

## **Judicial reform in Asia: case study of AusAID's experience in Papua New Guinea: 2003–2007**

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This case study evaluates the experience of Australia's aid agency (AusAID) in supporting bilateral judicial reform in Papua New Guinea through its Law and Justice Sector Program between 2003 and 2007. It marshals and evaluates a substantial body of new evidence from the Asia-Pacific region, which has been relatively under-studied in the academic discourse to date. The question to be addressed in this article is: *what does the actual evidence of practice tell us about the nature and effectiveness of judicial and related legal reforms in Papua New Guinea?* This case study adopts a documents-based, inductive, qualitative methodology to gather findings from the available evidence of reform endeavours. The structure of this article comprises three sections: an introduction to this empirical case study; the body of evidence provided, including background, findings and analysis; and conclusions that highlight their significance to two key issues relating to the purpose and evaluation of judicial reform endeavour. The evidence of practice provided by this case study is significant in supporting a number of key propositions. First, it reveals the still evolving nature of the judicial reform enterprise. Second, it demonstrates that AusAID has created some 'results'. Third, it remains much more difficult to find any evidence of 'success' owing to the continuing conceptual fuzziness in the purpose and goals of endeavour, and the continuing lack of systematic monitoring and evaluation. Fourth, there are some tentative indications of an emerging capacity to demonstrate developmental effectiveness. In sum, while the Papua New Guinea experience conforms in many ways to the global literature, it highlights the incubation of a potentially paradigmatic shift in developing performance monitoring and evaluation capacity.

**Keywords:** justice; development; evaluation; Papua New Guinea; AusAID; effectiveness

### **1. Introduction**

This case study presents empirical evidence from the practice of Australia's aid agency (AusAID) in judicial reform in Papua New Guinea (PNG) between 2003 and 2007. It contributes important additions to the literature, and illuminates our understanding of complex issues pertaining to the effectiveness of judicial reform and the means of evaluating it.

Firstly, this case study highlights the difficulties of restructuring development assistance systems, such as large aid programmes, to adopt a pro-poor focus to the purpose of reform. This is centrally relevant to the overarching debate within the 'law and development' discourse that posits the prevalence of a 'thin', pro-market efficiency model of reform against a 'thick', pro-poor rights promoting model (Carothers 2006, Jensen

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and Heller 2003, Trubek and Santos 2006). The PNG experience clearly illustrates that, despite explicit mandating of a restorative justice approach focused on adopting a pro-poor, 'bottom-up' approach to assisting the traditional or informal justice sector, there was a marked reversion toward conventional, 'top-down' state-centric activities such as developing case management systems, training clerks, renovating court infrastructure, and so on. I argue that this was due to a variety of reasons: the relative ease of engaging with the formal sector; limits of absorptive capacity in the informal sector; the unavoidably supply-driven systemic nature of governmental development assistance needing to find avenues to 'spend the money'; and perhaps also the inherent tendency of aid to formalise traditional community processes for accountability and procedural purposes. The evidence indicates that the reform process addressed those of its objectives that were easiest to accomplish, and there were few available mechanisms to adjust the direction of that process. In effect, this case study demonstrates that it was much harder than initially expected to implement the mandated restorative justice vision.

Second, this case study highlights the challenges of committing substantial resources and timeframes to demonstrate impact. This is of central relevance to the 'paradigm war' in development evaluation between the quantitative positivist approach and the participatory constructivist approach in demonstrating development results, spurred by the United Nations Millennium Development Goals and the Paris Declaration on Aid Effectiveness (Cracknell 2000, p. 161, United Nations 2000, OECD 2005). In PNG, outputs were clearly visible as were glimmerings of sector performance change. But, after four years of development activities costing some \$90 million plus a further \$6 million for monitoring and evaluation, there was still no available evidence of causal attribution between this assistance and improved results.<sup>1</sup> While the signs were potentially promising, the quest for evidence of impact remains elusive. Disappointingly, however, it was impossible to clearly discern whether this lack of evidence reflected a lack of impact or a lack of evidence of impact.

## **2. Background**

Australia's assistance to PNG's law and justice sector commenced in 1988, with policing assistance to the Royal Papua New Guinea Constabulary. This assistance subsequently expanded to the other agencies in the sector including the courts. In 2002 Australia's overall aid totalled \$988 million, of which \$197 million was allocated to PNG (OECD 2009). PNG was the largest single recipient of Australian aid (AusAID 2006c). It was also the largest recipient of all aid in the Oceania region. In 2001/02, \$20 million was provided through five projects in the key law and justice agencies and the Ombudsman Commission, which represented about 10 per cent of the aid programme to PNG and Australian assistance. According to Director General, Bruce Davis, AusAID's objective in this arena was 'more effective law and order and a safer region' (AusAID 2004a, p. 12). AusAID's thematic investment in legal and judicial development has increased markedly over recent years (AusAID 2006c). Over the period of this assessment, AusAID spent approximately \$114 million on the Law and Justice Sector Program (LJSP) (Armytage 2007).

The context of Australia's approach to supporting judicial and legal reform in PNG during the period of this case study was outlined in AusAID's concept paper of 2002. This paper reviewed Australia's strong historical, political, commercial and economic ties with PNG, its closest neighbour, and provided the justification for the LJSP on the basis that PNG suffered from a serious, chronic and deteriorating law and order situation (AusAID 2002). Many parts of PNG are dangerous, in particular the capital Port Moresby, where terminally violent crime is routinely reported in the daily papers.

This concept paper was foundational to Australia's ongoing assistance, which it described as providing support in the implementation of PNG's National Law and Justice Policy 2000–2005, discussed later in this case study (Government of Papua New Guinea 2000). The LJSP was introduced to trial programme-based support to the law and justice sector in place of the earlier modality of agency-based institutional capacity-building (Hassall & Associates 2003). It specified that the goal for the LJSP was 'to promote the rule of law in Papua New Guinea in order to realise PNG's broader development goals', and that its purpose was:

to assist the Government of Papua New Guinea in strengthening the efficiency and effectiveness of the formal law and justice system, and support the informal system as an alternative avenue for the redress of disputes, consistent with the PNG *National Law and Justice Policy*. (AusAID 2002, p. 11)

It identified a range of strategic issues for both governments to address, such as: adopting a sector-wide approach; affordability; articulating outcomes and measuring impact; reform and policy engagement; incentive or performance-based approach; PNG ownership and coordination (AusAID 2002, pp. 8–9). This would require the lightest possible 'footprint' across all areas of assistance. The concept paper also specified that the assistance was expected to deliver direct benefits to the poor through improved law and justice services while leading to longer-term and indirect benefits through an improved environment for investment and growth, and enhanced safety and security (AusAID 2002, pp. 12–13).

This concept paper built on a review conducted in 2000 that advocated a gradual change in the mode of delivery. It recommended a combination of agency-project and sector-programme approaches with a strong focus on measuring impact and achieving outcomes to make up for the lack of any preceding impact evaluation (AusAID 2002, p. 4).

As part of this approach, the Australian and PNG governments adopted a sectoral approach to law and justice. They were interested in assessing the contribution of the aid programme in implementing the National Law and Justice Policy, discussed below. Australian support was provided through two mechanisms: the LJSP to manage the delivery of support, and the Justice Advisory Group (JAG) to provide technical and management advice on planning and monitoring performance.

Within this context, this case study provides an assessment of a substantial example of development assistance in judicial and related reform, valued at \$122.4 million, representing AusAID's largest and longest direct investment in judicial and legal reform (see Armytage 2007). The concept paper provided what may be seen as AusAID's best shot at designing an approach to judicial reform in PNG. This approach consolidated AusAID's 20 years of reform experience in that country. The transition to the new sector-based programme approach was described in the concept paper as being a 'trial,' reflecting lengthy analyses of earlier experience. Within this context, this case study presents the LJSP experience as an exemplar of a major initiative in judicial and legal reform.

### **3. Findings and analysis**

This section provides the key findings from the available documentary evidence of this reform practice (AusAID 2009a). It is organised thematically by first presenting a summary of relevant data, followed by an analysis of significant findings contained in that data. These

findings are relevant to three significant themes in this case study: the journey to aid effectiveness; managing-for-development-results; and strategic approaches. This section then provides the foundation for the final conclusions that I will offer to address the research question of this case study.

### *3.1. Journey to aid effectiveness – ownership, capacity and change*

First, at the thematic level, this case study provides evidence of the existence of three substantial challenges that AusAID confronted in executing its commitment to promoting PNG ownership of the reform process. As we shall see, these challenges related in particular to ownership, capacity-building and change management.

In relation to ownership, the threshold of AusAID's engagement rested on a commitment to supporting the implementation of PNG's National Law and Justice Policy. As part of implementing this commitment, AusAID delegated oversight of the substantial development budget to local mechanisms without providing commensurate capacity-building to enable that ownership. It will be seen that these mechanisms were demonstrably unable to manage that process. This created a substantial gap in the oversight of AusAID's development budget. This deficit was exposed in the monitoring process, although it was not immediately addressed.

The documents revealed that the establishment and sustained operation of the National Coordinating Mechanism (NCM), supported by the Law and Justice Technical Working Group, provided leadership and demonstrated a visible commitment to the ownership of the legal and judicial development process in PNG. This was evidenced in regular meetings that demonstrated inter-organisational behavioural change at the sector level. These meetings were generally productive as a mechanism for policy formulation, management and oversight of administration (JAG 2004a, 2005a, 2006a).

However, a number of challenges remained. The most significant of these related to counterpart capacity, which, as we will see, was often cited in the LJSP documentation as being a constraint affecting the pace and scope of activities. The LJSP explicitly diagnosed this challenge in the Annual Program Plan for 2007 where it described the existing constraints of the NCM:

The (Sector Strategic Framework) SSF is an ambitious plan. But it needs someone to drive it. The principal driver is the NCM through the LJSWG [Law and Justice Sector Working Group]. However, at Madang in June 2005 the LJSWG recognised that they do not have the time or the resources to do all that is required. Its members have full-time jobs in agencies. . . . As we have found in 2006 this is a slow process. (Government of Papua New Guinea 2007a, p. 30)

Additionally, the LJSP added in its narrative in the Annual Program Plan for 2006:

The NCM and the LJSWG are not prepared to exercise executive powers to allocate funding or determine priorities. This is understandable given that the agencies are separate departments and the chief executives are naturally unwilling to impose their views on a fellow chief executive . . . NCM Leadership. A major weakness seems to be that, as the LJSWG members recognised at their Madang Retreat, it is very difficult culturally for the agencies to get out of their own agency mindset and to bring forward a collective sector approach. (Government of Papua New Guinea 2007a, p. 18)

The Law and Justice Sector Secretariat (LJSS) was established largely to address this lack of capacity and what the LJSP has described as 'cultural context' (Government of Papua

New Guinea 2007a, p. 18, among others). But initial indications from the documents suggested that the LJSS was itself limited in its established capacity and was struggling to find its feet to develop momentum (Government of Papua New Guinea 2006a, p. 38, among others).

It was noted from the documents that a number of initiatives were taken to strengthen the capacity-building approach. For example, annual programme plans identified numerous training courses provided to agency staff and, on occasion, members of the community (Government of Papua New Guinea 2006a, pp. 2–3). An analysis of periodic reports also provided evidence of a range of other measures. These included strategic planning; placement of advisors; procedural reforms for the courts; support for leadership; business planning and budgeting; financial management; human resources management; infrastructure improvements; provision of information technologies and vehicles; and training, among others (Government of Papua New Guinea 2006a, pp. 2–6, among other periodic performance reports).

This documentation also indicated that the LJSP in PNG was not sustainable without considerable ongoing donor assistance. However, this diagnosis was not matched with commensurate support, notably in building leadership capacity. My analysis of periodic reports revealed that the sustainability of the aid programme depended on additional capacity-building measures. As indicated in the Annual Program Plan for 2006, this was particularly the case with the key body, the LJSS. The planning documents stressed that nowhere was the need for capacity-building more important than in the critical LJSS, which was serving as the focal point for overseeing and administering the sector (Government of Papua New Guinea 2006a, p. 37 onwards, among many others). The LJSP's own appraisal that counterpart capacity was determining the pace of change made it clear that the LJSP's capacity-building approach had not yet attained its goals after four years (AusAID 2006d, p. 4). In particular, this documentation revealed the risk of the LJSS, as the capacity-hub of sector assistance, becoming overwhelmed by the range of responsibilities and functions delegated to it by the NCM and the Law and Justice Sector Working Group (LJSWG).

The documents indicated that this aspect of capacity-building presented the LJSP with a major challenge: it had to maintain its advisory role on the one hand, but on the other not allow its technical advisors to do the job themselves. The LJSP emphasised its acknowledgement of this distinction in the Annual Program Plan for 2006: 'while the Program can facilitate appropriate opportunities for discussion and ideas for consideration, it is not appropriate for the Program to usurp the LJSWG or NCM executive role' (Government of Papua New Guinea 2006a, p. 29). This is a critical distinction but, in practice, the line often became blurred. It would be naïve to underestimate the unrelenting institutional pressure on both aid agencies and their contractors to deliver results.

This issue of capacity-building is symptomatic of a more fundamental question relating to the goals of the aid programme in supporting the sector: *is it more important for the aid programme to develop capacity or to generate visible results?* In spite of the significance of this distinction, there was no evidence in any of the documentation about the process or parameters of capacity-building. Nor was there any evidence of a strategy to gradually build up from dependency to sustainability.

In conclusion, this experience revealed a discernible impediment to progress in the existence of what may be described as a 'locked black box' over the crucial issue of capacity-building. Even after four years of concerted engagement, this box was yet to be properly opened and sorted. This impediment was then exacerbated by demonstrable confusion over how to facilitate the convergence of notions of ownership and change management, as we shall see below.

### *3.2. Managing-for-development results*

Second, at the thematic level, this case study showcases the significance of planning and, linking it to monitoring and evaluation, highlights the considerable resources and time required to ensure that planning is adequate for the purposes of promoting aid effectiveness.

*3.2.1. Planning.* The available documents described the formulation of the Sector Strategic Framework (SSF) and stated that the vision of the sector was '[a] just safe and secure society for all'.<sup>2</sup> The SSF integrated with agencies' corporate plans to provide the architecture to direct, harmonise and coordinate sector performance generally, and development activities in particular. Each annual performance plan then aimed to support the attainment of the goals and objectives in the forthcoming suite of activities supported by AusAID.<sup>3</sup> It also linked with the sector's companion Performance Monitoring Framework (PMF) to ensure consistency, coherence and relevance in sector/programme performance monitoring and evaluation (Armytage and Miller 2008, p. 145). This required considerable time and resources, and represented a major output of both the LJSP and the JAG. Particularisation of performance targets was provided in the annexes to each annual performance plan. A pronounced feature of these targets was the use of general descriptors such as 'enhanced', 'increased', and 'improved' indices of performance.<sup>4</sup>

The first observation from an assessment of this planning is that it appeared to be comprehensive in its scope. Closer analysis, however, revealed that it was characteristically abstract in its specifications. Performance targets and indicators in the sector and the LJSP planning documents were quite general. They lacked any specification of how much the indicia would be 'enhanced', 'increased' or 'improved', or when. As a result, these non-specific indicators were of limited value as measures, capable only of specifying binary measures of yes/no, rather than better calibrated measures. For planning indicators to work they must be either 'SMART' or 'TURC'.<sup>5</sup> The significance of this analysis is that much of this planning work was at best superficial in its value and, under closer scrutiny, of restricted utility in informing the monitoring and evaluation functions of AusAID's project management cycle.<sup>6</sup> In effect, it engendered a false assurance of precision in managing development effectiveness that consequently contributed to the insufficiency of reform outcomes, to be discussed below.

The second observation arising from my analysis of the documentation relates to the scope of activities forecast in each annual programme plan and, in due course, reviewed in quarterly, six-monthly and annual reports. This revealed that the scope of the LJSP's activities remained wide and quite eclectic across the sector: from renovating courts and providing computers and boats for village courts, to supplying materials for bunk beds for prisoners; HIV/AIDS training; and supplying vehicles for correctional services to freight and courier allowances for the sector secretariat (Government of Papua New Guinea 2006a, Annex C). This is partly due to the substantial size of the LJSP, and to the perceived desirability of retaining continuity of support with earlier agency-based projects.<sup>7</sup> The programme manager for the LJSP was evidently aware of the risk of managing an excessively wide scope of activities and had tried to prioritise and 'filter' the activity proposals (see, for example, Government of Papua New Guinea 2005a, p. 14). Certainly, visible efforts were made to priorities reform activities. Notwithstanding, a discernible risk of support being spread too thinly remained, and was exacerbated by 'big ticket' items of infrastructure eclipsing lesser needs.<sup>8</sup> The loss of programmatic focus was consistently confirmed by reviews of related programmes (for example, AusAID 2005b, pp. 8, 14 and 20; 2005c, p. 44). LJSP was an experimental modality and arguably not a classic sector-wide approach

(SWAp), which usually requires development resources to be pooled in a funding facility, because AusAID was the sole donor in PNG's law and justice sector.<sup>9</sup> Its funds were nonetheless streamed through a dedicated impress account. For this reason, the LJSP experience is perhaps not analogous to the broader body of SWAp experience. Nonetheless, this experience provides evidence of the tendency of sector-based programming to spread the focus of engagement more widely than the available resources could manage was thus revealed, and *may* explain why the contribution analysis was unable to identify evidence of outcome-level results, as discussed below.

The third observation relates to the formulation of the development budget that lay at the heart of each annual programme plan, providing the blueprint for aid programme expenditure. Approval of annual programme plans formally authorised the allocation of development funds. As we have already seen, the LJSP had diagnosed an inability among the local leaders to exercise what it described as executive powers to allocate funding or determine priorities. This was because it was very difficult 'culturally' for the agencies to get out of their own mindset and to bring forward a collective sector approach (Government of Papua New Guinea 2006a, p. 18). What this narrative did not elaborate, perhaps for the sake of diplomacy, were the reasons for the lack of effective oversight, direction, or quality control by either the NCM or LJSWG. This weakness, combined with the 'lightest possible footprint' and the LJSP's concern over avoiding 'usurping the NCM executive role', supplied the ingredients for a discernible risk of loss of oversight of the AusAID development budget (AusAID 2002, p. 12; Government of Papua New Guinea 2006a, p. 29).

Finally, the LJSP experience provides evidence of competing development goals. It is an interesting case study of the new 'whole of government' approach whose most compelling advantage is the prospect of donor policy integration, but whose major weakness is its vulnerability to extraneous considerations. The Australia–Papua New Guinea Enhanced Cooperation Program (ECP) showcased this phenomenon. The ECP mobilised up to 250 Australian Federal Police to patrol the streets of Port Moresby at a cost estimated in the press between \$760 and \$1900 million – up to 10 times more than AusAID's largest ever investment in judicial and legal reform – in response to political imperatives to secure stability in Australia's immediate realm of influence in the post-9/11 period. In May 2005, PNG's Supreme Court found that elements of the ECP programme were inconsistent with PNG's Constitution in claiming immunity to the sovereignty of applicable PNG law. The *Wenge* decision suspended the policing element of the ECP programme indefinitely while the future of the entire ECP programme was reconsidered in consultation with the PNG Government (Supreme Court of PNG 2005; Skehan 2005). What is revealed here is that this intervention disregarded AusAID's development research in the lead-up to the LJSP and its endeavours. Many would agree that an integrated 'whole of government' approach is theoretically desirable, but this example highlights the additional challenges of embracing it (Collier 2008, p. 12).

In sum, this analysis provides evidence of a breakdown in oversight of the development budget process, however prudently it is conducted to ensure a balanced mix of local ownership and donor oversight for an effective allocation of substantial aid funds. It also illustrates some of the unplanned, and to some extent unplannable, aspects of the development process that can often involve very significant issues.

*3.2.2. Performance monitoring.* This case study is also important in providing evidence of an unprecedented donor investment in the capacity to monitor the performance of reform endeavour, and presents the first glimmering of significant evidence-based reform outcomes.

The documents revealed that, from the outset, the LJSP had a marked emphasis on investing in performance monitoring and evaluation. As we have seen, the concept paper advocated a new emphasis on performance monitoring through the establishment of the JAG. The JAG was established to support the development of a sector performance framework as a means of improving the effectiveness of the sector, focus donor assistance and measure performance and impacts, among other things (AusAID 2002, pp. 6–9). These objectives were reaffirmed in the Midterm Performance Review and Assessment of the JAG in 2005 (AusAID 2004b, pp. 28–31; see also JAG 2004b). This emphasis on performance monitoring was also evidenced in the PMF linked to the SSF, which required more than three years to design and operationalise (JAG 2004a, 2005a, 2006a).

The SSF, which was strongly influenced by PNG's National Law and Justice Plan, nominated 64 key performance indicators. Data of variable quality were initially available for 60 of these. Building the capacity of agencies to collect and monitor this data proceeded in step with operationalising the framework.<sup>10</sup> Significantly, it was only after three years that baseline data for these indicators was gathered and made available for measurement (JAG 2005c, Annex C). This enabled trend analysis to start in the following years. The use of evidence in decision-making and reporting represented a paradigm shift in the way that public sector organisations traditionally planned, budgeted and monitored their activities in PNG. I have separately co-described with Miller that this was a work in progress, a central feature of which was linkage of the Performance Monitoring Framework to the sector's priorities and strategic framework at the central level, and corporate plans at the agency level (Armytage and Miller 2008, pp. 145 and 153). At that time, we estimated the cost of this investment at around 6 per cent of the overall development budget.<sup>11</sup>

The PMF enabled the Government of Papua New Guinea and AusAID to monitor the performance of the sector for the first time, and provided a means to assess the contribution and effectiveness of development assistance. The sector started to publish annual reports of its performance, commencing with a baseline in 2004, which were initially structured to address 10 priorities (JAG 2004c, 2005b, 2006b). In mid-2005, a series of crime and crime-perceptions surveys were designed and conducted to provide baseline measures in a community crime survey in Port Moresby, Mt Hagen, Lae and Bougainville. Other measures included a business survey, a survey of truckers on the National Highway, and a telephone survey of civil society in remote communities (JAG 2005c, 2006c, 2007). The community crime surveys and the sector annual performance reviews generated streams of data that identified changes in 18 of 20 indicators of household victimisations in two sites (Arawa and Buka) in Bougainville. These changes were statistically significant, highlighting differences with Port Moresby where no changes were identifiable.<sup>12</sup>

These findings were important in a number of ways. They provided the first indications of a potentially ground-breaking enhancement in monitoring and evaluation capacity. Relevant, reliable and accessible data were now available on both the performance of the sector and, additionally, the contribution of assistance to improving that performance. This would enable systematic impact monitoring and evaluation for the first time. Second, these findings provided limited but actual evidence of significant changes in crime victimisation. They also enabled a comparative evidence-based analysis of performance at different times or places.

This evidence demonstrates a significant comparative advantage over the earlier approach of efficiency-based monitoring of activity outputs. For this reason, it is potentially transformative for monitoring and evaluation purposes. Curiously, however, recognition of this significance was not immediately apparent in project documentation. The LJSP

made no reference to sector performance data on improvements in crime victimisation in Bougainville in its annual performance report for 2005; nor was it referred to in AusAID's contribution analysis of late 2006, although this was for reasons of data collection (respectively Government of Papua New Guinea 2006c and AusAID 2006d).

This evidence is indicative of the time required for a paradigm shift in results-based management as the governing justification for both planning and performance to become operationally recognised in practice.

*3.2.3. Evaluation, impact, results and contribution.* This case study provides evidence of the comparative strengths and weaknesses of building the capacity to monitor and evaluate the performance of judicial and legal reforms through a dedicated mechanism. It also demonstrates that substantial resources and time are required for reforms to contribute change and show evidence of that contribution.

Reference has already been made to the wide package of activities delivered by the LJSP, which started in early 2003. Four years later, in December 2006, AusAID undertook a 'review and contribution analysis' of those activities in the law and justice sector. This review established that the reform efforts had led to some positive impacts in what it described as one or two areas (citing average periods of remand, reduction in case backlogs and number of escapes):

Significant changes in the operations and practices [sic] of various law and justice agencies were identified by the review team . . . These changes were found to be as a direct result of the sector approach to law and justice undertaken by GoPNG [Government of Papua New Guinea] over the past three years. The review also found that there was a clear contribution between these sectoral changes and the support provided by the Australian Government. However, in most cases there was no data available for the review team to conclude whether these changes at the sector level were having an impact at the real world level (for example on speedier and fairer justice, non-violent dispute resolution and prevention and detection of corruption). (AusAID 2006d, p. 4)

As the reviewers observed, this did not necessarily mean that other positive impacts had not occurred, but rather that anecdotal suggestions could not be substantiated. It concluded that:

[A]t this point in time, there was limited evidence of real world outcomes, though where there was evidence of real world outcomes there was no doubt that the Australian aid program had made a significant contribution towards them. (AusAID 2006d, p. 8)

These findings are very significant for a number of reasons. First, they document the existence of change in sector performance using valid and reliable data. As such, these findings are noteworthy because they represent the first important step in managing-for-development-results.

Second, they show evidence of a transformation in developing monitoring and evaluation capacity. They are indicative of an altogether new capacity to demonstrate results, however limited at that time. This new capacity resulted from AusAID's increased investment in performance monitoring and evaluation through the establishment of the JAG.<sup>13</sup> This focused unprecedented resources on developing the capacity to monitor and evaluate performance.

Third, and arguably more importantly, they indicate that while it was possible to identify some changes after almost four years of reform endeavour, there was still no evidence of a

relationship between activities and impact at the real world level. More specifically, there was no means of establishing development attribution, which remains a major problem for all development agencies.<sup>14</sup> The limits of these findings clearly demonstrate the substantial resources and time required to first contribute to change and second to demonstrate evidence of that contribution.

Fourth, these findings were timely in highlighting the need to orient all aspects of development endeavour on results. This involves both generating results and developing the capacity to demonstrate those results, establishing a relationship between reforms and impact, and supplying the key element of attribution. Significantly, the evidence indicates that further resources were required to affect performance change and, critically, to demonstrate the evidence of contribution.

Fifth, it is unfortunate that the data collection for this assessment omitted Bougainville. This meant that reference to the emerging trend data identified in the community surveys was excluded. It is all the more curious that no attempt was made to analyse the cause for the lack of impact data. The review is ambivalent about whether this was due to a lack of performance monitoring or a lack of performance. In terms of development effectiveness, the review was oddly opaque on this critical issue. This ambivalence continues to remain suspended and unresolved until some future date, owing to postponement of the contribution analysis.<sup>15</sup>

The omission of impact data is a matter for comment, as the lack of evidence of outcomes does not compare favourably with similar development projects where performance impacts are clearly measurable within shorter timeframes (see, for example, Sharif 2005, p. 11; also see Armytage 2003). Moreover, it is certainly a matter for comment that no performance impact could be identified by this review after more than four years of development assistance at a cost of some \$90 million.<sup>16</sup> Whether this lack of data was indicative of a performance deficit or an evaluative deficit was a central question that this review left unanswered.

AusAID has long been aware of its institutional weaknesses in its performance and evaluation approach.<sup>17</sup> This is evident in the recent inaugural annual review of development effectiveness, which found that while most aid activities were well managed and achieving some good results:

it is difficult to demonstrate the links between well-managed activities and better outcomes for the poor. To help measure the outcomes of Australian aid activities, the quality of monitoring and evaluation needs to be improved. (AusAID 2007a, p. 1)

If we accept that change was measurable within these timeframes and that other projects have demonstrated impact earlier, AusAID must be asked the critical question: *why was change still not visible at this stage of reform in PNG?* The answer to this question might be: the change management approach required revision, or data collection required improvement, or both. In this crucial sense, this review lost a critical opportunity to extend evaluative rigour to the question: *is it possible to demonstrate attributable results?* This omission is in line with the broader institutional pattern of deficient evaluation already internally acknowledged by AusAID, above. The reasons for the existence of this pattern may be found in the conflict of interest that AusAID confronts in its organisational function – what Hammergren has described as ‘*the fireman’s syndrome*’ – where self-evaluative rigour may be shied away from as being politically self-destructive (Hammergren 2007, p. 309).

Whatever the reason, there is sufficient evidence to demonstrate that AusAID's contribution analysis pulled its punches, resorting to the common call for more time in order to avert addressing the more difficult but central questions on aid effectiveness.

### 3.3. *Strategic approaches*

Third, at the thematic level, there is evidence of a distinctive development tendency to preference engagement with the formal sector, and some confusion over capacity-building.

*3.3.1. Restorative justice and the bias to the formal sector:* The case study provides discernible evidence of an organisational tendency to allocate resources to support the agencies of the formal justice sector of central government that was demonstrably contrary to PNG's restorative justice mandate.

As we have already seen, one of the defining features of the new approach to legal and judicial reform in PNG was its endorsement of the National Law and Justice Policy and Plan of Action.<sup>18</sup> This policy was built on three pillars: improved functioning of the formal law and justice agencies to increase the effectiveness of the deterrence system; improved sectoral coordination to target priorities and enhance operational performance; and an increased focus on crime prevention and restorative justice (Government of Papua New Guinea 2000). Notwithstanding this explicit endorsement, the documentary evidence indicates that only a tokenistic portion of LJSP funds was actually spent on activities that may be seen as supporting restorative justice.

Some of the reasons for this disjunction may be that restorative justice is not a readily understood concept and is evidently difficult to support. In the JAG's issues paper of 2004, Dinnen (2004, p. 10) defined restorative justice in PNG as being a justice process concerned with addressing obligations with problem-solving, and reparation rather than blame and punishment; it builds on kinship relationships to connect with communities and coordinate justice service delivery in a cooperative manner that is compatible with custom. The sector later defined restorative justice as a process that aims to repair the damage caused by a particular offence or dispute rather than one that simply focuses on the punishment of offenders. Ideally, it involves direct participation by both victims and offenders in the resolution of disputes and offences (Government of Papua New Guinea 2007b, p. xxii).

This understanding of restorative justice is centrally important for the annual programme plan. The expenditures for all development activities in the National Law and Justice Policy were specified in each annual plan, itemising how the LJSP would allocate its financial resources for both the formal and informal sectors during that calendar period. An analysis of the most recent plan for the period under study – APP 2007, Annex C – revealed that, of the annual programme disbursement of 77 million kina, the major spending was on capital works – mainly on building and renovating courts and prisons (36%); personnel – mainly technical assistance provided by long-term technical advisors (29.8%); and training (7.33%). The most visible community-related activities were the Yumi Lukautim Mosbi community-based youth project in Port Moresby (2.37%) and the Community Justice Liaison Unit (6.45%). In effect, just 8.75 per cent of the total programme expenditure was directly allocated to readily identifiable community-based activities, compared with the 36 per cent allocated to infrastructure of formal sector institutions. This reflects a four-fold differential in favour of the latter, and to the additional allocation of long-term advisors – most, although not all, of whom were posted in agencies of the central government, such as

the courts in Port Moresby. This trend was consistently reflected in other periodic reports (Government of Papua New Guinea 2006a, Annex C, 169; also see Government of Papua New Guinea 2004a, p. 6).

This evidence of a four-fold differential in LJSP expenditures between agencies of the formal sector and those of the informal sector and community-based entities, is manifestly contrary to the overarching spirit of PNG's restorative justice policy approach, and highlights the challenge and difficulties of operationalising it.

The allocation of financial resources is a significant, although not necessarily definitive, indicator of how development policy is being implemented. The identification of this bias in funding raises the fundamental question of whether the priorities for reform activities conformed to the Government of Papua New Guinea's vision of restorative justice. There is probably no formulaic answer to this question. On the one hand, in a highly dispersed, remote, traditional society of over 700 language groups where access to government services is often virtually non-existent, it can be forcefully argued that most resources are required at the village level to support the informal sector. On the other, where almost all available recurrent government funding is allocated on salaries, the central apparatus of the state is manifestly needy in many respects.<sup>19</sup> An arbitrary allocation of 50 per cent each to the formal and informal sectors offers little assurance of providing an appropriate balance, and may not address universally endorsed priorities. Additionally, the tendency towards engagement with the formal sector might reasonably be expected on the basis that it costs more to build prisons and courts than it does to build village courts or establish facilities for community-based diversionary and rehabilitation schemes. At the same time, there are limits to how much the informal, community-based Village Court system can absorb before it is transformed, through financial accountability requirements, into its antithesis, a formal court, and become an artefact of the formal system.

It is reasonable to deduce from this financial evidence that AusAID's engagement with the informal sector was more difficult than its engagement with the central agencies of the formal sector. The evidence indicates that the LJSP was struggling to operationalise the vision of restorative justice, and having difficulty in addressing what it has described in the programme design document as a programme element: 'business as usual is no longer acceptable' (Government of Papua New Guinea 2005b, p. 18). In effect, a cardinal element of the new restorative justice approach was being under-addressed, and the LJSP was unable to break the mould of traditional, state-centric, top-down institutional capacity-building, as prescribed in AusAID's original concept paper (AusAID 2002, p. 1).

Further insights on this perverse outcome may be gleaned when the profound nature of AusAID's shift in development approach is appreciated. By looking behind the facade of AusAID's formal adoption of Government of Papua New Guinea's restorative justice policy, it becomes apparent that until very recently, AusAID had traditionally approached justice reform as part of 'law and order' in the classic instrumentalist conception for promoting economic growth, characteristic of the World Bank's approach (World Bank 1945, art IV, s10; art V, s 6; art III, s 5(b); art V, s 1(g); also see Shihata 1992). This is explicit from AusAID's discussion of its contribution to PNG in 2003:

Public security and the effective operation of a rule of law that protects private property and contractual arrangements are essential for supporting socio-economic development and economic growth. The law and order problem has been identified as a major economic and social development problem and constraint in Papua New Guinea for all of the period since independence. (AusAID 2003, p. 11)

This reflects a historic preference, or bias, for supporting mainly ‘law and order,’ or police-based reform, as distinct from its new law and justice sector-wide approach.<sup>20</sup> More particularly, there is plenty of evidence to show that AusAID has adopted elements of the World Bank’s ‘thin’ instrumentalist approaches in aligning foundational aspects its development policy. Examples of this can readily be found in its approach to good governance, as we have already seen, which reasserts the familiar mantra that sound policies and institutions are central to growth and development, and that better governance can have a positive impact on the effectiveness of aid.<sup>21</sup>

Ultimately, the LJSP’s preferential support of the formal sector, despite an explicit mandate to the contrary, cannot be dismissed as incidental. Rather, this disjunction is significant in illuminating an organisational development philosophy and process that were deeply entrenched in a state-centric rather than a pro-poor orientation.

*3.3.2. Change management and incentives.* This case study also provides evidence of some confusion in overall change management approach, which is visible in the lack of any political economy analysis of the slow rate of change, and in the existence of a hands-off approach to facilitating change.

As we have already seen, the LJSP reported, on a number of occasions, a need to speed up the pace of PNG counterparts, and often commented that progress was slow.<sup>22</sup> More particularly, the LJSP described constraints that included ‘resistance to change’ on the part of counterparts (for example, Government of Papua New Guinea 2006d, p. 48).

The many reports of slowness and resistance to change warrant analysis. What did they signify? First, slowness is itself not a bad change management strategy, and may indeed be conducive to sustainability. But, in the context that this reform approach was explicitly ‘not business as usual’, it is notable that slowness was characterised as being both endemic and problematic. It may be observed that slowness was not surprising from bureaucratic systems that were chronically under-resourced, enervated by poor incentive structures, sometimes dysfunctional, and prone to being inertia-bound.<sup>23</sup> These shortcomings supported the earlier observations on the need for increased capacity-building, and signified a critical gap in donor support. But, oddly, there was no documented evidence of any discussion on the possible use of performance-based incentives for either key counterparts or LJSP contractors to address these problems. This was a surprising omission, as they gave rise to the possible need to review change management strategies. They are also indicative of an inadequate analysis of the political economy of change. Such an analysis would address the stakeholders’ interests in change, notably in the executive and the judiciary. None were apparent from the documentation that lacked any rigorous analysis of power, barriers to change or incentives that characterises the approach of DFID among other donors (see, for example, DFID 2005, 2006, p. ix; also see Warrener 2004, Dahl-Østergaard *et al.* 2005, Unsworth 2009). This may also be explained by the existence of embedded interests on the part of both AusAID and its consultants to operating within their familiar systems. In effect, the pervasive evidence of inertia is symptomatic of wholesale limitations in the vision and scope of change management strategies as they affected not just programme beneficiaries but also its managers and implementers.

In sum, what is troubling about this documentation was the wholesale lack of any considered reflection or analysis on the possible reasons for the reported slowness of pace and resistance to change. If reasons had been suggested, they would have been crucially relevant in improving the approach to change management. This omission points to a somewhat limited interpretation of the LJSPs role as a facilitator of developmental change, and shows a

diffidence or uncertainty about the nature of its leadership dimension.<sup>24</sup> It is disappointing that this issue was never thrashed out either with counterparts or AusAID, as it evidently entrenched the slow rate of change, somewhat disingenuously attributed earlier to ‘cultural context’.

#### **4. Conclusions**

In summing up, this case study of AusAID’s assistance in PNG between 2003 and 2007 showcases a substantial bilateral judicial reform approach that may serve as an exemplar of contemporary practice in the Asia Pacific region. This experience provides a range of empirical insights which nuance our understanding of the literature in relation to both the purpose and evaluation of judicial reform. So, what conclusions can be drawn from this experience, for the purpose of building or refining our understanding of the theory and practice of judicial reform?

This case study of AusAID’s experience in judicial reform in PNG provides a range of evidentiary insights that contribute to the literature and illuminate our understanding of critical aspects of judicial reform. Most usefully, this case study provides early evidence of an emerging capacity to measure reform success. While evidence of intended improvement remained elusive, this experience demonstrated that a performance monitoring framework approach could be an alternative to the logical framework approach to reform management. While early days, this evidence of capacity is sufficient to challenge the ogres of attribution and causation that plague the empirical discourse through the systematic measurement of sector performance change and its linkage to reform activities. Consolidating this capacity will, however, require substantial technical support, and sufficient time for development procedures to adapt and for results to become visible.

##### *4.1. Significance for the purpose of judicial reform*

More particularly, this case study is significant in demonstrating the still evolving nature of the judicial reform process and, in particular, a paradigm shift that remains an active work in progress. It also illustrates the profound nature and implications of this paradigm shift, and the time required to implement change to the prevailing outlook, systems, procedures and practices of development engagement. This is evident in a number of ways.

The case study establishes that there was marked progress in shifting the formalities of engagement from an agency-based project modality to a sector-based programmatic modality. It is however also clear that all the actors – AusAID, the Government of Papua New Guinea and the LJSP – struggled to develop the means to refocus from the traditional, state-centric, ‘top-down’ approach to a corresponding ‘bottom-up’ approach to enhance engagement with the community. Despite the existence of a clear restorative justice mandate to support the informal sector, a marked preference for engagement with the formal sector of the central government persisted. This preference for supporting the formal sector in a predominantly tribal society cannot be dismissed as incidental; rather, it illuminates a development philosophy and process that is deeply imbued with a state-centric rather than a pro-poor orientation.

In relation to the reform process, this case study provides evidence of the dynamic nature of judicial reform, and the need to improve development effectiveness. Building on an extended history of supporting the police since 1989, it demonstrates AusAID’s changing approach to judicial and legal reform in PNG, reframed to a sector-based approach in the concept paper of 2002. This is entirely consistent with mounting global concerns

of development failure discussed, which gave rise to the Millennium Development Goals and the Paris Declaration, above. The concept paper provided the pretext to emphasise the preceding inability to measure success and the imperative to adjust reform approach. This essentially evolving nature of the reform process was then consistently emphasised in the annual programme plans that stressed the imperative for an iterative and responsive approach to programme development design. It was also mirrored in records relating to the development of the PMF.

In relation to AusAID's stated purpose for reform, the concept paper specified that the LJSP design was expected to deliver direct benefits to the poor through improved law and justice services; longer-term indirect benefits through an improved environment for investment and growth; and enhanced safety and security. A poverty reduction analysis, and gender and poverty case studies were included in the preliminary design in the Program Design Document.<sup>25</sup> However, there was little direct reference made to these studies during the implementation of the LJSP, suggesting their inclusion was largely a formality. While a range of projects might potentially have benefited the poor as members of the general community, neither the implementation phase nor the annual programme plans articulated any justification for reform measures with the direct and explicit purpose of alleviating poverty or promoting the interests of the poor. The LJSP's community engagement programme was limited to the establishment of the Community Justice Liaison Unit, which was tasked to promote access to legal aid among other things, and the establishment of the Yumi Lukautim Mosbi project. In effect, the goals of poverty alleviation and economic growth became an abstraction at the project implementation stage where it was much easier to focus on the police and courts, ostensibly in an effort to reduce crime and promote community safety. While this preference – or bias – is understandable in dangerous environments like Port Moresby, it displayed a significant imbalance in approach. This should not, however, be seen as a dereliction of implementation on the part of the LJSP. Rather, I argue that this is evidence of the tenuous rationale of the 'thin' instrumentalist justification of judicial reform which asserts the institutionalist mantra that judicial reform is necessary to secure property and title for economic growth. On the bumpy arena of development practice in PNG, this theoretical justification has demonstrable difficulty in flying.

Ostensibly AusAID's approach to supporting judicial and related legal reforms in the LJSP was explicitly articulated in its concept paper, supporting implementation of PNG's National Law and Justice Policy within a broader pro-poor policy framework. The reforms were to improve law and justice services; improve the environment for investment and security; and enhance safety and security. At this time, AusAID was yet to formulate a comprehensive public policy on development assistance, although when this was ultimately formulated in a 'white paper' in 2006, it did little more than incorporate the existing approach.<sup>26</sup> Development intervention was now increasingly justified on the basis that effective law and justice systems promote regional security, increase international confidence and help attract foreign investment (AusAID 2007b). Interestingly, AusAID appears to have adopted a 'cut and paste' approach to judicial reform that largely reflected the instrumentalist, 'thin', neo-liberal efficiency-focused, pro-market approach of the World Bank to judicial reform over the past 20 years. This approach portrays with the promotion of the 'rule of law' as part of a suite of actions designed to instil a sense of certainty, not just in legal institutions of title and contract, but at the highest levels of global policy-making. The 'rule of law' movement became a key element of the 'Washington Consensus' approach to social, economic and political change, addressing competing pressures for democratisation, globalisation, privatisation, urbanisation and decentralisation (Trubek and Santos 2006, McInerney 2006). These policies were promoted by the

International Monetary Fund, the World Bank and the US Treasury during this period (Williamson 1990). In a sense, this reform was largely US-hegemonic in its overarching neo-liberal 'small state: free market' orientation, although it should be acknowledged that AusAID has recently explored adopting other conceptualisations; for example, in its support of the World Bank's Justice for the Poor programme (World Bank 2010).

As we have seen, an analysis of the subsequent programme design document and annual performance plans revealed a reform scenario characterised by its eclectic nature, wide parameters and the risk of lack of strategic focus. Beneath the rhetoric, this activity trend was indicative of a lack of any binding internal coherence of institutional policy on AusAID's part to clearly justify the specific goals of judicial and legal reform.

In relation to engagement, it was observed that the informal sector received one-quarter of the funding for the formal sector, which is an extraordinary imbalance for an overwhelmingly tribal society where some 85 per cent of the population live in remote communities largely beyond the reach of government services (AusAID 2009b). This experience clearly illuminates the latent bias of the reform approach to engage with the more accessible agencies of the central government in the capital district of Port Moresby in a classic 'top-down' modality. Beyond the rhetoric for inclusive and participatory approaches, more particular was the absence of any clearly articulated policy-based approach by the donor as to how it sought to engage with the community, and how it envisaged engagement to be participatory, and how judicial and legal reform should contribute to poverty reduction. In effect, there was a deficit of donor vision or policy. This deficit was left to be filled by the consultants amongst their many other usually intensely pragmatic priorities to deliver outputs to meet AusAID's monitoring requirements for activity implementation.

In relation to change management, the documentation revealed frequent references to the slow pace of implementation and also to resistance to change. But there was a troubling lack of analysis of the reasons for this or, more particularly, any evidence of political economy perspectives, power analysis or integrated political dimension in any of the planning documentation or implementation reports. Over all, formulation of the LJSP change management strategies provided few insights into stakeholders' powers and interests in change, or what DFID has described as its 'driver-of-change' or political economy analysis (Dahl-Østergaard *et al.* 2005).<sup>27</sup> Moreover, the documentation displayed a disconcerting lacuna in aligning notions of local ownership with the facilitation role of the programme manager. The consequence of this was to create a perception of a reform endeavour struggling to steer through a grey cloud, with much effort being expended in the process, but with few analytical tools at its disposal. In effect, there were suggestions of a project cycle where it seemed the same demonstrably unsuccessful approach from earlier interventions were being re-attempted with still more effort and resources, but no greater methodological assurance of success, pointing to a lack of research and evaluation, or utilisation of their findings.

As we have seen, this case study highlighted the competing development goals of the Government of Australia, evidenced in the Australia–Papua New Guinea ECP and AusAID's LJSP. It is little surprise that Australia's development policy is multi-dimensional, or that 'political' foreign policy imperatives trump development concerns.<sup>28</sup> What is more surprising is that the ungainly collision of these objectives is not resolved internally as a part of Australia's 'whole of government' approach, rather than being embarrassingly displayed through the operation of the PNG judicial process – ironically, perhaps the best possible evidence of the health of its justice system.

In relation to the planning approach, a number of observations are required on this experience. First, the case study demonstrated that considerable time and resources are

required to ensure adequate levels of planning. AusAID adopted the logical framework or project management approach to development planning that pervaded the foundational Program Design Document, the Sector Strategic Framework and each subsequent Annual Performance Plan. As has been seen, this methodology then extended to the Performance Monitoring Approach for purposes of linking planning targets with indicators of outcome. In this sense, the reform process was tightly planned. Second, in some contradiction, the linearity of this approach was consciously moderated by AusAID requiring designs to be iterative and responsive to change. Third, and perhaps most significant from a developmental design perspective, it is argued that the creation of the Performance Monitoring Framework in PNG presages what may become a profound and arguably unforeseen shift from the logframe to a new sector-based performance paradigm. During the period of this case study, this remained a work in progress. In due course, it may be anticipated that planning will become increasingly driven by a reform management cycle informed by a tandem of planning by the SSF and outcome monitoring from the performance framework rather than the donor's discretely logframed design approach. The foundations have been laid, although it has been noted that time is required for all parties: donors, counterparts and consultants to fully adjust.

Finally, the evidence reveals a range of anomalies in AusAID's stated approach to development that demonstrably impeded progress. For example, as we have seen, AusAID committed itself to supporting local ownership of the change process, but then delegated oversight of the substantial development budget to local mechanisms that were acknowledged to be unable to manage those responsibilities without commensurate capacity-building. At its most acute, this led to a systematic breakdown of oversight in the budget process, highlighting the unplanned and, to some extent, unpredictable nature of the development process. The linear dimensions of the logical framework approach as an assurance mechanism are invariably exceeded by this unpredictability. Reflecting Hellier's observation on donors' approach to the rule of law reform at the close of Chapter 3, reference has also been made to the existence of a 'locked black-box' of capacity-building lying at the heart of AusAID's change management strategy where convergence of core notions of local ownership and change facilitation seem disturbingly elusive. Finally, this case study provided evidence of the lack of any political economy analysis of the slow rate of change. The hands-off approach to facilitating change was indicative of a tension with promoting local ownership which was then permitted to be masked in the documentation by rhetoric about 'cultural context'.

#### *4.2. Significance for the evaluation of judicial reform*

Additionally, this case study is significant in demonstrating that AusAID has taken an organisationally profound move away from an accountability-based paradigm to monitor outputs, toward an effectiveness-based paradigm to monitor and evaluate impact and results. The LJSP experience provided dense evidence of this paradigm shift. While it was premature to assess the potentially transformative nature of this shift, or to ascertain any compelling evidence of results, there was plenty of evidence of its implications on changing many aspects of practice.

An examination of AusAID's monitoring and evaluation practice revealed a complicated and even conflicted picture: on the one hand, AusAID oversaw and even micro-managed a plethora of multi-levelled periodic reporting from its consultants: quarterly, half-yearly and annual performance reports for the sector; monthly, half-yearly and annual performance reports from both the LJSP and the JAG; the JAG annual performance

reviews of the LJSP; mid-term reviews of both the LJSP and the JAG; and a range of other focused and thematic reviews. This audit-style accountability and efficiency monitoring system was designed to ensure that AusAID's consultants delivered, on time and within budget, the outputs specified in the LJSP logframe. This substantial investment in conventional, project-based, self and peer monitoring consumed a significant portion of the available resources but was of negligible utility in terms of development effectiveness. It did little more than perversely reinforce what had now been largely outmoded and discredited in AusAID's own concept paper, which had explicitly identified the lack of any preceding critical analysis of impact of Australian assistance to the sector and prescribed a new approach.

On the other hand, there is also clear evidence that AusAID was simultaneously committed to redressing this deficiency by investing unprecedented resources in developing monitoring and evaluation capacity through the JAG. The case study noted the comparative strengths and weaknesses of having a dedicated mechanism for such capacity-building. This clearly reflected a substantial and unprecedented investment in monitoring and evaluation, estimated at 6 per cent or some \$8.4 million of overall programme cost. Preliminary evidence showed that capacity in sector performance monitoring was being established and, significantly, had started to generate useful data streams. At the same time, however, it was evident from JAG's appraisals of the LJSP performance reports that more time was required to reorientate from the earlier efficiency reporting to performance-based reporting.

This case study illustrated the still limited capacity of both donors and counterparts to systematically evaluate the contribution that reform has made on the performance of a law and justice system. A key element in the development of this capacity was the design of a Performance Monitoring Framework linked, as it were at the hip, to the sector strategic plan. This link enabled development targets and result indicators to be integrated from the outset in a continuous loop of targets and results. Additional elements included taking baseline measures of selected aspects of sector performance at the earliest feasible opportunity as counterfactuals in assessing impact. The ongoing collection and refinement of annual performance reporting followed and, in due course, enabled trend analysis of performance data. The development of local monitoring capacity continued throughout this process. Finally, and perhaps most importantly, there was a slow but steady building of evidence-based managerial leadership and organisational culture. It was during this period that the foundations of a systematic evaluative method were laid.

In relation to demonstrating development effectiveness, the emerging evidence of the LJSP experience in PNG is relevant and potentially ground-breaking. The 2006 contribution analysis, after almost four years of implementation at a cost of some \$90 million, was unable to identify any 'real world' impacts. The absence of impacts may be an indication that implementing visible change requires as much time and cost as building monitoring capacity. As we have seen, there is evidence to suggest that, for institutional reasons, this contribution analysis called for more time rather than address the more difficult question of why there was no available evidence of outcomes. It is additionally significant that data emerging from Bougainville provided the first clear evidence of positive trends in major indicators relating to the incidence of crime and public confidence in police, which, when compared with other sites were particular to those localities. At the time, it was not possible to attribute these trends to the LJSP on the available data, and assessing the causal issue of contribution was postponed to a later date. However, these trends clearly foreshadow the beginnings of a new era of impact monitoring and evaluation capacity, based on externally verifiable measures of outcome, impact and results on the performance of the sector. Considerable challenges, however, remain to be addressed in terms of developing local

capacity, refining the selection of performance indicators upon which the entire edifice for measuring effectiveness is based, and ensuring comprehensive, reliable data. The substantial dimensions of the shift to evidence-based monitoring and evaluation are undeniable, as is the need to adjust expectations on realistic resources and timeframes for the delivery of such evidence.

In sum, this case clearly demonstrates that monitoring and evaluation of justice sector reform programmes is expensive and time-consuming. It also demonstrates that to this point these endeavours have only partly demonstrated development effectiveness. These observations should not, however, be conflated to deduce that either the reform endeavours or monitoring and evaluation is useless. This is because the contribution analysis did not extend to differentiating the critical issue of whether the lack of real world impacts was due to deficiencies in the developmental performance or evaluative performance.

It is to be hoped that AusAID will continue to provide further resources to illuminate this critical issue in demonstrating development effectiveness, which remains outstanding to this point.

#### *4.3. An ethnomethodological postscript*

Finally, in closing this case study, it is fitting to assume a more critically reflexive voice in the combined interests of academic integrity and authenticity.

This case study is based on research initially conducted in 2007 as part of a desk review undertaken by this author for AusAID. Its purpose was to identify lessons to guide future strategy development in AusAID's law and justice sector programme/LJSP in PNG. This desk review occurred on completion of the initial phase of sector-based programmatic support for judicial and legal reform in PNG between 2003 and 2007. This study was based on an analysis of almost 100 historical documents drafted by the programme manager for LJSP, the JAG or AusAID. These documents were selected by AusAID, and are confidential to the Government of Australia. Copies of these documents are held by the author and were made available for the purposes of doctoral research through a research agreement entered between AusAID and the University of Sydney, dated 27 May 2009 (Government of Australia 2009).

In undertaking this case study, I have contributed my own professional narrative to AusAID's experience in PNG. To address this participatory dimension, I now provide an ethnomethodological analysis; in other words, making sense of 'ordinary, routine details of everyday life', as defined by Patton (2002, p. 110), to deal with this participatory dimension. This analysis will interrogate the 'space' between the evaluand, namely the subject under evaluation, and myself as evaluator, using my earlier professional works as counterfactuals for the purpose of constructing evaluative judgements in this case study.

In this case study, I have reviewed the PNG reform experience in which I served as project director of the JAG. Additionally, I have reviewed my desk review of that experience. In doing so, I have undertaken an academic analysis of this reform experience on two dimensions, framed in this third, theoretical dimension provided by the literature, which has provided me with a range of analytical tools from the global discourse on the purpose of judicial reform and the state of development evaluation. Significantly, I have now found that this theoretical dimension has changed the way in which I have previously perceived the value of this reform experience. For heuristic purposes, these changes in my perception are on occasion significant and warrant analysis.

First, I reiterate my interest in evaluating the contribution of the JAG on which I served between 2003 and 2005. It would be unreasonable to expect me to be totally unaffected

by participating in this work, and unethical not to disclose that interest. That said, I have argued that my participation provided a repository of knowledge, insight and understanding that contributed authenticity, and consolidated the integrity of the evaluation function. This clearly involved a trade-off in detachment. By exposing my interest, I have relied on Guba and Lincoln's argument that, by staying detached, the evaluator merely ensures that he/she can never really understand what is going on. I have now offered an analysis of the value and worth of the reform performance that I trust is relevant, credible, perceptive, reliable and adequately substantiated for the scrutiny of peers (Guba and Lincoln 1989, p. 249).

Second, in this case study process, I have been confronted with an adjustment in the relationship between myself as a professional evaluator in undertaking AusAID's desk review, and now as a doctoral researcher in undertaking this assessment. This adjustment arises from the functional requirements of professional evaluation that were framed by a 'client' who required my 'services'. This framing highlights a disciplinary debate over evaluative modelling that has been described by some commentators as being a 'paradigm war'. This debate pits those who may be called *positivists* against *constructivists*. At its essence, it is concerned with the issues of how evaluation finds truth and contributes to knowledge. On the one hand, positivists advocate a highly formalised scientific approach, often used in econometrics. They are primarily concerned with establishing the validity and reliability of data, adopt experimental methods and counterfactual measurements, and are preoccupied with the overarching need for methodological rigour. On the other hand, constructivists are primarily concerned to hear the voice of stakeholders, notably the alienated poor. They use participatory methods, case studies and observations and refute the scientific approach as being costly, impractical and irrelevant (Cracknell 2000, p. 47).<sup>29</sup> Within this debate, part of the constructivist critique of the positivist approach to evaluation addresses the artifice of neutrality and the asymmetry of most development partnerships that skew the evaluation function in favour of the donor. This has been described by Cracknell as 'the great unmentionable in evaluation theory'.<sup>30</sup> Bluntly put, this critique asserts that donors get the evaluations they want through the manner in which they frame the issues to be evaluated.

In undertaking this scholarly assessment of my earlier desk review, I am now confronted with the potency of this critique. As a professional working – and seeking to continue to work – in the judicial reform arena, I bring expertise. But I am additionally expected to provide services that address my client's needs. This expectation requires me to understand the purpose, nature and parameters of the evaluation. It involves some implicit measure of buying-in, and an internal reconciliation over the frame of reference about what is/not doable and amenable to critique. The evaluator is required to delimit his/her bounds of critique: the pragmatics of when 'to go in hard' and when 'to go in lightly'. This is an unquantifiable, highly discretionary 'space', sometimes described as involving 'good judgment'.

On completing this case study, I must acknowledge that this adjustment in the context and purpose of the desk review affected my evaluative function. This is measurable in the punches that I now find I may involuntarily have pulled in the desk review. For example, in the desk review I implicitly 'understood' AusAID's imperative to avoid highlighting what could be perceived as the futility of investing another \$90 million in PNG without visible results. An explicit mention of the lack of visible results could have had the effect of killing much needed further support – already termed by Hammergren (2007, p. 279) as the *fireman's syndrome*. Acknowledging this reflection has confronted me with Cracknell's observation that the posture of positivist neutrality is a fiction.<sup>31</sup> It also reminds me of

Patton's observation that 'to claim the mantle of objectivity in the post-modern age is to expose oneself as embarrassingly naïve' (Patton 2002, p. 50).

Hence, I must now acknowledge that it is not only AusAID that pulled its punches in its contribution analysis of reform performance for institutional and political reasons. This realisation has provided me with first-hand evidence of what may be described as 'embeddedness', involving the pragmatic suspension of evaluative faculties. In my own heuristic journey in undertaking this research, I must now acknowledge the application of the constructivist critique that impartial evaluation is either a fiction or even not desirable. Evaluating development effectiveness is determined by context and purpose. Trade-offs are unavoidable between insight and supposed neutrality. Significantly, however, these trade-offs may enrich rather than reduce the findings. The implications of this heuristic analysis are that I must now endorse the relative utility of the constructivist approach to evaluation in development practice.

## Notes

1. In this case study, money is denoted in US dollars (\$) unless otherwise specified.
2. See, in particular, the chart of sector framework (Government of Papua New Guinea 2006a, p. 5).
3. Government of Papua New Guinea for 2005 to 2007.
4. See, for example, Government of Papua New Guinea (2005a, 2006a, 2007a).
5. 'SMART' means specific, measurable, accurate, reliable and time-bound. See discussion of the alternative acronym 'TURC' for criteria: *technically* sound, *understandable*, *relevant* and *cost-effective* (De Vries 2001, p. 320).
6. The project management cycle is AusAID's key management tool for development effectiveness, comprising an integrated results-based approach to planning, implementation, monitoring and evaluation. The conceptual rationale for this approach lies in what is often described by donors as a 'results chain' that links the intervention's inputs to immediate outputs, and then to outcomes and final impacts or results. The OECD-DAC defines the logical framework as a management tool used to improve the design of interventions, most often at the project level. It involves identifying strategic elements – usually termed inputs, outputs, outcomes, impact – and their causal relationships, indicators, and the assumptions or risks that may influence success and failure (OECD 2002). Most aid project designs are founded on the orthodoxy of logic-based models and while this method has received criticism for its apparently rigid 'blueprint' approach to bringing about social changes, it has nevertheless predominated in the aid industry (Crawford *et al.* 2004).
7. See, for example, 'The LJSP design process has taken place within a strong GoPNG policy framework . . . A significant feature of this process has been the close interaction between the Design Team and the GoPNG senior managers who developed the National Law and Justice Policy and Plan of Action ("the Policy"), and who form the Law and Justice Sector Working Group (L&JSWG). This has provided a strong *continuity* of effort, understanding and commitment to LJSP within the GoPNG' (Government of Papua New Guinea 2005b, p. 1; emphasis added).
8. Infrastructure for courts and prisons was the largest head of discretionary expenditure accounting for 36 per cent of budget, or 77 million kina in capital works, mainly on building and renovating courts and prisons (Government of Papua New Guinea 2006a, Annex C).
9. See, for example, Foster (2000, 2004). While increasingly popular, there are a number of challenges emerging from the increasing use of SWAs – see, for example, White (2007).
10. Criteria for selection of indicators included simplicity, meaningfulness, part of core business of the collecting agency, continuity for trend analysis, and comparability for reliability. Armytage and Miller (2008) provide a case study of building capacity to monitor and evaluate legal and judicial reform in PNG during this period, outlining the process of designing the sector performance monitoring framework, selection of outcome indicators, collecting data and linkage to the sector strategic framework and the national law and justice policy, in a process that they

describe as iterative and evolving. They review a range of issues relating to developing monitoring capacity, collecting data and data quality, incentives, sustainability, resources, timeframe and design approach.

11. Armytage and Miller estimated costs as follows: 'Providing a cost to the JAG investment in sector performance monitoring – and thereby evaluating its own contribution – is not altogether straightforward, but in simple terms if some 40% of the annual budget for JAG is compared with the budget of the Law and Justice Sector Program, then it is estimated at around 6%' (2008, pp. 145, 155).
12. For example, 'Major reductions in crime victimisation occurred in both towns from 2004 to 2006. The 2004 baseline research found that household victimisation levels in Arawa and Buka were high and that violent crime featured. From 2004 to 2006, 18 of 20 indicators of household crime victimisation showed reductions each year. Twelve of the reductions from 2004 to 2006 were statistically significant' (JAG 2007, p. 1).
13. '[I]n the context where previous monitoring and evaluation has focused in the main on the efficiency of achieving contracted outputs . . . [t]he JAG which will report to both Governments on sector and AusAID program performance and advise on constraints to the effective functioning of the sector. The JAG will play a role in supporting GOPNG efforts to define sector outcomes and indicators drawing on information coming out of the above preparatory studies' (AusAID 2002, pp. 6–7). See also Armytage (2007, p. 19).
14. Flint *et al.* argue that: '[A]tribution is the major problem for . . . all development agencies that have adopted the Millennium Development Goals as the focus of their work . . . Demonstrating the causal link between DFID's activities and changes in any of the MDG indicators is virtually impossible . . . A consistent finding of evaluation reports is that impacts on poverty and other development outcomes are inherently hard to assess . . . The general problem nevertheless remains: the evidence on development impacts is patchy' (2002, p. 5). *Attribution* is defined by OECD as the ascription of a causal link between observed (or expected to be observed) changes and a specific intervention. Attribution refers to that which is to be credited for the observed changes or results achieved; it represents the extent to which observed development effects can be attributed (OECD 2002).
15. As at mid-2010, the contribution analysis had not been resumed (Bishop 2009).
16. Representing four-fifths of total expenditure at the end of the fourth year for this five-year programme.
17. In an internal synthesis evaluation over the period 1992–1997, McMaster found a weakness of some of the evaluations was the lack of quantitative information on the actual project inputs, outputs and outcomes and a comparison of the achieved outcomes with the outcomes predicted in the project appraisal reports. In several evaluations, conducting a cost–benefit analysis was difficult because of the lack of available quantitative information on which to base the analysis (McMaster 1998; also AusAID 2005a).
18. The purpose of LJSP was: 'To assist the Government of Papua New Guinea in strengthening the efficiency and effectiveness of the formal law and justice system, and support the informal system as an alternative avenue for the redress of disputes, consistent with the PNG National Law and Justice Policy' (AusAID 2002, p. 11).
19. The AusAID aid budget of approximately A\$300 million served as the Government of Papua New Guinea's de facto non-recurrent development budget during this period.
20. During this period, Australia provided more than A\$240 million in assistance to strengthen law and justice in PNG, 68 per cent of which has supported the police force (AusAID 2003, p. 11).
21. Historically, AusAID has often relied on research conducted by the World Bank – see, for example, AusAID (2006e). AusAID's governance approach is virtually indistinguishable from the World Bank, emphasising four focal areas for assistance, being: improving economic and financial management, strengthening law and justice, increasing public sector effectiveness, and developing civil society. See, for example, AusAID's conceptualisation of good governance: 'A landmark study by the World Bank, *Assessing Aid – What Works, What Doesn't and Why* (1998), demonstrated the crucial role that good governance plays in enhancing the effectiveness of aid. . . . One element of good governance that is needed for sustained development is an economy that operates in an ethical, accountable and appropriately regulated environment, which facilitates competition in the marketplace. Without this, there will be no driver for economic growth and sustainable development will not be possible. A dynamic private sector, operating in a properly functioning competitive market system, creates jobs and

- income, generates wealth and helps ensure that resources are used efficiently' (AusAID 2000, p. 5).
22. For example, 'Progress in 50 percent of the 30 activities, including several major initiatives, has been slower than planned or been delayed' (Government of Papua New Guinea 2004b, p. 2); and '[T]he Program "light-footprint" approach needs to be re-evaluated in light of the slow implementation progress' (Government of Papua New Guinea 2004b, p. 4); among many others.
  23. This was described more diplomatically by LJSP: 'As this was the first attempt at this approach to planning and implementation, the slowness is not unexpected' (Government of Papua New Guinea 2004b, p. 2).
  24. The programme manager discussed this dilemma in its role in the Annual Program Plan for 2006: 'while the Program can facilitate appropriate opportunities for discussion and ideas for consideration, it is not appropriate for the Program to usurp the LJSWG or NCM executive role' (Government of Papua New Guinea 2005a, p. 29).
  25. This analysis concluded: 'Wherever possible the resolution of crime and conflict should be linked to opportunities that address underlying issues. Income generation, vocational training, and micro-credit are vehicles for ensuring sustainable rehabilitation strategies. The bulk of those engaged in so-called *raskolism* could be diverted from crime through the provision of relatively modest socio-economic opportunities' (Government of Papua New Guinea 2005b, pp. 67–71).
  26. This White Paper advocated fostering functioning and effective states, wherein good governance, conceptualised largely as sound policies and institutions, is seen as central for growth and development, at xii. The paper similarly advocated an integrated approach to the law and justice sector: 'A focus on law and order will have marginal impact without parallel improvements in the prosecutions, courts and corrections systems. The integration of the work of AusAID, Australian Federal Police (AFP) and the Attorney-General's Department has been central to securing real improvements in law and justice systems. This will continue and will be expanded further . . . AusAID, the AFP and other agencies spent \$138 million in 2004–05 on integrated law and justice support. This expenditure will increase in future years' (AusAID 2006a, p. 46).
  27. A political economy approach can identify the constraints to development imposed by power relations and elite-interest domination . . . Instead of focusing on the organisational level, this approach focuses on the institutional change required to achieve transformational change. This institutional change is usually political, in that changing the way services are provided usually benefits some . . . at the expense of others (usually those who previously manipulated power and influence to serve elite interests) . . . A political economy analysis with a focus on power and interest may well conclude that the government – as protector and promoter of elite and powerful interests (and the institutions that defend those interests) – is a contributory factor in the slow pace of poverty reduction. See also Pycroft (2006, p. 4), DFID (2005) and Warrener (2004).
  28. Cirillo argues that Australia's aid programme characteristically follows two principal patterns of development strategies, first that reflected the thinking in international development circles, first in the 1980s focusing on structural adjustment, then following recognition of the importance of state institutions in *enabling* growth, AusAID adopted the 'good governance' paradigm. This governance agenda was simultaneously motivated by foreign policy concerns that were notably security and economic imperatives (Cirillo 2006).
  29. Cost is certainly significant: White recounts that in the experience of the Independent Evaluation Group of the World Bank, rigorous impact evaluation is expensive, costing between US\$300,000 and US\$500,000 per study (White 2006, p. 23).
  30. He/she who determines what is to be evaluated has power; as does the evaluator, whereas the classical evaluand is relatively powerless (Cracknell 2000, p. 88).
  31. Some commentators insist on objectivity and are fierce critics of the participatory approach, which does not seem to allow any scope for it; others, however, are willing to substitute objectivity with honesty, critical distance, integrity and avoidance of conflict of interest. Cracknell, however, argues that it is undeniable that evaluators in the past did not really possess absolute objectivity in any case owing to pre-conceived ideas and acquired values. It may seem to be an illusion that an evaluator can be totally impartial (Cracknell 2000, pp. 333–336).

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