijian waters are the spawning ground for many species including the endangered hump head wrasse and bump head parrot fish. Five of the world's seven species of sea turtle inhabit Fijian waters.[6]

Fiji was first settled by humans about three and a half thousand years ago.[7] However, it is not known with any certainty who the first settlers were. Indigenous Fijians appear culturally and physically to be of Melanesian origin, modified by Polynesian influences.[8] Certainly Fiji was governed in a more Polynesian hierarchical style, in contrast to the Melanesian village system.

Traditional Fijian society was structured into four levels. The most senior group was the *vanua*. From an Indigenous perspective, the concept of *vanua* is both physical (including the land, sea and people) and abstract, representing the whole of all people and their relationships with others, the land, spirits, and natural resources.[9] Each had its own customs and practices which regulated the community through the village leaders. However, these groups were ruled by feudal overlords known as *turaga* who were usually the male head of the most powerful families. Below the

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[1] Margolis S, *Adventuring in the Pacific* (1995). Page 234; Deacon K, *Australia and the South Pacific: Exploring the Islands and Underwater World* (1995). Page 110.

[2] Fiji Islands Bureau of Statistics, *Fiji National Census of Population 2007* (2007) <http://www.statsfiji.gov.fj/> at 24 July 2008.

[3] However, the Lau Group of islands (comprising approximately sixty separate islands) to the east were created by the same uplift as Tonga and typically do not rise much above sea level. About 500km to the north of Vanua Levu is another Group of islands which are politically part of the Fiji Islands but geographically (and culturally) distinct - the Rotuma Group.

[4] Sea Around Us Project, *Web Products: Countries' EEZ: Fiji* <http://www.seaaroundus.org/eez/SummaryInfo.aspx?EEZ=242> at 28 July 2008.

[5] *Weaving a Tapestry of Protection and Sustainability.* WWF South Pacific Programme Report, viewed on 21 June 2006, <www.wwfpacific.org.fj/publications/fiji/Big_win.pdf>, p.6.

[6] Ibid: Some of them for long periods of time and some for the breeding season.

[7] Margolis, above n 1, page 241. *Fijian Culture and Tradition*. <http://www.fiji.gov.fj/publish/history_culture.shtml> at 18 December 2005.

[8] *Fiji the Warrior Archipelago*. <www.tribalsite.com/articles/fiji.htm> at 21 June 2006, page 1.
It is also clear that Fijians are not ethnically the same throughout the archipelago. The people of the Lau Group of islands are culturally much closer to the people of Tonga than Melanesian Fijians and the people of Rotuma are primarily Polynesian in heritage.

[9] Nabobo-Baba, U. *Knowing and Learning: An Indigenous Fijian Approach* (Suva: University of the South Pacific, 2006), pp.77-78.

vanua was the *yavusa*, a grouping which was connected by its beliefs in the same God and recognition of the same chief. Then came the clan (*mataqali*) and finally the family unit (*tokatoka*). Historically, the *vanua* were significant because they held ownership of land. However, in 1880 the Great Council of Chiefs resolved that the Native Lands should be registered under the *mataqali.*[10]

Dutch and British sailors were the first European explorers to visit the Fiji Islands, in the 17th and 18th centuries respectively.[11] The initial British and American settlers set up their headquarters in the early 1800s, and in 1857 a British Consul was appointed at Levuka. On 10th October 1874 the *Deed of Cession*[12] was signed by the British Crown, Ratu Cakobau as Tui Viti ("King of Fiji") and 12 High Chiefs. The Deed of Cession has been accepted under international law as the treaty under which the land of the Fiji Islands was ceded to Great Britain.[13] Article 7 of the Deed of Cession guarantees:

> '... that the rights and interests of the said Tui Viti and other high chiefs the ceding parties hereto shall be recognised so far as is and shall be consistent with British Sovereignty and Colonial form of government'.

This has been interpreted to include customary fishing rights in coastal marine areas, but not propriety ownership rights to these zones. This is because the common law considers fishing rights mere 'profits of the soil' and a severable right from the 'right to the soil.'[14] Therefore, under the common law, the legal character of indigenous fishing rights under the Deed of Cession is therefore that of user rights, or usufructuary rights, that do not in themselves carry a proprietary interest.

The British brought with them a much greater reliance on written laws as well as the unwritten principles of English common law and equity. Some customary laws and traditional practices were maintained including native ownership of land and chiefly titles.[15] In 1970 Fiji gained its independence but the western legal system was maintained. But regardless of the official legal system, many Indigenous peoples continued to live a traditional lifestyle according to customary law.

The population of 827,900 is comprised of approximately 56% Indigenous Fijians and 36% of Indian origin with other Pacific Islanders making up a few percent.[16] About 80% of Fiji's population live in coastal areas and are at least partially dependent upon fish and marine resources for subsistence.

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[10] Tawake,A, and Tuivanuavou, S, 'Community Involvement in the Implementation of Ocean Policies: The Fiji Locally Managed Marine Areas (FLMMAs) Network', In *Tabus or not Taboos: How to use traditional environmental knowledge to support sustainable development of marine resources in Melanesia*. SPC Traditional Marine Resource Management and Knowledge Information Bulletin (2004) #17. Page 26

[11] Abel Tasman is said to have sighted the Fiji Group in 1643. Captain Cook visited Vatoa in 1774. Famously Captain William Bligh sailed through Fijian waters in 1789 following the mutiny on the *Bounty*. However, few Europeans stayed for long in Fijian waters as the islands were 'known' to be inhabited by cannibals.

[12] 10th October 1874 (Fiji Islands) [*Deed of Cession*].

[13] Baledrokadroka, J, "The Fijian Understanding of the Deed of Cession Treaty of 1874" (Paper presented at Traditional Lands in the Pacific Region: Indigenous Common Property Resources in Convulsion or Cohesion, Brisbane, Australia, September 2003) 4.

[14] McHugh, P, "The Legal Status of Maori Fishing Rights in Tidal Waters," (1984) 14 Victoria U. Wellington L. Rev. 254.

[15] Although the land could still be leased, and was leased to free Indian settlers from the 1920s.

[16] As at 2007: *Fiji Islands Bureau of Statistics*. <http://www.statsfiji.gov.fj/> at 24 July 2008.

1.2 Nature and importance of customary law

The Indigenous peoples of the South Pacific have a profound connection with the sea which extends from reliance on ocean resources for food and livelihoods to deeply rooted cultural practices involving the use of marine fauna and flora for ceremonies and celebrations. They also have a rich history of customary laws and practices related to the ocean including stewardship of inshore marine areas.

Historically, the use of marine resources within traditional fishing grounds (*qoliqoli*)[17] in Fiji were governed by customary law and informed by traditional ecological knowledge. Traditional conservation mechanisms for the maintenance of marine resource stocks included *tabu*, or no take zones. Other customary legal mechanisms included seasonal bans and temporary closures of some fishing areas, the declaration of sacred fishing grounds, control over the number of villagers allowed to harvest fish, the practices permitted to be used and the amount of fish that could be harvested.[18] Each village or clan identified with a totem fish and was responsible for it. Many other village rituals, customary laws and practices celebrated the spiritual connection with marine resources.[19]

However, during the colonial period the customary laws of the Indigenous people of the region were generally subordinated to the introduced legal system[20] and the local people stripped of marine tenure. Nevertheless many of these customs and practices, and indeed customary laws, have continued to play an important part in native Fijian village life.

The tension between customary law and the English common law is illustrated in the question of who owns the coastal zones. Under customary law, the community – most often the *yavusa*, but in some cases the *vanua* – owns the coastal zones.[21] Customary tenure arises from the use of the physical environment for the benefit of the community.[22] In contrast under the English common law the Crown may presume title to the foreshore and seabed of tidal rivers and coastal waters by prerogative right.[23] Indigenous peoples with customary ties to the coastal zones may *use* them if allowed by the Crown, but they do not *own* them in the common law sense of the term. The main difference here is that customary law associates ownership of an area and its resources with usage, whereas the English common law separates the ownership of the area from the utilisation of its resources.

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[17] The coastal zones in Fiji are subdivided into a network of *qoliqoli*, or customary fishing rights areas, to which local communities have customary rights to harvest marine resources.

[18] Aalbersberg, W, Tawake, A and Parras, T, 'Village by Village: Recovering Fiji's Coastal Fisheries', *The Wealth of the Poor: Managing Ecosystems to Fight Poverty. United Nations Development Programme, United Nations Environment Programme, the World Bank and World Resources Institute.* (2005). P.145.

[19] Ibid

[20] Although on occasions legal validity was conceded to other bodies of law not repugnant or inconsistent with written law: Benda-Beckmann F v and Benda-Beckmann K v, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 53-54 *Journal of Legal Pluralism* 1-44. Merry S E, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869-896. At 870.

[21] Kunatuba, P, Traditional knowledge of the marine environment in Fiji (Suva: Institute of Marine Resources, University of the South Pacific, 1983), p.50.

[22] Veitayaki, J and South, G, 'The constitution and Indigenous fisheries management in Fiji' (1998) 13 Ocean Yearbook at 462.

[23] McNeil, K, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 104.

In Fiji, laws derived from both customary and English common law traditions co-exist in a grey space created by the intersection of the two legal systems. Thus Fiji is truly a legally pluralist country and this must be recognised both in analysing existing laws and addressed in the law reform process. Customary laws have prevailed through periods of colonial rule, independence and military coups and have featured at all stages of the political development of the Fiji Islands to a greater or lesser extent. This situation, together with the strong cultural links with the marine environment, has provided the setting for the growth of the community conservation seed. But increasingly, globalisation, urbanisation and rapid population growth are putting increasing pressure upon both the traditional way of life and the marine environment upon which it depends.

1.3 Social and economic importance of marine areas

The marine environment, and fisheries in particular, continue to play a central social and economic role in Fiji. Offshore commercial fisheries include four major tuna species being albacore, yellowfin, bigeye and skipjack.[24] The coastal zone and inshore waters are of specific significance to local communities. In many other areas of the world the most pressing problem facing developing states is poverty, which in turn has been said to be the primary cause of environmental degradation. But the Fijian population have not traditionally suffered from abject poverty, which has been avoided due to the predominance of subsistence livelihoods.[25] Marine resources collected from traditional fishing grounds (*qoliqoli*)[26] have historically been the main source of protein for native people, with any excess harvest being sold.[27] This is expected to remain the case in the future.

In addition to household needs, marine resources (including fisheries) contribute significantly to the national economy. Subsistence[28] and small scale artisanal[29] fisheries contribute to national income.[30] Overall, the fisheries sector is the third largest natural resource sector in Fiji,[31] contributing F$91.9 million per annum to the national economy (2.7% of Gross Domestic Product (GDP)).[32] In addition, a healthy marine environment contributes indirectly to the tourism industry, which makes approximately twice the contribution to GDP of the fisheries sector.[33]

[24] Manoa, P.E., 'Judicial responses to illegal fishing prosecutions in Fiji' (2006) 10(1) *Journal of South Pacific Law*. http://www.paclii.org/journals/fJSPL/vol10/5.shtml accessed 22 August 2008.
[25] Gerbeaux, P, Kami, T, Clarke, P and Gillespie, T (2007) *Shaping a Sustainable Future in the Pacific: IUCN Regional Programme for Oceania 2007-2012*, IUCN Regional Office for Oceania, Suva, Fiji.
[26] The *qoliqoli* included coastal waters as well as all rivers, creeks and lakes: Ravuvu A, *The Fijian way of life (Vaka I Taukei)* (1983). Page 75.
[27] Aalbersberg et al, above n 18, page 144.
[28] Subsistence fisheries relate to catches mainly for home consumption with sales of excess harvest.
[29] Artisanal fisheries refers to small scale commercial fishery enterprises.
[30] In 2003 subsistence fisheries contributed F$48.6 million to the national economy and artisanal fisheries generated F$28.63 million: Asian Development Bank, 'Fisheries Sector Review: Republic of the Fiji Islands' (2005) *(Technical Assistance Report TA 4403, June 2005)*. Page 6.
[31] The two leading sectors are sugar and other agricultural crops, page 1.
[32] Ibid. Pages 6-7.
[33] Ibid. Page 7.

1.4 Threats to the marine environment

Key threats to the marine environment and its resources in Fiji include unsustainable fishing practices, development activities and pollution. Over-fishing and poaching, equipment usage (including small mesh nets) and fish poisoning all remain problems for inshore areas. Illegal, unreported and unregulated fishing persists offshore.[34] Development activities such as coastal reclamation, sand dredging, siltation and drainage (some due to land clearing for agriculture and the resultant deforestation and soil erosion) are also problematic. Pollution of water results from the release of untreated waste water and drainage of ballast water. In addition population growth, urbanisation and modernisation contribute indirectly to marine degradation.

It has been shown that MPAs are an appropriate tool to protect the marine environment.[35] They are a key component of integrated management of coastal zones and marine areas and an important part of efforts to achieve sustainable development.[36]

[34] Manoa, above n 24.
[35] Kelleher G, 'Guidelines for Marine Protected Areas' (1999) *IUCN Best Practice Protected Areas Guidelines Series 3.* Page xvii.
[36] Ibid, page vii.

2. BACKGROUND

2.1 Conservation approaches to marine areas

At the international level approaches to the conservation of marine habitats and living resources have evolved from purely centralised regulation of 'fishing' in terms of setting total allowable catches to the utilisation of a broader range of management tools. With the emergence of sustainable development as the paradigm of choice by law and policymakers, attention has turned towards mechanisms which achieve environmental, developmental and social goals. MPAs have the advantage of facilitating conservation of biological diversity, the safeguarding of cultural heritage, integrated coastal zone management and sustainable natural resource use. Thus this approach offers a range of benefits for fisheries, people and the marine environment.

2.2 Protection goals

The two principal reasons for the establishment of MPAs are the protection of habitats and biodiversity and the maintenance of fisheries.[37] However, MPAs can be established for a variety of reasons, including: the conservation of specific elements of the marine environment; the holistic protection of entire ecosystems; and, the protection of natural or cultural heritage sites (such as shipwrecks and Indigenous sacred sites including aboriginal fishing grounds). Furthermore, in Fiji where traditional practices, village governance institutions and customary marine spaces are all interlinked, it is of vital importance to protect the marine areas to safeguard cultural diversity and living heritage.

In the past many MPAs have achieved ecological success (in terms of an identifiable increase in the numbers and diversity of marine life and improvement of the overall health of the system) at the expense of local community livelihoods. In many cases interpersonal conflicts, lack of enforcement and the loss of fishing as an economic or food resource for the community have been the result. More recently it has been recognised that protection of marine biodiversity cannot be achieved in isolation. Therefore the challenge for modern MPAs is to achieve these triple bottom line goals.

2.3 Definition of MPAs

There is currently no single international law aimed specifically at defining or facilitating the establishment of MPAs. However, the *Convention on Biological Diversity* (CBD) calls for the establishment of a system of protected areas.[38] The *Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas* under the CBD has adopted the following definition of an MPA.

[37] Ibid, page xvi.
[38] *United Nations Convention on Biological Diversity* 5 June 1992, 1760 UNTS 79, 31 ILM 822 (entered into force 29 December 1993). Article 8.

> any defined area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna, and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings.[39]

The International Union for the Conservation of Nature (IUCN) defines an MPA as

> any area of intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment.[40]

A further but similar definition is provided by WWF

> An area designated to protect marine ecosystems, processes, habitats and species, including the essentials of marine biodiversity and which can contribute to the restoration and replenishment of resources for social, economic and cultural enrichment.[41]

Thus it can be seen that there is no internationally agreed single definition. But each of the above characterisations includes similar elements. For example, there is no necessity for formal recognition or legal declaration of a marine area for it to be considered an MPA. Also, MPAs may protect not only natural areas but can include social, economic and cultural interests as well.[42] This is in keeping with the principles of sustainable development that emphasise responsible stewardship and usage, as well as the needs of communities in the management of natural resources.

MPAs may be known by many different terms including 'reserves', 'closed areas', 'no-take zones', 'fully protected areas', 'sanctuaries', 'parks' and 'locally managed marine areas'. They may include areas managed by governments, local communities, non-government organisations, and other stakeholders or combinations of the above including the private sector.[43] MPAs can cover large or small areas but are mostly located in the territorial waters of coastal States.[44] Typically they involve some form of restriction on activities within a defined area including access and navigation, fishing and marine living resource harvesting, mining and other natural resource extraction, development and equipment usage.

The IUCN classification system of Protected Areas is commonly used for MPAs. The IUCN has established six categories of protected area covering a wide range of management measures with an overall purpose of biodiversity protection[45]

1. a. Protected area managed mainly for science (**Strict Nature Reserve**)
   b. Protected area managed mainly for wilderness protection (**Wilderness Area**)

[39] CBD, COP 7, Decision VII/5.
[40] Kelleher, G, above n 35, page xi; Resolution 17.38 of the IUCN General Assembly, 1988, reaffirmed in Resolution 19.46, 1994.
[41] World Wide Fund for Nature, *Marine Protected Areas: Providing a Future for Fish and People* (2005). Page 3.
[42] Javier Beltran, ed., Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies (Gland: The World Conservation Union, 2000) 3.
[43] World Wide Fund for Nature, *Marine Protected Areas: Benefits and Costs for Islands*, (2005). Page 11.
[44] There is currently much interest in the establishment of high seas MPAs although none have been declared as yet.
[45] IUCN, 'Guidelines for Protected Area Management Categories' (1994).

2. Protected area managed mainly for ecosystem protection and recreation (**National Park**)
3. Protected area managed mainly for conservation of specific natural features (**National Monument**)
4. Protected area managed mainly for conservation through management intervention (**Habitat/Species Management Area**)
5. Protected area managed mainly for seascape conservation and recreation (**Protected Landscape/Seascape**)
6. Protected area managed for sustainable use of natural resources (**Managed Resource Protected Area**)

In this study we will refer to government declared marine areas as MPAs which may be distinguished from informal LMMAs which are non-gazetted, community managed and conserved marine areas.

2.4 Best practice MPA governance

A number of studies have been undertaken to identify and analyse best practice approaches to MPA designation and governance.[46] These studies have resulted in key findings which indicate the likelihood of success of MPAs. These include the recognition that isolated 'islands' of protected areas are not best practice. Rather integrated networks of zones, linked by biodiversity corridors and regional or national planning, are superior.

A networking approach can ensure that MPAs take advantage of ocean currents, biodiversity migration patterns and other natural ecological connections. Networked MPAs could also provide resilience against a range of threats: For example, where a site is affected by a natural disaster others will remain refugia; and if one MPA is damaged it could be re-colonised from an adjacent site.[47] However, networks of MPAs need to be properly planned to provide for the protection of a wide range of valuable natural habitats and processes that exist. This has been recognised at the international level with world leaders agreeing, at the *World Summit for Sustainable Development* in 2002, to create representative networks of MPAs by 2012. WWF has declared a goal of the establishment and implementation of a network of effectively managed, ecologically representative, MPAs covering at least ten per cent of the world's seas by 2020.[48]

The need for planning MPA networks leads to a further key issue which is public participation. Importantly for countries such as Fiji, it is now generally accepted that the success and sustainability of MPAs is directly related to collaboration with marine resource stakeholders and users. In particular, community involvement in governance promotes compliance and support for an MPA. It is fundamental to the good governance of MPAs that their identification, designation, management and enforcement be undertaken in partnership with local communities.[49]

[46] For example see: Kelleher G, above n 35; Roberts C M and Hawkins J P, 'Fully-protected marine reserves: A Guide' (2000).
[47] World Wide Fund for Nature, *Marine Protected Areas: Benefits and Costs for Islands*, (2005). Page 15. See also Roberts C M and Hawkins J P, 'Fully-protected marine reserves: A Guide' (2000). Page 15.
[48] Although 20% has been advocated as the figure necessary: See Roberts C M and Hawkins J P, 'Fully-protected marine reserves: A Guide' (2000). Page 44.
[49] Posey D (ed) *Cultural and Spiritual Values of Biodiversity* (1999). Pages 4-32 and particularly page 13.

However, stakeholder involvement is not limited to local communities. Tensions between environmental, developmental and fisheries management agencies are counterproductive and therefore designation, and in particular management of MPAs, must be integrated with other economic and social considerations.[50] Critical factors include the objectives that the MPA is designed to serve, the management approaches including decision making arrangements, baseline information on marine resources and socio-economic status of the area, and its resulting technical design.

A further issue is the establishment of legal frameworks to provide a foundation for MPAs. It has been recognised that MPAs must be supported from above and below.[51] Community based projects need to be legally recognised to give them legitimacy and to ensure that management plans and rules can be enforced within the dominant legal system. The IUCN have identified alternative approaches including the modification of existing law or alternatively the implementation of specific purpose legislation; the use of national framework legislation combined with local delegation of authority or specific detailed centralised regulation. The choice of approach will depend upon the number, size and type of MPAs to be established: If there are a large number of small MPAs planned, local management supported by legislation may be suitable. Alternatively, if a few larger areas are to be established then it may be more appropriate to draft site specific legislation. As new legislation tends to take a long time to draft and implement, the use of existing law will usually be necessary at least in the short term.[52] In each case legislative controls for MPAs must complement broader environmental regulation and address international standards as well as local cultural values and traditions.[53]

2.5 Scope of Analysis

Despite the identification of best practice marine governance and guidelines for protected area management, incorporating this into law and policy remains a challenge. This paper will assess the legislation and current relevant policies in the Fiji Islands. In this paper the 'gaps' identified include areas where legislation and policy are missing. But also we identify the areas where there is a difference between the written law and policy and what is being applied in practice by local people. It will be seen that although centralised law and policy may be evident, the theory and practice do not match.

[50] Kelleher G, above n 35, p. xiii.
[51] Ibid. Page 13.
[52] Ibid. Page 13.
[53] Ibid. Page 11 and 15.

3. EXISTING POLICIES AND LEGISLATION

3.1 International Law and Policy Context

3.1.1 Ramsar Convention (1971)

The *Convention on Wetlands of International Importance* 1971 (*Ramsar Convention*) seeks to facilitate the conservation and wise use of all wetland areas through local, regional and national action and international cooperation. Fiji acceded to the *Ramsar Convention* in 2005.

The definition of 'wetland' under this treaty includes marine areas to a depth of 6 metres, applicable to both inshore and offshore waters. State parties are, upon ratification, required to nominate at least one site for international listing. Thereafter they must formulate and implement plans for conservation and wise use of listed wetlands and monitor and report changes. Importantly parties are also required to promote the conservation and wise use of wetlands whether or not they are listed. Fiji has one wetland area listed under the *Ramsar Convention*, though it does not involve a marine area.

3.1.2 World Heritage Convention (1972)

The United Nations Economic, Social and Cultural Organization adopted the *Convention Concerning the Protection of the World Cultural and Natural Heritage*[54] (the *World Heritage Convention*) in 1972. With 185 parties it is a near universal instrument. While Fiji does not have any sites designated under this treaty, it has four properties on a tentative listing.[55]

The main objective of the *World Heritage Convention* is to identify and conserve the world's cultural and natural heritage. Any cultural or natural site with outstanding scientific, conservation or aesthetic value may thus be designated on the World Heritage List. However, marine and wetland environments are underrepresented on the World Heritage List. As of 2006, only 28 of 144 sites represented coastal or marine environments.[56]

3.1.3 UN Convention on the Law of the Sea (UNCLOS III) (1982)

The third version of the *United Nations Convention on the Law of the Sea*[57] entered into force in 1994. UNCLOS establishes the broad legal framework for protection and governance of the oceans. Perhaps the most universally important feature of UNCLOS is its definition of national jurisdiction and sovereign rights over different

[54] 16 November 1972. In force 17 December 1975. 1037 U.N.T.S 151 (*World Heritage Convention*).
[55] World Heritage Centre, Tentative Lists Database: http://whc.unesco.org/en/tentativelists/state=fj accessed 19 August 2008.
[56] Roberts, J, Marine Environment Protection and Biodiversity Conservation: The Application and Future Development of the IMO's Particularly Sensitive Sea Area Concept (Springer Berlin Heidelberg, 2006) 37-38.
[57] United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 2, 21 I.L.M. 1261 (entered into force Nov.16, 1994), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm [*UNCLOS*].

areas of the sea.[58] These international definitions are instructive for state parties in the demarcation of their inshore, offshore and other types of waters.

Another important aspect of UNCLOS is marine protection. Part XII (Articles 192 – 237), entitled 'Protection and Preservation of the Marine Environment,' deals with marine conservation. Certain provisions require nations to protect and preserve the marine environment (Article 192), and to prevent pollution from any source (Article 196). While UNCLOS strengthens the ability of nations to establish MPAs, no specific reference is made to protected areas.[59]

3.1.4 Convention on Biological Diversity (1992)

The *Convention on Biological Diversity*[60] came into force in 1993. The three main objectives of the CBD are: the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the use of genetic resources. One of the key recommendations under the CBD was for the establishment of national systems of protected areas or areas where special measures are needed to be taken to protect biological diversity.[61]

The subsequent work programme for conservation of marine and coastal biodiversity was set out by the 1995 Conference of the Parties and the *Jakarta Mandate on Marine and Coastal Biodiversity*. The CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) on marine and coastal biodiversity has recognised that marine protected areas should be part of integrated marine coastal zone management frameworks.[62] In addition, the CBD has constituted programs of work on various thematic and cross-cutting issues, including island biodiversity, marine and coastal biodiversity, and protected areas.

3.1.5 Agenda 21 (1992)

Agenda 21 is the Program of Action resulting from *Rio Declaration* and 1992 UN Conference on Environment and Development. Chapter 17 spells out requirements for protection of marine living resources and the marine environment, including the establishment of limitations on the use of marine ecosystems through the designation of protected areas and other means.[63]

[58] For example, Article 3 defines the territorial sea as extending from the baselines to 12 nautical miles out to sea, and Article 2 specifies that coastal nations may enjoy near complete sovereignty in these areas. Under Articles 55 and 57, parties to UNCLOS may claim a 200-nautical-mile Exclusive Economic Zone (EEZ), where they may enjoy sovereign rights in terms of exploring, exploiting, conserving and managing marine resources (Article 56).
[59] For further discussion on UNCLOS and marine protection see Kundis Craig, R, 'Protecting international marine biodiversity: International treaties and national systems of marine protected areas' (2005) 20 Journal of Land Use, pages 365-366.
[60] June 5, 1992, 31 I.L.M. 818 (1992), 1993 A.T.S. 32 (entered into force Dec. 29, 1993) [*CBD*].
[61] Ibid., Article 8.
[62] For more discussion see Craig, above n 59 pages 367-8.
[63] Birnie, P, and Boyle, A, *International Law and the Environment* (Oxford: Clarendon Press, 1992) 680.

3.1.6 Barbados Declaration and the Programme of Action (1994)

The *Barbados Declaration* and *Programme of Action for the Sustainable Development of Small Island Developing States* were produced at the first *Global Conference on the Sustainable Development of Small Island States* in 1994. The *Barbados Programme of Action* (BPoA) contains 14 priority areas plus a number of actions and policies related to environment and development planning. Articles 21-25 highlight the actions required to ensure sustainable development of SIDS coastal and marine resources. In addition, Articles 41-45 highlight the special actions required at a national, regional and international level to protect and conserve biological diversity including marine biodiversity. The *Mauritius Strategy* under UNESCO is the implementing strategy for the BPoA. Chapter IV on *Coastal and Marine Resources* encourages the strengthening of representative networks of marine protected areas.

3.1.7 World Summit on Sustainable Development (2002)

The *World Summit on Sustainable Development* (WSSD) in 2002 resulted in an international commitment to establish networks of marine protected areas by 2012. Nations agreed to 'maintain the productivity and biodiversity of important and vulnerable marine and coastal areas and to utilise a broad range of tools, including the establishment of marine protected areas.' The Implementation Plan of the WSSD aims to 'develop and facilitate the use of diverse approaches and tools, including … the establishment of marine protected areas consistent with international law and based on scientific information, including representative networks by 2012'.[64]

3.2 Regional laws which support MPAs

3.2.1 Apia Convention (1976)

The *Convention on the Conservation of Nature in the South Pacific*,[65] (*Apia Convention*), entered into force in 1990. The Apia Convention has five parties: Australia, Cook Islands, Fiji, France and Samoa. However, its operation was suspended by all the parties in 2006, though it has not been disbanded and is the subject of revision. It was felt that the *Convention on Biological Diversity*, while a newer instrument, covers the same subject matter and is more universally applied.[66]

The *Apia Convention* had established a broad framework for conservation in the South Pacific region, respecting in particular migratory and endangered species and the preservation of wildlife habitat and terrestrial ecosystems. The main commitment secured from the parties was for the creation of protected areas (Article II), which are defined under the *Apia Convention* as either national parks or national reserves (Article I). These could but did not expressly include marine areas.[67]

[64] World Summit on Sustainable Development Plan of Implementation, Paragraph 31(c), available at: http://www.un.org/jsummit/html/documents/summit_docs/2309_planfinal.htm.
[65] Signed in Apia, 12 June 1976 [*Apia Convention*].
[66] See SPREP Report on the Joint Eighth Conference of the Parties to the Apia and Noumea (SPREP) Conventions, 7, 10 and 13 September 2006, Noumea, New Caledonia.
[67] SPREP Working Paper on the Convention on Conservation of Nature in the South Pacific, 2002, pages 4-10

3.2.2 Noumea Convention (1986)

The *Convention on the Protection of Natural Resources and the Environment of the South Pacific Region*[68] (SPREP or *Noumea Convention*), entered into force in 1990. Broadly, it requires state parties to prevent and regulate pollution, and to ensure proper environmental management and development of natural resources. Article 14 provides for the establishment of protected areas and the protection of wild flora and fauna. Importantly, the *Noumea Convention* implements the UNEP Regional Seas Programme in the Pacific Region. UNEP-RSP promotes the WSSD *Plan of Implementation* targets for establishing networks of marine and coastal protected areas by 2012.

3.2.3 Other Regional Laws

As mentioned above, UNCLOS created the legal framework for governance of the world's oceans, and obliges parties to protect marine biodiversity. Under this framework, there are several regional fisheries treaties that elaborate on UNCLOS in relation to conservation and management of the offshore tuna fishery. For example:

- The *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*.[69] This agreement focuses on the skipjack, yellowfin, bigeye and Southern albacore tuna fisheries across a vast tract of the Pacific Ocean.[70]
- The *Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*.[71] This is a regional management agreement that obliges state parties to bar their nationals, and registered vessels, from using driftnets in their fishing activities.

While the abovementioned examples make provision for the development of conservation measures, neither mention protected areas in the treaty text, nor require them to be integrated into the national legislative regime. It has been clarified that under the *CMFS Convention*, in particular, that conservation measures include time and area closures,[72] but none have yet been instituted under the Convention.

[68] Signed in Noumea, 24 November 1986 [*Noumea Convention*].
[69] Adopted on 5 September 2000 [*CMFS Convention*].
[70] Food and Agriculture Organization of the United Nations, United Nations Fish Stocks Agreement (online: http://www.fao.org/fishery/topic/13701/en).
[71] 1989, entered into force in 1991 [*Wellington Convention* or *Driftnet Convention*].
[72] Western and Central Pacific Fisheries Commission, Resolution on Conservation and Management Measures – 2004 – 04.

3.3 Regional policies and Domestic policy

3.3.1 Pacific Plan (2005)

The *Pacific Plan for Strengthening Regional Cooperation and Integration*[73] was endorsed by the Pacific Islands Forum in 2005. The Pacific Plan provides a broad strategic framework for regional cooperation and integration through shared initiatives developed around four priority areas (economic growth, sustainable development, good governance and security). In this framework, sustainable development includes 'improved natural resource and environmental management.' This entails, *inter alia*, the immediate development and implementation of 'national and regional conservation and management measures for the sustainable utilisation of fisheries resources,' though not expressly including marine protected areas.[74]

3.3.2 SPREP Action Plan (2005 – 2009)

The *SPREP Action Plan*[75] is the plan for implementation of the SPREP (Noumea) Convention. The Action Plan has three priority areas for policymakers: natural resources management, pollution prevention and climate change. The Action Plan includes protected areas management under 'natural resources management.'[76]

3.4 National fisheries policies

3.4.1 Fiji National Biodiversity Strategy and Action Plan (NBSAP) (2007 – 2011)

Consistent with its obligations under the CBD, the government of Fiji has developed a national biodiversity strategy and action plan (NBSAP). The strategy was drafted in 1999, reviewed in 2003 and 2006, and published in 2007. The goal of the Fiji Biodiversity Strategy and Action Plan is:

> 'To conserve and sustainably use Fiji's terrestrial, freshwater and marine biodiversity, and to maintain the ecological processes and systems which are the foundation of national and local development.'

In relation to protected areas, the strategy states that:

> '[t]he establishment of a comprehensive and representative system of reserves and conservation areas at the national and local levels is critical to successful biodiversity conservation'.

The strategy describes Fiji's existing system of protected areas as 'rudimentary' and calls for action to achieve the following objectives:

[73] The Pacific Plan for Strengthening Regional Cooperation and Integration (Pacific Islands Forum Secretariat, 2007).
[74] Ibid.,
[75] SPREP, Action Plan for Managing the Environment of the Pacific Islands Region: 2005 – 2009 (Apia, Samoa: SPREP, 2005).
[76] Ibid., 10.

- establishment of a comprehensive and representative core protected area system;
- establishment of protected or conservation areas in addition to the core protected area system;
- effective management of existing protected areas; and
- adequate funding for protected area management.

The strategy recognises that '[c]ontrol of local resources by traditional resource owners and users is critical to the success of biodiversity conservation' and calls for action to: (a) secure nationally significant sites through appropriate arrangements with resource owners; (b) encourage and assist resource owners to establish their own protected areas; (c) encourage resource owner participation in management of protected areas; and (d) provide equitable remuneration to resource owners for establishing and managing protected areas.

3.4.2 Ministry of Fisheries and Forests Policies and Strategies (2002 – 2006)

The commitment to the implementation of an inshore fisheries management plan was set out in the *Ministry of Fisheries and Forests Policies and Strategies* for 2002—2006. In 2002, a *Community-Based Fisheries Management Programme* for Fiji was developed at the request of the Department of Fisheries. The Programme was developed in 2002 but has not yet been implemented, and its present status is uncertain. The Programme was prepared by the *Secretariat of the Pacific Community* (SPC) *Coastal Fisheries Programme*, in consultation with a number of parties including the FLMMA Network and the University of the South Pacific. The Programme entailed the establishment of a series of *Qoliqoli Management Plans* under the national government, to supplement the coastal marine conservation efforts of the FLMMAs and other NGOs in Fiji. The Programme was developed by the Fisheries Department and was as such limited by the mandate of the Department. For example, the *Qoliqoli Management Plans* focused only on living resource stocks, and did not take a holistic view of conservation to incorporate entire ecosystems including non-living resources.[77]

3.5 Customary laws and institutions

There is a growing recognition internationally that traditional forms of governance, which stress a balanced relationship between people and their environment, may be utilised to help achieve the goals of sustainable development. For example, the *Convention on Biological Diversity*[78] recognises the central role of Indigenous and local communities in the promotion of its three core objectives, which are:

[77] See Fa'asili, U, Vunisea, A, Ledua, E, Mate, F and Vuiyasawa, V, *Proposed Community-Based Fisheries Management Programme for the Republic of Fiji* (Secretariat of the Pacific Community: Noumea, New Caledonia, 2002).
[78] *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992). [CBD].

> 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.'[79]

Article 8(j), in particular, notes that each party to the CBD shall[80]

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

A key question for the management of coastal marine resources in Fiji is the degree to which a balance can be struck between the national laws and customary (or traditional) laws, or indeed the extent to which these systems of law can be effectively integrated.

The Fijian Constitution does not provide blanket recognition of customary law. Instead, the *Constitution Amendment Act 1997* recognises customary law and traditional rights to terrestrial land, provided they are not inconsistent with any law or governing principle of the state. While Section 38 guarantees that the law applies to every person equally, it exempts certain laws and administrative actions regarding land, fishing rights and chiefly titles from this overall obligation. Section 186 of the Constitution makes provision for the application of customary laws and for dispute resolution in accordance with Fijian tradition, but this does not apply automatically and must be expressly recognised in legislation.

However, Fiji has developed a degree of functional integration between statute laws and customary laws relating to coastal marine resource management. Sometimes, the national laws will remain silent on an aspect of marine management. In these cases, customary laws may be applied to the extent that they do not conflict with the national law. At other times the national law will in some way affirm the role of traditional laws and institutions in the management of these areas. The immediate next section of this paper will illustrate this in relation to Fiji's national fisheries law.

3.6 Existing domestic legislation

Fiji does not have dedicated legislation dealing with protected areas. Current protected areas established under various statutes vary in terms of size and conservation potential and cannot be said to form a representative protected areas system. However, there is legislation providing that MPAs may be established in Fiji's inshore and offshore areas.

[79] Ibid, Article 1.
[80] Ibid, Article 8(j).

3.6.1 Jurisdiction

The written text of the *Deed of Cession* vests in the Crown the whole of the Fiji Islands and its adjacent waters, as well as all ports and harbours, rivers, estuaries and other waters and all reefs and foreshores within or adjacent thereto.[81] The contemporary law of Fiji affirms Crown ownership of the coastal zones, as derived from the *Deed of Cession*. The *Crown Lands Act*[82] includes as part of the definition of 'Crown land' the 'foreshores and the soil under the waters of Fiji, which are for the time being subject to the control of Her Majesty by virtue of any treaty, cession or agreement.'[83] When the courts have been asked to address the issue of ownership of the *qoliqoli*, they have been unequivocal that the state owns the foreshore and seabed, by operation of the *Deed of Cession* or the *Crown Lands Act*.[84]

The legal significance of Crown ownership is that, without formal recognition of title to the coastal zones, Indigenous people with customary rights to fish in the *qoliqoli* are denied the opportunity to make important decisions regarding planning and development of the foreshore and seabed. Currently, the Department of Lands and Surveys of the Ministry of Lands, Mineral Resources and Environment issues commercial development leases over the foreshore and seabed on approval by the Director of Lands and the Minister.[85]

Consistent with UNCLOS III, the *Marine Spaces Act* defines the archipelagic waters of Fiji (12 nautical mile territorial sea) and the 200 nautical mile EEZ over which Fiji has sovereign rights in relation to exploration, exploitation, conservation and management of marine resources. Formal declaration of these archipelagic waters and the EEZ is in the *Marine Spaces (Archipelagic Baselines and Exclusive Economic Zone) Order*.

Certain national laws also demarcate inshore and offshore areas. For example, Fiji's *Environment Management Act* defines the coastal zone as

> 'the area within 30 meters inland from the high water mark and includes areas from the high water mark up to the fringing reef or if there is no fringing reef within a reasonable distance from the high water mark.'

3.6.2 Fisheries Act and Regulations

The *Fisheries Act* is the primary piece of legislation governing the management of marine resources, with management functions vested in the Fisheries Department of the Ministry of Fisheries and Forests. The provisions of the Act cover the establishment and management of marine protected areas, and set out the arrangements by which communities may control their coastal marine resources.

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[81] Deed of Cession, above n 12, Articles 1 and 4.
[82] (Cap 132) (1975) [*Crown Lands Act*].
[83] Ibid, s. 2.
[84] See *Tokyo Corp v Mago Island Estate Ltd* [1992] FJHC 76, and *Attorney General for Fiji v Mocelutu* [2002] FJHC 264.
[85] Ibid, ss. 10 and 21(1)

Under Section 13 of the *Fisheries Act*, the jurisdiction of the group with customary rights to the *qoliqoli* is recognised and given effect. This provision states that customary rights holders must be consulted before granting inshore permits to any harvester wishing to gain entry to the *qoliqoli*. A decision to grant access to any harvester must therefore first be decided at the community level.

Section 9 of the *Fisheries Act* empowers the Minister to make regulations 'prescribing areas and seasons within which the taking of fish is prohibited or restricted, either entirely or with reference to a named species'. The regulations to the Act provide for the declaration of 'restricted areas', within which 'no person, unless he is authorised in writing under the hand of the Commissioner of the Division … shall … kill or take fish of any kind whatsoever, except by hand net, wading net, spear or line and hook' (r.11).

The Minister may designate seasons when fishing is restricted or prohibited, and also has the power to make regulations for 'any other matters relating to the conservation, protection and maintenance of a stock of fish which may be deemed requisite'.[86] The Minister may also prohibit fishing for named species in certain areas.[87]

Fishing activities in the *qoliqoli* are subject to a licensing and permit system under the *Fisheries Act*. Permits are required for any type of fishing in the *qoliqoli*, and licences are required for commercial fishing. However, there are exceptions: Any harvester is exempt from obtaining a permit when fishing is done with hook and line or with a spear or portable fish trap which can be handled by one person.[88] Commercial harvesters do not need a licence if they fish with a line from the shore or with a spear, or are specially exempted from the license requirement by the Minister.[89]

The Commissioner of the Division issues fishing permits, and the licensing officer, issue fishing licenses.[90] Before granting a permit, the District Commissioner must consult with the relevant Fisheries Officer and customary owners.[91] In practice, the Commissioner issues a permit on the strength of a chief's letter of consent that has been verified by the Roko Tui (chief) of the Provincial Council,[92] followed by endorsement from the relevant Fisheries Office. [93] For those seeking licences for commercial harvesting, goodwill payments to the chief or head of the *qoliqoli* area are levied in addition to a licence fee paid to the government.[94]

[86] *Fisheries Act*. s. 9(g).
[87] *Fisheries Act*, s. 9(b).
[88] *Fisheries Act*, s. 13(1)(a).
[89] *Fisheries Act*, s. 5(3).
[90] *Fisheries Act*, ss. 5(1) and (2).
[91] *Fisheries Act*, s.13(2).
[92] The powers and functions of Provincial Councils are set out in ss. 7 and 8 of the Fijian Affairs Act.
[93] Veitayaki, J and South, G, above n 22, 458.
[94] Kuemlangan, B, "Creating legal space for community-based fisheries and customary marine tenure in the Pacific: issues and opportunities" (Rome: Food and Agriculture Organization, 2004) 18.

Honorary fish wardens are designated under the *Fisheries Act* to prevent and detect violations of the *Act* and enforce its provisions.[95] Fish wardens are often harvesters themselves, who are chosen by their communities to protect the community's *qoliqoli*. Fish wardens are formally appointed by the Minister[96] and have the same enforcement powers as any licensing officer, police officer and customs officer.[97] Such powers of enforcement include: requiring anyone fishing to show his or her licence, equipment or catch; boarding any vessel and examining the equipment; taking any vessel, equipment or catch without warrant to nearest police station or port.[98]

3.6.3 Other Domestic Legislation

The Fisheries Act applies to both inshore and offshore marine areas. However, it is under the Marine Spaces Act that foreign fishing vessels are licensed and regulated. The Marine Spaces Act provides that:

> 22.(1) The Minister may make regulations for all or any of the following purposes:-
>
> (h) prescribing measures for the conservation and management of fisheries resource within the exclusive economic zone;

This provides a further avenue for the designation of offshore MPAs for protection of fisheries. However, this provision does not appear to have been utilised.

A further piece of relevant legislation is the *Environment Management Act*, which provides, *inter alia*, for the environmental assessment and approval of development activities. The commencement of the Act, on 1 January 2008, represents a major milestone in the development of environmental law in Fiji.

The Act applies to 'development activities or undertakings', which are defined broadly to include:

> any activity or undertaking likely to alter the physical nature of the land in any way, and includes the construction of buildings or works, the deposit of wastes or other material from outfalls, vessels or by other means, the removal of sand, coral, shells, natural vegetation, sea grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals, but does not include fishing.[99]

While the EMA expressly excludes fishing activities from its ambit, it may still have a potential role in managing the impacts on MPAs that do not involve fishing activities.

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[95] *Fisheries Act*, s. 3.
[96] *Fisheries Act*, s. 3
[97] *Fisheries Act*, s. 7(1)
[98] *Fisheries Act*, ss. 7(1)(a-c)
[99] *Environment Management Act*, s.2.

The Act requires the assessment of 'development proposals', defined as:

> a proposal for a development activity or undertaking submitted to an approving authority for approval under any written law.[100]

Under the Act, an approving authority[101] must examine every development proposal received by it and determine whether the proposed activity or undertaking is likely to cause significant environmental impacts.

If the approving authority determines that the activity or undertaking will cause a significant environmental impact, the development proposal must be made subject to the environmental impact assessment (EIA) process required under the Act.

The Act sets out three broad classes of development proposal:

1. proposals that must be processed by the Department of Environment;
2. proposals that must be processed by the approving authority; and
3. proposals that may not require environmental impact assessment.

Proposals that must be assessed by the Department of Environment are listed in Schedule 2, including:

> a proposal that could harm or destroy **designated or proposed protected areas** including, but not limited to, conservation areas, national parks, wildlife refuges, wildlife preserves, wildlife sanctuaries, mangrove conservation areas, forest reserves, fishing grounds (including reef fisheries), fish aggregation and spawning sites, fishing or gleaning areas, fish nursery areas, urban parks, recreational areas and any other category or area designated by a written law. [*emphasis added*]

This Act provides powerful provisions particularly relating to the assessment of the environmental impact of coastal development on MPAs.

3.7 Locally Managed Marine Areas

The Locally Managed Marine Areas (LMMA) network is a regional association of non-governmental organisations.[102] It employs a community-based and participatory method of managing coastal marine areas that is designed to combat ecological challenges while promoting sustainable livelihoods for the customary owners. The goal of each LMMA in the regional network is to ensure both a healthy ecosystem and community, each of which depend on abundant marine resources and sustainable fisheries.[103] Indicators of success therefore include species and habitat health, as well as the well-being of the community.[104]

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[100] Ibid.
[101] For this purpose, an 'approving authority' means a Ministry, department, statutory authority, local authority or person authorised under a written law to approve the proposal.
[102] The Network operates across South East Asia and the South Pacific in Fiji, Indonesia, Palau, Papua New Guinea, the Philippines, Pohnpei (Federated States of Micronesia), and the Solomon Islands: LMMA Network http://lmmanetwork.org/Site_WhereWeWork.cfm.
[103] Tawake, A and Tuivanuavou, S, above n 10, p. 26.
[104] Ibid, p. 26.

LMMAs across the South Pacific and South East Asia are governed differently, with varying relationships to government and levels of autonomy. However, the LMMA network system is based upon standardised monitoring methodologies and common adaptive management techniques, with a commitment to the sharing of skills and knowledge.[105] The LMMA network defines a locally managed marine area as[106]

> An area of nearshore waters and coastal resources that is largely or wholly managed at a local level by the coastal communities, land-owning groups, partner organizations, and/or collaborative government representatives who reside or are based in the immediate area.

The Fiji Locally Managed Marine Areas (FLMMA) provides a national mechanism for coordinating and supporting management of LMMA sites by communities and partner organisations. As of June 2007, there are 385 marine and 25 freshwater *qoliqoli* in Fiji, which cross all of Fiji's coastal and inshore waters, and contribute to the livelihoods of about 400,000 customary owners.[107] Roughly half of the *qoliqoli* areas in Fiji are now part of the FLMMA network. The Fisheries Department of the national government has formally adopted the LMMA system, and the Ministry of Fisheries and Forests is one of the partner organisations of the FLMMA network. The network is managed by an Executive Committee, which involves the partner organisations in the network,[108] as well as representative communities and other stakeholders. The chair of the Executive Committee rotates to the partner organisations; currently the Fisheries Department chairs the Committee. The role of the national government within the FLMMA network is partially that of a facilitator, and does not include formal decision-making authority greater than other partners in the network.

The process to establish a LMMA begins with an expression of interest from a community to one of a handful of partner organisations involved in the LMMA network. The partner organisation then facilitates a process of capacity building, which involves holding workshops in the community on management and action planning, biological monitoring, and socio-economic monitoring. The partner organisation compiles the community's information, and with this information the community and partner organisation then develop a *Marine Management Plan* for the site. After this stage the community is responsible for the implementation, monitoring and enforcement of the management plan.[109] Community level institutions carry primarily responsibility for managing the resource; often these are set up for the specific purpose of managing the *qoliqoli*, and follow traditional hierarchical command structures. The involvement of the partner organisation continues through the management stage for planning and other types of technical assistance.

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[105] LMMA Network Annual Report 2004, p. 3.
[106] Govan, H, Aalbersberg,W, Tawake, A, and Parks, J, *Locally-Managed Marine Areas: A guide for practitioners* (The Locally-Managed Marine Area Network, 2008), p. 2.
[107] Ibid, at p. 3.
[108] These include: World Wildlife Fund; Institute of Applied Science Programme of the University of the South Pacific; Foundations of the Peoples of the South Pacific, Ministry of Fisheries and Forests; and the Wildlife Conservation Society.
[109] Tawake, above n 10, at page 26.

Communities under the FLMMA network may choose to establish strict no-take zones (*tabu*) within the boundaries of their *qoliqoli*. While many communities have chosen to do so, only one site has been formally gazetted by the Minister of Fisheries and Forests. In this case (the Uluikoro Marine Reserve in Kadavu) the notice of the Ministerial declaration maps out the boundaries of the *tabu* area and sets an expiry date after which the MPA is reviewable. While the community and the active FLMMA partner organisation (WWF) have developed a management plan, the gazette does not formally adopt this.

4. LEGISLATIVE AND POLICY GAPS

From the above analysis a number of legislative and policy gaps are evident. Four areas have been identified by the authors of this paper: Firstly, the lack of comprehensive protected area management legislation; secondly, legislative and policy fragmentation which hampers the achievement of marine ecosystem protection and true integrated coastal zone management; thirdly, the scope and content of the *Fisheries Act* itself; and fourthly, the lack of formal recognition or other legal and policy support for LMMAs.[110] These issues will be dealt with separately below.

4.1 Protected Area Management Legislation

Comprehensive protected area management legislation is necessary in order to establish an integrated network of MPAs in Fiji. However, there are some practical challenges that impede the realisation of this goal. The first issue is a jurisdictional one; in particular, the unresolved issue of marine tenure. As mentioned above, there is a legal tension between the State – which legally owns and controls inshore and offshore waters – and customary owners with fishing rights in relation to inshore waters. A second and related issue involves the institutions employed to administer marine protected area laws. Even if such legislation were implemented, best practice indicates that it is unlikely to succeed without the support of the local community who has direct and easy access to the inshore waters. In particular, the national government lacks the resources to police and enforce compliance with inshore MPAs without the support of local communities.

One approach to resolving these issues would see community level institutions primarily responsible for executing protected areas management legislation. The FLMMA Network in particular has been successful in assisting in the establishment of multiple community-based protected areas with management plans and rules based largely on customary law. However, this system remains voluntary with no specific legislative support and in circumstances where there is no absolute constitutional recognition of customary law or marine tenure. These issues impact upon the legitimacy of LMMAs and the ability of local communities to enforce customary rules against adjacent villagers or outsiders.

Mechanisms need to be identified in order to meet international standards in relation to protected area management whilst also meeting the needs and expectations of the Indigenous peoples. This may well necessitate the drafting of *sui generis* protected area management legislation. But alternatively the protection of inshore areas might also be achieved through the strengthening of fisheries laws and providing legal support to the FLMMAs. This latter approach is discussed in further detail below.

[110] This fourth issue comprises a number of sub-issues including lack of recognition of customary law and Indigenous marine tenure.

The establishment of offshore MPAs is a more straightforward process as their management does not directly involve customary rights issues. However their effectiveness is still hampered by resource issues particularly in the area of monitoring and enforcement. Fiji's waters cover approximately 1.3 million square kilometres of ocean which makes the surveillance and deterrence of illegal fishing extremely problematic.[111] Where cases are prosecuted, penalties have not been applied consistently. In prosecutions under the *Fisheries Act* and the *Marine Spaces Act*, the judiciary has been seen to impose greater penalties for illegal fishing inshore, than in offshore areas.[112] This was despite documented evidence that, during the period studied there were more cases of illegal fishing in the EEZ than territorial waters.[113] This would perhaps indicate a need to focus greater attention on offshore areas.

Therefore, even if specific legislation was implemented, it would not ensure best practice conservation of the marine environment. There are important legislative and policy gaps which need to be addressed to support the establishment and effective management (including compliance and enforcement) of inshore and offshore MPAs in Fiji.

4.2 Legislative and policy fragmentation

Land and adjoining marine areas are interlinked and therefore MPAs should be incorporated into management regimes that deal with all human activities that affect marine life. Thus MPAs should be integrated with such policies and laws for integrated land and marine management.[114]

In Fiji, the goal of integration is hampered by significant fragmentation of law and policy relating to the marine environment. For example, the *Fisheries Act* is concerned with fish, which are defined widely but limited in essence to all marine fauna. Non-living marine resources and the marine environment generally are not within the jurisdiction of the Act or the Fisheries Department.

The *Environment Management Act* (EMA) takes a more holistic approach and is aimed at addressing fragmentation with provisions for integrated land and coastal zone management, environmental impact assessment and administrative linkages. However, as noted above, fisheries are specifically excluded from the definition of 'development activities' under the EMA. Although the Fisheries Department is one of the agencies involved in integrated planning and management of resources under the EMA, fishery activities are outside the Act's ambit. Nonetheless, the EMA does provide for assessment of coastal developments that may impact upon the marine environment.

[111] Manoa, above n 24.
[112] Ibid.
[113] Of the seven cases decided between 2002-2006, four involved illegal fishing in the EEZ: Ibid.
[114] Kelleher G, above n 35, page xi.

Administrative and policy fragmentation is illustrated by an examination of the agencies and documents which relate to the establishment of a network of protected areas. Policy clarification and administrative coordination is needed to ensure an integrated network of MPAs can be established efficiently and effectively.

Local communities have gone some way towards integrated coastal zone management of inshore marine areas and (to a lesser extent) coastal catchments with the establishment of a network of LMMAs in adjacent villages. However, the success of the LMMA Network has also created further problems as improved stocks inside restricted areas have attracted the increasing attention of poachers. Fishing is obviously much easier in areas where resources are plentiful. Monitoring and enforcement of LMMAs remains a problem. This is one reason why a legislative foundation should be provided for LMMAs, as discussed below.

4.3 Fisheries Act

At present the *Fisheries Act* is the only piece of legislation in Fiji which provides for the restriction of fishing in certain areas. However, it does not provide for holistic protected area management as such and only addresses harvesting issues. Where fisheries laws provide the main legislative framework for marine management, the focus tends to shift more towards the management of harvesting activities, and away from ecosystem-based conservation. However, as the *Fisheries Act* is the only statute that provides for MPAs at present, its provisions will be considered in further detail.

4.3.1 Restricted Areas

A preliminary issue relates to the wording of the provisions of the *Fisheries Act*. As noted above, under s.9(b) of the *Fisheries Act* the Minister for Fisheries can make regulations 'prescribing areas and seasons within which the taking of fish is prohibited or restricted, either entirely or with reference to a named species'. This section appears to be straightforward and would allow for complete no-take areas. However, when the regulations were made, they provided that fishing was prohibited 'except by hand net, wading net, spear or line and hook'.[115] Therefore, whilst it is legally possible for the Minister to make regulations which allow for the establishment of no-take zones, the current *Fisheries Regulations* (and the MPAs declared to date), do not have this effect. Whilst protection of basic fishing methods by individuals may be justified in inshore areas (for subsistence needs) it is unnecessary in offshore areas.

[115] Regulation 11 of the *Fisheries Regulations* 1990 provides as follows: 'No person, unless he is authorised in writing under the hand of the Commissioner of the Division in which the area described in the Fifth Schedule is situated shall, within such area, kill or take fish of any kind whatsoever, except by hand net, wading net, spear or line and hook.'

4.3.2 Fishing Permits

The regulation of inshore and offshore fishing activities is only by way of permits. This remains a significant issue in terms of achieving best practice governance of marine areas, since comprehensive MPA legislation could provide for regulation of in inshore and offshore zones, as well as address issues of the cumulative impact of harvesting activities.

The permit system may be used to protect a marine area, but its application is limited. Section 13(1)(b) of the *Fisheries Act* provides that where a permit is necessary for fishing it may exclude fishing of a particular species, in a particular area, or using a particular method. This additional provision does provide a means by which the Commissioner can restrict fishing in a marine area. However, it would be restricted to circumstances where a non-traditional owner wants to fish inside a *qoliqoli* area and is not using a hook and line, spear or portable fish trap which can be handled by one person. Licence conditions under Section 5 of the *Fisheries Act* have been used to protect *tabu* areas from commercial fishing activities, but these are again subject to exceptions, namely fishing with a line from shore or a spear.

4.4 Legal support for LMMAs

There is no doubt that, despite colonial rule and the introduction and maintenance of a western style legal system, customary law has continued to be applied by many Indigenous people in Fiji. And whilst these two areas of law need not necessarily be in conflict, the ideological gap between the two is significant. Where state legislation directly conflicts with customary law and deeply held cultural beliefs it is unlikely to be successful.

On the other hand, national laws have an important role to play in managing coastal marine areas. While local communities can make plans for their inshore *qoliqoli* areas, these are not directly enforceable and remain voluntary. Legal recognition is not essential in terms of the definition of an MPA, but best practice suggests that it is necessary for their success.[116]

4.4.1 Current Mechanisms for Community-Based Coastal Marine Management

At the village level, the customary laws and traditional governance institutions may be sufficient to ensure adherence to them, but enforcement issues arise in relation to adjacent villages and outsiders. Without legislative support, compliance with the LMMAs cannot be assured as they are not recognised within the dominant legal system. Community members, fish wardens, fisheries officers and police are not legally empowered to enforce locally-defined management rules in the absence of supporting legislation. Enforcement of locally-defined management measures

[116] Baines, G, Hunnam, P, Rivers, M and Watson, B, *South Pacific Biodiversity Conservation Programme Terminal Evaluation* (New York: UNDP, 2002).

without legal authority may expose those taking the enforcement action to criminal liability – for example, for assault, unlawful arrest and unlawful seizure of property.

For its part, the *Fisheries Act*, as mentioned above, allows for village-based fishing restrictions through the permit system.[117] In essence, when deciding whether to issue a permit, the Commissioner must consult *qoliqoli* owners.[118] However, there is no right of veto given to the *qoliqoli* owners and the discretion to issue a permit or not remains with the Commissioner. Furthermore, a permit is not necessary for anyone taking fish by 'hook and line or with a spear or portable fish trap which can be handled by one person'.[119] Therefore, these provisions provide an incomplete mechanism for enforcing village-based fishing restrictions.

4.4.2 Need for legal protection

Whilst the Government can declare inshore and offshore MPAs under the *Fisheries Act*, it is evident that the informal LMMA network is operating very effectively at this stage. A number of sub-issues relate to the improvement of legal protection for the LMMAs.

One concern is that of marine tenure. Under Fijian Indigenous customary law, 'land' includes the adjacent fishing grounds (*qoliqoli*).[120] Although the law now provides that terrestrial traditional land (as opposed to *qoliqoli*) is held by the *mataqali*, there is no recognition of customary marine tenure either in a western legal sense or traditional communal sense. Therefore, there is a mismatch between what Indigenous people consider to be their property and property rights as defined by the national legal framework. As a result, since 1880, marine tenure has never been granted the same status in Fiji as land tenure.

It has been suggested that community-based management of marine areas is likely to be more successful where government support is given.[121] Furthermore, communal marine tenure rights provide a foundation for local communities to police their marine areas.[122] Open access is a powerful disincentive to the creation of local rules to protect it.[123]

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[117] *Fisheries Act,* s.13(1).
[118] *Fisheries Act,* s.13(2).
[119] *Fisheries Act*, s.13(1)(a).
[120] There are 410 registered *qoliqoli.*
[121] World Bank, *Summary Report. Voices from the Village: A comparative study of coastal resource management in the Pacific Islands*, (2000). Accessed 20 July 2007 athttp://www.onefish.org/cds_upload/11105.Voices_from_the_Village,_A_comparative_Study_of_Coastal_resource_management_in_the_Pacific_Islands.2001-1-31.pdf. Page 16
[122] However the customary legal 'holding' of land did not equate to the western real property ownership right. There was no absolute right over land or control to buy, sell, improve or lay waste. Rather the land was held or owned on a communal stewardship basis. Individuals had rights to various parts of it for the purposes of dwelling or cultivation and responsibilities to take care of it, both now and for the future. But they were not true owners, as individuals, and could not sell or pass on their 'share' of the land. Boydell, S, and K Shah, K, *An inquiry into the nature of land 'ownership' in Fiji*. Paper presented at the International Association for the Study of Common Property Second Pacific Regional Meeting. Brisbane 7-9 September 2003. Page 2. See also Johannes, R E, 'Traditional Marine Conservation Methods in Oceania and their Demise' *Annual Review of Ecology and Systematics*, Vol. 9 (1978), pp. 349-364, at p. 360.
[123] Boydell et al, above n 122, page 11.

In 2006, prior to the most recent military coup, a Bill was presented to the Fiji Islands Parliament which provided for the transfer of the *qoliqoli* from State ownership back to the traditional owners, albeit with legal control and management vesting in a statutory body.[124] However, the interim military government has no plans to adopt or revisit this *Qoliqoli Bill*, and it remains to be seen whether this legislation or something similar will be proposed by any subsequent elected Fijian government.

However, granting of marine tenure alone will not provide FLMMAs with the legal status necessary to ensure that management restrictions can be legally enforced. Of fundamental importance here is the legal recognition of management plans to ensure their legitimacy and longevity and that they can overcome enforcement and compliance issues. There is therefore a gap between the ability to enforce rules relating to the declared MPAs as opposed to the informal LMMAs.

Another sub-issue relates to the types of laws best suited to offer legal protection to community-based conservation measures. In drafting new laws the tendency has been to regulate by way of centralised, state based legislation. Traditional conservation practices have been largely overlooked by law and policymakers and in some cases systematically undermined. Frameworks for their support are generally not reflected in national laws and policies.

In Fiji, the tension between customary law and the dominant legal system remains an issue with respect to the management and conservation of marine areas. This tension is well illustrated in circumstances where, as in Fiji, top down legislation has been largely ineffective, and community-based mechanisms are being re-discovered as a way to strengthen and improve sustainable natural resource use and conservation.

The FLMMAs have proved to be a successful initiative in terms of biodiversity, and social and economic outcomes.[125] Yet the management plans developed by the Network in conjunction with local villages are based upon customary law which has no formal recognition. This leads to enforcement issues where the plans are challenged by adjacent villages or outsiders. However, the existing legal framework does not directly offer them support. Whilst there may be constitutional or legislative recognition of customary law in the future, that appears to be unlikely at this stage.

[124] *Qoliqoli Bill 2006*, introduced into Parliament on 23 August 2006.
[125] LMMA Network Annual Report (2005).

5. RECOMMENDATIONS

The gaps in Fijian law and policy largely relate to the fact that environmental considerations, and particularly protected area management, have developed over time. In this way, measures are added into existing legislation and strategic policies are developed as international law and best practice evolve.

The need to implement international and regional obligations and also address community expectation whilst respecting cultural diversity is problematic. The issues of the translation of global standards into local action and the linkages between central government and the community are ones which trouble many countries. However, solutions to these problems can be informed by other practices in the Pacific where similar issues are being faced. These will be discussed below in the context of the three key gaps identified above.

The authors have made a number of recommendations in relation to the above analysis. However, it should be noted that at present there is no way to amend legislation in Fiji, as there is no lawfully elected Parliament.

5.1 Legislative and policy fragmentation

5.1.1 Legal and Policy Reform

National policy in relation to inshore and offshore MPAs needs to be developed that builds upon the objectives of the NBSAP and incorporates best practice in relation to the conservation of marine ecosystems and environmental regulation, including integrated coastal zone management and networking of marine areas. In particular, integration of MPAs across inshore and offshore areas needs to be addressed as many species move between these zones (particularly for the purpose of breeding or for nursery grounds).

Clearly the designation and management of MPAs must deal with fisheries, as they are a primary driver of ecological change in the marine environment. However, fishery issues should not be separated from land based activities and other management issues that affect the marine environment. This provides a powerful incentive to establish comprehensive protected area management legislation, which provides for an integrated network of marine and terrestrial zones.

Protected areas management legislation would need to meet the requirements of the CBD and address the protection of species, ecosystems and genetic resources as well as associated marine habitats. It would also need to take into account the multiple values associated with marine areas and socio-economic issues related to commercial, subsistence and artisanal fisheries, as well as Indigenous rights and tourism.

5.1.2 Administrative Coordination

As well as harmonised legislation, coordinated administration is also necessary. It is essential to ensure a continuing dialogue between the various government departments such as the Department of the Environment and Fisheries Department. Community level governance institutions must also be engaged and overall coordination needs to improve between government (with responsibility for offshore areas) and local communities who manage their customary inshore areas (including through LMMAs).

From an administrative perspective, the EMA attempts to draw together different government sectors through the establishment of a National Environment Council (which is to approve the National Environment Strategy for example).[126] But as this Act only came into force in 2008 it remains to be seen whether this can be achieved. However, it cannot overcome the problem of legislative fragmentation. At present MPAs can only be declared under the *Fisheries Act*, with only a limited provision, available under the *Marine Spaces Act,* in respect of conservation of marine areas in the EEZ. In addition, the Asian Development Bank (ADB) has previously recommended the establishment of a Marine Parks Authority or Marine Protected Areas Authority[127] and this would appear to be sound. Such an authority could coordinate the establishment and management of the network of MPAs advocated by the Government in the NBSAP.

Monitoring and enforcement may also be improved with greater administrative coordination. Protecting offshore areas is problematic due to the large size of the zone. More attention should be paid to these areas (particularly in the EEZ) to address illegal fishing and improved coordination between law enforcement and the judiciary is thus required. In coastal areas, greater cooperation between fish wardens, local law enforcement, and local magistrates is needed to clarify respective roles and narrow gaps in enforcement.

5.2 Amendments to the Fisheries Act and Regulations

As set out above, the procedures contained in the *Fisheries Act* fall short of a comprehensive system for creating and managing marine protected areas. The *Fisheries Act* and *Marine Spaces Act* are both old pieces of legislation that were drafted in a time when integration and holistic approaches to regulation were not considered best practice.[128] One previous study has recommended their review and amendment or repeal.[129] However, if specific legislation is not implemented in relation to MPAs then the provisions of the *Fisheries Act* would need to be amended to reflect a more modern and holistic approach to protected area management. The

[126] *Environment Management Act 2005,* s.7.
[127] Ibid. Page 45.
[128] Asian Development Bank, 'Fisheries Sector Review: Republic of the Fiji Islands' (2005) *(Technical Assistance Report TA 4403, June 2005)*, p.38.
[129] Ibid, p.39.

Act would need to be expanded to make specific provision for the declaration of MPAs and zoning of areas within them.

The main weakness with this system is that under the current *Fisheries Act* and *Regulations* it is legally impossible to establish a protected area where fishing is strictly prohibited. The creation of a strict nature reserve is not possible for three reasons: Firstly, restricted areas designated by the Minister contain exceptions for certain fishing methods. This loophole could be closed by the amendment of current regulations. However, the location of strict no-take zones would need to be thoroughly researched to ensure that subsistence fishers were not prejudiced by the regulation. Secondly, while the community has a measure of control over who is granted a permit to fish in the *qoliqoli*, there are again exceptions to this requirement for certain fishing methods. This is an issue of facilitating greater community involvement in the permit and licensing regulations. Thirdly, while the fish wardens do play a role in managing the *qoliqoli* and the protected areas within these, their formal role is restricted by the *Fisheries Act* (and the exceptions therein) and does not include enforcement of the *tabu* areas designated by the community. An increased role for the fish wardens is recommended.

We have seen that the Minister is empowered to make regulations on 'any … matters relating to the conservation, protection and maintenance of a stock of fish which may be deemed requisite,' and this power has already been used to establish MPAs. A similar regulation might specify that protected areas be established in *qoliqoli* areas, in consultation with customary fishing rights owners. Regulations could also delegate management functions to customary owners. These types of reforms may in effect give legal recognition to the role of customary fishing rights owners in managing the *qoliqoli* resources, and give legal status to the management plans that communities develop for their LMMAs as they relate to fisheries issues, including *tabu* areas.

5.3 Legal Recognition of Locally Managed Marine Areas

The governance provisions of LMMAs may be legitimised by handing back tenure of inshore marine areas to the traditional owners. However, it appears unlikely that this will occur in the near future. Several alternative options are available to strengthen the LMMAs, rather than simply granting marine tenure. Despite a lack of absolute recognition of customary law under the Fijian Constitution, legislative acknowledgment is possible and could be explored as a way of providing legitimacy and longevity to LMMA initiatives. Again it appears unlikely that the current constitutional position will alter in the near future. Therefore, working within the current constitutional framework, there appear to be two options to facilitate legal protection:

1. Implementation of a *sui generis* statute to support LMMAs;
2. Incorporation of LMMAs directly within the *Fisheries Act* permit structure.

5.3.1 Sui Generis Legislation

A specific piece of legislation could be drafted which would allow the formal recognition of LMMAs. The hallmark of this type of legislation is the integration of community-based resource management measures into the laws of the State. Such legislation has been passed in Vanuatu where the *Environmental Management and Conservation Act 2002* provides for the declaration of Community Conservation Areas (CCAs). The adoption of this legislation was preceded by a lengthy consultation process with chiefs and customary resource owners as well as other stakeholders and the drafting reflects respect for traditional resource management approaches through recognition of CCAs. The Act requires the making of a *'conservation, protection or management plan'* which is implemented by the community land owner, with technical or financial assistance from the Vanuatu Environment Unit (VEU). It is an offence to contravene any 'term or condition' of a registered community conservation area.

A similar approach could be adopted in Fiji. However, there are both positive and negative aspects of the development of a *sui generis* system. One benefit is that the legislation could be tailored specifically to the FLMMAs. On the other hand, the drafting of such legislation is likely to be time consuming and costly. Furthermore, it could add to the legislative fragmentation referred to above.

As the FLMMAs system has proved so successful, it is essential that further ways to support and strengthen are identified. A range of initiatives, such as capacity building, enhanced stakeholder empowerment and building greater interlinkages between government and communities, should be investigated.

5.3.2 Modified Fisheries Legislation

A principal concern is the identification of ways in which to improve the enforcement of management plans. This may be achievable in a much shorter time frame than the development of *sui generis* legislation, by utilising existing legislation.

As noted above, the Fisheries Department has accepted the LMMA model and is now a Network member. The Department has thus recognised the need for legislative underpinning of community-based marine initiatives. In this regard, the *Fisheries Act* could specify a more active role for the communities in the preparation and execution of their Management Plans, created as part of the LMMA network. Provisions could be inserted to delegate responsibility for the management of inshore fisheries resources, oblige the Fisheries Department to offer support in preparing the Management Plans, and recognise the contents of the Management Plans in Fiji's national legal system. However, this approach does raise issues of procedural fairness for non-resource owners and the mechanism by which it could appropriately be achieved will need further investigation.

The *Fisheries Act* and Regulations could also be modified by strengthening the provisions relating to fish wardens. Integrating village management with national regulatory mechanisms has significant potential as a means for supporting community-based priorities and engaging local communities in monitoring and enforcement activities. This approach has been proposed in Fiji by the Ministry of Fisheries and Forest Policies and Strategies for 2002-2006 and in the 2002 *Community-based Fisheries Management Programme for Fiji*. This Programme was prepared by the Secretariat of the Pacific Community's Coastal Fisheries Programme in consultation with the FLMMAs and the University of the South Pacific. The basis of the project was to establish a government based series of *Qoliqoli Management Plans* basically supplementing the work done by the LMMA network. In essence this proposal involved amending the *Fisheries Act* to delegate power to manage inshore fishery resources to *Customary Fishing Rights Owners* (CFRO). Thereafter, village rules (currently incorporated in the LMMAs management plans but proposed to be included in *Village Fishery Management Plans* (VFMP)) would be enforceable in Fijian courts. Lastly, legislation was proposed which would require the Fisheries Department to assist CFROs in preparing management plans and village rules. This was designed to overcome funding and resourcing issues at the village level.

The proposal is a modification of the approach that has been taken in Samoa. There the village institution, the *fono*, has been formally recognised in the *Village Fono Act*.[130] Thereafter, the *fono* has been empowered to regulate village fishing grounds by passing fishery by-laws which are enforceable, if necessary, in courts under the *Fisheries Act*.[131] However, in Fiji the Samoan approach would again raise the issue of the lack of correspondence between the traditional owners of marine and land areas. Although customary fishing rights are usually registered in the name of the land-owning clan (*mataqali*), traditionally they were held by different sub groups (*yavusa* or *vanua*). Furthermore, if the management of inshore fisheries was delegated to the *mataqali*, it would need to be recognised as a legal entity.

Because of these difficulties, it may be that the proposed amendments to the *Fisheries Act* would work better in Fiji. They would provide the power to pass by-laws, relating to inshore fishery resources, to the entity that is the registered holder of the customary fishing rights.

However, this addresses only the issue of inshore fisheries. Because the proposal originated through the Fisheries Department it focuses only upon living resource stocks and not the marine environment generally. This could be addressed if the power delegated to local communities was not limited to fishery issues but the inshore marine environment more broadly. This would be difficult within the framework of the *Fisheries Act*, the jurisdiction of which is limited to marine living resources. However, it is clear that the FLMMAs approach addresses broader issues such as ecosystem protection and sustainable livelihoods.

[130] *Village Fono Act 1990*.
[131] *Fisheries Act* 1988.

Nonetheless, at least in the medium term, amendment of the *Fisheries Act* is probably essential as broader law and policy mechanisms would take time to develop and implement. However, given the fragmentation outlined above, consideration should be given to developing more holistic policies and laws to protect the marine areas which incorporate a number of strategies. The LMMAs should remain an important part of any toolbox of mechanisms, as they have proved that they can achieve biodiversity and livelihood outcomes and meet the cultural expectations of diverse local communities.

SUMMARY

In summary the authors would recommend the following action:

1. There is a need for harmonisation of the existing law and policy to improve administration and reduce fragmentation.

2. Amendments to the *Fisheries Act* and regulations could be implemented to include greater community involvement in both the designation and management of inshore fisheries MPAs.

3. Broad and comprehensive protected area management legislation must be prepared which includes the establishment of integrated and networked inshore and offshore MPAs. Such legislation should meet the obligations of the CBD but also recognise and provide for the multiple values associated with marine areas.

4. Lastly, as the LMMA system has proved so successful other mechanisms need to be investigated to broadly strengthen the system, for example, through capacity building, stakeholder empowerment to improve enforcement and greater interlinkages between government and communities.

REFERENCES

Aalbersberg, W, Tawake, A and Parras, T, 'Village by Village: Recovering Fiji's Coastal Fisheries', *The Wealth of the Poor: Managing Ecosystems to Fight Poverty. United Nations Development Programme, United Nations Environment Programme, the World Bank and World Resources Institute.* (2005).

Asian Development Bank, *Fisheries Sector Review: Republic of the Fiji Islands* (2005) (Technical Assistance Report TA 4403, June 2005).

Baines, G, Hunnam, P, Rivers, M and Watson, B, *South Pacific Biodiversity Conservation Programme Terminal Evaluation* (New York: UNDP, 2002).

Baledrokadroka, J "The Fijian Understanding of the Deed of Cession Treaty of 1874" (Paper presented at Traditional Lands in the Pacific Region: Indigenous Common Property Resources in Convulsion or Cohesion, Brisbane, Australia, September 2003).

Beltran, J, ed., *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (Gland: The World Conservation Union, 2000).

Benda-Beckmann, F v, and Benda-Beckmann, K v, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 53-54 *Journal of Legal Pluralism* 1-44.

Birnie, P, and Boyle, A, *International Law and the Environment*, Oxford: Clarendon Press, 1992.

Boydell, S, and K Shah, K, *An inquiry into the nature of land 'ownership' in Fiji*. Paper presented at the International Association for the Study of Common Property Second Pacific Regional Meeting. Brisbane 7-9 September 2003.

Deacon K, *Australia and the South Pacific: Exploring the Islands and Underwater World* (1995).

Fa'asili, U, Vunisea, A, Ledua, E, Mate, F and Vuiyasawa, V, *Proposed Community-Based Fisheries Management Programme for the Republic of Fiji* (Secretariat of the Pacific Community: Noumea, New Caledonia, 2002).

Fiji Islands Bureau of Statistics. <http://www.statsfiji.gov.fj/> at 24 July 2008

Fiji Islands Bureau of Statistics, *Fiji National Census of Population 2007* (2007) <http://www.statsfiji.gov.fj/> at 24 July 2008.

Fiji the Warrior Archipelago. <www.tribalsite.com/articles/fiji.htm> at 21 June 2006

Fijian Culture and Tradition. <http://www.fiji.gov.fj/publish/history_culture.shtml> at 18 December 2005.

Gerbeaux, P, Kami, T, Clarke, P and Gillespie, T (2007) *Shaping a Sustainable Future in the Pacific: IUCN Regional Programme for Oceania 2007-2012*, IUCN Regional Office for Oceania, Suva, Fiji

Govan, H, Aalbersberg, W, Tawake, A, and Parks, J, *Locally-Managed Marine Areas: A guide for practitioners* (The Locally-Managed Marine Area Network, 2008)

Johannes, RE, 'Traditional Marine Conservation Methods in Oceania and their Demise' *Annual Review of Ecology and Systematics*, Vol. 9 (1978), pp. 349-364

McHugh, P, "The Legal Status of Maori Fishing Rights in Tidal Waters," (1984) 14 Victoria U. Wellington L. Rev. pp. 247 – 274.

IUCN, 'Guidelines for Protected Area Management Categories' (1994).
Kelleher G, 'Guidelines for Marine Protected Areas' (1999) *IUCN Best Practice Protected Areas Guidelines Series 3.*

Kuemlangan, B, *Creating legal space for community-based fisheries and customary marine tenure in the Pacific: issues and opportunities* (Rome: Food and Agriculture Organization, 2004)

Kunatuba, P, Traditional knowledge of the marine environment in Fiji (Suva: Institute of Marine Resources, University of the South Pacific, 1983)

Kundis Craig, R, 'Protecting international marine biodiversity: International treaties and national systems of marine protected areas' (2005) 20 Journal of Land Use 337.

LMMA Network, *LMMA Network Annual Report 2004. Improving the Practice of Marine Conservation.* (2004).

LMMA Network, *Annual Report 2005. A Focus on Lessons Learned* (2005).

LMMA Network: *Where we work*.
http://lmmanetwork.org/Site_WhereWeWork.cfm at 30 August 2008

McNeil, K, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989)

Manoa, P.E., 'Judicial responses to illegal fishing prosecutions in Fiji' (2006) 10(1) *Journal of South Pacific Law*. <http://www.paclii.org/journals/fJSPL/vol10/5.shtml> at 20 August 2008.

Margolis S, *Adventuring in the Pacific* (1995).

Merry S E, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869-896.

Nabobo-Baba, U. *Knowing and Learning: An Indigenous Fijian Approach* (Suva: University of the South Pacific, 2006).

Pacific Islands Forum Secretariat *The Pacific Plan for Strengthening Regional Cooperation and Integration* (2007)

Posey, D, (ed) *Cultural and Spiritual Values of Biodiversity* (1999).

Roberts C M and Hawkins J P, 'Fully-protected marine reserves: A Guide' (2000).

Roberts, J, *Marine Environment Protection and Biodiversity Conservation: The Application and Future Development of the IMO's Particularly Sensitive Sea Area Concept* (Springer Berlin Heidelberg, 2006).

Sea Around Us Project, *Web Products: Countries' EEZ: Fiji* <http://www.seaaroundus.org/eez/SummaryInfo.aspx?EEZ=242> at 28 July 2008.

SPREP, *Action Plan for Managing the Environment of the Pacific Islands Region: 2005 – 2009* Apia, Samoa: SPREP (2005).

SPREP Report on the Joint Eighth Conference of the Parties to the Apia and Noumea (SPREP) Conventions, 7, 10 and 13 September 2006, Noumea, New Caledonia.

SPREP Working Paper on the Convention on Conservation of Nature in the South Pacific, 2002.

Tawake, A. and Tuivanuavou, S. 'Community Involvement in the Implementation of Ocean Policies: The Fiji Locally Managed Marine Areas (FLMMAs) Network', in *Tabus or not Taboos: How to use traditional environmental knowledge to support sustainable development of marine resources in Melanesia*. SPC Traditional Marine Resource Management and Knowledge Information Bulletin (2004) #17.

Veitayaki, J and South, G 'The constitution and Indigenous fisheries management in Fiji' (1998) 13 Ocean Yearbook.

World Bank, *Summary Report. Voices from the Village: A comparative study of coastal resource management in the Pacific Islands*, (2000). <http://www.onefish.org/cds_upload/11105.Voices_from_the_Village,_A_comparative_Study_of_Coastal_resource_management_in_the_Pacific_Islands.2001-1-31.pdf> at 20 July 2007.

WWF, *Weaving a Tapestry of Protection and Sustainability*. WWF South Pacific Programme. <www.wwfpacific.org.fj/publications/fiji/Big_win.pdf> at 21 June 2006

World Wide Fund for Nature, *Marine Protected Areas: Benefits and Costs for Islands*, (2005).

World Wide Fund for Nature, *Marine Protected Areas: Providing a Future for Fish and People* (2005).