The Bougainville Referendum

Law, Administration and Politics

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ACRONYMS

ABG	Autonomous Bougainville Government
BCL	Bougainville Copper Ltd
BIG	Bougainville Interim Government
BP	Bougainville Partnership
BPA	Bougainville Peace Agreement
BPS	Bougainville Police Service
BRA	Bougainville Revolutionary Army
BRC	Bougainville Referendum Commission
BRC-TC	Bougainville Referendum Commission Transitional Committee
BRF	Bougainville Resistance Forces
BTG	Bougainville Transitional Government
COE	Council of Elders
CRC	Constituency Referendum-ready Committee
IFES	International Foundation for Electoral Systems
IDEA	Institute for Democracy and Electoral Assistance
IVR	Interactive Voice Recorded
JSB	Joint Supervisory Body
JTT	Joint Technical Team
MHR	Member of the House of Representatives
MDF	Me'ekamui Defence Force
NEC	National Executive Council (PNG government)
NRI	National Research Institute
NGDPs	National Goals and Directive Principles
NZAID	New Zealand Aid
NGO	Non-Government Organisation
OBEC	Office of the Bougainville Electoral Commissioner
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Cooperation in Europe
PACSIA	Peace and Conflict Studies Institute Australia

PMG	Peace Monitoring Group
PNG	Papua New Guinea
PNGDF	Papua New Guinea Defence Force
PNGEC	Papua New Guinea Electoral Commission
PPERA	Political Parties, Elections and Referendum Act 2000 (UK)
RPNGC	Royal Papua New Guinea Constabulary
UDI	Universal Declaration of Independence
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNOMB	United Nations Observer Mission on Bougainville
US	United States
USAID	United States Agency of International Development

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INTRODUCTION

The Bougainville Peace Agreement (BPA) of 30 August 2001 and the Papua New Guinea (PNG) constitutional laws that give effect to that agreement constitute a political settlement to the deeply divisive nine-year Bougainville conflict (1988–1997). Amongst other things, they provide for a referendum on the political future of Bougainville (the Bougainville referendum), which must include a choice of a separate independence for Bougainville. In addition, they provide for the demilitarisation of Bougainville (through withdrawal of PNG forces, limits on future deployment and disarming of opposing Bougainville armed groups) and a high level of autonomy for Bougainville, a unique status in PNG under which an Autonomous Bougainville Government (ABG) was established in mid-2005.

The BPA provided for the referendum to be deferred until the autonomy arrangements had been operating for at least 10 and no more than 15 years. As a result, the referendum had to be held within a five-year window between mid-2015 and mid-2020. The referendum results are not binding on the parties — in particular, a vote in favour of independence does not bind the PNG government. Rather, the two governments are required to consult over the results of the referendum and, subject to that consultation, the PNG national parliament may consider the results and make its decision. According to the BPA, the PNG parliament has final decision-making authority in relation to the referendum results. So, on its own, the referendum does not resolve the longstanding secessionist dispute between PNG and Bougainville. Rather, the parties have agreed to a process for dealing with the dispute that includes both the referendum and an obligation for PNG to consult on the result of the process.

This book presents an analysis of legal, administrative and political issues arising from the complex arrangements for the conduct of the Bougainville referendum. In doing so, the book responds to a gap in the growing literature on Bougainville. While much has been written on the origins and development of the Bougainville conflict (1988–1997[1]), as well as the peace process (1997–2005) and the implementation of the BPA,[2] as of early 2019 little of substance has been written about the referendum. With the exception of the reports being produced by a referendum research project conducted by the PNG National Research Institute (NRI) (see chapter two), much of what has been written deals mainly with the politics of reaching agreement on inclusion of the referendum in the BPA and the likely complex politics of implementing the referendum arrangements.[3] However, even the reports being produced by the NRI project do not deal with the complex arrangements for the referendum in Bougainville. For example, the report on referendum administration focuses on experiences elsewhere in the world and does not specifically analyse the arrangements for administration of the Bougainville referendum.

The first purpose of this book is to promote a better understanding of the arrangements for the referendum.

In seeking to contribute to filling this gap in the literature, the first purpose of this book is to promote a better understanding of the arrangements for the referendum. The need for this is illustrated by the fact that there are serious misunderstandings of key aspects of the arrangements. A 2013 report of a joint PNG and ABG review of the Bougainville autonomy arrangements said in a chapter on the referendum[4]:

> As with many things concerning Bougainville, misinformation and ignorance are clouding sensible planning and preparation [for the referendum] (JSB 2013:87).

Five examples illustrate this point. Firstly, from about 2010 it was widely but wrongly believed in Bougainville that the BPA required that the referendum be held in 2015, rather than in the five-year window beginning in 2015 as is actually provided for in the constitutional arrangements. Secondly, many in Bougainville incorrectly believe that a vote in favour of independence in the referendum will

itself result in independence, without further need for consultation with or action by PNG. Thirdly, few realise that there is already a comprehensive set of legal provisions on how the referendum shall be conducted contained in a schedule to the Organic Law on Peace-building in Bougainville — Autonomous Bougainville Government and Bougainville Referendum 2002. The erroneous belief that no such provisions have been made appears to be a major factor behind calls for ABG enactment of a Bougainville Referendum Act (for example, ABG 2017:8, 21). Fourthly, because the referendum must be held before the middle of 2020, some in Bougainville needlessly fear that unless the referendum results in independence the BPA and all arrangements under it, inclusive of Bougainville's autonomy, will cease to operate, with Bougainville reverting to the status of one of PNG's provinces. Fifthly, perhaps the greatest confusion and uncertainty concerns the widespread but incorrect belief that the disposal of weapons in post-conflict Bougainville and good governance on the part of the ABG are conditions that must be adjudged as having been met before the referendum can be conducted. This view (discussed in detail in chapter five), says that if determinations are made under section 338 of the PNG constitution that either weapons disposal in Bougainville is not complete or the ABG has failed to adhere to internationally accepted standards of good governance, PNG will have unilateral authority to determine that either the referendum should not be held or that it should be deferred beyond 2020. These misconceptions have been repeated so frequently that they have become received wisdom.

Several interrelated factors contribute to this confusion and misunderstanding about the arrangements. One factor is that most people now implementing or commenting on the arrangements have had no experience with referendums. Another is that about 17 years have elapsed since the BPA was signed, and four national level general elections have been held. Few who were involved in BPA negotiations are available to be involved in the process of implementing the referendum arrangements. Yet another factor is that, due to the turnover of both political and administrative leadership in four general elections, the complex history of the arrangements for the Bougainville referendum is little understood, especially at the national level. Still another factor concerns the fact that the arrangements themselves are complex and set out in several complex and interrelated documents, the details and relationships of which are little known. The nature of the issues involved in even considering a referendum on independence for a part of PNG is not only confronting for many in the national government, but also potentially divisive. Finally, there is limited capacity in the public service both in Bougainville and at the national level to grapple with the complexity of the arrangements.

Hence, this book aims to provide an accessible guide to the referendum arrangements and an explanation as to how they have been implemented in the period ending April 2019. In analysing the arrangements, the book seeks to explain them, where possible, by reference to relevant international comparisons.

A second purpose of this book is to consider what may be needed to ensure that the referendum is free and fair.

A second purpose of this book is to consider what may be needed to ensure that the referendum is free and fair, as is required by the BPA and the constitutional laws that implement it. The book proposes evaluation of the requirements of freedom and fairness by reference to emerging international standards for the regulation of referendums, standards that have largely emerged in the 19 years since the BPA was signed. The most significant of these are the standards established by the Venice Commission in its 2007 *Code of Good Practice on Referendums*, which is discussed in chapter three. The Venice Commission is an advisory body to the Council of Europe (a body distinct from the European Union)

that comprises representatives of most European countries and independent experts in the field of constitutional law and aims to uphold human rights, democracy and the rule of law in Europe.

The third and final purpose is to consider the impacts on peacebuilding that are involved in including a deferred referendum as part of a long-term peace process. The central issues here relate to the fact that the BPA establishes a process for building peace between Bougainville and PNG and amongst divided Bougainvilleans through the three main sets of arrangements already mentioned — the demilitarisation of Bougainville, autonomy for Bougainville and a referendum on the future political status of Bougainville. Demilitarisation was expected to be complete before autonomy began to operate, and then autonomy was required to operate for at least 10, but for no more than 15, years before the referendum was required to be held. All three main elements of the BPA, inclusive of the referendum arrangements, were intended to contribute to peace-building in different ways. In simple terms: demilitarisation would end the role of weapons, thereby encouraging cooperation across previous divides; autonomy would contribute to reconciliation between the national government and Bougainville and would encourage cooperation and the accommodation of differences; the referendum would be a peaceful way of resolving Bougainville's longstanding demands for separation from PNG, but only after the other two elements of the BPA had been operating long enough to enable development of relationships quite different from those existing in the immediate post-conflict situation.

One problem is that the referendum brings with it its own contradictions, with all sides perhaps tending to see autonomy as a temporary situation, and the referendum as the point when the main issues between the parties must be dealt with. A key issue is whether the referendum arrangements have contributed to peace in the period since the peace agreement was signed (in 2001), and if so whether they are likely to continue to contribute to peace as the date for holding the referendum approaches. An issue of central importance concerns whether the provisions for deferral of the referendum and making its outcomes non-binding are compatible with long-term peacebuilding.

This book is organised into two main parts. The first part, comprising three chapters, deals mainly with historical, contextual and background matters. Chapter one provides a brief introduction to PNG and Bougainville, then deals with the origins of the Bougainville referendum in both secessionist demands dating back as many as 50 years, and the negotiations for the BPA, and then provides an overview of the complex documentary sources for the referendum. Chapter two provides a guide to the growing number of reports or other papers on either the Bougainville referendum or issues relevant to it. Most of these reports are little known and largely inaccessible (other than to government officers and advisers), yet provide important insights into the contemporary Bougainville context and (in some cases) current thinking about many aspects of the referendum arrangements. Chapter three introduces some of the voluminous international literature about referendums, focusing on four main sets of issues: key definitions and categories of referendums; the benefits and dangers of referendums; some key issues about independence referendums in particular; and emerging standards for the regulation of referendums, with a focus on those directed towards ensuring that their conduct is free and fair.

Part two of this book examines the Bougainville referendum arrangements in some detail, their origins, intent, operation and implementation to April 2019. Chapter four examines the subject matter of the referendum — with a particular focus on the question or questions to be asked. Chapter five deals with the timing of the holding of the referendum, with a particular focus on frequently misunderstood questions concerning setting its actual dates. Chapter six deals with other major constitutional points, including qualifications for voters and the agency to conduct the referendum. Chapter seven looks at the constitutional rules for the conduct of the referendum. Chapter eight deals with the implementation of

the referendum arrangements to the middle of 2018, while chapter nine examines matters likely to arise after the referendum, including determination of the outcome, making decisions on its implementation and determining whether the referendum has been not only free and fair but is also a legitimate exercise of the will of those who were entitled to vote.

A set of legal documents containing the key provisions on the referendum in the BPA and in the constitutional laws that give effect to the agreement has been compiled and made available on the website for the Department of Pacific Affairs in the College of Asia and the Pacific at The Australian National University through the following link https://datacommons.anu.edu.au/DataCommons/rest/display/anudc:5914?layout=def:display. The documents are made available in this way not just because they are referred to throughout this book, but also because most of them are not otherwise readily obtainable and they are critically important to understanding the arrangements. These documents include the text of the single most important source of emerging international standards in relation to the conduct of referendums, the Venice Commission's *Code of Good Practice on Referendums*, which was released in 2007. In addition, this book has three appendices. The first has the text of the questions asked in a number of referendums on independence issues conducted in various countries since 1980; the second has the referendum prayer released in 2018 by the Catholic Diocese of Bougainville. The third appendix provides links to some of the key documents mentioned above on the referendum.

Finally, I must mention my own role in the Bougainville peace process. I have been a legal adviser to the Bougainville parties to the process since about 1998. This work involved advising during the negotiations for the BPA as well as in relation to the implementation of the agreement. My role has included direct involvement in negotiations about various aspects of the referendum arrangements that were not finalised in the BPA, but were left to determination by later negotiation between the national government and the ABG.

PART ONE

THE BOUGAINVILLE CONTEXT AND INTERNATIONAL EXPERIENCE

Photo: Adriana Schmidt

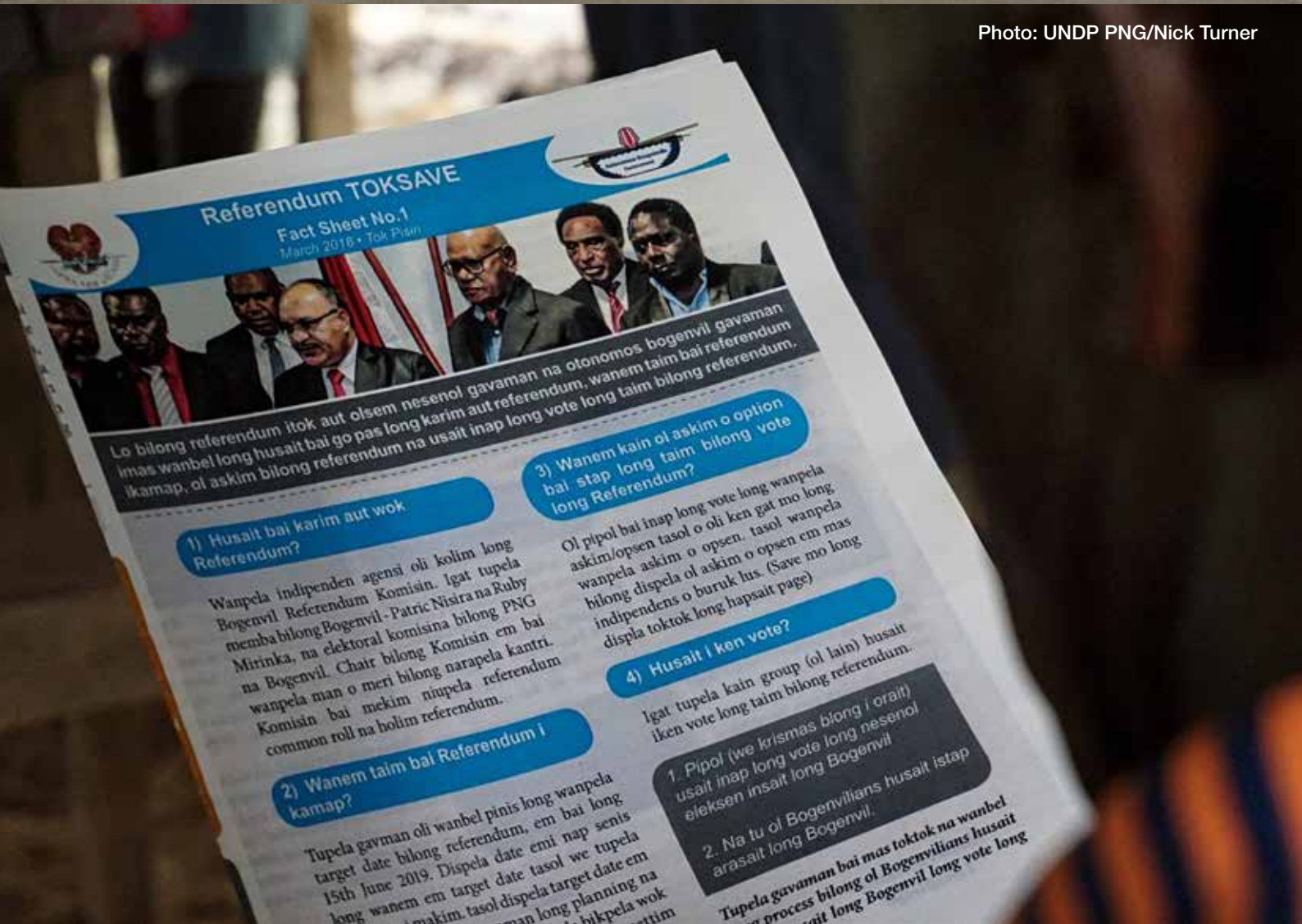

Photo: UNDP PNG/Nick Turner

CHAPTER ONE
ORIGINS AND LEGAL BASIS OF THE BOUGAINVILLE REFERENDUM

To provide a basis for understanding the nature and extent of secessionist sentiment in Bougainville as reflected in the BPA and the constitutional laws that implement it, this chapter begins by discussing the emergence of a pan-Bougainvillean identity during the twentieth century. How was it that, from the late 1960s, secession became a widely discussed possibility for Bougainville — largely in reaction to the Australian colonial government's decisions permitting the establishment of a large-scale mine in Bougainville? This chapter then briefly discusses the origins and impacts of the Bougainville conflict (1988–1997) and highlights what is still a little-known and understood fact of Bougainville history: that the origins of the conflict do not lie solely in the mining-related grievances and actions of young landowners from the Panguna mine area, but rather in grievances and actions of a broad coalition of Bougainville groups. The existence of such a coalition helps to explain the widespread response of Bougainvilleans to the violence of the PNG police mobile squads in 1988–1990, which saw separation of Bougainville from PNG becoming the central demand of the Bougainville Revolutionary Army (BRA) leadership. The discussion also considers the divisions amongst Bougainvilleans that developed during the conflict, which included significant divisions about the possibility of secession. It touches on the efforts made between 1988 and 1995 to prevent escalation of the conflict or to end the conflict, before turning to the beginnings of the Bougainville peace process from 1997 to 1999. In particular it discusses the origins and development of the Bougainvillean demands for the provision on a referendum on independence in the BPA and how a significantly modified version of those demands was eventually included in the BPA, when it was signed 18 years ago on 30 August 2001. The final section of the chapter outlines the origins of and legal basis for the specific arrangements for the referendum, which are for the most part contained in the BPA and the constitutional laws that implement it.

DEVELOPMENT OF A DISTINCT AND UNIFYING BOUGAINVILLE IDENTITY

PNG and Bougainville

Bougainville's population in 2018 was approximately 300,000, less than four per cent of PNG's total population. At 9438 square kilometres, it constitutes roughly two per cent of PNG's total land area. With 25 languages, a similar number of sub-languages and dialects (Tryon 2005) and many cultural differences even within the larger language groups (Ogan 2005), Bougainville reflects PNG's pattern of linguistic and cultural diversity. While in many ways Bougainville societies are close culturally and linguistically to those in the west of the neighbouring Solomon Islands, it is also true that many features of Bougainvillean cultures are similar to those found elsewhere in PNG, as well as in other countries of the Melanesian cultural area. The most distinctive feature shared by most (but not all) Bougainvilleans is very dark skin colour, noticeably darker than most (though not all) people from elsewhere in PNG.

Pre-colonial Bougainvilleans were organised mainly around tiny, stateless clan-based societies. Despite major social and economic changes since colonial rule began in the late nineteenth century, the most significant social groups in Bougainville today continue to be nuclear and extended families, the localised clan-based landowning lineages to which members of those families belong (typically containing 50–150 members) and flexible groupings of such lineages. These structures continue to be heavily influenced by customary arrangements that remain strong today despite many significant changes in Bougainville society associated with colonial and post-colonial change.

A minority of societies have hereditary (chiefly) leadership, the rest largely have performance-based leadership, often with a hereditary element. Most societies are matrilineal, but at the same time tend to be quite patriarchal (Eves et al. 2018; Hamnett 1977). Matriliny means that land and other valuable property (and often leadership) descends through the matrilineal line; that women tend to be

seen as custodians of customary land; and that they sometimes have quite high status within their societies, although the extent of this varies between culture and language groups. Under customary arrangements, however, women tend to have limited decision-making roles within the family and also tend to play limited public roles, with maternal uncles and brothers usually speaking on their behalf in public discussions, sometimes even on land matters (although women's views on customary land are usually regarded as important). It is still far from easy for women to play other public roles in Bougainville, although this situation is gradually changing. In part this change is because of the leadership roles women played in the origins of the Bougainville peace process (1997–2005) that ended the Bougainville conflict and in part because of leadership roles that women are now playing in several Bougainville-based NGOs[5] and as elected representatives in both the ABG (from 2005) and Bougainville's system of community governments established early in 2017 (in which each village assembly area elects both a male and a female representative).

While Bougainville was under nominal German colonial control from 1884 to 1914, the first colonial administrative centre was not established there until 1905. Australia took control from 1914 until PNG's independence in 1975 (with a brief period of Japanese control during World War II). Some parts of mountainous central and northern Bougainville had little contact with either churches or the colonial regime until after World War II.

The state in Papua New Guinea (including Bougainville) has always been relatively weak at all levels.

The state in PNG (including Bougainville) has always been relatively weak at all levels, with limited impacts on local communities, and has experienced difficulties in imposing policies on those determined to oppose them. There were no formal pan-Bougainville political structures under the highly centralised colonial administrative structure until very late in the colonial period. Indeed, elected local-level governments were only established gradually from the late 1950s onwards and in some areas were resented and resisted (Connell 1977; Griffin 1977). The first pan-Bougainville political structures were the combined councils conference established in 1963 (Griffin 1977:46) and the interim provincial government established early in 1974 and given a constitutional basis in 1977 as part of a settlement of Bougainville's first attempted secession in late 1975 (Ghai and Regan 2006). A group of young educated Bougainvilleans took the lead in the 1973 debates about establishing the interim provincial government. They were supported by John Momis, then a Bougainvillean member of the House of Assembly (the colonial legislature), who was de facto chair of the PNG Constitutional Planning Committee which proposed that a constitutionalised system of devolution to provincial governments be included in the independence constitution (Ballard 1981; Conyers 1976; Regan 1997a).

Identities among Bougainvilleans and pan-Bougainville identity

Before colonialism, while trade networks undoubtedly linked various Bougainvillean groups, most societies probably had little sense of Bougainville as a whole (see, for example, Specht 1974; Wickler 1990). Group identities were probably multiple and were often related to environmental and other localised factors (Regan 2005:423–24). A pan-Bougainvillean sense of identity only arose from the early twentieth century, initially as a response to plantation colonialism which brought about the first extensive interactions between Bougainvilleans and people from elsewhere in PNG. Dark skin colour became the primary marker of Bougainvillean identity (Nash and Ogan 1990). Bougainvilleans were regarded by the German colonisers as particularly fierce and they were consequently valued as policemen and as providers of security on plantations. Nash and Ogan argue that in carrying out such roles, many

developed a sense of the superiority of black-skinned Bougainvilleans over the lighter ('red-skin') people who they were often supervising or deployed against (ibid.).

Politicisation of this new pan-Bougainville identity developed after World War II. Contributing factors included continued close links to Solomon Islands (reinforced by the links of the two main Christian churches in Bougainville with 'parent' houses in Solomon Islands), grievances against the colonial regime for neglect of economic development in Bougainville (Griffin et al. 1979:150), and the racism of some planters and colonial officials (Ogan 1965, 1971, 1972). However, the strongest factor driving the politicisation of identity was Bougainvillean reaction to the development of one of the world's largest copper and gold mines in the mountains of central Bougainville from the mid-1960s, under Australian colonial rule. The mine was seen by many Bougainvilleans as imposed by the colonial authority for the benefit of the rest of colonial PNG with little regard to detrimental social and environmental impacts on Bougainville itself. There was particular resentment of the limited land rents and compensation and the fact that they were paid only to communities whose land was actually used for mining-related purposes, with no regard for the impact of mining on neighbouring communities or other communities experiencing less direct impacts of mining (Regan 2017). The mine operated from April 1972 until violent conflict closed it in 1989. It has not reopened since. While resented by many, economic activity associated with the mine together with widespread plantation and smallholder cocoa and copra production made Bougainville PNG's wealthiest province before the conflict. It was, however, wealth based on significant inequality, a factor which undoubtedly contributed to the origins of the conflict (Regan 2017).

BACKGROUND TO SECESSIONIST DEMANDS

Early evidence of secessionism

Both Conyers (1976:53) and Mamak and Bedford (1974:8–10) indicate that the possibility of secession had been discussed in some areas of Bougainville for many years before the first recorded Bougainville secession demands emerged in the late 1960s in the context of the development of the mine and the approach of independence, both of which raised expectations and opportunities for change. A September 1968 meeting of a group of 25 Bougainvilleans living in Port Moresby 'called for a referendum in Bougainville on its political future' (Griffin et al. 1979:152; Mamak and Bedford 1974:8–10). Spokesman for the group, Leo Hannett, issued a statement requesting that the proposed referendum be held by 1970 'to decide whether Bougainville should be independent, should unite with the Solomon Islands to constitute a separate unit, or should remain with PNG' (Premdas 1977:76).

The September 1968 call for a referendum led to considerable discussion amongst emerging educated Bougainvillean leaders about secession, who then sought to convey their perspectives to other local leaders, making deliberate efforts to communicate with local government council leaders through the Bougainville combined councils meetings. Most of the educated leaders probably saw their demands for secession as part of a strategy to gain autonomy for Bougainville within new PNG constitutional arrangements that would possibly come with PNG's independence.[6] Nevertheless the constant discussion of the topic led to widespread interest in secession as a solution to what were seen as a range of problems affecting late colonial Bougainville and especially mining-related problems. A new political organisation established in the Kieta area in 1969, Napidakoe Navitu, was openly secessionist and in 1970 attempted to stage its own 'referendum on secessionism', although it was 'a fiasco' (Griffin et al. 1979:153; Mamak and Bedford 1974:9–10). In March 1971, Paul Lapun, one of Bougainville's three representatives in the House of Assembly and Chairman of Napidakoe Navitu 'unsuccessfully introduced a Bill … calling for a referendum among Bougainvilleans to determine whether the island should be independent' (Premdas 1977:68).

The first Bougainville unilateral declaration of independence

In the aftermath of the December 1972 killing in the eastern highlands of two senior Bougainvillean public servants who had been involved in a car accident in which a small child was killed, secessionist feeling intensified. The educated leadership, however, gradually shifted the focus of debate to autonomy for Bougainville within PNG as their preferred approach to gaining a share of mining revenue and for dealing with Bougainville's broader needs. In late 1973, PNG reluctantly agreed to an 'interim' Bougainville provincial government (Ballard 1981; Conyers 1976:53–64; Mamak and Bedford 1974:18; Ghai and Regan 1992:56–59; Somare 1975:114–22). In 1974 and 1975 tensions developed over the demand by Bougainville's unelected Interim Provincial Government for a share of mining revenue. That dispute, and the move by then chief minister Somare in July 1974 to remove the constitutional arrangements for provincial government from the almost completed draft of the independence constitution, resulted in the Bougainville leadership making a unilateral declaration of independence (UDI) with effect from 1 September 1975, just days before PNG's independence. The secessionists were initially dismissed in Port Moresby as a minority that was strongly opposed in the north of Bougainville. But as Premdas observes:

> In late 1975, [PNG Prime Minister] Somare sent a delegation of cabinet ministers and other political personnel to ascertain the extent of secessionist sentiments … Everywhere they went, even in the northern parts of the island, they were met by large crowds, effectively destroying all lingering illusions that Bougainvilleans were undecided or divided on their demands for secession (1977:80).

Despite the existence of strong secessionist feeling, the Bougainville leadership was quite moderate. There was limited violence, the main exceptions being in January 1976 when 'secessionists destroyed government property and buildings and tore up airstrips in the northern and southern parts of the troubled island' and in June when the PNG government 'dispatched a riot police squad (sic) to southern Bougainville to evacuate the staff of Buin High School (which had been the scene of considerable disturbances a month before)' (Laracy 1991:55). Recognition from the international community for Bougainville's independence was not forthcoming and, after a failed effort to gain United Nations support for secession, negotiations between PNG and Bougainville developed and continued for about six months (Momis 2005:312–14). In mid-1976 an agreement was reached for constitutionalised autonomy, generalised to the whole of PNG through a system of provincial governments coupled with what was in effect special financial arrangements for Bougainville, then the only PNG province where a large-scale mining project was located. Its provincial government was to receive a guaranteed share of mining revenue through receipt of 95 per cent of the mineral royalties which until then had been paid by the mining company to the PNG government. (The other 5 per cent was already payable to the landowners of the mine lease area.)

Support for secession calmed after 1976, but never died. Bougainville's provincial government was initially widely accepted as a substitute for independence. There was, however, a gradual loss of faith as many people realised that Bougainville's provincial government had limited authority over matters of central concern to Bougainvilleans and in particular, mining, land and internal migration (Ghai and Regan 2006:295-96; Regan 2017; Tanis 2005). By the mid-to-late 1980s there was a growing but by no means universal sense that it had been a mistake for Bougainville to abandon the secessionist cause in 1976.

THE CONFLICT AND THE SECOND UNILATERAL DECLARATION OF INDEPENDENCE

These concerns contributed to a conflict beginning in late 1988 as new Bougainvillean leadership emerged that challenged the mining company, the national government and Bougainville's provincial government over not only the distribution of mine revenue but also concerns about social and environmental impacts of mining. In general the coalition of groups did not seek an end to mining, but rather a radical new mining regime that included considerably increased flows of revenue to mine-impacted communities and to Bougainville's provincial government (Regan 2017). While this new leadership was widely reported at the time, and has been discussed ever since, as involving mainly young mine area landowners led by Francis Ona, in fact there was a coalition of groups involved, the existence of which helps to explain how it was that the initial demands relating to mining were rapidly transformed into a generalised separatist uprising. This coalition emerged in 1987–88, and included:

- some younger generation landowners from the mine lease areas
- young Bougainvillean mine workers, who came from many parts of Bougainville
- members of the broadly representative Arawa Mungkas Association (see Mamak and Bedford (1974:13–17) for discussion of an earlier manifestation of the Mungkas Association)
- members of radical 'pressure groups', mainly from the Bana and Siwai areas of southwest Bougainville;
- members of criminal gangs recruited by leaders of other groups once police violence was being widely used
- indigenous political-religious groups such as Me'ekamui Pontoku Onoring, led by Damien Dameng (Regan 2017).

Most of the leaders of these groups were adherents of the Catholic Church, and they got strong support from some Catholic Church leaders, a fact that greatly added to the legitimacy of the coalition in Catholic-dominated Bougainville. The Catholic Justice and Peace Commission was a consistent voice of criticism of mining-related injustices (see Kigina 1984) as was the then bishop of Bougainville Gregory Singkai and several outspoken priests on the impacts of mining.

Although these groups had differing agendas and objectives, all were concerned in various ways about the impacts of the mine, and sought a far fairer mining agreement. Some of them, and notably the leadership of the Bana Pressure Group, saw secession as an important goal, but it was not a generalised one until the unifying experience of the PNG police mobile squads' violence made secession the key goal of what quickly became a more generalised uprising. Francis Ona, a young leader from the mine area and a worker at the mine, became the main leader of the coalition of groups because he was a member of most of the groups involved, but also because he was a strong personality with a particularly strong sense of grievance about the impacts of the mining company Bougainville Copper Ltd (BCL). His grievances were in large part related to internal family problems that saw him and his family excluded from distribution of BCL payments of land rents and compensation (Regan 2017:386–88; Roka 2014:23–26).

The November 1988 destruction of some mine property was the spark to a wider conflict. It involved, amongst other things, explosions that brought down power lines that supplied power to the Panguna mine site. These were actions carried out by members of the Bana Pressure Group,[7] contrary to most reports which attribute the action to young mine area landowners. The destruction of mine property was intended to put pressure on the mining company and both the national and Bougainville provincial governments to negotiate new mining arrangements. However, contrary to expectations of the Bougainville groups involved, their actions were almost immediately treated as a law and order issue and

police mobile squads were deployed from elsewhere in PNG. It was the indiscriminate police violence, initially mainly against communities in the areas around the mine but later on a broader basis, that quickly transformed the conflict into a generalised uprising, changing the key demands of the leadership away from mining-related grievances to secession.

Secession soon became the central demand of the newly established and very loosely structured BRA.

Secession soon became the central demand of the newly established and very loosely structured BRA, of which Francis Ona was the leader. Again, contrary to most reports, the BRA originated not amongst young Panguna landowners, but in members or associates of the Bana Pressure Group.[8] It soon expanded, however, to include members from most parts of Bougainville. Key BRA personnel actively recruited members of Bougainvillean criminal gangs in the belief that they would be more ready than most to use violence in response to the violence of the police mobile squads.

The PNG Defence Force (PNGDF) was deployed in April 1989, but to no avail, and its personnel too became involved in generalised violent action against the non-combatant population (Liria 1993). Closure of the mine was pursued as a goal, but Ona and the leaders around him also envisaged the mine being reopened as the major source of revenue for an independent Bougainville, provided it operated under a new dispensation, far fairer to impacted communities (Regan 2017). The mine did close in May 1989 and in March 1990 PNG forces (both police and PNGDF) withdrew from Bougainville under a ceasefire, upon which the Bougainville provincial government and all national government agencies in Bougainville ceased to operate.

In May 1990 Francis Ona made Bougainville's second UDI although, again, international recognition of Bougainville's independence was not forthcoming. Soon after the UDI was announced, PNG imposed a sea and air blockade of Bougainville that continued until late 1994. Bougainville's provincial government was suspended in mid-1990, remaining suspended until re-established as the Bougainville Transitional Government (BTG) in early 1995. The BRA sought to fill the vacuum in governance by establishing its own civilian government — the Bougainville Interim Government (BIG) — comprising founders of the BRA and other appointees of Ona and the BRA, but it was never effective.

Intra-Bougainville conflict

Internal divisions amongst Bougainvilleans developed rapidly following the departure of PNG forces in March 1990.

Internal divisions amongst Bougainvilleans developed rapidly following the departure of PNG forces in March 1990. Contributing factors included the very loose structures of the BRA and the presence in its ranks of many criminals. A significant contributing factor was the BRA standing orders issued by Ona which invited action against sorcerers, orders that provided the motivation for many targeted attacks based more on localised jealousies and conflicts than on any real need for action. Another factor in emergence of conflict was the strong localised identities of Bougainville (Regan 2005), with much of this conflict reflecting longstanding sources of division. In the end, a pan-Bougainville identity and the development of political demands associated with that identity had been able to unite Bougainvilleans when there was a national government and an international mining giant present to oppose. In the absence of both of them, localised identities took precedence and were often a factor in conflict on the island.

By the latter part of 1990 leaders of some local communities threatened by localised conflict actively supported the return of PNG forces, which began in Buka in September 1990. Former BRA elements loyal to such leaders then began actively assisting PNG forces, in time becoming part of the loosely structured Bougainville Resistance Forces (BRF). These developments established patterns of conflict that persisted until 1997. Terrible violence was unleashed through this internal Bougainville conflict, and at least some of this violence was modelled on and legitimised by the violence Bougainvilleans had experienced at the hands of the PNG security forces.

The conflict took on three distinct but overlapping dimensions. First, the BRA pursued independence and fought the returning PNG forces, gradually gaining the upper hand, at least from about 1994. Second, the BRA also fought BRF elements. The BRF leadership tended to oppose independence, but mainly because of fear of what exclusive BRA control of an independent Bougainville might mean rather than a principled opposition to independence. The third dimension of the conflict was highly localised conflicts over land, relationships and other family and community level causes, often but not always involving local BRA and BRF elements. All three dimensions of the conflict were violent and divisive and often to give rise to fluid and shifting relationships between groups at the local level.

Impacts of the conflict

The impacts of the conflict were severe. Varying estimates of the numbers of conflict-related deaths have been made, from 4000 to 5000 (see Braithwaite et al. 2010:87–88) up to 20,000.[9] Given that Bougainville's population immediately before the conflict was about 150,000, and that between 10,000 to 15,000 left Bougainville as a result of the conflict during 1989 and the first half of 1990, then even 4–5000 deaths was an appalling outcome. The deaths include perhaps 1000 or more from conflict, including both Bougainvilleans and several hundred PNGDF and police personnel. In addition, there were many extra judicial killings by all groups involved in the conflict, as well as an unknown number of deaths caused or contributed to by the PNG blockade of BRA-controlled areas. These deaths, and the many more injuries that occurred, caused grave trauma not only for Bougainville but also for the rest of PNG. Another source of anguish for Bougainville was the displacement of 60,000 people (about one third of the total population) from their hamlets and villages to displaced persons camps, called care centres. Deep divisions amongst Bougainvillean communities arising from the conflict led to further trauma. Other impacts included destruction of virtually all public infrastructure and private sector productive assets, and destruction of the capacity of both Bougainville's provincial government and of national government agencies previously operating in Bougainville. For PNG, the deaths and injuries suffered by many PNGDF and police personnel was a source of grave trauma, and contributed to significant loss of morale in both organisations. Further, the closure and loss of revenue from the Panguna mine had deleterious impacts on the PNG economy.

The extent of the divisions amongst Bougainvilleans was manifested in the establishment of opposing government structures: the BIG associated with the BRA and from early 1995 the BTG which was quite closely associated with the BRF (a nominated member represented the BRF in the government).

The cause of independence from PNG became a deeply held core belief for many Bougainvilleans.

Amongst the BRA personnel and the extensive support base it enjoyed in many Bougainvillean communities, PNG was seen as at fault due to its actions in the origins of the conflict, and in particular the indiscriminate violence wrought initially by the police mobile squads and later by the PNGDF. Many felt deep bitterness towards the PNG state. As a result, the cause of independence from PNG became

a deeply held core belief for many Bougainvilleans. Those views remain little changed by the 18 years that have elapsed since the BPA was signed. So deep was the conviction of pro-secessionists that they developed their own explanations for why BRF members and other Bougainvilleans opposed secession, which included a widespread belief that the support of BRF members and other pro-PNG leaders was being bought by PNGDF payments to the individuals concerned.

On the other hand, the experience of not only the chaotic internal conflict that began after the PNG forces withdrew, but also the subsequent localised conflict, led many Bougainvilleans to oppose independence, especially if it were to be under a BRA-dominated government.

THE PEACE PROCESS

From as early as late 1988, various initiatives were directed to either preventing the violence (in the early stages of the conflict) or ending the violence and achieving peace (see for example, PNG 1992). These included the talks held on New Zealand naval vessel NMNZS *Endeavour* in mid-1990, in Honiara in January 1991 and the October 1994 peace talks in Arawa. Although there were hopeful signs associated with some of the initiatives, they all failed to end the conflict for a variety of reasons. This is not to say that these efforts were a waste of time, as cumulative lessons were learnt through what was attempted (see Regan 2010:141–42).

Quite apart from such peace efforts involving the PNG government and the BRA/BIG leadership, there were also localised reconciliation efforts. Here it needs to be noted that reconciliation plays a significant role in Bougainville societies. To understand the importance of reconciliation it helps to consider the situation of pre-colonial Bougainville where, in the absence of anything vaguely resembling the state, violence was a common factor in inter-group conflict. However, the outcomes of violence tended to be unpredictable and as a result there were always people (usually older people, both men and women) who would step in to seek an end to conflict and encourage reconciliation between those in conflict. As the arrival of colonialism in Bougainville was quite recent, it is no surprise that there has been considerable continuity not only in the basic pre-colonial social groupings, but also in the culture of inter-group reconciliation. Much the same culture of reconciliation can be found in societies throughout the Melanesian cultural area (including Indonesia's Papua provinces, PNG, Solomon Islands, Vanuatu, New Caledonia and parts of Fiji).

During the Bougainville conflict, the deep divisions and violence between groups were initially visceral, but with time concern grew within many affected social groups about the dangers in ongoing localised conflict. From an early stage, a few people emerged at the local level seeking to end it. Although they often faced opposition, even vilification, from those engaged in or supporting the conflict, over time, as negative impacts of the localised violent conflict became more evident, more room emerged for voices seeking an end to violence and a beginning to reconciliation. Efforts were made to establish communications between opposing groups as a precursor to localised reconciliation and peacemaking. These efforts gradually provided a constituency for moderate leaders of the opposing factions, who by 1994 were becoming increasingly concerned about the divisive impacts of the conflict and that independence would cease to be a real possibility for a deeply divided Bougainville.

From late 1995, several developments created the political space within which a successful peace process was able to emerge. Two major and closely related factors come to the fore. One was the widespread emergence of localised leadership focused on local reconciliation that, in a way, empowered moderate leaders with all factions to actively work for peace. One of those was Theodore Miriung, a lawyer and former senior public servant who emerged as a moderate leader in the aftermath of the

October 1994 Arawa peace conference. He played a major role in persuading the national government in early 1995 to lift the suspension on Bougainville's provincial government, which had become the BTG. Under Miriung's leadership the BTG focused on finding solutions to the conflict. Opposing Bougainvillean factional leaders began meeting quietly and informally in 1994, leading to more formal talks in late 1995 in Cairns, Australia, between the BTG and BRF leaders on one side and BIG and BRA leaders on the other: for the first time moderate leaders on both sides engaged and explored possible ways ahead.

Unfortunately, a PNGDF ambush of BIG/BRA leaders returning to Bougainville from the December 1995 talks in Cairns resulted in a hiatus in the talks and was followed by a significant escalation of military activity by the PNGDF in 1996. These increased PNGDF efforts were, however, singularly unsuccessful. The failure of PNGDF action was a significant part of the motivation by the PNG government for ultimately unsuccessful efforts from late 1996 to engage mercenaries in an effort to defeat the BRA, known as the Sandline affair (see Dinnen et al. 1997; Dorney 1998; O'Callaghan 1998). Paradoxically, however, the Sandline affair resulted in a change of attitude on the part of the BIG/BRA leadership. Not only did the failed effort to engage the Sandline mercenaries give rise to concerns in the BIG/BRA leadership about the risks of a significant new and unpredictable escalation in the conflict, but the role of the PNGDF in ousting the Sandline personnel also contributed to senior BRA and BIG leaders reviewing their attitudes towards the PNGDF (Regan 1997b). At the same time, the Sandline affair added to what was already steadily growing pressure from the international community on PNG to move away from use of military force to resolve the conflict, towards use of political processes.

A peace process developed in mid-1997, initiated by moderate Bougainvillean leaders on both sides of the conflict.

In any event, a peace process developed in mid-1997, initiated by moderate Bougainvillean leaders on both sides of the conflict who had become deeply concerned about the potential long-term impacts of the intensifying divisions amongst Bougainvilleans. In a remarkable series of meetings from mid-1997 to January 1998, brokered mainly by New Zealand government officials, first just between opposing Bougainville factional leaders, and then between the loosely linked Bougainville leaders and the PNG government, the opposing factions 'vomited' out their grievances with one another and agreed to work together (Adams 2001; Hayes 2005; Mortlock 2005). The previous localised intra-Bougainville peacemaking and reconciliation efforts provided much of the impetus and even the modelling for the pan-Bougainville peacemaking and reconciliation efforts, and then for the peace process between the combined Bougainville leadership and the PNG government.[10]

The peace process had three main stages. The first was from mid-1997 to mid-1999, and mainly comprised efforts to build trust between previously opposing and still deeply distrustful groups. To that end, the Lincoln Agreement (one of three main agreements reached in the first seven months of the process) provided for the establishment of a single Bougainville Reconciliation Government, intended to bring together the previously opposing Bougainville governments, the BIG and the BTG. In this first phase, an international intervention was also developed through agreement between the opposing Bougainville groups and the PNG government. It comprised two main components. One was an unarmed regional group of personnel from four countries which monitored first a truce and later a ceasefire (the New Zealand-led Truce Monitoring Group from November 1997 to March 1998, then the Australian-led Peace Monitoring Group from April 1998 to June 2003). The second was a small United Nations (UN) observer mission, supplied by the UN Department of Political Affairs, which operated from mid-1998 to June 2005 (known as the United Nations Observer Mission on Bougainville or UNOMB).

The second phase of the process, from 30 June 1999 to 30 August 2001, was the negotiations for a political settlement to the conflict. The differences amongst the Bougainville factions, in particular, had been too deep to allow for negotiations before June 1999. The third phase, from August 2001, involved the implementation of the BPA. The initial steps were drafting the PNG constitutional laws that give effect to the BPA, the development between September 2002 and November 2004 of the Bougainville constitution under which the Autonomous Bougainville Government (ABG) was established in June 2005, and the implementation of the three-stage weapons disposal plan contained in the BPA. In many ways the implementation of the BPA has continued ever since August 2001, with the steps currently under way to prepare for the referendum on Bougainville's independence being just the latest stage in the implementation process.

While the first phase of the peace process was directed at bringing the deeply divided parties closer together, the divisions, especially those between Bougainvilleans, were still intense, so much so that new intra-Bougainville divisions emerged in the early stages of the peace process. Francis Ona and the minority of BRA elements who supported him was one such division as Ona opposed the peace process, claiming that Bougainville was already independent as a result of the May 1990 UDI. While Ona did not have enough armed supporters to disrupt the peace process, his strident support for Bougainville secession put strong pressure on the BRA leadership who were involved in the peace process. It also gave them useful arguments for the negotiations with PNG — they were able to claim with a high degree of credibility that they had limited room to move for fear of losing popular support to Ona. (For more on this aspect of the 'new' divisions, see Regan 2010:47–50).

A second source of such division related to the significant difficulties experienced in establishing the Bougainville Reconciliation Government under the Lincoln Agreement of January 1998. These difficulties saw three of Bougainville's four MPs, together with leaders of Buka's council of elders and some BRF elements, refusing to work with the mainstream Bougainville leaders supporting the peace process. In fact, they boycotted the May 1999 elections of the Bougainville People's Congress (which was designated as the Bougainville Reconciliation Government envisaged by the Lincoln Agreement) and the initial negotiations for the political agreement in June 1999. With the BRF and integrationist support more generally concentrated in particular areas, especially the large island of Buka and the northern part of Bougainville Island, there were serious risks of long-term geographic divisions emerging from the peace process. Indeed, a Tok Pisin slogan often used by a key Buka leader at this time was: *Sapos Bogenvil I bruk lus lo PNG, Buka bai bruk lus lo Bogenvil* (If Bougainville secedes from PNG, then Buka will secede from Bougainville). The split in this case emerged in December 1998. It then took almost 12 months before the dissidents and the leadership of the Bougainville People's Congress were able to agree to work together. (For more on this second aspect of 'new' intra-Bougainville divisions, see Regan 2010:50–52.)

THE REFERENDUM IN THE BPA

The combined Bougainville negotiating position

To understand the quite complex referendum arrangements in the BPA, and in particular the reasons why it provides for deferral of the referendum for 10 to 15 years after the ABG was established and why the referendum outcome is not binding on PNG, it is necessary to consider the origins of the BPA in the more than two years of negotiations that occurred in the second phase of the peace process, between June 1999 and August 2001.

The negotiations for the BPA actually involved two separate negotiations. The first was an intra-Bougainville negotiation in May and June 1999, intended to find a compromise between the divided

Bougainvilleans. That first stage resulted in the joint leadership in the Bougainville People's Congress developing a combined Bougainville negotiating position (Regan 2002), which they took into the second series of negotiations which lasted more than two years between Bougainville and PNG, from 30 June 1999 to 30 August 2001. Although the three Bougainville MPs, some BRF leaders and some Buka leaders were not part of these intra-Bougainville negotiations, they subsequently accepted the combined negotiation position when they reconciled with the Bougainville People's Congress in November 1999.

The election of the Bougainville People's Congress in May 1999 saw pro-secession and pro-integration leaders sitting together in the one institution for the first time. Developing the compromise 'united Bougainville negotiating position' was not easy. Up until that point the secessionist leaders had had very little appreciation of the degree of suspicion of them and their goals on the part of many of the BTG and BRF leaders. The BIG and BRA leaders to that point had been arguing that Bougainville should pursue the earliest possible independence, and the fear on the BTG and BRF side was that the BIG and BRA leadership might seek to dominate an independent Bougainville, excluding all others.

In the first few months of 1999, however, the split in the leadership supporting the peace process and the boycott of the Bougainville People's Congress by the three MPs and other leaders had brought home to the secessionist leaders the fact that there were serious differences amongst the Bougainville leadership on secession. So in the process of intra-Bougainville negotiations that preceded negotiations with PNG, the secessionists reluctantly accepted a referendum on independence as a democratic basis for taking such a step, but wanted it held as early as possible (such as within three to five years) and demanded that its outcome be mandatory. Other Bougainvillean groups were open to a referendum being held, but feared domination by armed BRA groups if an early referendum occurred before reconciliations were held and normalcy returned. So they argued for deferral of the proposed referendum for a longer period, to allow for reconciliation and for disposal of weapons. Some other Bougainvillean groups were initially opposed to anything other than Bougainville continuing to be a part of PNG, but with a high degree of autonomy. It was difficult to reach a common Bougainville position.

In an impressive process that has been described elsewhere (Regan 2002; Regan 2010:85–88) the combined leadership in the Bougainville People's Congress reached such a compromise which:

> involved those supporting independence dropping their demands for early independence and instead agreeing to deal with that issue through a referendum …. but deferred to allow time for divided Bougainvilleans to reconcile … On the basis that those supporting integration would agree to support the holding of the referendum, the secessionists agreed to support the high autonomy for Bougainville preferred by the integrationists (Ghai and Regan 2006:597).

The referendum would be held within six to eight years and the outcome would not only be binding on both PNG and Bougainville, but would apply to the whole of Bougainville irrespective of whether particular areas voted differently from the majority.

As they considered incorporating these compromises into a 'common Bougainville negotiating position' being prepared in June 1999 for the first negotiating session with the PNG government on 30 June 1999, a major concern was how to avoid the risk that a referendum might cause conflict if a substantial minority was left dissatisfied by the outcome. The particular concern was Buka and parts of north Bougainville where opposition to the BRA was strongest. As a result, the initial common negotiating position proposed that:

- » a vote of two-thirds or more of the Bougainville electorate would be conclusive
- » a vote of between 55 per cent and two-thirds would be conclusive only if approved by a two-thirds absolute majority vote of the Bougainville legislature
- » in case of either a vote between 55 per cent and two-thirds where the Bougainville legislature did not approve, or a majority vote of less than 55 per cent, a further referendum could be held at a time determined by the Bougainville legislature.

The precedent of influence here was the 1998 Noumea Accord negotiated for New Caledonia, under which as many as three referendums on independence can be held if the first does not result in a majority vote for independence.

In addition, the Bougainville side asserted that a vote in such a referendum should not only be binding on both PNG and Bougainville, but also be binding on all parts of Bougainville (if the majority vote in Bougainville was to be for independence, then a vote against independence in a particular part of Bougainville would not provide a basis for that part to remain within PNG, a provision proposed with particular reference to Buka).

From the outset of the negotiations between Bougainville and PNG, the PNG side opposed a referendum on independence, seeing that as an affront to its sovereignty (Regan 2010:59) and likely to establish a dangerous precedent for other parts of PNG, especially those where there had been a history of micro-nationalist movements (see May 1982), as well as a threat to Bougainvilleans opposed to independence. In the first few months of negotiations for the BPA, it became apparent to the Bougainville negotiators that, quite apart from the general concern that the PNG side had with a referendum, PNG had particular problems with the possibility that there could be more than one referendum. In the interests of seeking compromise on the referendum, the proposals for special majorities and a possible second referendum were dropped.

The negotiations for the BPA occurred in 21 sessions varying in length from a day to a month, held over two years between June 1999 and August 2001. The differences between the PNG and Bougainville parties over the referendum were extensive and extremely difficult to resolve. Indeed, in the early stages of negotiations the PNG side sought to avoid discussion of the issue. When the referendum was discussed, differences between the sides dominated. Despite the best efforts of the UNOMB director in chairing negotiations and mediating when he could, by late 2000, differences over the referendum resulted in stalemate. Tensions were high and a breakdown in the peace process seemed quite possible.

The referendum compromise, December 2000

It was an Australian government intervention in December 2000 that broke the deadlock. This mediation was possible only because of a little known but highly significant change in Australian policy in relation to Bougainville first announced in January 2000 by then Australian high commissioner to PNG, Nick Warner. The previous policy position had emphasised Australia's respect for PNG's territorial integrity, with Bougainville regarded as an integral part of PNG (a view that caused grave concern to pro-secession Bougainvillean leaders, committed as they were to self-determination for Bougainville). The newly announced position was that Australia 'would accept and support a political solution negotiated by the parties' (Downer 2001:33–34).

This major policy change was largely the outcome of the close engagement of Australia in the peace process, especially (but not only) through its leadership, from early 1998, of the regional Peace Monitoring Group (Breen 2016; Regan 2010:65–71; Wehner and Denoon 2001). This engagement

had helped the Australian government better understand not only the depth of feeling underlying Bougainville's demands in the negotiations and the difficulties involved in bridging the gap between PNG and Bougainville positions, but also the difficulties in Australia playing neutral peace monitoring or mediation roles if it was seen as having a predetermined position, supporting one side, on the most divisive issue: Bougainville independence. Many Bougainvilleans blamed Australia for the conflict because it had not only authorised the establishment of the mine, but had also supported the PNGDF during the conflict. Consequently, any suggestion that Australia was favouring the PNG side in the negotiations tended to undermine a claim to Australian neutrality.

The then Australian minister for foreign affairs, Alexander Downer, made his compromise proposal on the referendum arrangements in the course of visits first to Bougainville and then to Port Moresby in December 2000. His advice on the issues came from High Commissioner Warner and his first secretary responsible for Bougainville matters, Sarah Storey. Downer proposed that the parties should agree to a constitutionally guaranteed referendum, deferred for a longer period than Bougainville had hitherto proposed — 10 to 15 years after an autonomous Bougainville government was established. Most importantly, the referendum outcome should not be binding, but rather would become a matter for consultation between the parties, with the PNG parliament having ultimate decision-making authority.

Australia's compromise proposal put forward the idea that the referendum outcome should not be binding, but rather would become a matter for consultation between the parties.

The Australian proposal was intended to remove the immediate sources of tension over the question of a referendum. The first dimension of the proposal — deferral of the decision on the most contentious issue for an extended period — aimed to give the parties the opportunity to build trust and reach a better understanding through the operation of the autonomy arrangements (already largely agreed by December 2000). For its part, PNG was being offered the opportunity to manage its relationship with Bougainville in such a way as to gradually reduce division and bitterness and in doing so reduce support for independence. The assumption was that PNG would grasp the opportunity to make the autonomy arrangements work so well (for example, through financial support, transfer of powers, capacity building) that even many pro-secessionists might be persuaded to vote against secession.

The second dimension to the compromise was to significantly reduce the salience of the referendum. Instead of being decisive on the issue of independence (as proposed by the Bougainville negotiating position), if the referendum vote was to be in favour of independence then the parties would consult, with a view to finding agreement on the way forward. Hence although the referendum would not be binding, the national government could not simply ignore it. The government would be constitutionally obligated to consult with the Bougainville leadership about the referendum results.

The compromise proposal was accepted mainly because it offered both parties an escape from possible collapse of the talks and a likely consequential crisis. It did so through arrangements that gave each party a significant part of what they sought. Bougainville achieved a constitutionally guaranteed referendum and, after 18 months of tense negotiations, the Bougainville negotiators realised what a significant achievement that was. In doing so Bougainville conceded that the referendum alone would not decide the question of independence.

Serious concerns about that change were considerably reduced by what was seen as separate assurances provided by Downer's arguments in favour of the compromise. To the Bougainville parties he pointed to the East Timor precedent, saying that although the outcome of its 1999 referendum was not

binding on Indonesia, once an overwhelming majority of East Timorese voted in favour of independence the international community ensured that the vote was honoured. The Bougainville negotiators saw this argument as an assurance of the same international community support should there be similar outcome when the Bougainville referendum was held.

As for PNG, by this late stage of the negotiations for a political agreement it was becoming clear that there would be no agreement without including a referendum on independence; the depth of pro-secession feeling was clear. PNG conceded a referendum while getting the right of final decision on the outcome. Downer assured PNG that its sovereignty was protected if the outcome was not binding and ultimate authority rested with the PNG parliament. In doing so, PNG leaders took the view that Australia would support PNG's authority if it were to reject a referendum vote in favour of independence.

COMBINING AUTONOMY AND A DEFERRED REFERENDUM

As discussed briefly already, a key assumption of the proposal for inclusion in the political settlement of the combination of constitutionalised asymmetrical autonomy arrangements and a deferred but non-binding referendum on independence was that it would offer PNG the opportunity to persuade even pro-secession Bougainvilleans on the long-term advantages of remaining part of PNG. The most obvious example of such an approach in the region was the way that France was implementing the Matignon Accord (1988) and the Noumea Accord (1998) in relation to New Caledonia's political future by ensuring a programmed approach was followed, not only in the irreversible transfer of governmental powers, but also the adequate flow of resources to New Caledonia (Maclellan and Regan 2018).

However there are some aspects of the Bougainville arrangements that perhaps militated against PNG following the example of France. In particular, the outcome of the referendum in New Caledonia is binding, whereas that will not be the case with the Bougainville referendum. As a result there are those in PNG that feel it is not necessary to treat Bougainville too much as a special case, because even if the Bougainvilleans become disgruntled with their treatment by PNG, they will not have an enforceable right to separation even after a majority vote for independence. Further, PNG has much less freedom than France has to move in terms of making special provision for New Caledonia, especially in funding. Most of the provinces that constitute the rest of PNG have similar claims in relation to lack of adequate funding from the centre to those that Bougainville makes. Particularly in the period of low commodity prices since the advent of the global financial crisis, special treatment for Bougainville in funding could have resulted in strained relations for the centre with provinces elsewhere in the country. Hence although the autonomy arrangements are definitely designed to be asymmetrical — applicable only to Bougainville and not to the provinces elsewhere in PNG — there is clearly pressure on the PNG government to reduce the extent of asymmetry.

There has been real disappointment in Bougainville with the progress in implementation of the autonomy arrangements.

Whatever the reasons, there has been real disappointment in Bougainville with the progress in implementation of the autonomy arrangements, both in the pace at which powers and functions have been transferred from the national government and in the flow of funding from the national government to the ABG. The most serious problems with funding relate to the payment of one of the two main annual grants payable to the ABG by the national government — the restoration and development grant. In a conflict running since about 2010, the ABG has been claiming serious underpayment of this grant, resulting from a failure by PNG to calculate the amount payable annually on the basis of the formula in

section 49 of the Organic Law on Peace-building in Bougainville. On the ABG's calculations, the amount of the annual grant should be around K70 million (about AU$29.4 million), as opposed to the K15 million (about AU$6.3 million) annual payment usually provided in the national budget, and arrears of payment amount to in excess of K700 million. As the other main grant — the recurrent unconditional grant — meets the costs of the functions and powers vested in the ABG and so is in essence tied to meeting the costs of the existing ABG functions and powers, the restoration and development grant is of great importance if the ABG is to have funding available to allocate to development projects at its discretion. The failure, over about eight years now, to resolve the ABG's concerns about the restoration grant have undoubtedly contributed to strained relations between the ABG and the national government. These strained relationships suggest a failure on the part of the national government to grasp the opportunities inherent in the combination of asymmetrical autonomy and a deferred referendum.

THE REFERENDUM IN BOUGAINVILLE'S POLITICS AFTER 2001

As mentioned earlier, Ona and some BRA elements refused to join the peace process in 1997 and by early 1998 were claiming to be the true government of Bougainville through Ona's proclamation of the Republic of Me'ekamui. Throughout the negotiation of the BPA and the early period of its implementation Ona was a strident critic of the peace process and claimed that the referendum proposal was actually a trick on the part of the PNG government, intended to divert attention from the status of independence that he claimed had already been attained in May 1990. Soon after the ABG was established, however, Ona died in July 2005 quite unexpectedly. In the aftermath of his death, the Me'ekamui leadership split into two main factions and some associated semi-independent locally based groups. One of the main factions, calling itself the Me'ekamui Government of Unity, began working with the ABG from about 2007 which led to restoration of ABG government services in much of what had previously been a Me'ekamui-imposed 'no-go-zone' in areas around the mine and down to the main Buka–Arawa road. Nevertheless, even the Me'ekamui Government of Unity maintained a degree of separation from the ABG and continued to be sceptical about the possibility of a referendum. (For more on the post-Ona Me'ekamui leadership, see Regan 2010:114–17.)

This situation continued until about 2016, when it became increasingly clear that the national government was beginning to engage in a serious way with the ABG about the referendum. The first real progress towards organising the referendum began at the May 2016 Joint Supervisory Body (JSB).[11] From then on there has been a growing acceptance amongst the Me'ekamui leadership that the referendum will really occur and this change has manifested itself in the agreement by the Me'ekamui factions to a new weapons disposal program.[12]

The most significant leadership element refusing to commit to working with the ABG on the referendum is yet another group claiming to be the legitimate government of Bougainville — the Kingdom of Papala, headed by the self-appointed claimant to the monarchy, Noah Musingku. He first came to public attention in 1998 in Port Moresby as head of a major ponzi scheme, called U-Vistract, and fled to his home province of Bougainville in 2003 to escape warrants for his arrest arising from legal proceedings in relation to the failure of U-Vistract to pay hundreds of millions owing to investors in the scheme. Initially based at Guava village with Francis Ona, Musingku fell out with Ona in mid-2004 and went to his home area of Tonu in Siwai and from there has developed his claims about monarchy and the imminent payouts of the huge sums owed by U-Vistract. In 2018 it was widely reported that Musingku is opposed to the referendum, on the grounds that Bougainville is already independent, and that he seeks to discourage his supporters from even enrolling to vote. The speculation of many observers is that Musingku really opposes the referendum for fear that an ABG with growing legitimacy (or a successor

government to the ABG) might eventually take action against U-Vistract and the supposed Kingdom of Papala. (For more about U-Vistract, the Kingdom of Papala and Noah Musingku, see Cox 2014; Regan 2010:117–26.)

LEGAL SOURCES OF THE REFERENDUM ARRANGEMENTS

The constitutional basis

It is necessary here to set out briefly the PNG constitutional framework, which is unique in the Pacific, incorporating facets drawn from constitutional arrangements found in European constitutions. In particular, PNG has a system of organic laws, so called because they are organically connected to the constitution. Organic laws are made about subject matters provided for in the constitution and are as difficult to make and amend as the provisions of the constitution itself. Further, organic laws are of higher status than normal statutes in the hierarchy of laws in PNG and so prevail over ordinary statutes in cases of inconsistency. Hence it should come as no surprise that in giving constitutional effect to the BPA, a new part was inserted in to the constitution dealing with autonomy and referendum, but that in addition there was an organic law which provided details of matters authorised in that new part of the constitution.

The referendum arrangements are in fact set out in four main documents. Of course, the foundation is the BPA itself, which contains two quite brief sets of referendum-related provisions.[13] The most important are paragraphs 309–30 in part C of the BPA, 'Agreed Principles on Referendum'. In addition five sentences under the heading 'Referendum' that appear as Item 2 in the short 'Introduction and Outline' of the BPA are intended as a guide to what might be regarded as the BPA's 'substantive' provisions. Nevertheless, those five sentences are clearly part of the BPA and can be useful in illuminating the intention of particular substantive provisions (for example, in relation to the role of good governance and weapons disposal in setting the date for the referendum, as discussed further in chapter five).

As specified in paragraph 1 of the BPA, the agreement 'is the basis for drafting constitutional amendments and other laws, which the National Government will move to provide for implementation [of the agreement]'. The national constitution contains brief provisions (sections 338–43)[14] which not only set out the central principles for the referendum, but also authorise the detailed arrangements to be set out in an organic law. Those provisions are found in part XIV of the constitution, a 30-page addition to the constitution directed to implementation of the BPA. The principles in the sections on the referendum include: the requirement that the referendum will be held; setting the date of the referendum; specifying the only circumstances in which a decision can be made not to hold the referendum; deciding the question or questions to be asked in the referendum; a requirement for cooperation between governments to make the referendum free and fair; and the manner of dealing with the results and implementation of the referendum.

The preamble to the law that inserted part XIV into the constitution is also relevant in that it sets out in brief the history of conflict, the entering into the BPA, its provision for autonomy for Bougainville and a 'referendum among Bougainvilleans on the future political status of Bougainville' and the need to 'amend the Constitution so as to make provision in the laws of Papua New Guinea for that system of autonomous government and for that referendum'. The use of the expression 'a referendum among Bougainvilleans' in both the BPA and that preamble to the amending law is in contrast to specific provisions of the organic law enabling non-Bougainvillean residents of Bougainville to vote in the referendum, as discussed in chapter six.

Section 340 of the constitution authorises the establishment of 'The Organic Law on Peace-building in Bougainville — Autonomous Bougainville Government and Bougainville Referendum' (henceforth the organic law). Amongst other things, its provisions on the referendum[15] deal with: establishing the independent agency to conduct the referendum; authorising a schedule to the organic law to set out detailed rules for conducting the referendum; and resolving difficulties, inconsistencies or gaps in the totality of the legal arrangements for the referendum.

The overwhelming bulk of those legal arrangements is in the lengthy schedule 1 to the organic law, entitled 'Rules Relating to the Conduct of the Referendum'.[16] Its detailed provisions about how the referendum is to be conducted are based heavily on the PNG electoral law for elections for the national parliament as it stood in 2001. Indeed the schedule is the equivalent of a complete electoral law on the conduct of an election — covering the rolls of voters, the conduct of the polling and the scrutiny and so on. The Bougainvillean parties insisted that such detail be included in the constitutional laws because they feared difficulties in getting agreement to such arrangements if decisions were left to the time when the referendum was to be held, at least 10 to 15 years after the BPA was signed. Of course, the schedule does significantly modify the electoral law to meet the requirements specific to a referendum. For example, the schedule gives the independent agency to conduct the referendum a role in 'the promotion of informed debate on each side of the question or questions to be put in the Referendum' (sch. 1.9(1)(a)) which is certainly not a role usually vested in authorities responsible for management of elections.

Another relevant law is the Bougainville constitution which is itself authorised by the national constitution and sets out the structures and processes of the ABG. It contains referendum-related provisions in the preamble and in sections 193 and 194.[17] The most significant provision is section 194 which sets out the procedure that must be followed by the ABG should the question arise as to whether the referendum should not be held (a matter discussed in chapter five). Other provisions are also relevant to the referendum, notably sections 7 and 218. Section 7 provides a definition of who is a Bougainvillean, and requirements set out in that section were accepted by the June 2018 meeting of the JSB as the criteria under section 55 of the organic law needed to determine the links with Bougainville that a non-resident Bougainvillean must have in order to be entitled to vote at the referendum (see chapter six). Section 218 sets out the procedure that must be followed for the Bougainville Executive Council to be consulted about and agree to constitutional regulations under section 349(2) of the national constitution and under section 66(3) of the organic law.

One other constitutional instrument with considerable importance to the referendum is the charter establishing the agency to conduct the referendum — the Bougainville Referendum Commission.[18] Provided for by section 58 of the organic law, the charter is made by the head of state, on advice of the PNG Electoral Commission, but only where the Bougainville electoral authority agrees.

'Double entrenchment' of the Bougainville-related constitutional laws

Sections 345 and 346 of the PNG constitution make special provision regarding amendment of not only the provisions concerning Bougainville in the national constitution but also the organic law, offering an unusual degree of protection from change for part XIV of the PNG constitution and for the organic law. They provide that neither the autonomy nor the referendum arrangements can be altered unilaterally by the national parliament. These sections became known during the negotiations for the BPA as the 'double entrenchment' provisions. Neither part XIV of the PNG constitution nor the organic law can be amended or repealed by the PNG parliament without the agreement of the ABG. The Bougainville

constitution (section 217) sets out the procedures for consideration and voting by the Bougainville legislature on any proposed alteration to the Bougainville-related provisions of these PNG constitutional laws. In addition to the requirement for widespread public consultation in Bougainville before any vote can be held in the Bougainville legislature, a two-thirds absolute majority vote of the legislature is necessary for such a law to be passed on the referendum arrangements. Only a simple majority is required for ABG agreement to other Bougainville-related provisions of the national constitutional laws.

Human rights and other constitutional provisions

Section 276 of the national constitution provides that part XIV of the constitution applies:

> Notwithstanding the provisions of this Constitution, and where the provisions of this Constitution are inconsistent with the provisions of this Part [i.e. Part XIV], the provisions of this part shall prevail.

The aim of this section is to ensure that part XIV takes full effect despite the possible existence of contrary provisions elsewhere in the constitution. It does away with the need for extensive cross-referencing that might otherwise be required. Section 277 goes further and states that part VIA of the constitution — on provincial and local-level governments — does not apply to Bougainville.

The effect and application of sections 276 and 277 have not yet been considered judicially. It is unlikely that a court would see section 276 as overriding provisions clearly intended to be of general application. The most relevant provisions are the human rights provisions of the PNG constitution which are extensive. Of particular importance could be the protections of the rights to freedoms of conscience, thought and religion, of expression, of assembly and association, and possibly freedom of information. In general, international good practice for referendums includes the principle that 'use of referendums must comply with the legal system as a whole' (Venice Commission 2007:11).

In addition, the National Goals and Directive Principles (NGDPs) set out in the preamble to the PNG constitution may be relevant as they are intended to guide government action. The five principal national goals include 'equality and participation' under which 12 separate directive principles are set out, some of which could be of considerable relevance when giving effect to the referendum arrangements. Although under section 25 of the PNG constitution the NGDPs are non-justiciable (that is, not enforceable by judicial order), they are nevertheless required by the same section to be given effect by all governmental bodies and should guide any person in the exercise of any law or any power conferred by law. Hence, any authority implementing or interpreting the legal arrangements on the referendum should be doing so with reference to the NGDPs, seeking to give effect to them 'or at least not to derogate them' (subsection 25(3)).

The BPA as a source of interpretation

There are two main reasons why the BPA remains relevant to understanding the changes to the PNG constitutional laws which give effect to the BPA. The BPA is not only the main source[19] of those laws, but it is:

- also made available by the PNG constitution as a source of interpretation of the constitutional laws (subsection 378(3)); and
- required to be 'interpreted liberally, by reference to its intentions and without undue reference to technical rules of construction' (subsection 378(4)).

The BPA is also specifically referred to in some of the constitutional law provisions in such a way that the provisions can only be understood by direct reference to the BPA.[20] However, while the BPA is clearly relevant to understanding provisions of the constitutional laws, it is important to be aware of potential dangers in relying on it automatically when considering the referendum. The main reason is that the quite brief BPA provisions were elaborated in the process of developing the relevant provisions of part XIV of the PNG constitution and — especially — the organic law. Excessive reliance on the BPA provisions can be misleading in particular circumstances.

Separate considerations arise as to, first, the circumstances where a court might look to the BPA when interpreting provisions of the constitutional laws and, second, how courts would approach determining the intention of a particular provision of those laws. These scenarios must be discussed briefly because of the possibility of court cases arising during preparations for, or conduct of, the referendum that raise questions of interpretation of the referendum provisions of the constitutional laws.

In relation to the first question, in general, courts do not look to 'originating materials' such as the BPA in cases where the meaning of the provision under consideration is clear. But in cases of doubt, such materials can, and very often will, be used as an aid to interpretation, particularly where (as here) there is a constitutional authorisation to do so. Of significance here is the fact that when a court does make use of the BPA it will be required to also consider the intention of the BPA. As to the second question, the national constitution provides no specific guidance on how a court would approach the issue of determining the intention of the BPA. There has not been a case (so far) requiring interpretation of the constitutional laws that implement the BPA and therefore no case where the intention of the BPA could have been assessed. However, some guidance may be found in a 2015 Supreme Court decision on other aspects of the PNG constitution. The court was interpreting a series of amendments to the provisions on the 'grace period' the constitution provides after the election of a prime minister within which motions of no confidence cannot be moved against the prime minister. The court decided to consider the intentions of the amendments and to do so, sought evidence from several former prime ministers as to what the intention was.[21] If a similar approach were followed in relation to the BPA, the court might be expected to seek evidence from persons who were involved in negotiating the BPA as to the intentions of the BPA. Such persons could include John Momis, currently the president of the ABG and Sir Moi Avei who was minister for Bougainville affairs for the last nine months or so of the 26-month negotiation period for the BPA.

Additional legal arrangements can be made

As discussed further in chapter six, additional legal arrangements can be made for the referendum in three distinct ways. First regulations can be made under both part XIV of the constitution and the organic law. Second, provision is made for the courts, the governments or the agency with responsibility for conduct of the referendum to deal with inconsistencies, gaps or uncertainties in the relevant provisions of the organic law. Third, with the agreement of both governments, either the ABG or the national government can legislate on matters that could not have been anticipated at the time of the drafting of the organic law (provided always that such laws are consistent with the organic law itself).

In large part this range of options to develop additional provisions for the referendum is included because it was recognised that the passage of time might make it likely that gaps and problems would be found in the operation of the constitutional arrangements and that double entrenchment arrangements might then be seen as an obstacle to providing remedies. These provisions are discussed further in chapter six.

Photo: UNDP PNG/Alice Plate

Photo: Adriana Schmidt

Photo: Adriana Schmidt

CHAPTER TWO
REPORTS RELEVANT TO THE REFERENDUM

In the seven years between 2013 and 2019, a number of reports or reviews have been written about Bougainville by a range of bodies for a range of purposes. Some are specifically focused on understanding aspects of the referendum arrangements, while others are more general, dealing with various aspects of the social and political situation in pre-referendum Bougainville, or the views of Bougainvilleans on referendum-related issues. As these reports shed light on aspects of ongoing debate about the referendum, and as several of them will be referred to elsewhere in this book, they are identified here with brief comments on their origins and on the information they provide relevant to the referendum. Further, in several instances the reports contain serious misunderstandings about the referendum arrangements. These issues are highlighted here because they shed light on the complexities involved in preparing for the referendum.

Some of the reports originate in decisions of a joint national government and the ABG Referendum Committee (the Joint Bougainville Referendum Committee), which operated between 2010 and 2016 as a result of a decision of the JSB. The JSB is established under section 332 of the PNG constitution as a joint national government and ABG institution to oversee implementation of the BPA (inclusive of the referendum arrangements), provide a consultative forum for the two governments and their agencies and contribute to the resolution of intergovernmental disputes. The Joint Bougainville Referendum Committee was established in about 2010 to advise the JSB on all issues concerning preparations for conducting the referendum on the political future of Bougainville. It was jointly chaired by the PNG and ABG chief secretaries and supported by a joint referendum Technical Working Group made up of senior officials of the two governments.

2013 UNITED NATIONS REPORT ON WEAPONS DISPOSAL

In late 2012, the Joint Bougainville Referendum Committee requested the United Nations (UN) provide a team to carry out 'a thorough assessment to evaluate weapons disposal in Bougainville and provide recommendations on next steps' (UN 2013:48). The context in which expert assessment was sought was the continuing presence of conflict-related firearms in Bougainville and the very limited disposal of weapons that had occurred since the end of the UN-supervised weapons disposal program under the BPA conducted between 2001 and 2005. Significant armed elements had not been part of the UN-supervised process, notably former BRA groups, who from early 1998 regarded themselves as the Me'ekamui Defence Force (MDF) supporting Francis Ona. It was widely understood that to balance the potential threat from the MDF some BRA and BRF personnel also retained weapons, and there was ongoing locating and refurbishing of World War II weapons in at least two areas of Bougainville, Torokina and Buin.

A UN team visited Bougainville in November and December 2012, and provided its report early in 2013 (UN 2013). Amongst other things, the report notes: 'There is a high level of misunderstanding and confusion among ordinary people regarding the basic provisions of the Agreement and in particular regarding the role that weapons disposal plays in clearing a path to a referendum' (UN 2013:10). The report surveyed the extent to which weapons remain available and in use in Bougainville, finding that many were available and from several distinct sources. It recommended a second round of weapons disposal in anticipation of the referendum, discussed the need to involve former combatants in such a process (including the MDF) as well as incentivise their active involvement and commented: 'In this context, the significance of a political incentive — i.e., relinquishment of weapons as a means of helping to clear a path towards the referendum — should not be underestimated' (UN 2013:35).

The report was noted and endorsed by the JSB in October 2014.

2013 USAID *BOUGAINVILLE STABILITY DESK STUDY*

In 2013, USAID contractor Development Transformations prepared a report on Bougainville based on an extensive literature study and (mainly telephone) interviews with about 25 'experts, practitioners and academics' (Development Transformations 2013:1). The focus was on threats to Bougainville's stability. Noting the constitutional provisions for the referendum, the report states, incorrectly (see chapter five of this book), that under the BPA 'certain requirements for weapons disposal and good governance must be met before a referendum can be held' (ibid.:12–13). In a similar vein, it identifies potential ABG willingness to 'push through with the referendum despite failing to meet BPA requirements' as a potential source of instability (ibid.:13). Other referendum-related potential sources of instability identified were: a lack of general understanding in Bougainville that the referendum will not necessarily be only about independence, but could also include other options; risks of disruption to referendum polling; and uncertainty about possible outcomes, particularly because of the PNG parliament's final authority in relation to the outcome (ibid.:13–15).

2013 JOINT REVIEW OF THE BOUGAINVILLE AUTONOMY ARRANGEMENTS AND ABG ADHERENCE TO GOOD GOVERNANCE REQUIREMENTS

The BPA (paragraphs 298–308) and the PNG constitution (section 337) require that a five-yearly review of the autonomy arrangements under the BPA be carried out by the two governments. The first review was required to be held 'as close as is practicable to the fifth anniversary' of the establishing of the ABG.

Under the BPA and the PNG constitution, a review is conducted in two main parts. First, independent experts are appointed to examine distinct aspects of autonomy, namely financial arrangements, public administration and legal issues. The governments can also agree to other independent expert studies. Reports from the experts must then be considered by the two governments before they undertake the main part of the review, which is supposed to occur through direct engagement between the two governments.

In addition to examining autonomy, reviews are also the means by which a determination is made in advance of the referendum about whether or not the ABG has been and is being conducted in accordance with internationally accepted standards of good governance (see chapter five). Such a determination is required to be taken into account when the two governments consult about the date for the referendum. There is no specific provision for the autonomy review process to include an independent expert on good governance nor for the specified independent experts to deal with good governance issues. On the other hand, there is nothing to prevent the specified experts dealing with such issues, or their terms of reference requiring them to do so.

When the BPA was negotiated, the clear intention was that reviews should be limited to examining the autonomy arrangements, mainly because of concerns on the part of Bougainville negotiators that review of the referendum arrangements might be used to pressure for changes to those arrangements or, in particular, abandon the referendum.

The first review, which should have taken place in 2010 (five years after the ABG was established), actually took place in 2013, with seven persons appointed as 'independent experts'. They conducted widespread public consultation in Bougainville and compiled a 100-page joint report that was submitted to the JSB in October 2013 (JSB 2013). The JSB did nothing more than note the document. The direct engagement of the two governments — the second part of the review process — arguably never occurred.

The report includes two sections directly relevant to the referendum. The first is a discussion of whether the ABG 'has been and is being conducted in accordance with internationally accepted standards of good governance', which are those standards 'as they are applicable and implemented in the circumstances of Bougainville and Papua New Guinea' (see subsections 338(3) and (5) of the PNG constitution). The second is a chapter reviewing the referendum arrangements in overview. While inclusion of the former is no doubt justified, there is nothing in the constitutional basis for the review that provides a basis for inclusion of the latter. The authors of the review acknowledged that there was nothing in the terms of reference for the study that called for such an analysis, but argued that the referendum 'underlies the purpose of the review. Also it dominated all aspects of the [public] consultation undertaken for the purpose of the review and is the centre-piece of autonomy for many. Accordingly the team provided this chapter for consideration of the two governments.' (JSB 2013:87).

The discussion of good governance is included in a chapter on public administration. It notes the inadequate terms of reference that the independent experts received in relation to the good governance issue and indicates a number of sets of criteria and/or indicators that could be used to assess good governance. On the basis of a quite cursory look at the possible indicators and the limited available evidence, the joint report concluded that 'it is doubtful if it could be said that Bougainville was achieving the required standard of good governance as at mid-2013' (JSB 2013:69). This conclusion was based on assessments of 'weak capacity and poor compliance with recognised good practice, even in the Papua New Guinea context', with the ABG found to be 'significantly below some of the better performing PNG provinces in terms of administration' (ibid). The report noted 'serious capacity issues in the competencies of individuals and the capability of various parts of the administration of government to do their respective parts', but also noted that often 'there is simply a lack of data which makes it impossible to make a valid assessment' (ibid).

The nine-page chapter on the referendum arrangements made some useful contributions to an enhanced understanding of them. Amongst other things, it identified issues about which there were significant misunderstandings amongst the Bougainvilleans who participated in the public consultation held as part of the review, including that the referendum was required to be held in 2015, that fiscal self-reliance is a condition of either the referendum or independence, belief that non-resident Bougainvilleans are not permitted to vote and a lack of knowledge that the organic law contains detailed provisions for conducting the referendum (JSB 2013:89). The report also sought to advance preparations for the referendum by pointing to a number of key aspects of the referendum arrangements where agreement between the two governments is needed, including: allocation of financial resources; determining the body that will conduct the referendum; determining the rights of Bougainvilleans to vote outside Bougainville; and choices on the ballot paper. These and related matters are discussed further elsewhere in this book.

2014 REVIEW OF CONSTITUTIONAL AND LEGAL ISSUES

In November 2013, one of the then co-chairs of the Joint Bougainville Referendum Committee, then-PNG chief secretary Sir Manasupe Zurenuoc, requested lawyer and former acting National Court judge Nemo Yalo to review the constitutional and legal issues related to conducting the Bougainville referendum. Yalo subsequently provided a 34-page document entitled Review of the Constitutional and Legal Issues Pertaining to the Conduct of Referendum for Bougainville (Yalo 2014). It was circulated widely to all those involved in work related to referendum preparation.

The document covers a wide range of issues arising from what three of the four main documents say about the referendum arrangements — namely the PNG constitution, the organic law and the Bougainville constitution. Of particular importance were a few pages arguing that weapons disposal and good governance are 'conditions' that must be met before the referendum can be held, and not restricted as matters merely required to be taken into account when determining the date for the referendum. The reasons why this view is incorrect are discussed in chapter five.

2014 UNDP REPORT ON PEACE AND DEVELOPMENT IN BOUGAINVILLE

In 2013, the UNDP commissioned a study of peace and development in Bougainville, which resulted in a March 2014 report entitled *Peace and Development Analysis: Findings and Emerging Priorities* (UNDP 2014). That study was intended as a basis for a 'Peacebuilding Priority Plan' to meet the requirements for funding to be provided for the referendum and related matters through the UN Peacebuilding Fund. Over 1,000 Bougainvilleans and others were consulted in the preparation of the report.

The report focused on Bougainvillean views on the conflict, perceptions of the current situation and on Bougainville's future, 'notably in light of the referendum' (UNDP 2014:17). Amongst other things, it discussed findings about the extent of understanding amongst Bougainvilleans about the referendum and their views about whether Bougainville is ready for it to be conducted. In relation to levels of understanding about the referendum, the report makes sobering reading:

> Many Bougainvilleans do not know what a referendum is … [many are] not aware that there is a five year window period [within which the referendum must be held] … [many] don't know who decided the date … [many] do not know … the BPA references to weapons disposal and good governance as factors to take into account in deciding the date … some are led to believe that it will be a referendum on independence, rather than independence being one of the options. Many … are not aware that ultimate decision-making authority resides in the National Parliament (UNDP 2014:17–18).

2014 REPORT ON WORKSTREAMS TO PREPARE FOR THE REFERENDUM

In July 2014, on the advice of the Joint Bougainville Referendum Committee, the JSB directed that a Technical Working Group develop a structured work program for preparations for the referendum and sought donor assistance in support of that work. That assistance included support from NZAID providing a short-term adviser to assist in preparation of a report on the workstreams required. The report, by Mike Richardson, discussed what was required in terms of work, resources and timing in relation to seven distinct workstreams:

1. Engagement with the people of Bougainville and Papua New Guinea and the two governments.
2. Weapons disposal assessment.
3. Criteria allowing non-resident Bougainvilleans to vote.
4. Good governance assessment.
5. Process for determining the referendum question(s).
6. Establishing the independent administrative agency and financing the referendum.
7. Review of the provisions for the conduct of the referendum (Richardson 2014).

The report was helpful in focusing the attention of both governments on the numerous tasks involved in preparations for the referendum, but has not otherwise had any significant impact on the preparations.

2015 UN REPORT ON ELECTORAL SCOPING AND REFERENDUM PREPARATION

In March 2015, the UN provided a brief report (UN 2015a) to the Joint Bougainville Referendum Committee on scoping of assistance for electoral support in relation to the 2015 ABG general elections and support for Bougainville Referendum preparations. In relation to the referendum, the report discussed establishing 'the independent authority' to conduct the referendum (which the report incorrectly assumed was a choice already made) by the two governments, voter eligibility issues and other matters.

The report comprised a four-page summary submission to the Joint Bougainville Referendum committee and the JSB on issues relating to both election support and preparations for the referendum (UN 2015a), as well as two more detailed and substantive attached discussion papers entitled:

- Independent Authority to Administer the Referendum on the Future Political Status of Bougainville: Mandate, Structure and Key Issues to Consider (UN 2015b) and
- Referendum on the Future Political Status of Bougainville — Voter Eligibility Criteria: Areas Requiring Further Agreement and Legislation (UN 2015c).

The report made useful contributions to the discussion of important and quite specific aspects of the referendum arrangements. At the same time, the analysis in both papers reflected some misunderstandings of key aspects of the issues discussed. One concerned an assumption that formal agreement had already been reached on establishing an independent authority to conduct the referendum. In fact, no agreement meeting the requirements of the national constitutional laws had been reached at that point, and the report contributed to confusion about these issues. Another misunderstanding concerned a view that only Bougainvilleans as defined in the Bougainville constitution are entitled to vote in the referendum, whereas the BPA and the national constitutional laws provide that any person in Bougainville who meets requirements for enrolment for national elections, whether a Bougainvillean or not, is entitled to vote (a matter discussed further in chapter six).

2016 THE BOUGAINVILLE REFERENDUM: A TECHNICAL GUIDE

In July 2016, in response to concerns that availability of accurate information about the referendum was limited, the PNG Electoral Commission and the Office of the Bougainville Electoral Commission jointly published a small 12-page booklet containing basic information about the referendum (PNGEC and OBEC 2016).

2017 BOUGAINVILLE AUDIENCE STUDY

This report (Thomas et al. 2017) deals with an extensive research project undertaken in Bougainville in 2015 at the request of the ABG that examined three main issues. The first concerned media ownership and access, the aim being to understand how and by what means Bougainvillean population groups can be reached by mass media initiatives. The second concerned the level of information and knowledge Bougainvilleans have about the BPA and Bougainville's political situation. The third concerned Bougainvillean views on what can be done to improve communications in Bougainville. The report was based on in-depth interviews with 203 people and a quantitative survey involving 1114 people in almost all of Bougainville's 43 local government areas and all three regions (south, central and north).

'Only six out of 100 people say that they are clear about the referendum and its processes' (Thomas et al. 2017:32).

In relation to knowledge of the BPA, and of the referendum arrangements in particular, 74 per cent of those surveyed 'were not sure or indicated they did not know much about the referendum', and 'only six out of 100 people say that they are clear about the referendum and its processes' (Thomas et al. 2017:32); a 'majority of survey respondents said they did not know the link between autonomy and independence (78% n+1110), and they did not understand the requirements for independence (76% n+1070)' (Thomas et al. 2017:35); 'three quarters of survey respondents did not know when the referendum would take place (76% n+1064)' (Thomas et al. 2017:36); and 'independence is seen as a possibility for change often described as a wish or a vision, and "idealistic" views appear to draw on Bougainvillean pride, sense of identity and potential rather than a realistic view of what is achievable' (ibid.).

MARCH 2017 REPORTS OF THE ABG CONSTITUENCY REFERENDUM-READY COMMITTEES

In September 2016, a resolution of the ABG legislature (the House of Representatives) called on each member of the House (MHR) to become responsible for making declarations by December 2018 that their constituency is 'referendum ready'. The aim was to see the MHRs take the lead not only in generating referendum awareness in their constituencies, but also in relation to creating conditions conducive for the holding of the referendum, particularly in relation to weapons disposal and local reconciliations. It was expected that involving the MHRs in this way would mean that the House as a whole would feel a strong sense of responsibility for preparing Bougainville for the referendum, and would be able to speak as a representative voice of Bougainville if issues were to later arise regarding the extent of readiness for the referendum. The resolution calling for the 'referendum-ready' declarations tasked each MHR with making a report back to the House in March 2017 dealing with the status of their constituency's

- weapons disposal
- reconciliation and unification processes
- implementation of autonomy
- consultation on referendum matters and
- awareness on the process of conducting the referendum.

The expectation was that each MHR would establish a Constituency Referendum-ready Committee (CRC) to work with him or her in conducting awareness, carrying out consultation and working towards weapons disposal and reconciliation. The ABG's Department of Peace Agreement Implementation as well as the staff of the House of Representatives were expected to work with the CRCs, and the UN Peacebuilding Fund provided some funds (K9,000 per constituency) for the work of the committees. Most of the committees have been established and are made up of representatives of local-level governments, as well as of women, veterans, youth, churches, disabled people, local businesses, the 'maui groups and the Bougainville Police Service. By establishing such broadly representative committees, the goal was to develop robust structures in each constituency that could take on responsibilities with referendum preparation.

When the House met in March 2017, of the 39 constituency members — 33 local constituencies and three regional constituencies each for representatives of women and of former combatants —a total of

30 reports were tabled. They comprised reports from 26 of the 33 local constituency representatives, and two each of the three women and three ex-combatant representatives.

In relation to weapons disposal and local reconciliation, most reports discussed the need for further work to both remove weapons from their communities and to bring about local reconciliations. On weapons in particular, only five of the 33 local constituencies reported being weapons-free, while 19 reported the presence of varying number of weapons, from single digit numbers up to about 150 weapons (in the case of the Eivo/Torau constituency in central Bougainville).

Concerning awareness about the referendum, the picture painted by the 30 reports was mixed. Some reports, however, presented blunt assessments. The MHR for Konnou constituency (in South Bougainville) reported that 'half of the constituents know very little of the referendum, the process of attainment [of the referendum], what to expect before and after the referendum. The population being ignorant of the political process is probably why the some [sic] ex-combatants are not willing to freely surrender their arms. Many people the committee interviewed knew very little of the impending referendum' (Masiu 2017:10). The MHR for Bolave constituency (in Central Bougainville) reported that despite efforts by the CRC in the constituency 'the information dissemination [is] still low as the wider community, constrained by the scattered hamlets and geographical locations, could not be easily reached. Thus the level of awareness and understanding of the rural majority on the process of conducting the referendum is still low' (Lokonai 2017:20). The MHR for Haku constituency (in North Bougainville) reported that 'the level of understanding of what [a] referendum is, is way below our expectation, therefore conducting awareness is of paramount importance' (Tulsa 2017:10).

The Department of Peace Agreement Implementation provided an information package to assist MHRs and their committees, though the reports indicate that in some cases the packages were not received by the committees. Some of the reports complained that the awareness material produced by the ABG was in English, whereas most rural people that can read are literate only in Tok Pisin. On arrangements for the referendum, several reports indicated that people did not want to see non-citizens voting, and a few also opposed the idea that non-resident Bougainvilleans should be able to vote. While most seemed to understand that the voting age for Bougainville residents was already set at 18, a few argued for a lower voting age, varying from 14 to 16. Ten reports argued that, in the interest of avoiding confusion on the part of people with little or no education, the question to be asked in the referendum should be kept as short and simple as possible. Most of those reports argued that the question should be whether people support independence, with the possible answers being 'yes' or 'no'. Several reports called for the use of symbols on the ballot paper to help illiterate voters be more certain about which option they preferred to support.

Several of the reports complained that the limited funds made available to meet the costs of the work of the committees meant that it was not possible to reach most areas of the constituencies and argued for more funds to be made available for future rounds of work by the CRCs. Each member was asked to make another report on the work of the CRCs in mid-2018, but by the end of 2018, the second reports had not been tabled in the House of Representatives.

APRIL 2017 REPORT OF THE PARLIAMENTARY BIPARTISAN COMMITTEE ON BOUGAINVILLE AFFAIRS

This report, entitled *Implementing the Bougainville Peace Agreement: Pertinent Issues and Challenges*, was prepared in April 2017 but not tabled in the national parliament until April 2018. The report was prepared by a committee of four members of parliament, chaired by Hon. Willliam Powi. In the report,

the committee stated that its overall aim was to 'oversee the overall implementation of the Bougainville Peace Agreement as stipulated in the National Constitution of Papua New Guinea'. The committee made two visits to Bougainville, one in October 2016 and the other in March 2017.

The 32-page report surveyed a range of issues concerning the situation in post-conflict Bougainville and the implementation of the BPA. It focused more on the operation of the autonomy arrangements than on the referendum, giving particular attention to the failure of the national government to deliver in full on the financial arrangements. The report noted the central role being played by the JSB and queried whether an eminent persons group from PNG alone, or from PNG and the Pacific, might be able to play a 'go-between' role in relation to the two governments. The report erroneously discussed weapons disposal and good governance as pre-conditions for the holding of the referendum (PNG 2017:16, 18, 29).

JUNE 2017 REPORT OF ABG LEGISLATURE COMMITTEE ON REFERENDUM, WEAPONS DISPOSAL, PEACE AND UNIFICATION

In 2015, the Bougainville House of Representatives established a Committee on Referendum, Weapons Disposal, Peace and Unification, with a main task of monitoring preparation for the referendum. In June 2017, it tabled a report entitled *An Assessment on the Constituency Referendum Reports*. The general picture presented in the report was that the referendum-ready concept was not yet working well. For example, the Committee chairman's foreword expressed 'grave concern' about the approach, saying it needed 'to be revisited by … reaching all existing structures … to fully participate in the awareness campaign' (ABG 2017:iv). The report found that few constituencies had access to a 'referendum awareness information package' supposed to be used in awareness programs (ABG 2017:4). There was what the committee called 'misinformation' being spread as a result of uncoordinated awareness efforts (by constituency referendum-ready committees and NGOs). An example was provided of the problems said to arise from lack of coordination: 'Many believe it [the referendum] to be a vote for immediate independence from PNG which … can … bring about false hope' (ibid.). The committee identified a number of specific problems with the organisation of the referendum-ready concept, including:

- Lack of induction and training for those involved in provision of awareness
- Lack of coordination of the various entities involved in awareness activities
- Inadequate funding
- Inadequate representation of some areas in awareness teams.

The general picture presented in the report was that the referendum-ready concept was not yet working well.

The committee's assessment was that awareness was not reaching majority of the population.

Voters who talked to the committee raised a number of pertinent questions about various aspects of the referendum:

1. What happens to those who vote 'no'?
2. What happens to those who are eligible to vote but won't vote for known reasons?
3. What happens if a majority vote 'yes' but Bougainville fails to meet the benchmarks?
4. If the result is 'yes', will we immediately get what we want?
5. What happens to BPA in 2020?

6. What type/system of government will Bougainville adopt after 2020?
7. If we vote on referendum and there are still guns around, what will happen?
8. Is Bougainville ready or prepared to govern itself or are we looking to other countries to help us?
9. If we are successful with referendum, are we able to sustain our livelihood?
10. After referendum is conducted, what happens to the veterans and other informal structures? (ABG 2017:7).

The committee noted concerns on the part of a spokesperson for non-resident Bougainvilleans that while much effort was being made to generate awareness in Bougainville, very little was being done to help non-resident Bougainvilleans understand the issues (ibid.).

The committee also made some specific suggestions about organisation of the referendum. They included: a suggestion for the ABG to make a Bougainville Referendum Act which, amongst other things, should allow non-resident Bougainvilleans to vote on the basis of skin colour (ABG 2017:8); a proposal that there be a liquor ban during the referendum (ibid.), that just one question should be asked in the referendum, namely 'should Bougainville be an independent country?' and that well-recognised symbols should be used on the ballot paper in order to assist illiterate voters (ABG 2017:10). As discussed in chapter seven, the call for a Bougainville law is largely based on misunderstandings about the existing legal framework for the conduct of the referendum.

Regarding constituency referendum readiness, the committee made what it termed 'the following crucial findings':

» Not all constituencies established constituency Referendum Ready Awareness Teams.
» Not all constituencies received the Referendum Awareness Information Package.
» No overall coordination of the referendum awareness campaigns results in confusion with different groups carrying out the same awareness with own (sic) information on the same groups of people.
» Constituency Referendum Ready Concept is not effectively working as most constituents are not reached in the process.
» [There is] (L)ack of funding support to implement constituency priorities (ABG 2017:20).

These negative findings were also balanced a little:

> The committee appreciates some level of achievements made by constituencies in commencing the process to referendum readiness in the areas of addressing reconciliation and unification, discussion on weapons, and how governance works in their constituency. The committee also hails the level of commitment achieved by ex-combatants in unifying their factions towards referendum readiness (ibid.).

The committee made 10 recommendations, which while consistent with the body of the report, also revealed some misunderstandings. In particular, they included:

» A call for the ABG to consider postal voting to enable non-resident Bougainvilleans to vote — when in fact the organic law already makes such provision (ABG 2017:21).
» A proposal to 'instruct' the Office of the Bougainville Electoral Commission (OBEC) to prepare the electoral roll for the referendum through community governments (ibid.), when

OBEC is not the agency designated to conduct the referendum that has responsibility for the electoral rolls — that body is the Bougainville Referendum Commission (see chapter six).

» A proposal to 'instruct' the ABG House of Representatives to enact a Bougainville Referendum Act 'to provide details on the process of Bougainville's referendum' (ibid.), when in fact those details are provided in the schedule to the organic law, which unfortunately is little known and understood.

SEPTEMBER 2017 PRESENTATIONS TO ABG TAX AND REVENUE SUMMIT

The ABG organised a revenue and tax summit held at Hutjena, Buka Islands between 26 and 29 September 2017. A particular focus was how the ABG might achieve fiscal self-reliance. The most substantive examination of the issues involved was a paper presented by Professor Satish Chand. Amongst other things, it estimated the size of the budget for Bougainville that should be needed for an independent Bougainville government — between K836 (AU$351) and million K923 million (AU$387.5 million) — and the extent to which locally derived revenue contributes to the ABG budget at present, only K21 million (AU$8.8 million) or 13 per cent of a total K162 million (AU$68 million) budget in 2016 (Chand 2017). His estimate of the budget likely needed by an independent Bougainvillle was based on comparisons with other small Pacific states. The 18 presentations made at the summit are available at abg.gov.pg/government/departments/treasury-finance.

THE NRI BOUGAINVILLE REFERENDUM RESEARCH PROJECT, 2017–19

This research project, initiated by the PNG National Research Institute in 2017, is generating seven separate reports on discrete aspects of the referendum arrangements. Six of those reports had been finalised and released at the time of writing. Those that had been released were:

» a report by Professor Matt Qvortrup entitled *Independence Referendums: History, Practice and Outcomes* (Qvortrup 2018)[22]

» a report by Andrew Ellis entitled *Administration of Referendums: A Comparative Study of Independence Referendums* (Ellis 2018)[23]

» a report by Karl Kossler, Franceso Palermo and Jens Woelk entitled 'Options for Bougainville's Autonomy Arrangement: A Study from a Global Comparative Perspective' (Kossler et al. 2018)

» a report by Satish Chand entitled *Financing for Fiscal Autonomy: Fiscal Self-reliance in Bougainville* (Chand 2018)

» a report by Christine Bell and Robbie McVeigh entitled *Bougainville Referendum Outcome Issues* (Bell and McVeigh 2018)

» a report by Kylie McKenna entitled *Status and Implementation of The Bougainville Peace Agreement and Implications for the Referendum* (McKenna 2019).

The one report still to be released will deal with post-referendum scenarios.

None of the reports are intended to provide an analysis of the legal, administrative and political issues arising from a close analysis of the referendum arrangements, as is the intention of this book. However, the reports released thus far provide valuable insights into the referendum, with particular reference to comparative perspectives.

OCTOBER 2018 JOINT REVIEW OF THE BOUGAINVILLE AUTONOMY ARRANGEMENTS AND ABG ADHERENCE TO GOOD GOVERNANCE STANDARDS

The first part of the second five-yearly review of the autonomy arrangements was undertaken between August and October 2018, with the preparation of a report undertaken by four independent experts engaged and funded by the UN, undertaken with the approval of the JSB. The second stage, involving consideration of the experts' reports by the two governments, was expected to occur early in 2019 at the first meeting of the JSB, which was held on 1 March 2019. However, the report received cursory attention from the JSB.

The 200-page report submitted in October 2018 comprised four main sections, one each on 'financial management, public administration, technical and legal issues and good governance. The report did not deal directly with referendum issues. Nevertheless, it holds considerable significance for the referendum. This is because under the BPA and section 338 of the national constitution, it is only when there has been an assessment of the good governance requirement through the process of the five-yearly reviews of the autonomy arrangements that the actual date for the referendum can be determined by consultation between the two governments. Whilst those governments did agree at the JSB meeting in May 2016 to June 2019 as the date for the referendum, that date was agreed only for planning purposes, and hence was referred to as a target date only. Consultation and agreement on an actual date can only be undertaken when the review process has provided an assessment of the ABG's performance in relation to good governance. Under the BPA and the national constitution, that review process involves two distinct stages. One involves assessments by independent experts and the second involves joint assessment by the two governments, an assessment in which the two governments are required to take into account the views of the independent experts generated by the first stage.

The consolidated report of the four experts contains an extensive assessment of the ABG's record in relation to good governance. It deals with a number of aspects of good governance arising from the provisions of the BPA and the national constitution. They include rule of law, democratic space, corruption, conflict and service delivery. The study reached the generally positive conclusion that 'there are many positive aspects of the current Bougainville governance system, and still other aspects that can be improved upon' (PNG JSB 2018a:191). It also concluded that responsibility for the key aspects of good governance in respect to problems was shared between the ABG and the national government. It also found that the importance attached by the two governments to peacebuilding and reconciliation had been 'at the cost of delivery of public services' (PNG JSB 2018a:193). As discussed in chapter six, the report of the autonomy review then provided the basis for the two governments to engage on the issue of whether the ABG has been adhering to internationally accepted standards of good governance, which in turn allowed them to determine the date for the referendum.

2018–19 REPORTS OF THE ABG CONSTITUENCY REFERENDUM-READY COMMITTEES

A total of 21 reports similar to those prepared by the CRCs in 2017 were tabled in the Bougainville House of Representatives in mid- to late 2018, and two more were tabled early in 2019. A number of issues were common to reports on constituencies in different parts of Bougainville. One such theme related to weapons disposal, with several reports expressing concern that weapons might not be disposed of before the referendum and indicating fear that the presence of weapons might be a negative factor when it comes to determining whether the referendum is free and fair. A common view on the disposal of outstanding weapons was that some form of buy-back scheme was needed, in recognition that some holders of weapons had purchased them at significant cost, which would need to be recouped. Several

reports indicated support for the disposal of weapons through placing them in some form of memorial, rather than destroying them.

One of the strongest and most common themes was the necessity for widespread reconciliation in relation to conflict-related matters before the referendum is held. Some reports listed the matters in relation to which reconciliation was required. Clearly there are linkages to the work of the District Peace and Security Committees, discussed in chapter eight. The widespread distillation of highly alcoholic 'home brew' was a concern expressed in several reports, it being seen as contributing to law and order problems. Several reports called for a ban on liquor in 2019, at least in the period within which the referendum is to be held. Although each constituency had received funding for their work — K15,000 from the UNDP and K50,000 from the ABG — several reports complained about the funding not being anywhere near enough for them to carry out wide-reaching awareness exercises.

Several of the reports indicated that the reach of the awareness activities was limited. However, even so, they clearly believed the awareness was important, presumably because it was reaching opinion leaders, who would in turn be able to raise awareness in their families and communities. One report, however, indicated extensive reach — the late 2018 report for Suir constituency (situated in the far north of Bouganville Island) reported attendance at its awareness sessions of 2800 people out of a constituency population of almost 6000 (Karaston 2018:11).

CHAPTER THREE
ASPECTS OF INTERNATIONAL EXPERIENCE

WHAT IS A REFERENDUM?

A referendum is defined as 'a direct vote by the electorate of a country to advise or decide on a specific issue, in contrast to votes for individual candidates to national or local elections' (Biegbeder 2011:1). The Oxford English Dictionary definition of the word is a 'direct decision by the electorate of a country on a single political issue'. In fact, referendums are in many ways like an election, but instead of voting for candidates or political parties, voters answer one or more questions about particular policies, usually (but not always) through a choice of 'yes' or 'no' answers.

Referendums are a form of direct democracy, which is often seen in contradistinction to representative democracy. In direct democracy voters participate directly in reaching decisions on important matters (IDEA 2008; Qvortrup 2013). By contrast, in a representative democracy 'citizens delegate, via elections, political decision-making powers to a small group of public officials' (Le Bihan 2016:1). In other words, representatives make decisions on behalf of the people. Critics of referendums often argue that they are not well suited for decisions on complex matters because, amongst other things, most voters are not as well-equipped as elected representatives to deliberate on complex political and policy questions and referendums simplify complex issues into 'yes' and 'no' decisions, making informed deliberation difficult. The implication is that as a result referendums are liable to produce bad decisions. However, others argue that while there are aspects of referendum processes that can inhibit deliberation, there are ways to improve the deliberative qualities of referendums (for example, see LeDuc 2015; Levy et al. 2018; Tierney 2013a).

CATEGORIES OF REFERENDUMS

In the past 30 or so years, referendums have been held with increasing frequency around the world.

In the past 30 or so years, referendums have been held with increasing frequency around the world (Qvortrup 2017). However, referendums cannot be readily treated as a single group of processes — they are not homogenous. This lack of homogeneity can make it difficult to make comparisons between particular referendums which take different approaches and can cause difficulties in considering how best to regulate referendums. Therefore, before analysing the Bougainville referendum, it is helpful to clarify what category of referendum it falls into.

Referendums can be categorised in several different but overlapping ways. One category mainly groups the broad type or aim of the referendum and places emphasis on distinctions between key aspects of the legal basis for each type. Another way of categorising referendums is by their subject matter. However, these categories can be of limited value as many particular referendums do not readily fit into them. But while sometimes of limited value, categories can provide a guide to understanding the key characteristics likely to be associated with a particular referendum, a basis for making comparisons between referendums and a guide to referendums of similar kinds which might be useful in providing precedents.

When categorising referendums according to type and legal basis, Table 1 illustrates one approach.

Table 1: Referendums: A typology

Type of referendum	Implies	Outcome of referendum	Countries where used (for example)
1. Compulsory and binding or mandatory constitutional	Referendum constitutionally required to change constitutional law	Binding	Australia, Denmark, Ireland, Switzerland
2. Rejective/facultative or abrogative (usually citizen-initiated)	Referendum on whether to reject a law already passed by the legislature, usually citizen-initiated	Usually binding	Austria, Denmark, Italy, Sweden, Switzerland
3. Initiative/direct legislation or citizen-initiated	Referendum on a subject brought about by petition of citizens	Usually binding	New Zealand, Switzerland, United States (some states only)
4. Advisory/plebiscite or consultative	Referendum on a subject initiated by the government or legislature	Non-binding	Australia, Canada, Finland, France, Netherlands, Spain, UK

Source: Adapted from De Vreese 2007.

Another way of categorising these various types of referendums is to distinguish between government-initiated and citizen-initiated referendums or between constitutionally-required and ad hoc referendums. Both categories 1 and 4 in Table 1 would usually be regarded as government-initiated, while categories 2 and 3 are citizen-initiated.[24] Category 1 is constitutionally required, while category 4 is ad hoc (in the sense that there is no constitutional imperative that a referendum be held). Even the citizen-initiated categories may be seen as ad hoc in that it is a matter for citizens to decide whether or not they wish to initiate them.

The distinction between the first category in the table (mandatory constitutional) and fourth (consultative) is important. A mandatory constitutional referendum can be mandatory in two senses: the constitution requires that the referendum be held and it can also make the outcome of the referendum binding. Many national constitutions provide for mandatory constitutional referendums in relation to approval or rejection of laws which seek to amend, or repeal and replace, the constitution. However, these are not the only examples of constitutional referendums that are mandatory in this dual manner. Other examples include some referendums on independence, for example the one that the French constitution required to be held in New Caledonia in 2018.

A referendum fits into the fourth category (advisory/plebiscite) where it is consultative in two senses. First, the referendum is not required by the constitution or any existing law, but is initiated by government or by the legislature to gauge the views of the people on a particular matter. Second, it is for the government or the legislature to decide whether the results of the referendum are given effect, for neither the constitution nor any other law makes the outcome binding on the government. Examples of such referendums include the 2016 referendum in the United Kingdom about whether to leave the European Union (known as Brexit) and the late 2017 postal survey on same-sex marriage in Australia. (Of course, while not legally binding, it may be difficult politically to ignore the results of a consultative referendum as, for example, has been the case with the 2016 Brexit referendum.)

The Bougainville referendum does not readily fit into the typology set out in Table 1 because although the PNG constitution requires that the referendum be held, the outcome will not be constitutionally

binding. On the other hand it is not merely a consultative referendum, in that the PNG government will be required to consult the ABG about the results and the results may be tabled for debate in the PNG parliament.

In terms of categorisation by the subject matter of referendums, this to some extent cuts across the approaches to categorisation just discussed. There are many ways subjects could be grouped. LeDuc proposes four categories. The first is constitutional, comprising not only amendments to a constitution but also changes to political institution, forms of governance, basic laws and so on. The second is treaties and international agreements, including all agreements between nations and with supranational organisations, whether the referendums in question are constitutionally mandated or not. Examples include the many referendums held in European countries on various aspects of the European Union. The third category encompasses referendums related to sovereignty, which include those on territorial questions, issues of 'national' self-determination, devolution of authority, federation and secession. And the last is public policy referendums 'on important policy questions, including consultative votes on government proposals, abrogative votes on public laws, citizens initiatives etc' (LeDuc 2002:33; see also De Vreese 2007:2–3).

Other authorities regard constitutional referendums and ethno-national referendums as significant subject categories. Referendums can be 'constitutional' in two principal ways: their subject matter covers issues or processes of a constitutional nature and they are often (but not always) required to be held by the terms of national constitutions themselves. In terms of sub-categories of such referendums, Tierney identifies:

> four types of constitutional process where the referendum is regularly used today: the founding of new states, most recently … South Sudan in 2011; the amendment of constitutions or the creation of new ones, for example Iraq in 2005; the establishment of complex new models of sub-state autonomy, particularly in multinational states such as Spain and the UK; and the transfer of sovereign powers from the state to international institutions (2012:1).

Ethno-national referendums deal with the political concerns of sub-national groups with distinct ethnic identities. Qvortrup proposes four categories:

1. 'Difference eliminating' referendums, as with the Anschluss referendum of 1938 regarding the integration of Austria into Germany.
2. 'Difference managing' referendums which aim to manage ethnic or national differences, such as the devolution referendums for parts of the UK in 1997 and 1998.
3. 'Secession referendums … to endorse (or otherwise) a territory's secession from a larger entity (e.g. … the referendum in Eritrea in 1991)'.
4. 'Right sizing referendums, that is, votes dealing with the drawing of disputed borders between countries' (2014a:10–11).

The Bougainville referendum can be categorised as a constitutional referendum (it is provided for in the PNG constitution), as one for founding of a new state under constitutional referendums, and as a secession (or independence) referendum under ethno-national referendums. Only a small number of referendums on independence have ever been held — just over 50 since World War II (Qvortrup 2014b).

Bougainville is one of very few territories that have been given the constitutional or legal right to hold a referendum on independence.

Bougainville, then, is one of very few territories that have been given the constitutional or legal right to hold a referendum on independence. Other such referendums include: Eritrea's independence from Ethiopia in 1993; Quebec's independence from Canada in 1995; East Timor's independence from Indonesia in 1999; South Sudan's independence from Sudan in 2011; and Scotland's independence from the United Kingdom in 2014.

INDEPENDENCE REFERENDUMS

Qvortrup's 2014 study of independence referendums draws some broad 'lessons' about independence referendums. On the question of why such referendums are held, very few arose out of decolonisation after World War II —there being very little evidence of pressure for referendums to legitimise new post-colonial states. The greatest number — 33 —occurred in the 1990s (Qvortrup 2014c:155), when states emerging from the break-up of both the USSR and Yugoslavia sought independence. It was only in this period 'that independence referendums became something approaching an international norm before secession could take place. In many cases, referendums were held because the international community — especially the major European powers — insisted upon referendums in order to recognise new states' (ibid.; see also Radan 2000:47). Hence most of these referendums were not about resolving conflict over the question of independence, but rather about meeting an established criterion for recognition of statehood. Further, in most cases significant majorities in favour of independence were known to exist before the referendums were held. However when referendums in states of former Yugoslavia 'arguably exacerbated the ferocity of the conflict [in former Yugoslavia], the demand for referendums disappeared' and the numbers of independence referendums in the 2000s dropped back to 'the natural level of less than a handful' (Qvortrup 2014c:154–5).

National symbolism can be another reason for independence referendums, particularly where high levels of support for independence are well known before the referendum is held. Examples include the new states formed from the former USSR and the former Yugoslavia. In such cases the referendum can become 'a kind of symbolic national manifestation of a newly found freedom … a symbolic representation of the nation itself' (Qvortrup 2014b:60).

On reasons for the outcomes in independence referendums, Qvortrup notes that most have been held in territories 'with less than impeccable democratic records', where there have generally been huge 'yes' majorities, a combination of circumstances that he sees as making it 'difficult to establish what determines the outcome of a referendum' (2015:6). Limiting the cases examined to the few independence referendums held in 'democratic territories', and adding in cases of referendums on autonomy and devolution, he discerns a trend with two circumstances where government-initiated referendums (usually sub-national governments) succeed. The first is where the governments have taken office recently. The second is where there is already broad popular support for independence before the referendum campaign. When a government has taken office recently, Qvortrup notes that any government in office for a long period is likely to have disappointed or antagonised many voters and interest groups, whereas a newly elected government often enjoys a honeymoon period. That voters antagonised by a government may vote 'no' in a referendum where that government supports a 'yes' vote shows how a 'referendum can be a proxy for a vote on the record of the government' (ibid.). This can be seen as an example of how voting in a referendum may be determined by issues peripheral or even unrelated to the purpose of the referendum.

On a third question of whether independence referendums contribute to conflict, while noting that conflict has been associated with a few referendums (notably Bosnia Herzegovina and East Timor), Qvortrup's primary conclusion is that 'generally speaking independence referendums are not correlated with civil war' (2015:11). However, neither Qvortrup nor any other authority I examined considers whether the small number of independence referendums intended to resolve conflict were held without causing violence or any other form of escalation in conflict, or whether they resolved the conflicts.

On procedural questions for independence referendums, Qvortup comments on the extent to which special majorities (in turnout and quorum) are required and to which expatriates of the territory in question are entitled to vote, as well as the inclusion of 'value-laden' words in the question asked in the referendum. On special majorities, he notes that while the importance of independence as an issue means there may be good reasons to have them, in fact 'such provisions have been relatively rare' and that 'more often than not, supermajority requirements have been introduced as an obstructionist tactic' (Qvortrup 2014b:64). In relation to whether non-resident voters should be allowed to vote, as a general rule, the practice is that 'only voters living in the jurisdiction are allowed to vote' (although there are some exceptions to the general principle, including Eritrea and South Sudan). As to the question (or questions) asked in a referendum, great care is usually taken on a matter of such central importance. While there is sometimes concern expressed about inclusion of 'value-laden words' or 'rhetorical questions', the limited evidence available suggests that the use of such wording has little, if any, impact on referendum outcomes. Qvortrup (2015:9) speculates that problems with the wording of the question on the ballot paper may not be significant if voters understand the issues surrounding the central question through public debate in the campaign preceding the referendum.

Legal basis for an independence referendum

The determination that an independence referendum shall be held, and the details of the arrangements for its conduct, can be contained in a variety of documents. In general, however, 'the employment of the institution of the referendum does not seem to be mandated by the norms of international law or any general principles' (Suski 1993:247; Radan 2012:18). There is usually no legal necessity to hold an independence referendum, it is more a political necessity. Only two distinct situations create a legal necessity:

> The first is in cases of a secessionist claim where the relevant parties enter into an agreement that requires a referendum to be held as a means of resolving the secessionist claim. The second relates to explicit provisions in a parent state's constitution that mandate the holding of a referendum as part of the process of secession (Radan 2012:18).

Radan's examples of independence referendums required by agreement are Bougainville; the 2005 Sudan Comprehensive Peace Agreement under which the South Sudan referendum was held in 2011; and the Comprehensive Settlement of the Cyprus Problem of 31 March 2004 under which referendums were to be held in the two separate parts of Cyprus. An additional case not mentioned by Radan is New Caledonia, where provisions of the French constitution implementing the 1998 Noumea Accord provided for a referendum that was held in November 2018. Just three states have 'explicit constitutional provisions regulating secession': Ethiopia, St Kitts and Nevis, and Liechtenstein (Radan 2012:15). St Kitts and Nevis is the only one of these three states where such a referendum has in fact been held (in 1998).

Radan also points to what he describes as 'an implicit [legal] right to secession' defined in the Canadian Supreme Court decision of 2008 in relation to Quebec.[25] In addition, there are cases where a part of a state's territory seeks to secede under the authority of a local law, made without the consent of the state's government, as occurred in October 2017 in Catalonia in the northeast of Spain. Neither of these situations is of direct relevance to questions surrounding the legal basis for the Bougainville referendum and so are not explored further here.

In situations where the agreement for the referendum is between the state and secessionist representatives, it can be given effect by either a change to the state's constitution (Bougainville and New Caledonia) or by statute (South Sudan). Where the legal basis is in both agreement and law, the arrangements can become more complex including the potential for misunderstandings on what is intended. Because of the sensitivity of an independence referendum, all parties generally give close attention to the need to adhere to the requirements set out in the legal arrangements.

Combining constitutionalised autonomy and a deferred independence referendum

Few countries have ever included in a national constitution provision for both autonomy for a part of a country and a deferred referendum on secession for that area to be held within a specified period, as is the case with Bougainville and PNG. Two other examples are France for New Caledonia, where a referendum was held early in November 2018, twenty years after the Noumea Accord provided for it; and Sudan, in relation to South Sudan, where a referendum was held in 2011, about six years after the Sudan constitution was amended to provide for it. So Bougainvilleans are a privileged people to have achieved the opportunity to make a decision about their future in this way. In all three cases the referendum arrangements have been part of a broader package intended to find ways of ending bitter and violent conflict. Autonomy was intended to operate in the period before the deferred referendum in the hope (for some parties in all three cases) that it would help resolve divisions before the referendum was held. The assessment was made that autonomy might contribute to a situation where the referendum would not be necessary or could be deferred or, perhaps, contribute to a referendum outcome in favour of continued national unity.

BENEFITS AND DANGERS OF REFERENDUMS

There is continuing controversy about whether the increasing use of referendums around the world is a positive or a negative trend for the development of democracies.

There is continuing controversy about whether the increasing use of referendums around the world is a positive or a negative trend for the development of democracies. A 2010 report by a House of Lords inquiry into referendums in the United Kingdom summarised the expert opinion given to the committee in what it described as nine 'claimed positive features of referendums' and ten 'claimed negative features',[26] as set out in Table 2:

Table 2: Claimed positive and negative features of referendums: House of Lords inquiry

Claimed positive features	Claimed negative features
Referendums enhance the democratic process 'by giving voters greater opportunities for involvement [in democratic decision-making]' and in the process can be an important mechanism for giving legitimacy to democratic processes (p.13).	They are used as a tactical device by the government of the day, for example in an effort to demonstrate the public support for a prime minister or president, rather than with the goal of resolving a serious issue.
They can be a weapon of entrenchment, in that it is difficult for politicians to ignore a referendum result and to enact legislation with opposite effect.	They are 'dominated by elite groups, including politicians, the media and wealthy individuals, rather than "ordinary" citizens' (p. 17).
They 'settle' the debate on a controversial issue, bringing a degree of finality that a parliamentary decision cannot.	They can have a damaging effect on minority groups, by allowing majorities to override their rights.
They are a protective device, in the sense that they are a safeguard against controversial decisions being taken without demonstrated public support.	They are not so much a protective device (above) but more a conservative device, blocking progress, often because 'the status quo can … seem more reassuring and less threatening than … change' (p. 18).
They enhance citizen engagement with the political and democratic process.	They fail to achieve final settlement on issues, with history in the United Kingdom showing that the subjects of referendums have readily been revisited in subsequent referendums.
They promote voter education, through public debates on important issues that promote political knowledge.	They are not an appropriate means of dealing with complex problems — that a referendum oversimplifies into a simple choice of 'yes' or 'no'.
Voters are capable of making reasoned judgments, even on complex issues, provided there is adequate public education.	They tend not to be about the issue in question, but are often instead dominated by peripheral issues, including the popularity of the government organising that particular referendum.
Referendums are popular with voters, because they are seen as a fair way of resolving difficult issues.	Voters show little desire to participate in referendums, as demonstrated by the low voter turnouts often seen in referendums (often lower than for general elections in the same country).
Referendums complement representative democracy, merely augmenting the representative institutions (such as parliament) where the vast majority of decisions continue to be made in any democracy.	They are costly, especially if they are to be done properly.
	They undermine representative democracy, as they 'put the people before parliament' (p. 20).

Source: Adapted from House of Lords Select Committee on the Constitution 2010:13–20.

Some of these arguments for and against referendums are more relevant to countries such as the United Kingdom where referendums have been held with increasing frequency since the 1990s, than

to Bougainville and PNG where a referendum is being held for the first time. There are, however, a number of the arguments that are relevant to Bougainville. The arguments 'for' with particular relevance include use of referendums to 'settle' an issue, referendums as a protective device, and that voters are able to make reasoned judgments on complex issues in a referendum. Relevant arguments 'against' referendums include the impacts on minorities, that they do not necessarily settle an issue and that they tend not to be about the issue in question.

Closely related to some of the arguments against referendums is the evidence of what sometime appears to be quite deliberate misuse of the device by those in power. Writing in 2005, four years after the BPA was signed, Qvortup noted that 'referendum campaigns have been accused of demagoguery, one-sided spending, and inappropriate government interventions, raising doubts about their integrity' (2005a:13). In at least some parts of the world there is a record of problems in the conduct of referendums. Writing about the countries of the Commonwealth of Independent States (the states that emerged from the former USSR in the 1990s), Wheatley commented:

> In most cases, referendums have been about consolidation of power, rather than public consultation. Typically, referendums in former Soviet republics have been used to approve proposals to augment the power of the president and the presidential administration at the expense of the legislative body … They have often been marred by electoral fraud — especially to artificially inflate turnout figures — and very little time has been devoted to public consultation so that voters can consider the proposals that they are supposed to vote on. Often there is a very short time between the finalisation of the referendum questions and the referendum itself. On occasions a number of diverse issues have been lumped together into a single proposal, preventing voters from expressing a positive attitude to one and a negative attitude to another (Wheatley 2008:2; see also Hill and White 2014).

Problems with referendums, including serious criticisms about their conduct, are not limited to the states that emerged from the USSR; they have been applied in varying degrees to referendums in Africa (Kersting 2014) and Asia (Kobori 2014). In the 2016 national referendums in the United Kingdom (Brexit) and Italy (on constitutional reform), 'in each case the Prime Minister was seeking voter endorsement to consolidate his own political standing' (Leyland 2017:121). In the United Kingdom referendum, contrary to emerging international standards (for example, Venice Commission 2007), there was considerable government expenditure in support of the government's preferred outcome and numerous observers commented on the degree of significant misinformation provided to the public by both the 'leave' and the 'remain' campaigns (Electoral Reform Society 2016; Kildea 15/11/2016).

Controversy about the Brexit referendum in the United Kingdom generated extensive debate about the benefits and dangers of referendums. While much of this debate relates to broad questions about representative versus direct democracy, which can sometimes be of little or no relevance to independence referendums, some aspects about the dangers of referendums may be relevant. One example is Qvortrup's aforementioned point that voters in an independence referendum may vote 'no' not so much because they oppose independence, but more because they oppose the government that is supporting the referendum. In fact, many critics of referendums note that votes in a referendum can readily become proxies for issues unrelated to the referendum.

Many critics of referendums note that votes in a referendum can readily become proxies for issues unrelated to the referendum.

Other — often related — dangers elaborated in post-Brexit publications (for example, Henley 7/10/2016; Lowe and Suter 6/7/2016; Taub and Fisher 4/10/2016) include:

- A referendum provides an indication of public opinion at one time, when it is quite likely to change depending on the circumstances.
- Random factors can have an impact on outcomes: one example is the 2016 referendum in Colombia on the peace agreement between the government and the Revolutionary Armed Forces of Colombia (FARC) where turnout on the day of voting was probably limited by extreme weather.
- Complex and divisive issues are simplified into 'yes' or 'no' choices, where not only are many people ill-equipped to answer the question but additional sources of complexity often exist, including interest groups bombarding people with complex information during the campaign period.
- Information provided to voters can be distorted through media coverage and through the debate almost inevitably being dominated by political leaders and elite figures.
- There is seldom any guarantee for an even playing field for the two sides of the argument in the referendum — for example resources are seldom equal.
- Where a majority 'wins' the referendum, there are not just likely dangers for minorities, but also risks of serious division.

These and similar problems are likely to be amplified in less developed parts of the world particularly where there are high levels of illiteracy and limited local access to information and awareness programs and materials. Unfortunately there has been no study of the specific problems likely to be experienced in the conduct of referendums in such places.

In the same context, a problem with referendums held in less developed countries is mobilisation of people to cast their vote. This is likely to be a particular problem in places such as Bougainville where a large proportion of the population is illiterate or semi-literate, scattered in often remote rural areas rather than concentrated in cities and towns, and where political parties are very weak. In an election, candidates, political parties and their active supporters have a major role at the local level in informing potential voters about the referendum and mobilising them to vote. But as there are no candidates in a referendum, this form of voter mobilisation does not occur. Instead, voter mobilisation probably requires organised groups campaigning at the local level with effective information and awareness programs designed to reach illiterate and scattered rural populations. It is not clear whether these types of arrangements will be able to be put in place before the Bougainville referendum.

FREE AND FAIR — REGULATION OF REFERENDUMS

As with elections, it is often said that referendums should be free and fair.

Referendums have many similarities with elections and, as with elections, it is often said that referendums should be free and fair. Although there is a large body of literature about fairness and freedom in elections and how those qualities should be evaluated and achieved,[27] the situation is less clear with referendums. Writing in 2005, Qvortrup commented that 'there is no legal international consensus on what constitutes a free and fair referendum; there is not even a consensus on whether

regulation is needed at all' (2005b:22).[28] While these comments remain broadly valid 14 years later in 2019, there has been some emergence since the early 2000s of accepted international standards for the conduct of referendums. Important reasons Qvortrup's description in 2005 are that the trend to much greater use of referendums was still new and — apart from Switzerland and California, where citizen-initiated referendums are common — for most countries were (and in most cases still are) quite rare events.

This is not to say that every aspect of referendums has generally been unregulated — the electoral process for the referendum in particular (such as voter registration, polling, scrutiny) is usually regulated by law, either the law providing for a particular referendum or a law dealing with the conduct of referendums generally. Freedom and fairness in the electoral side of a referendum deals with much the same issues as elections. Freedom relates to the rights of voters to register and vote, with rights to freedom of expression, association and assembly being recognised. Fairness relates, amongst other things, to all political parties and civic groups having equal rights to contest and campaign, thereby creating a fair chance to persuade voters to vote for them. What tends not to be regulated are factors specific to referendums as opposed to elections, including setting the question, provision of balanced information to voters, government campaign spending in favour of one side of the referendum — factors that will be discussed more in the second part of this book.

The emergence of regulatory standards for referendums since Qvortrup's 2005 observations has been a response to the increasing use of referendums and the growing evidence of problems caused or contributed to by a lack of systematic regulation. There is growing acceptance of the proposition that a referendum should be a legitimate expression of the people's views but that there are simply too many ways in which referendums can be manipulated, by those in power and others. As a result, the concept that referendums should be capable of being evaluated as to whether they are free and fair beyond their electoral aspects has increasing legitimacy.

In general the emerging regulatory standards are directed to responding to as many as possible of these problems with the conduct of referendums, with a view to ensuring that people can freely participate in referendums that are fairly conducted. The assumption is that if regulatory standards can ensure that a referendum is free and fair, then there will be a strong basis for the outcome of the referendum to be regarded as legitimate. Further, once standards for freedom and fairness of referendums are established, they can be used to evaluate the conduct of particular referendums.

In the case of the Bougainville referendum, not only does the BPA (para. 317) require that the referendum be free and fair but the PNG constitution (s. 341) requires that the two governments 'shall cooperate to ensure that the referendum is free and fair'. Under the organic law (sch. 1.9(1)(b)) the functions of the agency tasked with conducting the referendum include 'encouraging wider public interest in ensuring that the Referendum is conducted in a free and fair manner'. In the absence of guidance in the two constitutional laws, it seems prudent to seek guidance from the emerging international practice in determining the meaning of free and fair in relation to referendums.

Various approaches to regulation of referendums are emerging. In countries where legislation deals with referendums on a case-by-case basis, there is less likelihood of basic regulatory standards being established than if a country develops general legislation for the conduct of referendums. Not unexpectedly, general legislation is much more likely in countries that have held several referendums (Reidy and Suiter 2015:168; Zellweger et al. 2010:214).

Perhaps the most widely known example of general referendum legislation is the United Kingdom's Political Parties, Elections and Referendums Act 2000 (commonly known as PPERA). While some provision for a particular referendum held in the UK is set out in the legislation initiating that referendum, numerous aspects of the regulation of all referendums are in PPERA. Thus, while a law about the particular referendum contains the question and timelines for that referendum, PPERA authorises the UK's Electoral Commission to act as an independent regulatory body for all referendums. Amongst other things, the Act also gives the commission a significant role in evaluating the 'intelligibility' of the question to be asked in the referendum and establishes campaign funding, expenditure limits and reporting requirements. After the 2016 Brexit referendum, there was considerable criticism of PPERA for not establishing an adequate regulatory framework for the delivery of information to voters, ensuring the accuracy of statements made by campaigns and the restriction of government expenditure in support of one side of the campaign (Electoral Reform Society 2016; Kildea 15/11/2016).

Referendum legislation and the conduct of referendums generally is gradually being shaped or at least influenced by emerging international standards. So far these standards are emerging mainly in Europe. Contributions include the analysis of and 'recommendations and best practices' for referendums proposed by the Institute for Democracy and Electoral Assistance (IDEA) in its *Direct Democracy International Handbook* (IDEA 2008:41–59, 195–7).

Undoubtedly, however, the most influential regulatory guidance so far comes from the Venice Commission's *Code of Good Practice on Referendums* (2007).[29] While it has been described as setting 'only a minimum standard formulated in rather open terms' (Zellweger et al. 2010:222) it provides far more comprehensive coverage of regulatory questions than PPERA. The code is based on the Venice Commission's *Code of Good Practice in Electoral Matters* of 2002. Indeed the first part of the referendum code reflects the electoral code, adapted to the needs of referendums. The latter part deals with aspects of referendums that are distinct from electoral arrangements. The code constitutes unenforceable but nevertheless influential recommendations for the 47 member states of the Council of Europe (all European states including Turkey and the post-Soviet Commonwealth of Independent States, except Belarus, Kazakhstan and the Vatican). It provides much of the basis for evaluations of referendums in European countries, usually made after extensive referendum-monitoring exercises. Sometimes this evaluative work is undertaken by the Venice Commission alone, sometimes by the Office for Democratic Institutions and Human Rights (ODIHR) in the Organization for Security and Cooperation in Europe (OSCE) and sometimes jointly by these latter two bodies.

These evaluative reports can be highly critical of how particular referendums have been conducted, in large part by reference to the 2007 code. For example, the OSCE/ODIHR report on Turkey's constitutional referendum of 16 April 2017 (with extensive reference to the code), concluded, inter alia, that the referendum:

> took place on an unlevel playing field and the two sides of the campaign did not have equal opportunities. Voters were not provided with impartial information about key aspects of the reform, and civil society organizations were not able to participate … One side's dominance in the coverage and restrictions on the media reduced voters' access to a plurality of views … Contrary to international good practice for referenda, the 18 proposed amendments affecting 72 articles of the [Turkish] constitution were voted on as a single package. Voters did not have the opportunity to make a choice about each of the distinct issues featured in the amendments and were simply asked to vote for a yes or no option. The state did

> not ensure that voters were provided with impartial or balanced information on the amendments and their potential impact, thus limiting their ability to make an informed choice (OSCE/ODIHR 2017:1–2).

While only a few key points of the Venice Commission's *Code of Good Practice on Referendums* (2007) can be highlighted here, they are sufficient to indicate its scope:

- There should be equal opportunity for supporters and opponents of the proposal being voted upon, including in relation to media coverage, bill posting, advertising, rights to public demonstration, and access to public funding for campaigning (p. 6).
- While there may be room for government figures and bodies to intervene in the campaign, this should not extend to use of public funding by such authorities for campaign purposes (p. 7).
- The question put must be clear, not be misleading, not suggest the answer, be able to be answered by a 'yes', a 'no', or a blank vote and must not ask an open question necessitating a more detailed answer (pp. 7, 21).
- The authorities must provide voters with objective information containing balanced campaign material from the referendum proposal's supporters and opponents sufficiently in advance of the referendum and certainly no later than two weeks prior to the referendum (pp. 7, 17).
- Postal voting should be used only where the postal service is safe and reliable (p. 8).
- Referendum observers should undertake the widest possible observation, not restricted to the time of voting, but extending to voter registration, the campaign period, and so on (p. 10).
- There should be no requirement for either a turnout quorum or an approval quorum (p. 13).
- The executive arm of government must organise referendums provided for by the legislature, whether or not they involve executive initiative, and must comply with procedural rules, including adhering to 'the time limit prescribed by law' and establishing the 'body responsible for organising the referendum in a transparent manner' (p. 8).

For sub-national or ethno-national referendums, including independence referendums, several academic commentators have also proposed basic regulatory standards (Qvortrup 2014a:123–43; Rosulek 2016a; Sen 2015:209–65; Tierney 2004:305-24). These proposed standards are not as detailed as the Venice Commission's code but have considerable overlap with it. The most extensive can be found in the distillation of 10 aspects of referendum regulation by Qvortrup, which he indicates are derived from 'a bewildering array of regulations' from around the world, but which nevertheless represent 'the best practices on how to organize referendums on ethnic and national issues' (Qvortrup 2014a:124–25). This analysis of possible best practice are summarised in the conclusions to this book.

Interest in the possibilities of more uniform regulation of referendums under internationally accepted standards is growing, in large part with a view to facilitating better 'comparative evaluation of the impact of referendum regulation under various settings, and additionally that it may be used to examine whether the normative assumptions behind many of the regulatory recommendations do, in fact, hold true' (Reidy and Suiter 2015:168).

PART TWO

THE BOUGAINVILLE REFERENDUM ARRANGEMENTS

Photo: Adriana Schmidt

CHAPTER FOUR
THE SUBJECT OF THE BOUGAINVILLE REFERENDUM

In October 2018, the JSB approved the question to be asked in the Bougainville referendum. The decision was to have a single question, as follows:

> Do you want Bougainville to have:
>
> (1) Greater Autonomy;
> (2) Independence.

In addition, the JSB agreed to include explanatory words that would not be part of the question, but instead were intended to make it clear to voters that the ultimate decision about the outcome of the referendum is vested in the national parliament, as is discussed later in this chapter.

This chapter reviews aspects of international experience in deciding the subject matter of a referendum. The second part of the chapter examines the decision by the national government and the ABG made in October 2018 on the question to be asked in the referendum.

ASPECTS OF INTERNATIONAL EXPERIENCE

The question as part of the ballot text

The wording of the question put to a referendum through the referendum ballot paper is sometimes described as being a part of the ballot text, mainly because the text on the ballot paper sometimes includes more than just the question or proposition put to the voters. Categories of wording that can appear on the ballot paper include: possible instructions to voters on how they should complete the ballot paper; an introductory or explanatory statement about the question or proposition or other form of wording that comes before the question or proposition(s); any symbols associated with particular options (sometimes included to assist illiterate voters); and the 'response options' offered in relation to the question asked or options put to the voters. A range of broadly similar issues can arise with any of these various categories of ballot text.

The concept of 'response options' requires a brief explanation. They are the formulations of the answers to the question asked or choices in relation to alternative proposals in the referendum. Very often the response options offered on the ballot paper are 'yes' and 'no', but there are other possibilities. In fact, there are arguments that 'yes' and 'no' responses could be a source of problems. For example, although 'yes' and 'no' response options had previously been used in UK referendums, the UK government accepted it's electoral commission's recommendation for the 2016 UK Brexit referendum to not use these responses even though they had been originally included in the proposed ballot text. The reason was that after testing voter understanding of that proposed text and consulting political parties, interest groups and language experts, the commission concluded that because the 'yes' vote involved acceptance of the status quo (the UK remaining in the European Union), it was likely to 'encourage voters to accept one response [remain in Europe] more favourably than the other' (Electoral Commission 2015:39). As the commission explained in its blog, this meant that:

> While we found that voters understood the 'yes' and 'no' question in the Bill [the law proposing the original text], some campaigners and members of the public felt the [originally proposed] wording is not balanced and there was a perception of bias. (Electoral Commission 1/9/2015).

Eventually the question asked was: 'Should the United Kingdom remain a member of the European Union or leave the European Union? The two response options were: 'Remain a member of the European Union' or 'Leave the European Union'.

Another example of response options other than 'yes' and 'no' comes from the UN-supervised Tokelau referendum[30] in 2005–06 on proposals for free association of Tokelau with New Zealand, which were 'I agree with the proposal' and 'I reject the proposal'. In the South Sudan independence referendum of 2011, the question and the response options were in a sense combined. The ballot paper contained just two words in both English and Arabic —'unity' and 'secession' — together with symbols for each option and voters were instructed to place their thumb print in the square space next to the option that they supported.

Analysis of the ballot text often focuses on bias. For example, Rosulek analyses questions asked in eight independence referendums, held in Europe and post-colonial states between 1980 and 2014, and finds most of them biased to some extent (2016b). On the other hand, Qvortrup (2014a:143) argues that, in relation to referendums on devolution and self-government (1980–2011) 'there is no evidence that biased words lure voters to support propositions that they disagree with'.

'There is no evidence that biased words lure voters to support propositions that they disagree with.' (Qvortrup 2014:143)

In addition to bias, however, there are other ways in which phrasing of ballot text can cause or contribute to problems in a referendum. The text can be deliberately or unintentionally leading, ambiguous, misleading or otherwise unbalanced. Long, complex, unclear or confusing wording can (intentionally or otherwise) mislead voters (Burnett and Kogan 2015)[31] and/or result in them experiencing difficulties in voting for the outcome that they support. So there are good reasons for seeking to ensure that there are as few problems as possible with the ballot text.

In general, it is widely accepted that 'the wording of the question [in a referendum] can have an important effect on the result and its legitimacy' (IDEA 2008:54). Even if there is no clear evidence that bias or other problems in the text can mislead voters, there is little doubt that perceptions of bias or other deficiencies can themselves cause serious problems. They can raise fears of lack of fairness and legitimacy in the referendum process as a whole, which can in turn contribute to a range of problems, including abstention of voters.

Emerging international standards for the ballot text

Recommended standards for referendum ballot texts have emerged in the years since the BPA was signed and are available to the PNG government and the ABG when consulting about the 'question or questions' to be asked in the Bougainville referendum. The three most often cited sources of such standards are the Venice Commission's *Code of Good Practice on Referendums*, the UK's PPERA, and IDEA's 'Recommendations and Good Practices' (for various forms of direct democracy, including referendums), with the Venice Commission's code being the most comprehensive. This is not to say that they were actually used in the process for reaching agreement on the question in the Bougainville case. Rather, they may provide possible benchmarks for evaluating the question asked.

The Venice Commission's code regards the clarity of the question as a crucial aspect of the voter's freedom to form an opinion, itself a part of general principles of universal, equal and fair suffrage. The explanatory memorandum for the code states:

> The clarity of the question is a crucial aspect of voters' freedom to form an opinion. The question must not be misleading; it must not suggest an answer, particularly by mentioning the presumed consequences of approving or rejecting

> the proposal; voters must be able to answer the question asked solely by yes, no or a blank vote; and it must not ask an open question necessitating a more detailed answer. Lastly, voters must be informed of the impact of their votes, and thus the effect of the referendum (is it legally binding or consultative? does a positive outcome lead to the adoption or repeal of a measure, or is it just one stage in a longer procedure?) (Venice Commission 2007:18).

In the UK, where the question or proposition to be put to a referendum is set out in the law authorising the referendum to be held, the electoral commission has a critically important role in looking at the 'intelligibility' of the question. The commission has issued guidelines about how it assesses, and makes recommendations about improving, intelligibility of the question, which the commission defines as including 'the question, the responses, and any statement that comes before the question' (Electoral Commission 2009). The key provisions of the guidelines are:

A referendum question should present the options clearly, simply and neutrally. So it should

- be easy to understand
- be to the point
- be unambiguous
- avoid encouraging voters to consider one response more favourably than another
- avoid misleading voters (ibid.).

The commission uses the following checklist in assessing intelligibility:

- Is the question written in plain language? That is, language that:
  - uses short sentences (around 15–20 words)
  - is simple, direct and concise
  - uses familiar words, and avoids jargon or technical terms that would not be easily understood by most people.
- Is the question written in neutral language, avoiding words that suggest a judgment or opinion, either explicitly or implicitly?
- Is the information contained in the question factual, describing the question and the options clearly and factually?
- Does the question avoid assuming anything about voters' views? (ibid.).

In the UK, the electoral commission interprets its statutory role on intelligibility as going beyond just advising about whether or not voters will understand the language used in the proposed question.

The electoral commission interprets its statutory role on intelligibility as going beyond just advising about whether or not voters will understand the language used in the proposed question. Rather, the commission regards itself as having the power to 'suggest alternative drafting or to offer suggestions as to how a particular question might be reframed' (Electoral Commission 2015:5).

The key principles in the best practice proposed by IDEA (2008:196) are that 'the ballot text should be as precise and clear as possible and should have only one goal and one possible interpretation'.

Ballot text languages

Where referendums are held in places where more than one language is spoken, questions often arise about the possible need for the ballot text to be written in more than one language. The multiplicity of languages spoken in Bougainville and the limited education of a majority of people means that Melanesian Tok Pisin is not only the language that a large proportion use, but is also the main language in which many are literate. Clearly an important consideration for the referendum is determining whether the referendum ballot text, as well as official information and awareness material about that text, should be in both English and Tok Pisin.

Some of the challenges of preparing for a multilingual referendum were highlighted by the chair of the Welsh Language Board when commenting on the invitation to that board by the UK government to participate in deciding the question to be asked in the 2011 referendum on the law-making powers of the National Assembly for Wales:

> When people go out to vote, it is important that they can do so in language that they are most comfortable using. Many people will read the referendum question in Welsh before casting their vote … so it is essential that the wording makes sense. By writing the question in Welsh at the same time as in English, particular attention will be given to what works in both languages, and there will not be anything that will be lost in translation (Office of the Secretary of State for Wales 7/6/2010).

It is far from unusual for the ballot text to be written in more than one language and decisions must be made on which languages to use. In the East Timor 1999 referendum, the ballot text was in four languages (Tetum, Portuguese, English and Bahasa Indonesian). In the Kurdistan referendum held on 25 September 2017, the text was written in four languages — Kurdish, Arabic, Turkmen and Assyrian. Of course, referendums where the text is in two languages are more common. Sometimes this will be two languages for just part of a country (as occurs with Wales in UK national referendums), but more often for the whole country as with the Tokelau referendum of 2005–06 (Tokelauan and English), Irish referendums (Irish and English), referendums in Canada (French and English) and the 2011 referendum in Sudan (English and Arabic).

Once two or more languages are required, significant organisational challenges can arise in arranging dual language materials — for example where the texts in the two or more languages are not prepared simultaneously, rather one is translated from the other. For example, when the proposed English language question for the 2016 UK Brexit referendum was being translated into Welsh, the Welsh word for ‘remain’ caused some difficulty because of its similarity to the Welsh word for ‘bread’ (GFK Social Research 2015:46).

Translation from one language to another can actually create serious consequences, as occurred in the Irish referendum of 2015 on a proposed constitutional change to permit same-sex marriage. The English version of the constitutional change was: ‘Marriage may be contracted in accordance with law by two persons without distinction as to their sex’. When translated into Irish and then translated directly back into English it stated: ‘A couple may, whether they are men or women, make a contract of marriage in accordance with the law’. Constitutional problems could have arisen. ‘The use of the plural [in the translation back to English] created a difficulty in that one interpretation of the wording was that it distinguished only between female couples and male couples, but did not distinguish between same-sex and heterosexual couples’ (McGee 10/3/2015). The Taoiseach (Irish prime minister) was quoted as saying

that in future he wanted to see such constitutional amendments 'co-drafted (simultaneously in Irish and English)' rather than have 'the text … written in English and subsequently translated into Irish' (ibid.).

Multiple options and/or multiple questions

The vast majority of referendums deal with just one question or proposition for which there are two possible response options, usually 'yes' and 'no', one of which usually seeks retention of the status quo and the other a change. There has been, however, a small minority of referendums[32] with more than two options, which have sometimes asked two or more questions. Before the decision was made in October 2018 on the question for the Bougainville referendum, there were several options being discussed which could have been dealt with by having multiple options and/or questions on the ballot paper.

As Tierney (2013a) notes, the analysis here is about referendums with more than two distinctive options, each addressing the same issue and directed to achieving one outcome. Bougainville would provide an example of such a referendum if it were to involve one or more questions offering two or more options on the political future of Bougainville in addition to independence. A multi-option referendum directed to achieving a single outcome on the same issue is different from either a multi-question referendum where voters are offered separate votes on a number of distinct questions, leading to multiple decisions on those issues, or a single question referendum in which voters are asked to agree or disagree with multiple but distinct changes to a constitution or other law.

The emerging regulatory standards for referendums do not rule out multi-option referendums. For example, the Venice Commission's *Code of Good Practice on Referendums* (2007:11) talks of 'questions submitted to a referendum'. IDEA (2008:54) tackles the issues more explicitly:

> Usually referendums give the voters the possibility to vote for or against a specific proposal. In some cases voters have been given a choice between three alternatives … The clearest result is obtained if the voters are asked to choose between two alternatives. If they have to choose between three or more alternatives it may be difficult to interpret the referendum result. However, if a choice between more than two alternatives is really wanted, a vote where the alternatives are rank-ordered could be applied, or the issues could be split up into two or more questions — each of them with two alternatives — as in the Republic of Ireland, where policy on abortion was split up into three separate questions in the 1992 referendum dealing with that issue.

The principal advantage of a multi-option referendum is that it can address situations where there are more than two options that have a significant degree of support. The normal two-option referendum usually offers a choice between the status quo and a change. A much-discussed example is the 2014 referendum on independence for Scotland. A form of autonomy, known as devolution, was then operating in Scotland. At the same time as independence for Scotland was being debated, there was open discussion about various alternatives, most of which involved increased devolution, to make Scotland even more autonomous while still remaining a part of the UK. In the lead-up to the referendum, before the text had been finalised, opinion polls consistently showed that the preferred option of a majority of the people was 'some model of substantially stronger devolution without attaining full independence' (Adam 2014:51). Nevertheless, the UK government insisted on a two-option referendum (independence or the status quo), an arrangement to which the Scottish government eventually agreed.

Adam points out what could have resulted from including a third option — one of the forms of increased devolution — on the ballot paper:

> it would have required a definition of this intermediate option, and this would have brought with it a more nuanced discussion of its different possible versions … second, it would have required an agreement between both levels of government [the UK and the Scottish governments] on its definition, and also a commitment from both sides to carry out the necessary reforms, if that option had won. Third, the inclusion of the third option would have allowed for the establishment of a third campaign [in the referendum], arguing specifically for the advantages of 'more devolution' over both the status quo and the independence options, and a more general and comprehensive debate on Scotland's future (2014:63).

In addition, the absence of any further devolution option on the ballot meant that supporters of devolution were then forced to consider whether they would support one of the two options that were agreed to be on the ballot paper — the status quo and independence— or whether to support neither option. As a result, the absence of a third option might have meant that the referendum vote did not accurately reflect the views of the voters.

Major disadvantages of referendums with three or more options include the ballot text probably being longer and more complex than if there were just two options and greater complexity in the issues that voters should consider. In addition, as Tierney indicates, there is another problem with referendums where more than two options are included in one question and where the winner is whichever option gains the majority of votes (whether or not it gets more or less than 50 per cent support) (2013b:10). Where no option gets at least 50 per cent support, it is easy to have confusion and disagreement about the outcome. Tierney points to the example of a 1957 Swedish referendum on welfare reform where none of the three options put forward received majority support. The implications of the vote were unclear and efforts to implement the reform which had the greatest support were opposed on the basis that it had not received majority support.

Tierney outlines five main ways in which a multiple-option referendum might be conducted (2013b) and Boschler discusses yet another, drawn from experience of referendums in three Swiss cantons (2010). It is not possible here to adequately discuss the complex information and arguments that Tierney and Boschler present. However, a general indication of possibilities and of some of the issues involved may be gained from a brief explanation and comparison of just two of the examples discussed by Tierney. New Zealand took the approach of having two separate referendums, in 1992–93 and again in 2011, while the other way adopted by Puerto Rico in 2012 was for just one referendum.[33]

The New Zealand process sought to make decisions about proposed reforms to that country's electoral system. The first referendum, in 1992, had two questions. The first question asked if voters wanted change from the status quo, and if so, the second question asked which of four change options they preferred. In response to the first question a majority voted for change from the status quo (the first-past-the-post voting system).In answer to the second question, the option with the highest support was a mixed member proportional (MMP) system. A second and binding referendum was held a year later where voters were presented with one question, asking them to choose between the status quo and the MMP system, with a majority voting for change to the MMP system. Tierney describes this method, used to decide between five options (the status quo and four possible changes), as the 'gateway, filter and run-off model over two referendums' (2013b:11–12). The gateway was the first

question in the first referendum where a choice was made between the status quo and change. The second question in the first referendum was the filter, selecting a single reform option from a possible four choices and enabling a final choice between the status quo and the most popular reform to be made in the second referendum (the run-off). In the 2011 referendum, two questions were again asked. The first was the gateway question as to whether voters wanted to retain the status quo (now the MMP system) or wanted change, while the second — or filter — question offered four possible options for change. On the first question, a majority of voters (57.8 per cent) chose to support the then status quo (that is, retain the MMP system), which meant that votes for the options offered in the second question did not need to be considered. As a result, there was no need to organise a second — run-off — referendum.

The Puerto Rico referendum of 2012 was about the political status of Puerto Rico and in particular the future of its relationship with the United States. It was similar to the two New Zealand referendums in that there was an initial — gateway — question asking if voters wanted change from the status quo (Puerto Rico was an unincorporated part of the USA), with a second — filter — question asking which of three possible new political statuses would be preferred if the answer to the first question supported change. The three change options were become a state within the USA, independence, or free association with the USA, with the result to be decided on a plurality (first-past-the-post) model. In the vote on the first question, the majority (54 per cent) rejected the status quo. Of those answering the second question 61.11 per cent supported statehood, 33.34 per cent chose free association, and just 5.55 per cent chose independence.

In looking at the differences between the New Zealand and Puerto Rico examples, perhaps the most important is the use of the second referendum in New Zealand (as opposed to one only with Puerto Rico), and the possibility of the final decision on choice of a change option in Puerto Rico being made by a plurality vote rather than an absolute majority of votes as took place in New Zealand. As Tierney points out, although a plurality decision

> is widely accepted for the election of officials in first past the post electoral systems, it is widely viewed as inappropriate for the making of major constitutional decisions [in referendums]. The main objection would appear to be that referendums, particularly those determining matters of the highest constitutional consequence, require a more conclusive result (2013b:15).

The process for determining the ballot text

A 1996 UK study of referendums in the UK noted that ‘there is always likely to be argument over the fairness of the wording and the layout of the ballot paper’ (Constitution Unit and the Electoral Reform Society 1996:46). The likelihood and intensity of such argument can, however, be significantly reduced depending on the process used to determine the question. Ranney notes that:

> The broad issue put to the public in a referendum is likely to be controversial, even before its exact formulation into a ballot question. Certainly the debate over how the proposition is to be worded can be an important part of the whole campaign, educating the protagonists and the electorate about what is at stake. Those sponsoring a referendum naturally want the phraseology likely to elicit the most favourable result … Nonetheless, fair referendums do require the question to be as balanced and unambiguous as possible (1981b:190).

The question of the most appropriate processes for defining ballot text is under increasing international discussion, with much of the focus on who has final responsibility for determining the text and who can have an input into the process. As it is invariably a government that initiates a referendum, an initial question is whether it should also be solely responsible for formulating the ballot text. There have been many cases where governments have sought to influence referendums through the way they formulate that text. As a result 'in some jurisdictions, an electoral management body … may have oversight of the formulation of the referendum question so that this responsibility is placed in the hands of a more politically neutral body' (IDEA 2008:53).

An important option includes the public in some way in formulation of the ballot text. Tierney (2013a:511–14) discusses cases of consultation in British Columbia (in Canada) and Australia undertaken through 'mini-assemblies' of either randomly selected voters or a more broadly representative but still relatively small body. The government sought the public's views and publicised the outcomes of the consultations. While there were shortcomings in these processes, they also had their benefits and certainly offer examples of consultative methods that might be adapted in other referendum processes. In independence referendums, the ballot text can be expected to be a matter of considerable sensitivity and there is likely to be a range of interest groups that will not only have strong views but may also feel they have a right to be consulted on the text. It will be a matter of judgment in each case as to what consultation will be necessary and/or possible. Informal consultation may often be all that will be required.

The role of the UK Electoral Commission in assessing the intelligibility of the ballot text gives it a critically important role in shaping the final text in any UK referendum. Its reports on recent referendums — on proposed changes to the UK electoral system (Electoral Commission 2010a), law-making powers of the National Assembly for Wales (Electoral Commission 2010b), Scottish independence (Electoral Commission 2013) and UK membership of the European Union (Electoral Commission 2015)— have all recommended changes to the ballot text, which were all accepted by the government concerned. The commission follows a rigorous process:

- Carrying out qualitative public opinion research [about the proposed ballot text] with people from different backgrounds and demographics across the UK, through focus groups and one-to-one, in-depth interviews [to test the ballot text].
- Asking for advice from experts on accessibility and plain language.
- Writing to interested parties, including political parties and would-be campaigners, to seek their views and to offer meetings to hear from them.
- Receiving views and comments from individual people or organisations who contacted the commission, having seen from its website or otherwise heard that the commission was undertaking the question assessment (Electoral Commission 2015:5).

In assessing intelligibility in advance of the 2011 referendum on the law-making powers of the National Assembly for Wales, the commission consulted extensively with experts on the Welsh language on both the wording of the Welsh language version and the consistency of the meaning of the Welsh in comparison with the English version of the question (Electoral Commission 2010b).

When all put together, the independent status of the UK Commission, the rigour with which it carries out its assessments of intelligibility and its track record of carefully considered reports on successive ballot texts make it almost unimaginable that its advice on ballot text would be rejected by government.

One of the main benefits of the process followed by the UK Electoral Commission is exposure of the ballot text to the scrutiny of various categories of expertise, but this could be done in a less formal

manner. A post-referendum study of a 1999 citizen-initiated referendum in New Zealand indicated that many voters had probably had limited understanding of what was undoubtedly a poorly designed text that incorporated a number of questions into one.[34] The study concluded that:

> survey professionals need to be involved in designing referendum questions and that proposed questions need cognitive pre-testing to ensure that they convey their intended meaning and can be understood by voters. A poorly designed question reduces the credibility of the referendum process and threatens the outcome of specific policy initiatives (Gendall et al. 2002:303).

While this study looked at a citizen-initiated referendum rather than one initiated by government, the points made remain valid for all categories of referendum.

An additional requirement identified by the Venice Commission (2007:11) is vesting an appropriate appeal body with authority, before the vote in the referendum takes place, to review the validity of the ballot text. IDEA identified other factors important to the practical operation of an appeal system:

> If this option [appeal against the way in which the ballot text has been formulated] is adopted, it must be precisely established who can appeal, for instance, a governmental institution different from the one which wrote the ballot text, or a certain number of citizens, and within what period of time. Consideration should also be given to which body shall be called upon to decide the matter. In the same way, there should also be a clear regulation about the period of time the body will have to resolve the conflict [about the ballot text] (2008:55).

Finally, there is the possibility in independence referendums of some form of international community involvement in the framing of the ballot text, but mainly in cases where the UN or some other international body has responsibility for organisation or oversight of the referendum. Qvortrup (2015:9) notes that the questions asked in the referendums in Eritrea (1993), Montenegro (2006) and South Sudan (2011) were all drafted with international community involvement (see the texts of these questions in appendix 1).

THE CONSTITUTIONAL PROVISIONS ON THE SUBJECT OF THE BOUGAINVILLE REFERENDUM

The PNG constitution requires that the referendum must be ‘on the future political status of Bougainville’ (subsection 338(1)), which might be described as the broad subject matter of the referendum. That broad subject is different from what the constitution separately refers to as ‘the question or questions’ to be asked in the referendum, which is (or are) directed to identifying with specificity a particular political future favoured by the people of Bougainville. In other words, the question or questions must offer options on the future political status of Bougainville. The constitution identifies one such option that must be included — that of a ‘separate independence for Bougainville’ (PNG constitution section 339(c)). However, the broad subject matter is potentially wider than just a single option and the constitution makes it the responsibility of the two governments to decide whether and what other options are also included. The possibility of inclusion of other options is, however, subject to the requirement that the question or questions as agreed between the two governments ‘shall be formulated to avoid a disputed or unclear result’.

The two governments are free to agree to either a single question or to a series of two or more questions and either approach could offer choices of options, provided always that one of the options is independence and that the formulation is directed towards achieving an agreed and clear result.

A 2014 United Nations Development Program (UNDP) report argued that:

> The people of Bougainville will need to be clear that it is not a referendum on independence but a referendum on Bougainville's future political status, and that independence is an option. If there can be more options than continued autonomy and independence, this needs to be discussed sooner than later, so that people have time to absorb this (2014:28).

In fact, if the two governments were to agree, the referendum could be about independence only. For example, this would be the case if the governments were to agree to just a single question with no more than one option, provided a 'choice of a separate independence' is part of the question (which would then require choice of a 'yes' or a 'no' response). Such an approach was recommended by the June 2017 report of the ABG parliamentary committee (ABG 2017:9–10) and by the proposals made by the ABG to the JSB[35] at its December 2017, June and October 2018 meetings. The decision reached by the October 2018 JSB meeting, however, includes two options.

It should also be noted that while the PNG constitution requires either a question or questions, experience elsewhere shows that referendums do not always have to actually ask a question. Rather, a referendum can deal with a choice of alternative options for deciding the issue that the referendum is intended to deal with. An example is provided by the 2011 referendum on independence of South Sudan from Sudan, in which voters chose by marking the ballot paper with a finger print beside one of just two single-word options: 'secession' or 'unity'. To assist illiterate voters, the ballot paper also included symbols beside the two options — joined hands next to the unity option and a single hand next to the secession option.

Developing Bougainville's question or questions

As noted already, from as early as December 2017, the ABG advanced its proposals for the wording of what it proposed should be a single question. The proposed question was: 'Do you support Bougainville becoming independent?' with the response options being 'yes' or 'no'. In advancing this proposal, the ABG emphasised the need to determine the question as soon as was practicable so that there could be informed debate and awareness campaigns about the subject of the referendum. At the December 2017 JSB, the national government indicated it was not yet ready for a discussion of the question or questions and it was agreed to defer the discussion to the next JSB, which was held in Arawa (central Bougainville) on 29 June 2018. During the preparations for this meeting it became evident that there was actually considerable concern within the national government about the referendum and particularly about the fact that the referendum is required to include an option of independence for Bougainville. In part this concern reflected the lack of attention that issues relating to Bougainville had been receiving from the national government.

An additional complication was several postings made on social media by a lawyer and former minister in the Chan government (1994–97), Daniel Tulapi, asserting that the provisions of the PNG constitution providing for the referendum were in fact unconstitutional. He claimed, in particular, that under the PNG constitution it was unconstitutional to make provision allowing for part of the country to become independent. He argued that that was what the constitutional provisions on the Bougainville referendum

did.[36] In fact, there was no basis for Tulapi's claims and in due course the PNG Attorney-General and Minister for Justice, Davis Steven, acknowledged that fact in discussions with Bougainville ministers in August 2018. Nevertheless as a result of such concerns, the Joint Technical Team (JTT), comprising officials from both the ABG and the national government and which usually meets a week or two before each JSB meeting, was requested by the PNG Chief Secretary to authorise joint legal advice on the constitutional issues arising from the ABG's proposed question. Such advice was prepared before the JSB meeting and it indicated that the proposed question was constitutionally valid. There was, however, discussion amongst the 11 members of the PNG Cabinet who attended the JSB meeting in Arawa of the possibility of making a constitutional reference to the PNG Supreme Court about the constitutionality of the referendum question. When the prime minister and the ABG president held a one-on-one meeting before the JSB, the prime minister advised that the national government was not ready for discussion of the question, and proposed deferring the discussion to a special JSB, to be held before the end of July 2018. The ABG was by now concerned that there might be a constitutional challenge before the JSB met.

The JSB did not meet in late July as had been agreed at the 29 June meeting. In August 2018 a team of three ABG ministers travelled to Port Moresby to meet counterpart national government ministers in order to prepare for the special JSB. In a meeting with PNG's Attorney-General, he confirmed national government concerns about the constitutional validity of the question proposed by the ABG and indicated that the lawyers from both governments should consider the issues involved. As a result, the ABG lawyers met the State Solicitor, Daniel Rolpagarea. He indicated that the key point for the national government was that the wording of the question should make it clear that the outcome of the referendum was subject to the ultimate authority of the national parliament. The ABG lawyers argued that inclusion of such wording could make the question long and complex, but that they would take up the issue with ministers and the Bougainville Cabinet.

The special JSB was eventually held in Port Moresby in October 2018 and its main focus was the question or questions to be asked in the referendum. The national government initially stated that it was not satisfied with a question that included just one option, that is, independence.

The JSB preferred a question that offered two options, independence and 'greater autonomy'.

It preferred a question that offered two options, independence and 'greater autonomy'. This was the first mention of 'greater autonomy' as a concept or a possible option and the term was not defined in any way. Nevertheless the ABG agreed to the national government proposal as it had always been open to a question referring to the status quo – the current autonomy arrangements — as an alternative to independence. The ABG leadership was surprised at the proposal for 'greater autonomy' as the alternative, but welcomed it as indicating that the national government was willing to move away from just the existing autonomy arrangements.

The new wording was quickly agreed between the two technical teams, but when this text was presented to the political leadership of the JSB, former PNG prime minister Peter O'Neill said that he was not satisfied. Instead he insisted that the wording on the ballot paper must include a statement that the outcome of the referendum would be subject to the ultimate authority of the national parliament. He indicated that the wording about parliament did not need to be included in the question, but could be added as what he called 'a footnote' to the question in the ballot text. Not having the additional words about parliament's role in the question itself meant that ABG concerns about the question becoming

too long and complex were met. ABG politicians and advisers quickly agreed to the prime minister's proposal and the technical teams to the two governments authorised the new wording. A preamble on the ballot paper would state:

> The outcome of the referendum on the future political status of Bougainville will be discussed by both governments (the GoPNG and the ABG) and will be presented to the National Parliament for final decision making in accordance with the Bougainville Peace Agreement and the National Constitution.

On the reverse of the ballot paper the following words were to appear:

> The Referendum process is:
>
> 1. People vote.
> 2. National Government and the ABG consult.
> 3. National Parliament decides.

The national government's electoral commissioner, Patilius Gamato, was present at the meeting, with two advisers. As the two technical teams discussed the wording, electoral commission officials prepared drafts of ballot papers, showing how a ballot paper with the preamble and the wording on the reverse might appear.

The proposal to include 'greater autonomy' rather than the status quo originated with the national government and was never elaborated in the discussion between the technical teams or in the JSB meeting itself. The ABG side took it to mean that the national government was recognising that the existing autonomy arrangements were widely regarded in Bougainville as being defective and so might not be a particularly attractive alternative to independence. However, the details of what might be involved if the majority voting in the referendum chose greater autonomy were never discussed.

On the question of translation of the ballot text and inclusion of symbols on the ballot paper, the technical officers agreed that both English and Tok Pisin should be used and the draft ballot paper developed by the electoral commission officers included a translation of English into Tok Pisin. However the inclusion of Tok Pisin was never authorised by a JSB resolution. Further, the translation was done from the English text rather than the English and Tok Pisin texts being developed at the same time. In terms of symbols, the ABG had proposed that they be included on the ballot paper to assist illiterate voters. One suggestion discussed in the JTT meeting preceding the October 2018 JSB meeting was to use the flags of PNG and Bougainville. Both flags would appear next to the greater autonomy option and just the Bougainville flag next to the independence option. This option was opposed by the PNG chief secretary and was not taken up in the discussion at the JSB meeting, so was not included in the JSB resolution on the question to be asked.

In determining the intelligibility of the ballot paper text, while the ABG had indicated the need for testing of intelligibility in its proposals to the December and June JSB meetings, the issue was neglected when authorising the text at the October 2018 JSB. However, in a letter to the speaker of the ABG House of Representatives dated 11 December 2018, the chair of the BRC indicated that 'before the ballot paper will be released to the public, it needs to be carefully tested in a controlled environment to ensure any potential for voter confusion is mitigated'.

The chair of the BRC argued that 'before the ballot paper will be released to the public, it needs to be carefully tested…

That letter from the BRC chair was sent in relation to a 'mock' referendum which was conducted by a member of the ABG House of Representatives for adults living in his constituency. The mock referendum used a different question from the one approved by the JSB. The BRC chair expressed deep concern about the mock referendum and sought the assistance of the speaker in bringing those concerns to the attention of all members of the House, and requested that no further mock referendums be held. The BRC chair's concerns were about the potential for confusion amongst voters likely to be caused by the conduct of mock referendums, especially where — as in this case — the question asked was differently worded from that which had been approved by the JSB. When the ABG House of Representatives met in mid-December, the speaker carefully explained the reasons for the concerns expressed by the BRC chair, and a resolution was passed indicating that no further mock referendums would be conducted by members of the House.

While it is the two governments that have the responsibility to determine the text of the question or questions to be asked (national constitution section 339(a)), the BRC has the responsibility:

» to determine 'the form' of the ballot paper (organic law sch. 1.75(1)); and

» where more than one question is to be voted on, to direct how 'the ballot papers shall be prepared' (organic law sch. 1.75(2)).

The role of the two governments could be regarded as limited to the text of the questions; other text, such as the preamble and the wording of any text following the questions, could be regarded as matters for the BRC. The position is, however, unclear. If the role of the BRC extends to text other than the question to be asked, then the BRC role in considering intelligibility could see it making decisions about the preamble and the text on the reverse of the ballot paper.

Looking at the recommendation in the Venice Commission's *Code of Good Practice on Referendums* about the need for a system of review for questioning the validity of texts, the PNG constitution (section 343) provides for any differences about the referendum arising between the two governments to be dealt with by the multi-stage dispute resolution procedure in sections 333–336 of the constitution, which allows for matters to be dealt with by the courts. It is clear that these provisions relate solely to disputes between the two governments and would not provide a basis for appeals by other interested parties. Further, there is no provision for any review or appeals beyond that, meaning that at present there is no appeal avenue for interest groups that might have concerns about aspects of the ballot text. On the other hand, if the two governments were to agree, it may be possible to make provision for an appeal process (that is, through a law made under section 63 of the organic law, which must be agreed to by the two governments).

The inclusion of the option of 'greater autonomy' was acceptable to the ABG representatives in large part because of strong views amongst them that the autonomy arrangements had not worked as well as had been expected when the BPA was negotiated. Proposing 'greater autonomy' indicated willingness by the national government to improve the situation. However, the lack of any exposition of what greater autonomy would involve could see inclusion of the option leading to confusion for voters. Awareness campaigns to inform voters about the options available to them in the referendum will need information about what greater autonomy actually means. Indeed, at a meeting of officials in Port Moresby in January 2019, the suggestion was made that without adequate information about the options for voters, that there may be a danger that the referendum would not be regarded as free and fair.

Photo: UNDP PNG/Alice Plate

Photo: UNDP PNG/Alice Plate

CHAPTER FIVE
DETERMINING THE REFERENDUM DATE AND RELATED ISSUES

No part of the referendum arrangements is more poorly understood than that on setting the date.

No part of the referendum arrangements is more poorly understood than that on setting the date. For a long time after the BPA was signed, many Bougainvilleans assumed that the referendum must be held in 2015. Those asserting or strongly implying that the referendum could be deferred if weapons are adjudged not to be secure, or standards of good governance adjudged as being poor, have included PNG government politicians, officials and advisers (e.g. Yalo 2014), as well as authors of one of the reports discussed in chapter two (see Development Transformations 2013:12–13), academic commentators (e.g. Wallis 2012:37), and former PNG prime minister Peter O'Neill (see, for example, Tlozek 2017; *The National* 5/3/2018; *PNG Post-Courier* 3/5/2018).

This chapter concerns how the date for the referendum is set and, in particular, whether it must be held within the five-year window from 2015 to 2020 or whether it can be deferred beyond that period. It also deals with related issues about how the dates for the various phases of the process (official campaign, voting and scrutiny) are determined, the target date of June 2019 agreed to by the JSB in May 2016, the actual date of 12 October 2019 set by the JSB on 1 March 2019, whether the referendum could be held in conjunction with the ABG general election required in mid-2020 and whether there is a possibility that a decision could be made not to hold the referendum.

THE DATE IN THE BPA AND THE PNG CONSTITUTION

The provisions of the BPA and the constitution concerning the determination of the date when the referendum will be held have given rise to considerable misunderstanding and controversy. Consequently, the terms of those provisions require detailed analysis.

The relevant portions of the BPA are as follows:

> Introduction and Outline, 2:
>
> The referendum will be held no sooner than ten years, and in any case no later than fifteen years, after the election of the autonomous Bougainville Government.
>
> 312.(a) The Constitutional amendments will guarantee that the referendum will be held:
>
> – no earlier than 10 years and, in any case, no later than 15 years after the election of the first autonomous Bougainville Government;
>
> – when the conditions listed below have been met;
>
> – unless the autonomous Bougainville Government decides, after consultation with the National Government and in accordance with the Bougainville Constitution, that the referendum should not be held.
>
> (b) The conditions to be taken into account include:
>
> – weapons disposal; and
>
> – good governance.
>
> (c) The actual date of the referendum will be agreed after consultations by the autonomous Bougainville Government and the National Government.…
>
> 321. The National Government and the autonomous Bougainville Government will consult and co-operate to ensure that the conditions intended to apply before the referendum are met.

The relevant provisions of the Papua New Guinea national constitution are in section 338:

1. Subject to this section, a Referendum on the future political status of Bougainville shall be held in accordance with this Division [Division 7].
2. Subject to subsection (7), the Referendum shall be held on a date agreed after consultation by the Bougainville Government with the National Government, which date shall be not earlier than 10 years and, notwithstanding any other provision, not more than 15 years after the election of the first Bougainville Government.
3. The date referred to in Subsection (2) shall be determined after considering whether[37] –

   (a) weapons have been disposed of in accordance with the Agreement; and

   (b) in accordance with Subsection (4), it has been determined that the Bougainville Government has been and is being conducted in accordance with internationally accepted standards of good governance.
4. The question whether the Bougainville Government has been and is being conducted in accordance with internationally accepted standards of good governance shall be determined in accordance with the review and the dispute resolution procedure.

Both the BPA and the PNG constitution clearly require that the referendum must be held no earlier than 10 years and no later than 15 years after the establishing of the ABG. The first ABG took office in June 2005. As a result, there is a five-year window within which the referendum must be held, which began in June 2015 and will end in June 2020.

Both the outline, introduction and paragraph 312(a) of the BPA provide that the PNG constitution would 'guarantee that the referendum will be held … no earlier than 10 years, and in any case, no later than 15 years after the election of the first autonomous Bougainville Government'. The clear intention of the Bougainville negotiators, accepted by the PNG negotiators and reflected in the words 'in any case, no later than 15 years', was that under no circumstances could the referendum be deferred beyond 15 years after the establishing of the ABG. Their focus on the need to guarantee that there could be no deferral beyond the 15-year window was largely a response to the compromise proposed by Downer late in 2000 (see chapter one). That compromise resulted in a much longer period of deferral of the referendum than pro-secession negotiators had previously demanded. They could only accept that longer deferral if they had the strongest assurance that there could be no further deferral.

Under no circumstances could the referendum be deferred beyond 15 years after the establishing of the ABG.

Section 338 of the PNG constitution gives constitutional effect to the guarantee in the BPA. Amongst other things, it requires that the referendum be held 'on a date agreed after consultation' between the two governments, 'which date shall be not earlier than 10 years and, notwithstanding any other provision, not more than 15 years after the election of the first Bougainville Government'. Those words, 'notwithstanding any other provision', are clearly intended to honour the guarantee in the BPA. They have the same intent and effect as the words 'in any case, no later than' in the introduction, outline and paragraph 312(a) of the BPA.

In this context, the words 'notwithstanding any other provision' signal something akin to 'in spite of anything else that might be said somewhere else' or that 'anything else said on this subject found elsewhere does not have any standing'. The provision states clearly that even if some other provision of the constitution, or any other law, or the BPA, might be interpreted as allowing a delay of the referendum, the requirement of 'not later than 15 years' must be followed.

DECIDING THE ACTUAL DATE

The actual date within the five-year window is to be agreed between the national government and the ABG, but only after:

a. consultation and agreement between the ABG and the national government on the criteria for enrolment of non-resident Bougainvilleans as required by section 55 of the organic law section 55; and

b. consultation about the date of the referendum, as required by section 338(2) of the PNG constitution.

In fact, there is no limit on what matters or concerns might be considered as part of the consultation required by subsection 338(3). It is mandatory, however, that when determining the date the two governments must consider whether:

» 'weapons have been disposed of in accordance with the Agreement [the BPA]' (338(3)(a))

» the ABG has been and is being conducted in accordance with 'internationally accepted standards of good governance', as 'applicable and implemented in the circumstances of Bougainville and Papua New Guinea as a whole' (338(3)(a); 338(4)–(5)).

Although subsection 338(3) requires determinations about whether weapons disposal 'in accordance with the Agreement' has occurred, and whether the requirements of 'good governance have and are being met', once these determinations have been made, these are simply matters that must be considered in setting the referendum date. If one or both of these determinations is or are negative, that will simply be an issue to take account in setting the date. For example, a negative determination on good governance could reasonably be used to support arguments for the date of the referendum being delayed till towards or at the end of the five-year window. Alternatively, if any determinations are made on good governance and weapons, but the governments are unable to reach agreement on the date in the process of consultation, then the referendum must be held 'in any event', no later than 15 years after the establishing of the ABG.

There is no basis, however, in the provisions of the constitution or the BPA for arguing that weapons and good governance are conditions that must be met before the referendum is held.

There is clearly a need for better awareness about the referendum arrangements. In the interest of contributing to that, I now discuss in more detail both the weapons disposal and good governance issues, as well as the arguments in favour of and against good governance and weapons disposal being regarded as conditions that must be met before the referendum can be held

Good governance

The PNG constitution provides that the question as to whether or not the good governance criterion has been met is to be determined by 'the review and dispute settlement procedure' (subsection 338(4)). The 'review' refers to the five-yearly joint ABG/PNG review of the autonomy arrangements provided for under section 337 of the PNG constitution. The 'dispute settlement procedure' refers to the multi-stage process for resolving disputes between the two governments provided for in sections 332 to 336. The dispute procedure would come into operation only if there were to be a dispute between the two governments over the good governance issue during or after the autonomy review process, for example in relation to the findings of the review.

Guidance on what good governance means for the purpose of a determination under subsection 338(3) is provided in subsection 338(5):

> The internationally accepted standards of good governance, as they are applicable and implemented in the circumstances of Bougainville and Papua New Guinea as a whole, include democracy, the opportunity for participation by Bougainvilleans, transparency, accountability, and respect for human rights and the rule of law, including this Constitution.

As discussed in chapter two, under section 337 of the national constitution, the review process involves two distinct stages, the first being reviews by independent experts and the second being consideration of the expert studies by a joint meeting of the two governments. The first stage of the first such review was conducted in 2013 and generated a report that consolidated the views of the seven independent experts who conducted reviews of the discrete aspects of the autonomy arrangements listed in section 337. That report discussed possible approaches to how good governance could be measured and made a negative assessment of the ABG's performance (JSB 2013:62–9). This assessment was made in the context of a broader chapter of the report dealing with public administration and took little or no account of how matters covered in other chapters impacted ABG capacity and performance (e.g. chapters on social and economic matters; grants, revenue and tax; and legal and constitutional issues). Further, the report's authors felt constrained by a lack of clear terms of reference for dealing with the good governance issues. They commented that 'for the next review the terms of reference should be much clearer about the good governance criteria that the experts are required to report against. The term of reference and the scope of the independent expert reports should be prepared against a selection of indicators' (JSB 2013:62). The concern about terms of reference was correct, as those for the 2013 review contained no mention of good governance. As noted in chapter two, the second stage of the review — consultation between the governments about the reports by the independent experts — did not occur.

The first stage of the second five-yearly autonomy review required by section 337 was carried out between August and October 2018. As discussed in chapter two, this time the terms of reference for this part of the review explicitly added good governance to the subjects required to be considered as part of the review. The 200-page report of the review carried out by four independent experts selected and funded by the UN includes a 34-page discussion of the adherence of the ABG to internationally accepted standards of good governance. The main finding of the report in relation to good governance was as follows:

> Overall, ABG has met many standards for good governance, including the delivery of free and fair elections, an active parliament, the provision of basic public services and a relatively peaceful region in which reconciliation is a priority. In some cases, for example local government, ABG has surpassed international standards. For others, such as accountability and transparency, ABG is at a similar stage of development to PNG as a whole. These things have been accomplished despite a lack of consistent funding, and a focus on peace and reconciliation (JSB 2018a:43).

The second stage of the review process involves consideration of the experts' report by the two governments. At the JSB meeting on 1 March 2019, the report of the experts was tabled. There was no detailed discussion of the good governance assessment by the experts. There was, however, a discussion of the dates for the referendum. The main aspect of the date that was discussed was the assessment by the BRC that a lack of funding meant it would not be possible to conduct the referendum on the target date of 15 June.

The evaluation of good governance by the autonomy review process is only a matter to be taken into account in setting the date within the five-year window. It cannot be an issue used to defer the referendum beyond mid-2020 (when that window closes). Indeed, even if it had not been possible to conduct the second review, that would simply have meant that the two governments could not consult over good governance in the manner envisaged by the BPA and section 337. The likely outcome would have been that the date of the referendum would have been pushed back to the end of the five-year window – June 2020. There would have been no basis for further delaying the referendum.

Weapons disposal

There is no mechanism specified in the PNG constitution for deciding if 'weapons have been disposed of in accordance with the Agreement' (subsection 338(3)). The word 'agreement' is defined in subsection 278(1) as 'the Bougainville Peace Agreement signed in Arawa on 30 August 2001 and published in the National Gazette G141 of 9 November 2001'. The only part of the BPA that deals with weapons disposal is Part E, entitled 'Weapons Disposal', which incorporates into the agreement a plan agreed between the Bougainville factions and national government officials for a three-stage process for disposal of weapons held by Bougainvillean factions. The process was to be monitored by the United Nations Observer Mission on Bougainville (UNOMB) with specific verification mechanisms provided in relation to the last two stages of the three-stage disposal process.

Clearly, then, the weapons being disposed of for the purposes of subsection 338(2) are the firearms that were the subject of the weapons disposal plan incorporated into the agreement in paragraph 329. The question whether 'weapons have been disposed of in accordance with the Agreement' means: have they been disposed of in accordance with the agreed weapons disposal plan contained in the agreement? To determine whether they have been disposed of as required, there are UN reports available.

Before touching on those reports, the issue arises as to why the constitution should have been so concerned with the completion of the weapons disposal plan contained in the BPA. The key point to note here is that when the BPA was signed (30 August 2001) and Part XIV of the PNG constitution enacted (March 2002), implementation of the weapons disposal plan was just beginning. No one knew if the weapons would in fact be disposed of in accordance with the plan in the agreement. Hence, the issue about weapons disposal to be determined was formulated as whether disposal 'in accordance with the Agreement' had occurred. It is clear that the purpose of subsection 338(3) was simply to determine whether the requirements of the plan had been complied with.

There is ample evidence that in fact those requirements have been met. That is not to say that every weapon in Bougainville has been disposed of. Indeed, despite hopes to the contrary, it was always understood that it was quite likely that the plan under the agreement would only deal with a proportion of the weapons then present. In particular, the MDF, comprised mainly of former BRA members still loyal to former BRA leader Francis Ona, was never a signatory to the weapons disposal plan under the BPA, nor to the BPA itself. Therefore, the weapons they held were never dealt with under the agreement.

In December 2003, the parties to the plan reached agreement on destruction of weapons as the final means of disposal.

Nevertheless, in July 2003, the UNOMB verified the completion of stage two of the plan (UNOMB 2003). That verification was made for the purposes of provisions of the BPA and the law amending the PNG constitution giving effect to the BPA, which provided that after being enacted the constitutional provisions would not come into operation until the UNOMB verified completion of stage two of the plan.

The UNOMB made that verification despite acknowledging that MDF weapons, and some others, had not been disposed of under the plan. Subsequently, in December 2003, the parties to the plan reached agreement on destruction of weapons as the final means of disposal. Then, in the lead-up to the ABG elections of 2005:

> On 19 May [2005], UNOMB informed the parties to the Bougainville Peace Agreement that the weapons disposal plan incorporated into the Agreement had been implemented. Of a total of 2,016 weapons kept in containers, 1,896 were destroyed. UNOMB collected and destroyed an additional 155 weapons, bringing the total to 2,051 weapons. It therefore determined that the parties had substantially complied with the implementation of the plan, paving the way for the holding of elections (see p. 454). The parties agreed that it would be up to the Autonomous Bougainville Government to address the issue of the remaining weapons that had not been placed in containers, or that had been stolen out of them during the implementation of phases II and III of the plan (UN 2008:455).

It should also be noted that paragraph 324 of the BPA provides that the plan in the BPA is to be 'fully implemented' before ABG elections are to be held. As the first ABG elections were held in June 2005, the clear implication is that the weapons were indeed disposed of 'in accordance with the Agreement' before the date of the election.

It is clear, then, on the basis of the issues discussed that even though an unknown number of weapons remain in circulation in Bougainville, disposal of weapons 'in accordance with the Agreement' has in fact already occurred.

Some alternative perspectives are relevant here. Some would argue that weapons disposal in accordance with the agreement was intended to be far broader than was actually achieved, and so what was actually achieved can't be assessed on that basis. Further, it is a fact that not all of the weapons contained under the plan were destroyed as they should have been in accordance with the decision on that matter in December 2003. Indeed, some weapons were withdrawn from containers and subsequently made use of by various Bougainvillean groups in the course of the complex localised conflict that occurred in parts of south and south west Bougainville between 2006 and 2011 (see Regan 2010:121–26). On the basis of those facts, it can be argued that even disposal of weapons that were being contained and dealt with under the plan in the BPA was not complete.

Two important points need to be emphasised here, however. The first is that even if disposal 'in accordance with the Agreement' was to be assessed as having been incomplete, such an assessment could not have led to deferral of the referendum beyond the 15th anniversary of the establishing of the ABG. Once a determination has been made whether or not weapons have been disposed of in accordance with the agreement, then that is simply a matter to be considered when the two governments consult and agree on the date within the five-year window in which the referendum must be held.

The second point is that even if the issue under subsection 338(3) is limited to whether weapons disposal has occurred 'in accordance with the Agreement', there are no limits on considering other aspects of weapons disposal issues as part of the consultations about the date of the referendum under subsection 338(2).

There are undoubtedly still weapons (firearms) in Bougainville that never came under the weapons disposal plan in the BPA. They include:

- some weapons held by former BRA elements that were contained as part of the process that ran from 2001 to 2005, but which were removed from containers before they could be destroyed
- those widely believed to have been retained by some senior BRA and BRF leaders and members as a form of insurance should the peace process fail
- those still held by the various MDF factions, as well as some other weapons not disposed of as part of the BPA disposal plan
- other ('new') weapons believed to have been brought into Bougainville from various sources since the BPA was signed (including some from Solomon Islands) and
- World War II weapons dug up in Torokina and other parts of Bougainville and refurbished and brought into circulation since 2001 (see UN 2013).

It is widely recognised in Bougainville that such weapons still remain available. The ABG and former combatant groups, inclusive of those who supported Francis Ona, have on several occasions since 2016 openly acknowledged the need for disposal of these additional weapons and agreed to enter into a new disposal process. As discussed in chapter eight, this new process was approved by the June 2018 JSB and the funding needed to complete it was estimated at K12 million. While provision of the necessary funding is in doubt because of the PNG government's fiscal crisis, there seems little doubt that most of the relevant Bougainville groups are willing to discuss the disposal of these additional weapons as part of the consultation required to agree the date of the referendum.

The continued availability and occasional use of such weapons is clearly something the two governments would be expected to consider when consulting on the referendum date and could be a basis for arguing for the date to be pushed back towards the end of the five-year window. But, once again, such arguments cannot delay the referendum beyond the end of that window.

Weapons disposal issues will also be highly relevant to planning and decision-making about other aspects of the referendum.

Further, weapons disposal issues will also be highly relevant to planning and decision-making about other aspects of the referendum, in particular about seeking to ensure that the constitutional requirement that it be free and fair is met — issues discussed in chapter eight.

Do good governance and weapons disposal involve conditions that must be met?

The only place where detailed argument has been advanced in favour of the proposition that good governance and weapons disposal are conditions that must be met before the referendum can be held is in the 2014 legal opinion by Nemo Yalo (see chapter two). He asks whether weapons disposal and good governance were intended to be:

a. considerations that must be taken into account by the two governments when consulting about and reaching agreement on the referendum date or
b. conditions that must be met before the referendum can be held, with failure to meet them resulting in deferral of the referendum beyond mid-2020.

alos's answer is that they were intended to be conditions. His key argument concerns the use of the word 'conditions' in two paragraphs of the BPA. As discussed in chapter one, the PNG constitution (section 278) makes the BPA available 'as an aid to interpretation' when interpreting any provision of Part XIV or any organic law authorised by Part XIV. In using the BPA for interpretation, it 'shall be interpreted

… by reference to its intentions' and avoiding undue use of technical rules for interpreting laws. Yalo relies on those provisions to say that the use of the word conditions with reference to weapons disposal and good governance in paragraphs 312 and 321 of the BPA allows the term conditions to be read into subsection 338(2) of the PNG constitution.

He also argues that the use of the word conditions in the BPA in relation to weapons disposal and good governance indicates intent that they must be evaluated as having been achieved before the referendum can be held. Yalo summarises: 'What appears under Section 337(3) [sic] reflects the intentions of the BPA clause 312. They are not mere considerations' (2014:8).

In relation to the requirement for weapons disposal 'in accordance with the Agreement', Yalo examines the provisions of the BPA on the steps in the disposal plan in the BPA, and argues that it is not necessary to examine whether weapons have in fact been disposed of in accordance with that plan. Rather, the complex and detailed nature of the plan indicates that weapons disposal is intended to be a condition to be met before the referendum can be held. On good governance, Yalo mainly discusses various approaches to how the achievement of good governance might best be evaluated.

Otherwise, Yalo's major argument is that weapons disposal and good governance are matters of such obvious importance that they must be achieved before the referendum can be held (Yalo 2014:14–15). His position might best be summarised as seeing weapons disposal and good governance as 'conditions precedent' that must be met before the holding of the referendum.

Almost the entire basis for Yalo's arguments relates to the use of the word conditions in paragraphs 312 and 321 of the BPA as a basis for interpreting subsections 338(2) and (3) of the constitution. While section 278 makes the BPA available as an aid to interpretation 'so far as it is relevant … where any question relating to interpretation or application of any provision' of Part XIV or the organic law 'arises', it is usually not necessary to look to such 'originating' documentary sources of constitutional provisions if the meaning of the provision is itself clear.

In this case, as already discussed, the inclusion of the words 'notwithstanding any other provision' in subsection 338(2) make it clear that the aim is to provide for both the earliest possible date for the referendum and the last possible date. The provision states with absolute clarity that even if some other provision of the constitution or any other law might be interpreted as allowing a delay, the requirement of 'not later than 15 years' must be followed.

Several powerful arguments based on a more complete understanding of the relevant BPA paragraphs all militate strongly against the 'conditions precedent' analysis advanced by Yalo.

Firstly, while the BPA does use the word conditions in relation to weapons disposal and good governance, as already noted, the term is not used in the national constitution provisions that give effect to the BPA. The omission of the term was a deliberate choice made by the joint national government/Bougainville team that oversaw the drafting of the constitutional laws giving effect to the BPA. The term was omitted precisely because its use could have given rise to confusion.

Secondly, while it is true that BPA paragraph 312(b) describes weapons disposal and good governance as conditions, it is far more significant that the paragraph makes them conditions to be taken into account when setting the referendum date. Nowhere in the BPA are they actually described as conditions that must be met before the referendum is held, nor is that clearly implied anywhere.

Thirdly, the use of the word 'guarantee' in the opening words of paragraph 312 relates first and foremost to the period within which the referendum must be held. It is a guarantee that the referendum will be held no earlier than 10 years after and 'in any case, no later than 15 years after' the first ABG is elected.

The use of the word guarantee is a powerful signal of intent on the period within which the date can be delayed.

Fourthly, the word 'conditions' is used in the BPA with reference to the process of weapons disposal and the quality of government, etc. known as good governance. The BPA requires that the questions of whether the process has been completed and the quality achieved be considered before the two governments agree a referendum date. That requirement does not of itself denote that the process must be evaluated as complete and the quality evaluated as having been achieved before agreement on the date can be reached.

Fifthly, the argument that the use of the word conditions in the BPA shows the intention of the BPA, thereby shedding light on the intended meaning of section 338 of the constitution, is misconceived. While section 278 of the national constitution makes the BPA available as an aid to interpretation of the constitution, it also specifies that the BPA must not be interpreted in a legalistic manner, but rather by reference to its intention. It is contrary to section 278 to interpret the intention of the constitution, and the BPA, by heavy reliance on the use of a single word contained in the BPA — conditions — without reference to the intention of the broader set of provisions about setting the date for the referendum.

What do we know of the intentions in that regard?

The BPA provisions on the referendum represent a set of compromises amongst deeply divided parties aimed at ending violent conflict.

Ample evidence is available that the BPA provisions on the referendum represent a set of compromises amongst deeply divided parties aimed at ending violent conflict. As discussed in chapter one, in the early stages of BPA negotiation, the strongly preferred position of Bougainvilleans supporting secession was that a referendum be held on that issue at the earliest possible date, with the outcome binding on all parties. In other words, a majority 'yes' vote would give rise to constitutional obligations on PNG to implement it by facilitating Bougainville's independence. But some Bougainvilleans were either opposed to independence or had concerns about a referendum being held too soon, while PNG opposed a referendum as undermining its sovereignty.

A compromise was reached under which all sides agreed that a referendum would definitely be held, but would be deferred for an extended period. That deferral would allow time for the unification of Bougainville and the re-building of trust between Bougainville and PNG. But for Bougainvillean supporters of secession to agree to the compromise, it was essential that they had the strongest possible assurances that, although deferred for an extended period, the referendum could not be deferred indefinitely. For this reason, the BPA (paragraph 312) provides for an earliest possible referendum date (10 years after the first ABG election) and a latest possible date (15 years). It does so by saying that the referendum shall be held 'no earlier than 10 years and, ***in any case, no later*** than 15 years' after that first election (emphasis added). The use of those words 'in any case, no later' made it clear that nothing could result in further deferral beyond the 15-year point.

It would undoubtedly be a matter of grave concern to those involved in the negotiations for the BPA, who were initially pressing for an early and binding referendum, to find that the compromise they made has been interpreted as allowing a potentially open-ended deferral.

Sixthly, if Yalo's argument were to be correct and failure to meet the conditions precedent for holding the referendum could result in deferral beyond the 15th anniversary of the first ABG election, it would be expected that the BPA and the constitution would deal with the consequences of such deferral. For

example, provision would be expected about such basic matters as the process for making a decision on deferral, how long the deferral should be, what would happen in the meantime and when a further evaluation of the conditions would occur.

The absence of such provision provides very strong support indeed for the proposition that the clear wording of subsection 338(2) is directed to ensuring that the date for referendum cannot be delayed beyond the 15th anniversary of the establishing of the ABG. In fact, not only is no such provision included, but the BPA (paragraph 312(a)) and the constitution (subsection 338(7)) provide only one avenue for a decision to prevent the referendum being held in the five-year window. That avenue is a decision of the ABG, made in accordance with procedures set out in the BPA, that the referendum not be held (a matter discussed later in this chapter).

What about fiscal self-reliance?

Statements are sometimes made that fiscal self-reliance for Bougainville and its government is also a condition for the referendum to be held (or perhaps for independence for Bougainville to be considered). In fact, there is no such requirement in the BPA or the constitutional laws.

There are provisions concerning fiscal self-reliance in the BPA and the constitutional laws. They do not relate, however, to the referendum arrangements. Rather, they concern aspects of the financial arrangements for autonomy, in particular the point where revenues collected in Bougainville from company tax, customs duties and GST is sustainably greater than the cost to the national government of paying the annual recurrent unconditional grant due to the ABG (see organic law sections 39 and 40). At that point, additional revenues from those three sources must be shared between the two governments on a basis that must be negotiated, and the ABG gains the right to adjust the rate of income tax for Bougainvillle by as much as five per cent.

Beyond that rather technical meaning of fiscal self-reliance, there is a broader meaning to the phrase, which is not used in the BPA or the constitutional laws that give effect to it. This meaning relates to whether Bougainville has the financial resources to be self-reliant, whether for the purposes of autonomy or independence (see Chand 2017). Neither meaning of fiscal self-reliance is a legal pre-condition to either the referendum or independence. Nevertheless, the broader meaning of that expression can be expected to be an issue of some practical significance when voters make choices between possible responses to the question asked in the referendum. It might well be an issue suitable for consideration in the course of consultations about agreeing the referendum date (under subsection 338(2)), and can be expected to be of great importance in any post-referendum consultation about implementation of the outcome of the referendum (see chapter eight).

Some of the reports discussed in chapter two indicate that many Bougainvilleans have quite limited understanding of the extent of fiscal resources that would be needed for independence and the limited options that Bougainville has available in order to access the levels of resources required (e.g. Development Transformations 2013:15; UNDP 2014:18, 20–30). One study notes the efforts of the ABG leadership in ‘drawing attention to the economic viability of an independent Bougainville’, but points out that ‘the question is not on the forefront of most people’s minds’ (UNDP 2014:18). This situation suggests a need for an awareness campaign to help voters understand the practical financial arrangements for both greater autonomy and independence.

What do Bougainvilleans think about setting a date?

The 2014 UNDP report found that:

> Bougainvilleans are yet to come to terms with the realities of a referendum which should determine Bougainville's future political status and understand its implications. The BPA is yet to be properly understood in the light of weapons disposal and good governance as important factors in considering the date of the referendum. The PDA [Peace and Development Analysis] clearly identified two strands of opinion regarding the timing of the referendum. There are those Bougainvilleans who feel that the referendum should take place as soon as possible, while others believe substantial improvements are needed before Bougainville will be ready for either the referendum or independence. It is also quite evident that there is little public awareness about possible risk scenarios related to the referendum and how to prevent and proactively manage them if and when they do arise (UNDP 2014:6).

The consultation being undertaken through the referendum-ready committees (see chapter two) will presumably have assisted to improve public awareness of fiscal self-reliance issues, but the criticism of that process by the 2017 report of the ABG legislature's Committee on Referendum, Weapons Disposal, Peace and Unification (see chapter two) suggests that the extent of the improvement may be limited.

TARGET DATE OF JUNE 2018 VERSUS ACTUAL DATE OF OCTOBER 2019

In May 2016, the two governments agreed on what they termed a 'target date' for the referendum of 15 June 2019.

At the JSB meeting in Port Moresby in May 2016, the two governments agreed on what they termed a 'target date' for the referendum of 15 June 2019 — one year before the end of the five-year window within which the referendum must be held. The target date was set solely for the purposes of planning work in preparation for the referendum, for at the same JSB the governments agreed to an extensive plan of activities needed for planning, preparing for and conducting the referendum. Planning these activities was not possible without also agreeing an indicative or target date. However, the target date was definitely not the actual date.

Further, there were some steps that the constitutional laws required to be taken before the actual date could be determined. Those steps involved determining the criteria for enrolment to vote of non-resident Bougainvilleans (something only agreed at the June 2018 JSB meeting), the determining of issues concerning the good governance standards of the ABG and consultation between the two governments on the question of the date. The PNG constitution required that the good governance issue be determined through the two-stage process of review of the autonomy arrangements. As discussed earlier in this chapter, the first stage of the second review process was undertaken by four experts between August and October 2018. The terms of reference for the review explicitly included examination of whether the ABG was and is being conducted in accordance with internationally accepted standards of good governance. The second stage of the review involved consultation between the two governments on the report of the experts. That engagement occurred, in a peremptory manner, at the JSB meeting held on 1 March 2019. As a result of that step being taken, the two governments had met the requirements for consultation about setting the actual date. In doing so, the primary focus

was not on the assessment of good governance, but rather on what the BRC advised was a workable date, on the assumption that the funding needed for the BRC to undertake preparations for the referendum would become available. The advice from the BRC was that it would not be possible to hold the referendum on the target date, but that if the necessary funding were to be available, it would be possible to hold the referendum from 12 to 17 October 2019. Hence, actual dates of October 2019 were agreed to by the two governments during that JSB meeting.

Curiously, that date, as well as the date for the issue of the writ for the referendum — 16 August — was set on the advice of the chairman of the BRC that the target date was not attainable, and without the consultation between the governments on the issues of good governance and disposal of weapons that is envisaged by section 338 of the constitution. It is not clear why the national government in particular did not make any reference to the matters mentioned in section 338 of the national constitution.

REFERENDUM ON THE SAME DATE AS THE ABG ELECTION?

Before the decision on the actual date was reached at the March 2019 JSB, discussion of alternatives to the target date tended to assume that the referendum could be held as late as the very end of the five-year window within which it must be held — that is, in June 2020. However, under the ABG constitution, the fourth general election for the ABG must be held at about the same time. The suggestion has sometimes been made that the referendum might be conducted together with that election, the point being made that there could be significant cost and administration advantages involved in holding them together.

It is not uncommon for referendums and national elections to be conducted together, with examples including the USA, Uruguay, Armenia, Taiwan, Slovakia and Cook Islands (ACE Electoral Knowledge Network 2006). A recent example involves Zambia in August 2016, when a referendum on the adoption of a new national constitution was conducted together with a national election.

The advantages and disadvantages of holding referendums and elections together were summarised in a 2006 advice on the ACE Electoral Knowledge Network (ibid.), which separates practical from political considerations. Advantages of a practical nature involved in holding elections and referendums together relate mainly to cost savings involved in being able to distribute both sets of ballot papers at the same time, use of the same registers of voters, use of the same polling places and personnel and so on. Political advantages relate mainly to the possibility of increased voter turnout being generated by voter interest being amplified by the combination of the two processes.

Practical disadvantages include, amongst other things, the logistical and economic burden on the country because processes such as counting, tabulation and reporting will be more complex, take longer and be more costly. Voter education and information campaigns will also be more complicated and costly. Political problems include the risk of protest votes against government spilling over and impacting voting in the referendum. Further, campaign messages can be more difficult to convey, in part because there can often be cross-party campaigning (e.g. parties opposing one another in the election may find themselves on the same side in the referendum, or vice versa).

There could be a number of specific administrative problems involved in holding the Bougainville referendum and the ABG election together. For example, there would be two different administrative authorities involved — the BRC for the referendum and OBEC for the election. There would be different rolls of voters and probably different voting systems (limited preferential voting for the ABG election and effectively first-past-the-post for the referendum). There would be a need to differentiate the ballot papers, particularly to assist illiterate voters. There would be serious risks of administrative overload due

to of the different requirements. In this context, it also needs to be remembered that each voter in an ABG general election receives four ballot papers (one each for the president, the regional women's and ex-combatant's[37] seats and a single member constituency). Requiring them to receive an additional and rather different referendum ballot paper could be a significant source of confusion, especially for illiterate or semi-literate voters. There would be serious risks of administrative overload because of the different requirements.

A significant political consideration in relation to the Bougainville referendum is that there will be a need for some certainty in ABG leadership in the immediate aftermath of the referendum, as it will be in this period that the national government and the ABG will need to consult about the results of the referendum. It normally takes some time after the return of the writ ends the ABG general election before the newly elected president is able to put together his or her cabinet. This consideration alone suggests that it would be important that the referendum is held a few months before or after the ABG election. The period for holding an ABG general election is usually around three months, taking into account the time needed for campaigning, voting and scrutiny. The setting of the dates for the ABG general elections is done under section 107 of the Bougainville constitution, which requires that they be held within three months before the fifth anniversary of the day fixed for the return of the writs for the previous general elections, or otherwise if the Bougainville legislature decides to call an earlier election by a three-quarters absolute majority vote. The date for the return of the writ in the last ABG election was 15 June 2015, and so it can be anticipated that the writs for the 2020 general election will be dated so as to be returned on or about 15 June 2020. In practice, then, it is quite unlikely that a general election will be held earlier than in the last three months of the five-year term of the ABG. So, if the referendum cannot be held on the current target date, it probably cannot be delayed much longer than six to seven months — to the end of 2019 or early in 2020. Alternatively, it would be possible for the ABG to amend its constitution to allow a short delay of the Bougainvillle elections until a little later than mid-2020, thereby allowing clear space for holding the referendum in the middle of 2020.

DECISION NOT TO HOLD THE REFERENDUM

The only way a decision can validly be made to stop the referendum being held is through a decision of the ABG.

The only way a decision can validly be made to stop the referendum being held is through a decision of the ABG, as is provided by subsection 338(7) of the PNG constitution:

> The Referendum shall not be held where the Bougainville Government decides, in accordance with the Bougainville Constitution, after consultation with the National Government, that the Referendum shall not be held (see also BPA para.312(a)).

In terms of the intention of the BPA in relation to this requirement, as discussed in chapter one, once the main outlines of the compromise proposed by Australian Foreign Affairs Minister Downer were agreed, Bougainville negotiators concentrated on ensuring a clear guarantee that although the referendum would be deferred for a considerable period, such a period would be strictly limited (no later than the end of the five-year window from the 10th to the 15th year after the establishing of the ABG).

In discussion of this guarantee, PNG negotiators raised the possibility that it might be Bougainvilleans themselves who would not want the referendum held within the five-year window, or at all. They argued that in such circumstances it would be wrong to force Bougainville to hold the referendum.

The Bougainville negotiators had no objection to a provision empowering the government representing the people of Bougainville to have the right to decide not to hold the referendum, provided that the procedure for reaching such a decision was a matter for Bougainville to decide, in accordance with the Bougainville constitution. It was on that basis that provision was included in the BPA (paragraph 312(a)) and PNG constitution (subsection 338(7)) about the ABG authority to decide that the referendum not be held. Understanding the intention of the relevant BPA provisions sheds light on the provisions of both the BPA and the national constitution as to the clear guarantee that the holding of the referendum cannot be deferred by PNG beyond the 15th anniversary of the establishing of the ABG.

The ABG authority to decide that the referendum 'shall not be held' (PNG constitution subsection 338(7)) requires a decision made in accordance with the Bougainville constitution. That constitution provided for two separate votes, each of a three quarters absolute majority of members of the ABG legislature, separated by at least three months, during which the ABG must undertake widespread consultation with the people of Bougainville (Bougainville constitution section 194). It is unlikely in the extreme that the ABG would ever entertain such a process.

CHAPTER SIX

VOTER ELIGIBILITY, THE REFERENDUM COMMISSION AND OTHER CONSTITUTIONAL REQUIREMENTS

This chapter discusses several key aspects of the constitutional arrangements for the referendum including voter eligibility requirements, choice of an independent agency to conduct the referendum and other key matters for which the constitution requires agreement between the two governments.

VOTER ELIGIBILITY — SUFFRAGE

According to the Venice Commission's *Code of Good Practice on Referendums*, suffrage should be universal, equal, free and secret. In defining universal suffrage, the code states 'that all human beings have the right to vote', although that right can be 'subject to certain conditions' (Venice Commission 2007:6). Such conditions extend to minimum age and nationality requirements, although it would be advisable for foreigners to be allowed to vote 'after a certain period of residence' (ibid.). The requisite period of residence should not exceed six months. Electoral rolls should be reliable with provision for constant updates and registration of voters who are not registered.

With regard to foreigners having a right to vote, there is a question about non-Bougainvillean citizens of PNG who are resident in Bougainville.

With regard to foreigners having a right to vote, in Bougainville there is a question about non-Bougainvillean citizens of PNG who are resident in Bougainville. The referendum is widely discussed as being one only for 'Bougainvilleans'. Indeed the wording used in paragraph 2 of the Introduction and Outline to the BPA — and in the preamble to the law amending the PNG constitution by inserting part XIV on Bougainville — would suggest that only Bougainvilleans can vote. Paragraph 2 of the BPA says: 'The agreement provides for the right, guaranteed in the National Constitution, for a referendum among Bougainvilleans on Bougainville's future political status.' However, when it comes to the substantive provisions of the BPA about entitlement to vote in the referendum, the term Bougainvilleans is used only in relation to 'non-resident Bougainvilleans' and the provisions for residents of Bougainville are clearly intended to allow non-Bougainvillean residents of Bougainville to vote. But in part because of the wording of the BPA's introduction, misconceptions about voter entitlements are widespread, even appearing in the discussion paper on voter eligibility, discussed in chapter two, attached to the 2015 UN report on electoral scoping and referendum preparations (UN 2015c:3).

At the time that the BPA was signed and the constitutional laws implementing it were enacted, there was no authoritative definition of 'Bougainvillean'. The Bougainville constitution enacted late in 2004, under which the ABG was established, does contain a definition (see section 7; reproduced in item 5 of appendix 3). However, that definition does not operate to define 'Bougainvillean' for the purposes of the BPA or the organic law.

The BPA (para. 315) summarises voting entitlement requirements:

> Eligibility to vote in the referendum will be the same as for national elections in Bougainville plus non-resident Bougainvilleans (detailed criteria to be finalised through consultation).

These requirements are elaborated in the schedule to the organic law, which provides that PNG citizens resident in Bougainville are entitled to vote if they have been resident in Bougainville for six months before their enrolment claim is lodged and if they have a right to vote in elections for the national parliament (sch. 1.23). This means that a voter must be a PNG citizen of voting age (18 or over) and not subject to restriction resulting from being under a sentence of death or imprisonment for more than nine months, or having been convicted in the three years prior to polling day of a prescribed polling

offence. Being Bougainvillean does not constitute a qualification for Bougainvillean residents to vote in the referendum. Indeed, it is clear that provided they have been resident in Bougainville for at least six months and meet the other criteria in sch. 1.23, people from elsewhere in PNG will be entitled to vote.

The question of whether non-Bougainvilleans resident in Bougainville have the right to vote in the referendum was explicitly discussed in the negotiations for the BPA.

The question of whether non-Bougainvilleans resident in Bougainville have the right to vote in the referendum was explicitly discussed in the negotiations for the BPA, with the PNG negotiators arguing that such persons had a real interest in the issue or issues to be decided by the referendum. The Bougainvillean negotiators accepted that point and agreed to such persons having the entitlement to vote. However, these facts are little understood in Bougainville, as is reflected in the March 2017 constituency referendum-ready reports (discussed in chapter two), several of which indicated that public consultations had shown that people believed that only Bougainvilleans should be able to vote. It is quite possible that there will be some public concern when the actual voting requirements become better known, particularly because of the use of the phrase 'referendum amongst Bougainvilleans' in the introduction to the BPA.

At the time of the BPA negotiations, it was agreed to defer to a later decision the question of the links to Bougainville that a non-resident Bougainvillean would require to vote.

As noted, when the BPA was negotiated, the parties agreed that non-resident Bougainvilleans should be allowed to vote in the referendum. At the same time it was agreed to defer to a later decision the question of the links to Bougainville that a non-resident Bougainvillean would require to vote. Section 55 of the organic law states 'that the detailed criteria to determine the link or links to Bougainville that a … "non-resident Bougainvillean" … must have in order to be entitled to vote at the referendum' must be the subject of consultation and agreement in writing between the PNG government and the ABG. Once agreed, the 'criteria shall be notified in the Gazettes and in an available newspaper' (subsection 55(2)). Those criteria then become the basis for non-resident Bougainvilleans to be enrolled as voters (organic law sch. 1.23(2)). The agreement under section 55 must be reached before the actual date for the referendum is set. In fact, the criteria were agreed to by the two governments at the June 2018 JSB meeting: a non-resident Bougainvillean will be entitled to vote in the referendum if they are a Bougainvillean as defined in section 7 of the Bougainville constitution. That section provides that to be a Bougainvillean, a person must be a member of a clan lineage owning land in Bougainville under customary arrangements, or must be adopted into such a clan, or must be married to or a child of such a person. In addition, it was agreed that to be enrolled, a person must be entitled to vote in PNG national elections, which will mean that they must be citizens of PNG of 18 years or older and resident in an existing electorate for the purpose of enrolment for national elections. One consequence of the requirement for current enrolment in a national parliament electorate is that non-resident Bougainvilleans living outside PNG would not be able to vote in the referendum. However, as section schedule 1.47(1)(f) provides for Bougainvilleans living abroad to have a right to a postal vote, it seems likely that the BRC will need to make provision for non-resident Bougainvilleans living abroad.

The agreed criteria for enrolment of non-resident Bougainvilleans must be published in the *PNG National Gazette*, the *Bougainville Gazette* and in a daily newspaper, which occurred in March 2019.

Just as it is not widely understood that non-Bougainvilleans resident in Bougainville will be entitled to vote, many in Bougainville do not realise that non-resident Bougainvilleans will also be so entitled. Again, several of the March 2017 constituency referendum-ready reports indicate that people believed that only resident Bougainvilleans should be able to vote.

Establishing voter eligibility — rolls of voters

The electoral system used in PNG since the first national election in 1964 has relied mainly on rolls of voters as the basis for establishing eligibility of voters. The rules in the schedule to the organic law provide for the agency with responsibility to conduct the referendum (the BRC) to 'determine the areas that in its view are most appropriate to be voting districts for the purposes of the Referendum including one or more areas outside Bougainville to be voting districts for non-resident voters' (sch. 1.12(1)). Existing electorates for the purposes of elections to the PNG parliament or constituencies for elections to the ABG House of Representatives may be adopted as 'voting districts' (sch. 1.12(2)). A roll of voters is required for each voting district.

The agency conducting the referendum can adopt existing rolls of voters in Bougainville (sch. 1.16(1)) and the BRC Transitional Committee (BRC-TC) has decided to use the rolls prepared for the 2015 ABG elections as a starting point, subject to those rolls being updated. It is proposed that the updating exercise should use the assistance of the more than 300 ward-level recorders that are part of the ABG's system of local-level government, called community governments. However, as there are no existing rolls for non-resident Bougainvillean voters, such rolls will have to be developed for the referendum as is envisaged by sch. 1.23(2).

As with other parts of PNG, there have been chronic problems with the accuracy of the rolls for all elections in Bougainville since at least the 1980s. Problems in some other parts of PNG have extended to manipulation of the rolls to influence the outcomes of elections (Haley 2013:59–62; Haley and Zubrinich 2019:12–29). There are obvious possible avenues for manipulation of the rolls for the referendum. One possible avenue is non-Bougainvilleans resident in Bougainville, particularly bearing in mind the minimal six months residence requirement. Another concern is potential difficulties in the implementation of the arrangements for enrolment of non-resident Bougainvilleans.

Clearly, it will be essential that the necessary time and resources are made available to the BRC to enable preparation of accurate rolls of voters, both for residents of Bougainville and for non-resident Bougainvilleans. Concerns about accuracy of the rolls are also relevant to an evaluation of whether the referendum will be free and fair — in addition to the results of the referendum. These issues are discussed in chapter eight.

THE AGENCY TO CONDUCT THE REFERENDUM

When the BPA was being negotiated, it was agreed that the PNG Electoral Commission and a new Bougainville electoral authority, to be established when the ABG was established, should 'be jointly responsible for conducting the referendum' (BPA para. 318). (OBEC has since been established as that new authority.) In elaborating paragraph 318, the joint PNG/Bougainville technical team, that from September to November 2001 oversaw the drafting of the constitutional laws to give effect to the BPA, identified four alternative institutional arrangements each of which could possibly be used as what the organic law calls the 'agency' through which the two electoral bodies exercise the required joint responsibility. They four alternatives in section 56 of the organic law are:

- the PNG Electoral Commission; or

- » the Bougainville Electoral Commission; or
- » those two electoral authorities working together; or
- » a special purpose independent authority established under section 58 of the organic law.

The organic law (subsection 56(2)) also sets out a series of steps for:

- » choosing from those four alternatives for the agency to conduct the referendum administrative and other arrangements for the operation of the agency, while always reflecting the joint responsibility of the two electoral authorities.

The Bougainville Referendum Commission (BRC)

Serious discussion of which of the four alternatives should be used emerged as early as 2013, in the process of consultation for the *Joint Review of Bougainville's Autonomy Arrangements* (see chapter two) which reported receiving 'informal views … at senior levels that there is a strong preference to choose the option of establishing an [independent] authority under section 58' (JSB 2013:90). The report of the review made a recommendation to that effect (JSB 2013:94). Because the report of the joint review was formally endorsed by the JSB in October 2013, it was widely accepted for some time that a decision to establish an independent authority had already been made. However, section 56 of the organic law requires that the two governments and the two electoral authorities consult and enter into a formal agreement on which of the four alternatives is to be adopted. Such an agreement was only reached by representatives of both governments and both electoral authorities on 24 January 2017. The agreement chose a special purpose independent authority, to be called the Bougainville Referendum Commission (BRC), to be the agency to conduct the referendum. Reflecting the requirement for the two electoral authorities to exercise joint responsibility for the conduct of the referendum, the agreement provides that those bodies will participate in the management of the BRC.

On the same day, the two electoral commissioners signed a separate agreement setting out the administrative arrangements underpinning the agency, which under the organic law (section 57) needed to be resolved in order to give effect to the agreement on the agency. This second agreement recorded commitments by the two electoral authorities to support the administrative needs of the BRC, recognise the independence and financial autonomy of the BRC, second staff to the BRC and make other resources available to the BRC (such as voter rolls, polling district lists).

The charter for the BRC

Under section 58 of the organic law, the BRC is established by a charter issued by the head of state on the advice of the PNG electoral commissioner, given after consultation and agreement between the PNG electoral commissioner and the Bougainville electoral commissioner. The text of the charter is available through the ANU website.[38] Issued on 30 August 2017, the charter provides for the establishment of the BRC as envisaged by the first of the agreements of 24 January 2017. The BRC is the decision-making body, supported by a secretariat, and is made up of a chair jointly appointed by the two governments through the JSB, the two electoral commissioners, and two persons each appointed by the PNG Cabinet and the ABG Cabinet. One each of the appointees of the two cabinets must be a woman. No provision was made as to the qualifications of the chair or of the commissioners so appointed. The ABG appointed two persons early in 2018; one of these was a female. The national government announced its appointments at the JSB meeting in October 2018. Curiously, both of the national government appointees were males, contrary to the requirements of the charter that one each of the two ABG and national government appointees should be a female.

Under the terms of the charter, without both the chair and the national government's two appointees the BRC could not meet. Anticipating problems of this kind, the charter provided for a transitional committee (the BRC-TC) to undertake the work of the commission prior to the necessary appointments being made. The BRC-TC comprised the chief secretaries of the national government and the ABG, and the respective electoral commissioners of the two governments. Up to April 2019, the BRC-TC had met ten times and the full BRC four times. With these meetings a great deal of progress has been made in advancing the planning of the referendum, in large part through the work of four committees established at the first meeting with inputs from International Foundation for Electoral Systems (IFES) and UNDP advisers.

The December 2017 JSB meeting delegated authority to appoint the BRC chair jointly to the PNG prime minister and the ABG president. While the ABG had expressed interest in seeking agreement for the appointment of Helen Clark (former New Zealand prime minister and former head of the UNDP), when former prime minister O'Neill proposed the former prime minister of Ireland, Bertie Ahern, President Momis concurred, to a large extent on the basis that by proposing such a person as chair, the prime minister was taking an important degree of ownership of the referendum process. The offer from former prime minister O'Neill and President Momis was made through a jointly signed letter in April 2018, and soon after Ahern was reported to be interested in the proposal (Dineen 19/4/2018). The BRC charter requires that the appointment of the chair be notified in both the *PNG National Gazette* and the *Bougainville Gazette*. The notifications in both gazettes did not occur until November 2018.

The chief referendum officer, who was appointed by the BRC in February 2019, will manage the work of the secretariat as directed by the BRC. The staff of the secretariat will comprise officers seconded by the two electoral commissions as well as members of the PNG and ABG public services assigned to the BRC. The BRC will also be able to engage other persons itself. The charter reflects provisions of the organic law on the independence of the BRC and prohibition on its involvement in political activities.

The charter also states that the functions of the BRC will be those assigned to it under the organic law, or any new law on the referendum made by either the PNG national parliament or the ABG legislature with the consent of the other. For the most part, the functions and powers of the BRC are those set out in the organic law schedule (designated as the functions and powers of whichever of the four possible options under section 56 is selected as the agency to conduct the referendum). After all, to a large extent, the schedule is about how the agency chosen under section 56 conducts the referendum.

Roles of the BRC

The BRC has the standard roles of an electoral management body in relation to the conduct of the voting at the referendum, as well as some significant additional roles. The latter include identifying groups that will be able to promote public involvement in the referendum and nominating persons as scrutineers (a role given to the BRC because of the absence of the candidates who would normally nominate scrutineers for an election). In addition, the BRC has a significant role in the promotion of public awareness about the referendum. It is also possible that, as more work is done on organising the referendum, the BRC will be given additional tasks — for example, something similar to the role of the UK Electoral Commission in assessing the intelligibility of any proposed question or questions for the referendum. Additional roles might be provided by way of regulation or by laws agreed to between the two governments.

The BRC has a significant role in the promotion of public awareness about the referendum.

BRC independence and impartiality

The independence of the agency responsible for the conduct of the referendum is emphasised in the PNG constitution (section 341), the organic law (section 59 states that the agency is 'not subject to direction by any person including the National Government or the Bougainville Government') and the charter (which repeats the requirement of section 59). Independence will be a vitally important attribute for the BRC. That consideration is undoubtedly why there has been consensus on the need for the agency to be an independent body (the BRC) rather than either or both of the electoral authorities.

The organic law also provides that the agency must carry out its duties 'in an impartial manner without regard to the outcome of the Referendum' (subsection 60(1)). In addition, the agency is not permitted to 'engage in promoting any particular outcome of the Referendum, or support any person or group promoting a particular outcome' (subsection 60(2)). These requirements on impartiality and prohibition on activity promoting a particular outcome are also repeated in the schedule to the organic law (sch. 1.8). At the same time, however, the schedule includes amongst the functions of the agency:

- promotion of informed debate on each side of the question or questions to be put in the referendum (sch. 1.9(1)(a))
- encouragement of wider public interest and involvement in ensuring that the referendum is conducted in a free and fair manner (sch. 1.9(1)(b))
- recognition of interest groups able to take part in various aspects of the referendum including monitoring of the polling and the scrutiny (sch. 1(10)).

The steps the agency can take to promote informed debate and wider public interest in the referendum being free and fair include 'the holding of public meetings, and the preparation and distribution of literature' (sch. 1.9(2)). The BRC will clearly need to walk an ill-defined and perhaps (at times) difficult line between not being seen to promote a particular outcome while at the same time promoting informed debate on each side of the question or questions to be put in the referendum.

Establishing and providing resources for the BRC

Before the BRC will be in a position to begin to carry out its significant responsibilities, it will need resources commensurate with those responsibilities (such as premises, staff, equipment) and it will need to establish its own internal organisation and procedures. Many observers believe that if the target date of June 2019 was to have been achievable, then the BRC should already have been fully established for some months before August 2017, when the charter for the BRC was actually signed.

In terms of resources for the operation of the BRC, in addition to the provisions about assignment of staff contained in the charter, there is significant provision in the organic law:

> It is the duty of the Governments [the PNG government and the ABG], to ensure, as far as it is within their respective legal powers, that all arrangements are made, staff, facilities and funding provided and all steps taken to enable and facilitate, as far as may reasonably be, the proper and convenient performance of the functions of the Agency and of each Returning Officer (sch. 1.3(1)).

The BRC budget submitted to the October 2018 JSB meeting was K34 million. However, neither the PNG nor ABG budgets for 2017 had an allocation for BRC funding; the same was true of the national government budget in 2018, although the ABG allocated K0.5 million. The 2019 national budget make provision of K20 million for the BRC.

There has long been some concern amongst senior PNG and ABG officials that because there has been no prior experience of running referendums in PNG, there would be a need for appropriate international assistance. In 2013 the autonomy review process reported a 'consistently strong view that the Referendum should be conducted with appropriate assistance from an international body such as the United Nations or the Commonwealth Secretariat' (JSB 2013:91). One aspect of the referendum arrangements that may be of concern to officials is that fact that the BRC is charged with providing awareness and promoting informed debate, roles and functions that go well beyond those carried out by PNG electoral authorities (see above).

OTHER MATTERS FOR INTER-GOVERNMENT AGREEMENT BEFORE THE REFERENDUM

Because at the time the BPA was negotiated, it was agreed that the holding of the referendum would be deferred for as long as ten to fifteen years after autonomy was established, there were a few critically important issues where it was agreed decisions needed to be deferred. The most significant of these issues have already been determined as of the date of writing (April 2019). These include agreement on the question or questions to be asked in the referendum, the establishment of the agency to conduct the referendum, the criteria for enrolment of non-resident Bougainvilleans and the date for the conduct of the referendum. Because the deferred decisions were all matters closely connected to points otherwise resolved by the BPA, they were left to be handled by later consultation and agreement between the two governments (the ABG being seen, of course, as the legitimate successor to the Bougainville parties to the BPA negotiations). They were not seen as matters that could have been left to decision by the agency established to conduct the referendum (the BRC) because they involved questions that were politically sensitive.

Apart from these potentially highly sensitive issues, there are less sensitive processes where consultation between the governments will, or may, be required, including:

1. Determining and providing the resources necessary for the BRC to be able to conduct the referendum (organic law sch. 1.3.).
2. Inviting international observers (organic law sch. 1.11.).
3. Reviewing and dealing with any gaps or changes needed to the referendum rules set out in the schedule to the organic law, in respect of which either government is empowered to make necessary laws, but only with the agreement of the other (organic law s. 63).
4. Making any constitutional regulations needed to give effect to the organic law (including the schedule 'Rules Relating to the Conduct of the Referendum'), such regulations being made by the head of state on advice of the national executive council (NEC), but only after consultation and agreement with the Bougainville executive council.[39]
5. Security arrangements for the referendum, with an ABG proposal to the June 2018 JSB (Momis 2018) giving rise to a joint request by the two chief secretaries to the New Zealand High Commission for a New Zealand-led regional group of police to assist Bougainville police with security for the referendum.
6. Resolving difficulties that may occur in any consultation required to occur between the two governments on the referendum (organic law s. 62).
7. Using the dispute resolution procedure (should any difference or dispute arise on the referendum arrangements) as per section 343 and section 333 of the PNG constitution.

Mode of consultation with the national government

The constitutional laws provide some guidance about how consultation should occur on the numerous aspects of the referendum arrangements where decisions were deferred to later consultation between the governments. As many of these decisions are important, the consultation provisions require brief elaboration.

On timing, section 54 of the organic law states that the two governments and the two electoral authorities 'may begin consultations and agree on any matters required for the purposes of this law' before the tenth anniversary of the first election of the ABG (that is, before the opening of the 'window' within which the referendum must be held). In fact, the two governments have been consulting, in a broad sense, since 2009–10 when the JSB established the Joint Bougainville Referendum Committee. It was not, however, until the first half of 2016 that decisions began to be made on substantive matters where consultation was required.

On the mechanism to be used for consultation, section 332 of the PNG constitution states that one of the two main functions of the JSB is 'to provide a consultative forum at which consultations between the National Government and the Bougainville Government and their agencies can take place'. That is not to say, however, that there is any restriction on other mechanisms (formal or informal) that could be used for consultation about referendum arrangements.

As to the characteristics of consultation, some requirements from the BPA (para. 269) have been incorporated into part XIV of the PNG constitution (subsection 278(2)), which states that where the constitution or the organic law provides for consultation, it shall be conducted as follows:

- views to be communicated in a timely manner in writing or electronic equivalent to a 'specified point of contact'
- adequate opportunity to respond in similar manner
- in case of differences, 'meaningful views' are to 'be exchanged within an adequate time-frame, either agreed or specified in a written document' (or electronic equivalent), with the aim of reaching agreement
- a clear written record of the outcomes of the consultation is to be prepared and made available for all parties.

Where no agreement is reached, the multi-stage intergovernmental dispute resolution process set out in the PNG constitution is available to either government.

RESPONDING TO GAPS OR OTHER PROBLEMS IN THE ARRANGEMENTS

At the time of the BPA negotiations, Bougainville's chief concern was that by the time 10 to 15 years had elapsed that there might be less commitment in the national government to ensuring that the full legal framework for the referendum was in place.

As discussed in chapter one, the main reason why the rules in the schedule contain so much detail is that when the BPA was being negotiated, Bougainville's negotiators wanted to have as much as possible of the legal framework for the referendum put in place immediately, as part of the process of developing the constitutional laws implementing the BPA. The alternative would have been to have left the development of the detailed law about the referendum to closer to the holding of the referendum. Bougainville's chief concern was that by the time 10 to 15 years had elapsed that there might be less

commitment in the national government to ensuring that the full legal framework for the referendum was in place.

At the same time it was also recognised that:

- some key issues could not be resolved at the time and had to be left to later processes (for example, setting the actual referendum date and determining the question or questions to be asked).
- given the time that would elapse before the referendum was to be held, that when that time arrived it could be expected that:
  - gaps, errors, inconsistencies and uncertainties might be identified in the legal arrangements, particularly in relation to matters not anticipated at the time the constitutional laws implementing the BPA were prepared
  - problems might be identified through the conduct of both PNG and ABG elections from the time of the BPA being signed through to the referendum — a period of as much as 19 years (2001–2020) which might highlight the potential for improvements or changes to the rules.

The negotiators also wished to ensure that insurmountable differences between the governments did not arise in dealing with issues that could not have readily been anticipated when the constitutional laws were developed. So the organic law provides guidance on how inconsistencies, gaps or uncertainties might be dealt with. In particular, section 62(1) states:

> In the event of a difficulty [in relation to the referendum] arising from an inconsistency, gap or uncertainty in the operation of this Part [of the organic law] –
>
> (a) the courts, for the purposes of the (sic) interpretation and enforcement;
>
> (b) the Governments, for the purposes of consultation with one another;
>
> (c) the Agency, for the purposes of administration, may proceed to resolve the difficulty in the light of the primary sources and by way of analogy from relevant laws.

This section is a direction to the bodies mentioned to be creative in dealing with inconsistencies, gaps and uncertainties. The governments could have faced such challenges when they consulted on the referendum date, referendum question or questions or the criteria for enrolment of non-resident Bougainvilleans — and the courts could face such problems if called upon to interpret or enforce a constitutional provision. But it is perhaps the agency (the BRC) that is most likely to find such problems as it administers the complex rules on conduct of the referendum.

In subsection 62(2) of the organic law, the guidance extends to identifying the ‘primary sources’ and the ‘relevant laws’ that courts, governments and agency are required to take into account. ‘Primary sources’ are restricted to the PNG constitution (and in particular the NGDPs) and the BPA. The ‘relevant laws’ refer to the organic law on provincial and local-level government elections, other PNG laws on elections and referendums, and laws from other countries dealing with elections and referendums.

It seems likely that section 62 envisages mainly administrative arrangements for resolving inconsistencies, but it is also possible that the section might be used by the BRC, at least, to provide a basis for making rules about the conduct of the referendum. In the first half of 2018, officers of the PNG electoral commission and advisers from IFES and the UNDP conducted a careful analysis of the

65-page schedule to the organic law, in order to identify potential difficulties that might be caused by any inconsistency, gap or uncertainty in the schedule. Initially they were proposing that extensive amendments might need to be made to the schedule. But as the procedures for making amendments to an organic law are onerous and time consuming, and bearing in mind the limited time left within which the referendum must be held, they instead turned to section 62. Under a constitutional regulation prepared in late 2018, but not yet approved as of April 2019, provision is being included to the effect that the agency to conduct the referendum will have authority to make rules to deal with difficulties arising from any inconsistency, gap or uncertainty in the schedule.

It might be assumed that section 62 was directed to removing any need for new laws related to the referendum. Perhaps, as a result, the introductory words of section 63 state that the purpose of the section is 'to avoid any doubt about the capacity of legislation to make provision for matters that cannot be anticipated at the time of the making of this law'. Subsection 63(2) provides that such laws can 'confer powers, functions, duties or responsibilities on the Agency, or make other provision in relation to the conduct of the referendum'. Such new laws must, however, be consistent with the organic law, which includes the schedule (see subsection 63(3)). More importantly, while either government can make them, any such law can only be made after agreement from the other government, a provision which is a logical extension of the 'double entrenchment' of the PNG constitutional laws that give effect to the BPA (see chapter one). Requiring the agreement of the other government ensures that neither government can manipulate their law-making powers to the disadvantage of the other government.

So far there has been no need to make new laws on the referendum. There have been, however, some calls for the making of such laws. In particular, the chair of the ABG House of Representatives Committee on Referendum Weapons Disposal, Peace and Unification has made several calls for the passage of a Bougainville law on the referendum. His particular focus seems to be on qualifications for voters, and perhaps reflects lack of knowledge of the extent to which such matters are covered in the constitutional laws (and especially the schedule to the organic law). The June 2017 report of the committee calls for a Bougainville Referendum Act made by the ABG to cover issues about Bougainvilleans' entitlements to vote and in particular linking such entitlements to 'skin colour'. It also proposes that such a law should 'secure the views' of conscientious objectors, described as 'those who are eligible to vote but cannot do so due to their religious belief and perhaps some factions and individuals having [their] own interests' (ABG 2017:8). Both possible subjects for an ABG law are misconceived. As discussed earlier in this chapter, voting qualifications for Bougainville residents are specified in the organic law, while those for non-resident Bougainvilleans must be the subject of consultation between the governments. On the point about conscientious objectors, the aim of the proposal appears to be that such persons are free not to vote. If so, then it would appear that it is not universally recognised that voting is not compulsory. In addition, it is not clear that the committee is aware that any law relating to the referendum made by the ABG would have to be agreed to by the national government before it is made.

The committee also advances a proposal for another ABG referendum-related law — a Bougainville Liquor Ban Act — directed to helping 'to ensure that law and order is maintained during the period of the vote and beyond' (ibid.). Once again, as it would be related to the referendum, such a law could probably be made only with the prior agreement of the national government.

CHAPTER SEVEN
RULES FOR CONDUCT OF THE REFERENDUM

The most detailed set of legal provisions on the Bougainville referendum arrangements are to be found in the 177 sections of the schedule to the organic law entitled 'Rules Relating to the Conduct of the Referendum'. As the name suggests, the schedule sets out the main provisions about how the referendum is to be conducted. To a very large extent, the rules in the schedule are based upon the provisions of the main PNG electoral law as it stood in 2001 — the Organic Law on National and Local-Level Government Elections 1997. There were two main reasons for using that law as the source for the schedule. One involved the intense time pressure under which the legislative drafters were operating after the BPA was signed on 30 August 2001. A second was that it was recognised that, in many respects, aspects of the referendum would be much the same as an election, and that there would be advantages for the administration of the referendum if the rules were similar to the electoral law, for officials called on to administer the election would be familiar with much of what they would be required to do.

PROMOTION OF PUBLIC INVOLVEMENT

There are, however, aspects of the referendum rules that give the BRC roles that would not arise in an election. Perhaps the most significant of these involves the role of the agency (the BRC) in what the rules refer to as 'Promotion of Public Involvement' (in the referendum). Under sch. 1.9(1), this role has two main aspects:

- the promotion of informed debate on each side of the question or questions to be put at the referendum and
- encouraging wider public interest and involvement in ensuring that the referendum is conducted in a free and fair manner for the purposes of section 341 of the constitution (it being section 341 that specifies that the two governments 'shall cooperate to ensure that the Referendum is free and fair').

The rules provide that in carrying out these roles, the steps that the BRC may take include holding public meetings and 'the preparation and distribution of literature to raise public awareness' (in terms of both informed debate and encouraging interest in the referendum being free and fair) (see section schedule 1.9(3)). The BRC is also required to 'develop a policy for promoting public involvement', which is to be publicised in the gazettes of the two governments and in a newspaper circulating in both Bougainville and elsewhere in PNG (see section schedule 1.9(3) and (4)).

These roles are remarkably different from those carried out by the PNG Electoral Commission, and if the BRC is to be effective in carrying them out it will need to develop capacities additional to, and in significant respects quite different from, that commission. These are not roles that are exclusively vested in the BRC. Not only is there no suggestion of exclusivity in the rules, but in addition the human rights provisions of the PNG constitution operate to guarantee the freedom of expression and publication, which undoubtedly would ensure that any interested person could enter into the debates about the issues involved in the referendum.

One of the purposes for which interest groups are recognised is to enable them to nominate scrutineers for the purposes of polling and the scrutiny of the ballot papers.

There is room for some confusion arising from the fact that the provisions on encouraging informed debate and encouraging interest in the referendum being free and fair are found in Part III of the schedule together with provisions giving the BRC authority to recognise interest groups. One of the

purposes for which interest groups are recognised is to enable them to nominate scrutineers for the purposes of polling and the scrutiny of the ballot papers, but in addition they can be involved in promoting public involvement in the referendum. The danger might be that the proximity of the recognition provisions to the promotion of public interest provisions leads to conclusions being drawn that interest groups are required to be recognised to take part in informed debate. This impression could be reinforced by the fact that the BRC policy for promoting public involvement is required to include 'the criteria for the recognition of [interest] groups' (sch. 1.9(3)). This view would be, however, contrary to the provisions of the PNG constitution guaranteeing freedom of expression.

While the BRC is clearly intended to play a significant role in encouraging informed debate, it has not been specifically vested with a role that the Venice Commission's *Code of Good Practice on Referendums* sees as critically important. This involves providing objective information on the referendum in the form of a document containing 'the text submitted to a referendum and an explanatory report of balanced campaign material from the proposal's supporters and opponents' (Venice Commission 2007:7), all of which 'must be sent directly to citizens sufficiently in advance of the vote (at least two weeks beforehand)' (Venice Commission 2007:17). There is no specific provision in the rules on such a role for the BRC (or any other authority), though perhaps the BRC role of the 'promotion of informed debate on each side of the question or questions' could be regarded as extending to include such a role. If it does, and if the BRC decides to take on such a role, it would need to adapt it considerably in view of the fact that there is no system of postal delivery in Bougainville (other than to a few hundred post boxes at two post offices), as well as no established system for delivery of anything (document or otherwise) to every voter, or even to every household, in Bougainville. On the other hand, there may be other means of ensuring widespread, if not universal, distribution of such an explanatory text — for example through the Bougainville churches and schools or through the ABG's system of community governments.

NEUTRALITY OF REFERENDUM ADMINISTRATION

The organic law (section 59) provides for the independence of the BRC, stating that it is 'not subject to direction by any person, including the National Government or the Bougainville Government'. At the same time, in a section headed 'Prohibition on Political Activity', the organic law also provides (section 60) for the neutrality of the BRC:

> (1) The Agency shall carry out its duties in an impartial manner without regard to the outcome of the Referendum.
>
> (2) In particular, the Agency shall not engage in promoting any particular outcome of the Referendum, or support any person or group promoting a particular outcome of the Referendum.

The schedule to the organic law (sch. 1.8.) extends the same requirements for impartiality, etc. to 'referendum personnel', a term defined in schedule 1.8. to mean the BRC staff and management as well as the officials involved in the management of electoral activities that are part of the referendum. The charter establishing the BRC contains provisions on its independence and neutrality which largely repeat the organic law provisions on those subjects.

These provisions are consistent with the focus by the Venice Commission (2007:9–10) on the need for independence and impartiality of anybody responsible for conducting a referendum. On the other hand, it is perhaps an oversight in the preparation of the rules in the schedule that while the heading to schedule1.8. indicates that 'political activity' by referendum personnel is prohibited, no offence is created

in relation to behaviour that breaches that prohibition. Such an oversight could be dealt with through a regulation or by a law agreed to by the two governments.

INTERNATIONAL OBSERVERS

The schedule enlarges on the BPA provision (para. 319) that international observers 'will be invited to observe the conduct of the Referendum', requiring that the two governments 'shall consult and agree on the international observers to be invited to observe the conduct of the Referendum' (sch. 1.11(1)). Further, such an observer is to be given 'full and free access to … observe all aspects of the conduct of the Referendum', including the polling, delivery of ballot boxes to counting centres and the scrutiny of ballot papers (sch. 1.11(6)). Full and free access is defined to include provision by referendum officials of information and transport.

To date there has been no consultation between the governments about inviting international observers. On the basis of agreement readily made in relation to inviting such observers to all of the three ABG general elections (2005, 2010 and 2015), it can be anticipated that there is unlikely to be any serious difficulties with inviting referendum observers.

The rules in the schedule make no provision for allowing domestic (or national) observers, though the Venice Commission code recommends that both national and international observers be authorised to observe any referendum.

However, the focus of the provision made in the rule for access of observers is during the polling and scrutiny, which is significantly narrower than that which emerging international standards suggest ought to apply. The Venice Commission *Code of Good Practice on Referendums* recommends that both national and international observers be involved and that:

> Observation must not be confined to election day itself, but must include the referendum campaign and, where appropriate, the voter registration period … It must make it possible to determine whether irregularities occurred before, during, or after the vote. It must always be possible during vote counting (Venice Commission 2007:10).

The Venice Commission also recommends that 'observation should cover respect by the authorities of their duty of neutrality' (ibid.).

IDENTIFYING VOTERS — COMPULSORY REGISTRATION

The schedule provides that enrolment to vote is compulsory, a requirement that extends to keeping enrolment details up to date in terms of changing address.

The schedule provides that enrolment to vote is compulsory, a requirement that extends to keeping enrolment details up to date in terms of changing address (especially important in terms of changing from one voting district to another. On the other hand, voting is not compulsory. In general, these arrangements are much the same as those under the organic law on national elections.

Voting districts are the basic unit for both enrolment and voting in the referendum. Voting districts have been determined by the BRC-TC, which initially decided to use existing constituencies created under the Bougainville constitution for the purpose of elections to the ABG legislature, but more recently has been considering treating the whole of Bougainville as a single voting district. A separate roll of voters is required for each voting district.

For non-resident Bougainvilleans, there must be one or more voting districts outside Bougainville. Once the qualifications for enrolment of non-resident Bougainvilleans are finalised by publication (in the gazettes of the two governments and in a newspaper, as required by organic law section 55), the BRC will need to give considerable attention to how best to manage their registration for the purposes of voting in the referendum.

Voters are required to vote in the voting district for which they are enrolled. The aim of this requirement is to allow the BRC to break the electoral roll into smaller units than would otherwise be the case, thereby reducing the complexity of managing voting in the referendum.

THE ROLLS OF VOTERS

The BRC can choose to adopt existing rolls of voters and then make additions, alterations and corrections to take account for changes in voter information occurring since the rolls were compiled. Alternatively, if the BRC decides that there are 'no appropriate rolls for a voting district' (sch. 1.17(1)), it can direct the preparation of new rolls. In all four national government general elections held since the turn of the century, as well as the three ABG general elections held (under slightly different voting qualifications), there have been serious problems with the accuracy of the rolls of voters for Bougainville. As discussed in the previous chapter, the BRC-TC has decided to use the rolls used in the 2015 ABG elections as a starting point. The limited capacity and resources available to electoral authorities have been widely regarded as factors contributing to poor quality rolls, and the major question will be how the BRC can develop the capacity and resources necessary to perform significantly better.

Entirely new rolls will be needed for the voting district (or districts) established for non-resident Bougainvilleans.

Entirely new rolls will be needed for the voting district (or districts) established for non-resident Bougainvilleans. The numbers of Bougainvilleans living outside Bougainville (both elsewhere in PNG and abroad) are not known with any certainty. Figures from the most recent PNG national census indicate that in 2011 there were just over 10,000 people born in Bougainville who were resident elsewhere in PNG (PNG NSO 2015:43). That number would include some people whose ethnic origins were not Bougainvillean but who happened to be born in Bougainville, but would not include many people who identify as Bougainvilleans but were born outside Bougainville. Further, no figures are available indicating the breakdown of the non-resident figure by age, nor are there figures available indicating the number of Bougainvilleans living abroad. Issues about the constitutional provisions in relation to enrolment of 'non-resident Bougainvilleans' are discussed in chapter six. Non-resident Bougainvilleans are scattered all over parts of PNG and conducting the comprehensive enrolment process needed to give them fair access to voting rights will not be easy. It should also be noted that the early decision by the BRC-TC to exclude Bougainvilleans living outside PNG is likely to be invalid, because section schedule 1.47(1)(f) permits such persons access to a postal vote.

THE WRIT AND THE PERIODS FOR CAMPAIGNING, POLLING AND SCRUTINY

The issue of the writ is the formal process for both calling the referendum and setting dates for the main campaign period, the polling and the scrutiny. The writ is a process adopted in full from the organic law on national elections. It is also used in relation to ABG elections under the ABG Elections Act. For the referendum, the writ must be issued by the PNG head of state. However, reflecting the requirements of the BPA and the PNG constitution that the date for the referendum must be agreed between the two governments, sch. 1.43 provides that the action of the head of state must be decided by agreement

between the governments. This means, however, that it is the two governments that decide not just the date or dates for polling, but also the dates for the campaign period and for the scrutiny (the counting of votes).

As with a writ for a national election, the writ itself must set out the dates for the periods of the polling and scrutiny, and in so doing the dates for the campaign period, before the polling are also determined. The writ must state the date of its issue and specify a period of between eight and 11 weeks that can expire from that date before the polling period begins. Although the term is not used in the schedule, that period is known as the campaign period for the purposes of national and ABG elections, and presumably will be similarly classified for the purposes of the referendum. The periods for the polling and the scrutiny must be not more than 14 and 21 days, respectively.[40] These periods can be extended if necessary (sch. 1.125).

The campaign period of eight to 11 weeks compares favourably with those for referendums worldwide, which average from one to six months (Qvortrup 2014a:136). Longer campaign periods provide more time for voters to understand and consider the issues involved, provided of course that they have access to reasonable amounts of relevant information. In this case, the writ will be issued on 17 August, eight weeks before the polling begins (on 12 October).

There is also the issue of disinformation, with Qvortrup (ibid.) asserting that anything less than a month is 'insufficient time for debating, refuting, and challenging allegations made by different campaigns'. On the other hand, it might be argued that long campaigns are less necessary in countries where there is extensive history of use of referendums, or the referendum in question is dealing with an issue where people have 'strongly held and fully formed opinions regarding the issue(s) involved' (LeDuc 2007:21; De Vreese 2007). In the Bougainville case, voters will have no past experience of referendums and the available evidence indicates that many people have little understanding not only of what a referendum is, but also of the main options — greater autonomy or independence (Thomas et al. 2017). These circumstances, and the fact that there will undoubtedly be major logistical and other difficulties in promoting awareness for a population with significant levels of illiteracy scattered in often remote rural areas, are factors pointing to a need for a campaign period that is longer than normal.

THE CAMPAIGN PERIOD AND CAMPAIGNING

The growing literature on the regulation of referendums focuses extensively on regulation of conduct during the official campaign period, which, as just discussed, will be between eight and 11 weeks in the case of the Bougainville referendum.

> The BPA and the constitutional laws contain very little on regulation of campaigning. While they do require the referendum to be conducted in a free and fair manner, they provide little machinery directed towards achieving that goal — certainly very little when compared to the emerging international standards on regulation of referendums. But of course, such standards have emerged mainly since the BPA was signed.

What campaigning regulation there is in the rules is drawn straight from the organic law on national elections. Those provisions do include one potentially significant limit on the dissemination of disinformation in the form of provision making the following an offence at the referendum:

> Printing, publishing or distributing an advertisement, notice, handbill, pamphlet or card containing an untrue or incorrect statement intended or likely to mislead

> or improperly interfere with a voter in or in relation to the casting of his vote (sch. 126(1)(d)).[41]

However, the equivalent provision in the organic law on national elections has had very little, if any, impact on the use of disinformation in PNG national elections and would probably be difficult to utilise in the context of the Bougainville referendum unless the BRC took a major role in scrutinising campaign materials.

The other provisions relevant to regulating campaigning also comprise mainly offences under the schedule. The main ones involve requiring campaign documents (advertisements, notices, pamphlets etc.) to include the name and address of the authorising person and the printer (sch. 1.128); requiring articles about the referendum in print media be signed (sch. 1.128); requiring broadcast announcements about the referendum include the 'true name and address' of the author (sch. 1.129(1)); prohibiting the display of referendum material 'directly on a place open to public view' (sch. 1.130(1)); prohibiting the use of loud-hailers (sch. 1.133); and prohibiting disorderly behaviour at a 'public political meeting held in relation to the Referendum' and empowering the chair of such a meeting to 'direct' a police officer to remove a person that the chair believes is 'preventing the business of the meeting being transacted' (sch. 1.146).

It is quite likely that, with the exception of the requirement concerning broadcasts, the provisions about publishing material do not extend beyond printed materials, meaning that in general radio and television broadcasts are very little controlled and electronic communications (other than broadcasts) are not controlled at all. Given the extent of the use of social media by many Bougainvilleans, there may be a need for the BRC to examine the experience in other referendums of efforts to regulate the various forms of electronic media. Additional provision of this kind might be made by way of constitutional regulation, or by a law made by either government (each requiring the consent of both governments).

Measures to regulate campaigning in referendums elsewhere in the world are to some extent a reaction to such dangers of referendums (discussed in chapter three) of being dominated by elites (and the money available mainly to elites) and unfair to minorities. The regulatory measures in question are generally directed to ensuring equality of opportunity in referendum debate, without which a referendum may not be free or fair.

CAMPAIGN FUNDING

One of the most significant areas of debate about regulation of campaigns relates to campaign funding. One aspect involves prohibitions on government expenditure in support of one side in a referendum campaign. For example, the Venice Commission's *Code of Good Practice on Referendums* recommends that while some participation in campaigning by government may be permissible, 'the public authorities (national, regional and local) must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes must be prohibited' (Venice Commission 2007). While this recommendation has not yet been universally accepted and followed, where heavy government expenditure in support of one side does occur, that can be the subject of widespread criticism, as in the case of the UK government support for the 'remain' side of the Brexit referendum in 2016 when it spent 9.3 million pounds on a pamphlet explaining the government's position on remaining in Europe that was sent to every household in the UK (Renwick and Russell 2017).

This issue of government funding for one side or another is one that could readily become a problem in the Bougainville referendum. It would be possible, for example, to have the PNG government

heavily funding a 'no' to Bougainville independence campaign and the ABG strongly supporting a 'res' campaign. In a presentation made to an NRI conference on the Bougainville referendum in Port Moresby in early June 2018, ABG President John Momis proposed that awareness on the options to be voted upon in the referendum should be provided jointly by the two governments, both remaining neutral, and not advancing a preferred option. It may be that this is an area where there should be regulation agreed in advance of the referendum, although time is running short.

Campaign funding is a focus of other aspects of regulation, in large part because referendum critics often 'lament the excessive role money plays in referendum campaigns' (Lutz and Hug 2010:2). But as the same authors note, there has so far been insufficient research on the impacts of campaign financing to be able to discern objectively whether unregulated campaign funding is actually an evil or whether, provided potential voters can 'inform themselves of who sponsors what in a referendum contest, this information might in fact aid them in making their voting decision' (ibid.). In the Bougainville context, there is also the issue of the right to freedom of expression and publication (PNG constitution section 46), which would limit the possibilities of restricting campaigning unless such restrictions are imposed by law and meet the procedural and other requirements of laws that restrict that right. The main regulatory measures employed to varying extents in a number of countries include campaign expenditure ceilings and reporting requirements (mainly for organised groups actively involved in 'for' or 'against' campaigns). The example of such arrangements most often cited involves those under the UK PPERA (see Ghaleigh 2010).

Yet another aspect of campaign funding regulation involves provision of financial support to groups actively involved in campaigning. An example here comes from the UK, where a key issue concerns the fact that political parties tend not to be the main opposing groups in referendums. Indeed political parties normally opposed to one another often find themselves on the same side in a referendum campaign. Rather, multiple groups often become involved in campaigning, sometimes by reference to issues peripheral to the central controversy. Because they may be established solely for the purposes of the referendum campaign, they often face difficulties obtaining the funding needed to operate effectively. So referendum legislation in a few countries enables the commission conducting the referendum to define the recognised groups involved in campaigning into two group and designate just two broadly representative organisations as the lead campaign groups (they are sometimes referred to as umbrella organisations). Such a designation process enables provision of equal financial subsidies to the two designated groups and can also be used to facilitate the operation of media access rules. The need for equality in any public subsidies is emphasised in the *Code of Good Practice on Referendums* (Venice Commission 2007:6).

There is no provision in the Bougainville referendum arrangements for either recognition of umbrella organisations or provision of funding to them and there has not been any discussion of the need for such arrangements (which could, of course, be made by a law agreed to between the two governments).

MEDIA ACCESS

A further aspect of regulation of campaigning concerns access to the media. The concerns here are in large part financial, in that those with ample funding can usually more readily dominate media coverage in a referendum campaign. The Venice Commission's *Code of Good Practice on Referendums* recommends as follows:

» In public radio and television broadcasts on the referendum campaign, it is advisable that equality be ensured between the proposal's supporters and opponents.

» Balanced coverage must be guaranteed to the proposal's supporters and opponents in other public mass media broadcasts, especially news broadcasts (Venice Commission 2007:6).

While the 2017 Bougainville Audience Study makes it clear that the limited forms of mass media operating in Bougainville have very limited reach, nevertheless equality of access to them will be a matter of some importance in terms of ensuring that the referendum is free and fair. This is an area where there is good reason to consider legislation agreed to by the two governments.

THE BALLOT PAPER

While the two governments are required to reach agreement on the question' or questions to be put in the referendum (see chapter four), the form of the ballot paper is a matter for the agency with responsibility for conduct of the referendum (the BRC).[42] In general, design and manipulation of ballot paper content are things that can have significant impacts on elections and referendums (Reynolds and Steenbergen 2006).

It is helpful to distinguish between the content of the ballot paper and the design of the layout of the ballot paper. Content is largely (but not necessarily exclusively) the responsibility of the two governments, while layout is the responsibility of the BRC. As discussed in chapter four, content of the ballot paper can include instructions to voters on filling the ballot paper; an introductory or explanatory statement about the question or questions; the question or questions asked; the response options to the questions; symbols; and boxes, spaces, etc. in which voters can indicate the response option (or options) that they support. The responsibility of the governments to agree to the question or questions extends to the wording of not just the question or questions, but also any introductory or explanatory text and the response options. It would probably also extend to the use of symbols, as they would be included mainly to assist illiterate voters unable to read the text on the ballot paper and so are integrally connected to the question or questions asked. It will probably also extend to the choice of language or languages. The responsibility of the BRC will probably mainly extend to designing the layout of the content as agreed between the governments. The only content it might determine would be any instructions to voters about how to fill the ballot paper.

The key issues about the design of the ballot paper are ensuring that the information contained in it is presented clearly, so as to reduce the likelihood of confusion on the part of voters, and as neutrally as possible.

THE VOTING SYSTEM

Whatever the voting system used in a country is usually adapted for use when a referendum is held. In PNG elections since after the 2002 general election, and ABG elections since after their first general election in 2005, the limited preferential voting system has been used. Previously, the simple plurality (first-past-the-post) system was used for both sets of elections. It may be possible to use the preferential voting system in a referendum where more than two options were to be put before the voters (Tierney 2013b:21). However, when the BPA was being negotiated, no consideration was given to that possibility.

Even though existing voting systems are usually adopted for use in referendums, there will always be significant changes involved, chiefly because voters are not voting for candidates in a referendum, but rather for answers (usually) to questions being asked. As a result, voting in a referendum 'poses a change to well-known electoral choice and this may affect voters' view of the dynamics of a referendum and their choice [whether or not] to participate and how to vote' (De Vreese 2007:8). These

considerations suggest a significant need for extensive provision of information about the process of voting in the referendum.

POSTAL VOTING

The schedule includes extensive provision for postal voting (sch. 1.46–62), even though postal voting had been done away with in PNG national elections from the 1990s, mainly because of the administrative complexity involved and particularly because the PNG postal system is notoriously unreliable, and in Bougainville practically non-existent. For the Bougainville referendum, it was agreed that if non-resident Bougainvilleans in particular were to have a realistic right to vote — in a situation where there could be limited numbers of polling booths for such people — it might be necessary to have postal voting available. The postal voting provisions in the schedule were adopted, with little change, from the organic law on national elections. The main provisions that would enable many non-resident Bougainvilleans to vote by post are found in sch. 1.47(1)(a)(ii), which applies to persons who, throughout the polling period, 'will not … be within 16km by the nearest practicable route of a polling booth open in his (sic) voting district', and sch. 1.47(f), which makes postal voting available to Bougainvilleans who are 'residing abroad'.

In its *Code of Good Practice on Referendums*, the Venice Commission (2007:8) recommends that 'postal voting should be allowed only where the postal service is safe and reliable'. The obvious concern is disenfranchisement of people and impacts on results if a significant proportion of voters use postal votes and the postal service cannot ensure that the ballots reach counting centres promptly. The postal service in PNG is generally slow and does not .extend beyond major urban centres. As a result, postal voting may be of limited practical value.

In one of its early meetings, the BRC-TC decided that provision for postal voting in the referendum would be impractical both because of the poor postal service and the significant additional administrative load for the BRC that would be involved in providing for this form of voting. As a result, a decision was made to seek amendment to the schedule to the organic law to delete the provisions in respect of postal voting. The necessary amendment was drafted in July 2018 but no further progress was made towards getting it enacted. As a result, the BRC must make provision for postal voting

APPOINTMENT OF SCRUTINEERS — POLLING AND SCRUTINY (COUNTING)

The schedule to the organic law makes provision for scrutineers to be present at the polling and at the counting, or scrutiny, of ballot papers. While scrutineers at PNG national elections and ABG elections are appointed by candidates and political parties, different provision needed to be made for the referendum. The schedule provides that scrutineers may be appointed by an 'interested party', which is defined as 'the National Government, the Bougainville Government or a recognised interest group' (sch. 1.64 in relation to scrutineers for the polling and sch. 1.95 in relation to scrutineers for the counting).

At first sight it may seems strange that the two governments are able to appoint scrutineers. However, both governments may well have a strong interest in making their own assessments as to whether the referendum being conducted by the independent BRC is being conducted in a free and fair manner. The recognised interest groups must be, as discussed briefly in chapter six, recognised by the BRC. Under sch. 1.9(3), the BRC must first develop and advertise a policy for promoting public involvement in the referendum that must include 'the criteria for recognition of groups'. That policy must be advertised by the BRC. Then the BRC must advertise to 'invite persons representing groups whose members have a common interest in the referendum to apply in writing for recognition' (sch. 1.10). It is then a matter for the BRC to consider whether a group has a 'sufficient interest' to be granted recognition, taking account of:

- the appropriate number of groups that ought to be recognised in respect of a particular area
- the possible problems involved in having too many scrutineers
- the 'need to avoid communal friction'
- the character of the group in question, having regard to:
  - the extent to which it represents a significant part of the population in a voting district and
  - the desirability … that a reasonable balance is achieved in the areas in relation to which groups are recognised of views representing all sides of the referendum question or questions (ibid.).

Developing, creating awareness about and implementing these arrangements for recognition of interest groups are essential to ensuring that there is adequate scrutiny of both polling and counting. However, these tasks involve another significant amount of work for the BRC, additional to those that an electoral commission would be expected to perform.

POLLING — IN BOUGAINVILLE AND FOR NON-RESIDENT BOUGAINVILLEANS

As has been the case with all elections in PNG since before independence, voting in the referendum will not be compulsory (though there have been some calls in Bougainville for voting to be made compulsory in this case).[43] To vote, a person will need to identify themselves to officials at the polling place and have their name marked on the copy of the voting roll. Voting in the referendum is required to be secret, with schedule 1.85 calling for ballot papers to be marked in private. Assistance can be provided to voters who have impaired sight, are physically incapacitated or are illiterate. Schedule 1.86 provides for voters to record their vote on a ballot paper 'by placing an "X" in the square to indicate his [sic] choice on the question, or on each question, on the ballot paper' (sch. 1.86). If there is more than one question, then 'failure to vote on a choice for one or more of the questions does not invalidate a vote given on a choice for another question or questions' (sch. 1.102(5)).

Minimising the risk of double voting: Use of indelible ink

Issues arise about the dangers of people voting more than once, something that has been a common problem in PNG national general elections. One measure introduced in PNG in the 1980s in an effort to eradicate multiple voting was a provision for marking a voter's fingernail with indelible ink when they are voting. The provision for use of the ink in elections to the national parliament is found in a constitutional regulation made under the Organic Law on National and Local-level Government Elections. While the regulation empowers officials to examine a voter's fingers for signs of ink, it does not empower them to refuse a vote to a person whose finger is found to be marked. The reason is that grounds for rejection of a voter are set out in the organic law on elections and do not include presenting with a finger marked with indelible ink. No provision for use of indelible ink was included in the schedule. The draft regulations prepared late in 2018 provide clear authority for officials to refuse a vote to a person whose finger is found to have been marked, but the difficulties involved in amending the organic law seem to have put an end to efforts to enact the amendment. However, the aforementioned constitutional regulation also includes provision for all voters to have a finger marked with indelible ink.

THE SCRUTINY (COUNTING)

The result of the referendum will be determined in much the same way as the results of a PNG or ABG parliamentary election.

The result of the referendum will be determined in much the same way as the results of a PNG or ABG parliamentary election. The required steps under the schedule to the organic law are:

- Conducting scrutiny of all ballot papers cast for each voting district (see sch. 1.94–1.119 of the organic law), which, amongst other things, involves excluding informal ballot papers.
- Counting the valid (formal) ballot papers in each voting district, in much the same way as in an election, but in this case the purpose will be to determine 'the total number of votes given for each choice' in the question or questions asked in the referendum (sch. 1.122).
- The returning officer for each voting district notifying the BRC conducting the referendum of the result for that district, upon which the BRC will be required to 'calculate the total number of votes given for each choice' in the question or questions asked (sch. 1.123).

REPORTING THE RESULTS

The BRC is responsible for publishing the results of the referendum, which will include:

- officially returning the writ for the referendum to the PNG head of state (the governor-general) with the results written on it
- publishing the results in both the PNG and Bougainville gazettes and an available newspaper and
- publicly declaring the result, which must occur as soon as convenient after the result has been ascertained (sch. 1.123).

CHALLENGING THE RESULTS — DISPUTED RETURNS

Under the rules, the results of the referendum can be challenged in the National Court by either the BRC or any voter, in much the same way as an election result can be challenged in a Court of Disputed Returns. The availability of a 'final appeal to a court' is a strong recommendation in the *Code of Good Practice on Referendums* (Venice Commission 2007:10).

REGULATIONS

Both part XIV of the PNG constitution and the organic law empower the making of 'constitutional regulations' that (subject to consistency with the constitutional laws) can make provision in relation to any matter which either part XIV or the organic law require or permit to be prescribed by regulation, or where prescribing by regulation would be necessary or convenient. Such regulations must be made by the National Executive Council (cabinet), but only after consultation and agreement with the Bougainville government (another manifestation of the principle of double entrenchment — see chapter one).

Constitutional regulations are clearly envisaged by a number of provisions in the schedule, which provides for things to be done through later enactment of regulations. Examples include a number of forms (such as the form for enrolment of voters) in respect of which it is provided that they be as prescribed. In late 2018, the necessary constitutional regulations were prepared to provide for forms and also in relation to the use of indelible ink as a means of preventing voters from voting more than once. At the time of writing (April 2019), the draft regulations were with the national government's state solicitor for perusal.

Photo: UNDP PNG/Alice Plate

Photo: UNDP PNG/Nick Turner

CHAPTER EIGHT
PREPARING FOR THE REFERENDUM

This chapter provides an overview of steps taken up to April 2019 in advance of the referendum, bearing in mind that some significant aspects of preparations have already been discussed in chapter two and chapters four to seven.

THE ROLES OF THE JSB

The JSB is the body established by the BPA and the national constitution to oversee the implementation of the BPA and to provide a forum at which the two governments and their agencies can consult. It should be no surprise, then, that the JSB has been the institution through which the governments have reached agreement on matters which the constitutional arrangements did not resolve but left to later intergovernmental decisions. The major questions so far decided through the JSB are the:

- agency to conduct the referendum
- appointment of the chair of the BRC
- criteria for links to Bougainville that non-resident Bougainvilleans must have to be eligible to vote at the referendum
- question to be asked in the referendum and additional ballot text which the JSB agreed should appear on the ballot paper
- dates for the issue of the writ for the referendum and the commencement of voting.

Chapter six looked at the remaining matters on which the constitutional arrangements require similar agreement.

As might be expected, quite apart from these matters where the constitutional arrangements require such agreement, there are a number of other referendum-related matters which the JSB has dealt with. These include funding for the BRC, post-referendum transition planning, weapons disposal and the second autonomy review.

The JSB, which comprises at least two nominees each from the national government and the ABG, meets once or twice per year and has proven to be a robust institution, capable of dealing with complex issues. Until the last two or three years, much of the work of the JSB was done through direct engagement of the leaders, taking account of preparatory work by the senior officials from both governments constituted as the JTT. Since about 2015, however, increasingly matters have been dealt with by officials in the JTT, which usually meets two to three weeks before the JSB to finalise the agenda and develop draft resolutions for formal approval of the JSB. There has been little or no opportunity for input from the political leaders attending the JSB and ABG leaders have become increasingly concerned about the lack of direct engagement with national government leaders. ABG leaders consider that to deal with important matters such as the date for the referendum and the outcome of the vote, that JSB procedure will need to change to ensure that there can be direct communication between the governments.

ESTABLISHING THE BRC

Before the gazettal of the appointment of the BRC chair in November 2018, the BRC was able to undertake referendum preparatory work from December 2017, mainly through the operation of the BRC-TC. By December 2018 the BRC-TC had met nine times and had made a range of decisions on the conduct of the referendum. To a large extent this work was possible because two of the four members of the BRC-TC were the PNG and ABG electoral commissioners and the focus of their decisions was on what might be called the electoral side of the referendum, drawing on advice from IFES and the UNDP.[44]

At its first meeting on 5 December 2017, the BRC-TC set up four committees to develop the BRC and its operational capacity. The committees were responsible for:

- the concept of technical operations, planning and budgeting for the referendum
- awareness and external relations
- establishment of the BRC secretariat
- recruitment of the chief referendum officers.

As early as its second meeting, on 23 February 2018, the BRC-TC began making major decisions on organisation of the referendum.

As early as its second meeting, on 23 February 2018, the BRC-TC began making major decisions on organisation of the referendum. On the basis of a report from the Committee on the Concept of Technical Operations, Planning and Budgeting, it determined that existing ABG constituencies would be used as voting districts (for voter enrolment and polling); that each province elsewhere in PNG would be a voting district for enrolment and polling of non-resident Bougainvilleans; and that vote-counting centres in Bougainville would be at Buka, Arawa and Buin — and for non-resident Bougainvilleans in Port Moresby, Lae and Kokopo. On the basis that PNG postal services are 'unreliable', the BRC-TC decided that postal voting would be impracticable, even though postal voting is provided for in the schedule to the organic law. It was further agreed to transform the concept of operations to an actual operations plan. Several of these decisions were later changed once the BRC started operations with its full board.

The Committee on Communications and External Relations discussed problems arising from the wide range of groups disseminating awareness information and the need for greater coordination between the various groups involved. The BRC-TC also discussed the need to develop a BRC policy on 'public involvement' as required by schedule 1.9(3). As discussed earlier in this book, the BRC has a responsibility for 'promotion of informed debate on each side of the question or questions to be put at the referendum' and 'encouraging wider public interest and involvement in ensuring that the referendum is conducted in a free and fair manner'. The BRC must also include criteria for the recognition of 'interest groups', which are apparently to be recognised not only for their involvement in awareness activities but also in nominating persons to be scrutineers at polling booths and counting centres (see sch. 1.9(3) and 1.10).

The BRC-TC also discussed a proposed structure for the BRC secretariat and steps to select the head of the secretariat — the chief referendum officer. On the basis of recommendations in a report by IFES, decisions were made on preparing the rolls of voters. The key decision was to start with the rolls used in the 2015 ABG general election. Other BRC-TC decisions include the budget for the referendum, which at one stage was estimated at K127 million, of which K70 million was regarded as the 'core' budget, with the remainder needed to meet costs of such things as weapons disposal and payment of outstanding claims arising from past elections. At a JTT meeting in advance of the October 2018 JSB meeting, the PNG chief secretary criticised the proposed budget as excessive; the two electoral commissioners then submitted a revised budget of K38.75 million. There was little in that budget to meet costs of awareness activities.

At the request of the BRC-TC, the PNG Electoral Commission and advisers from IFES and UNDP undertook a detailed review of the provisions of the schedule to the organic law and developed proposals for extensive amendments to it. Many of the proposed amendments related to apparent mistakes, inconsistencies and uncertainties in that schedule. After consultation with the ABG lawyers,

the BRC-TC decided not to attempt such amendments, mainly because the onerous requirements for amending the schedule would have made it very difficult to ensure that amendments would in fact be complete before the referendum is held. Instead it was decided to deal with most of the concerns through decisions of the BRC, made under section 62 of the organic law. As discussed in more detail in chapter six, that section empowers the BRC, the courts or the governments to make decisions on difficulties arising from any 'inconsistency, gap, or uncertainty' in the operation of the organic law on the referendum (including the schedule to the organic law). In addition, in late 2018, ABG lawyers, in consultation with an IFES legal adviser assisting the BRC-TC, developed draft constitutional regulations under the organic law on a number of matters which the schedule to the organic law had envisaged regulations being made. These matters included the form needed for enrolment of voters, amongst many other necessary forms.

At its meeting in April 2018, the BRC-TC considered the question or questions to be asked in the referendum. It did so while recognising that under the national constitution decisions on the question or questions to be asked are matters for the two governments. Hence the four options developed by the BRC-TC were intended to assist the two governments in their consideration of the question or questions to be asked — and this did occur when the JSB made its decision on the question (a process discussed in chapter four).

COMMUNICATION AND AWARENESS[45]

In a situation where more than 50 per cent of the population is illiterate, most of the population is scattered through rural areas, many of them remote from transport, and the penetration of television, radio and newspapers is very limited (Thomas et al. 2017), the challenges in building communication and awareness on the referendum are considerable. There are, however, a number of organisations and individuals working on communication and awareness efforts of various kinds.

The members of the ABG House of Representatives (MHRs) are all supposed to be engaged in village-level awareness activities, as part of the constituency-based referendum-ready program agreed to by the House (see the discussion in chapter two). The other major communication and awareness activity of the ABG is undertaken through its Media and Communications Directorate, which is working closely with the ABG's Department of Peace Agreement Implementation. The multiple activities of the directorate include:

- Production of 30,000 copies on each run of a quarterly 20- to 24-page newspaper, the *Bougainville Bulletin*, of which 12 editions had been produced by late 2018, which includes articles in both English and Tok Pisin, much of the material being about preparations for the referendum.
- Production of in-colour Tok Pisin fact sheets (10,000 copies each run) and posters (6000 copies per run) which are distributed through schools, community governments, NGOs and so on, which cover a range of topics outlined later in this chapter.
- A community radio broadcasting service, called *Radio Ples Lain*, which has a mobile broadcasting unit transmitting programs in localised areas, with a focus on the referendum.
- A community video information presentation program, called *Piksa Ples Lain*, where a team from the ABG's Media and Communications Directorate and the Department of Peace Agreement Implementation presents videos of leaders talking about different aspects of the referendum and the preparations for its conduct.

Responding to the fact that the 2017 audience research report discussed in chapter two showed that mobile phone usage is high and is a preferred or most used means of communication, the Media and Communication Bureau is also well advanced in plans to disseminate awareness materials drawing on reported experience from other countries of 'interactive voice recorded' (IVR) menus on mobile phone platforms. It is expected that the initial project will be launched mid-2019. It will operate for eight weeks, in which the 30,000 people with mobile phones linked to the Digicel network in Bougainville will receive an SMS message notification alerting them that new information about the referendum and related processes is available through a free call.

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When the subscriber dials the free call number they listen to a voice-based menu listing autonomy, weapons disposal and referendum options. They are then able to select an option through their phone keypad, which will link them to a pre-recorded one-minute voice message on the topic, presented by a recognised Bougainville leader. For each week of the eight week program the messages will be changed. At the end of each week, SMS surveys will be sent to key users to evaluate their use of the IVR platform and the impact of the awareness information that it contains.

All of the referendum-related messages in the ABG's Media and Communications Directorate's material are jointly agreed between the national government and the ABG. The latest draft of the jointly developed messages is available through the ANU website.[46]

The Brisbane-based Peace and Conflict Studies Institute Australia (PACSIA) is working on an awareness and dialogue project funded by the German Catholic aid agency MISEREOR. The project is supported by the Catholic diocese of Bougainville and undertaken in close cooperation with the ABG's Department of Peace Agreement Implementation. The project has recruited and trained over 80 facilitators from all 33 of the ABG's single-member constituencies who undertake referendum awareness dialogues at the local level, the aim being 'to make each and every hamlet, village, ward and constituency "referendum ready"' (PACSIA 2018:4). The awareness dialogues are held in schools, marketplaces, churches and community government offices. Based on reports from 20 of the 30 local facilitator teams at work in 2017, PACSIA reported that their 20 teams had held a total of 198 awareness sessions attended by 9687 people, of whom 4995 were males and 4752 were females (ibid.:9–10). The PACSIA teams seek to generate discussion at their meetings, keep a record of the questions that people ask, then share that record with the ABG's Media and Communications Directorate, which in turn uses that information to develop its materials.

The churches are also involved. The Catholic Church is supporting the PACSIA awareness dialogues, while on 3 August 2018 the Uniting Church launched its own referendum awareness program, whereby talks on the referendum take place during Sunday church services, daily devotions and weekly ministry fellowships (Uniting Church 2018). The Bougainville Women's Federation and several Bougainville NGOs established by women are also conducting awareness activities focused on women voters.

Most awareness material generated so far has been about what a referendum is, the need for Bougainville unity, the importance of the referendum being free and fair and safe, the need for weapons disposal, the different steps in the referendum process and the time required for them and the importance of women's involvement in the referendum. Largely because the issue of the question or questions to be asked was decided late in 2018, there has so far been little focus on the options that

will be available to voters (that is, independence versus greater autonomy). Anecdotal reports indicate that the referendum-ready awareness being undertaken by ABG MHRs favours strong promotion of independence as the option that people should vote for in the referendum.

As discussed in chapter six, under the schedule to the organic law, the BRC is vested with significant awareness-raising roles, although, as at the time of writing, it has yet to undertake such activities. Section schedule 1.9(1) states that the BRC functions include the:

- promotion of informed debate on each side of the question or questions to be put at the referendum
- encouragement of wider public interest and involvement in ensuring that the referendum is conducted in a free and fair manner for the purposes of section 341 of the [national] constitution.

In addition, the steps that the BRC may take in relation to these significant functions 'include the holding of public meetings and the preparation and distribution of literature to raise public awareness' (sch. 1.10(2)). The BRC is required to 'develop a policy for promoting public involvement' which must be published in the gazettes of the two governments and in a daily newspaper (sch. 1.10(3) and (4)). The BRC has developed a draft awareness strategy, prepared by the ABG's Media and Communication Directorate after consultation with the ABG Department of Peace Agreement Implementation and advisers provided to OBEC, the PNGEC and the BRC by IFES and UNDP.

The BRC is required to 'develop a policy for promoting public involvement' which must be published in the gazettes of the two governments and in a daily newspaper.

A question for the BRC on building awareness will be whether it takes on responsibility for providing a document containing 'objective information' about the referendum to voters, which the Venice Commission's *Code of Good Practice on Referendums* recommends should be developed by 'the authorities' if voters are to have freedom to form an opinion (Venice Commission 2007:7). More specifically, the commission recommends:

> This implies that the text submitted to a referendum [the question or questions to be asked] and an explanatory report or balanced campaign material from the proposal's supporters and opponents should be made available to the electors sufficiently in advance, as follows:
>
> i. they must be published in the official gazette sufficiently far in advance of the vote;
>
> ii. they must be sent directly to citizens and be received sufficiently far in advance of the vote;
>
> iii. the explanatory report must give a balanced presentation not only of the viewpoint of the executive authorities or persons sharing their viewpoint but also of the opposing one (ibid.).

In the explanatory memorandum attached to the *Code of Good Practice*, the Venice Commission elaborates:

> another possibility would be for the authorities to send voters balanced campaign material from the proposal's supporters and opponents — corresponding, *mutatis mutandis*, to candidates' election addresses made available to citizens prior to some elections (Venice Commission 207:18).

The explanatory memorandum also recommends that the text to be submitted to referendum and either the explanatory report or balanced campaign material 'must be sent directly to citizens sufficiently in advance of the vote (at least two weeks beforehand)' (ibid.).

As discussed in chapter seven, the work in producing and distributing such material would be considerable and would require the BRC to develop significant capacity in a short time. Getting the material directly to voters would be highly problematic, as most Bougainvilleans have no postal address. On the other hand, it would be possible to distribute such material through churches, schools and community governments.

In the context of discussion of the freedom of voters to form an opinion, the Venice Commission further recommends that:

- public authorities should not 'influence the outcome of the vote by excessive, one sided campaigning', and
- 'the use of public funds by authorities for campaigning purposes must be prohibited' (ibid.:7).

The anecdotal reports indicating that the awareness activities of most ABG MHRs favours active promotion of the cause of independence could be regarded as contrary to the Venice Commission recommendations, in that it indicates that the government of Bougainville is supportive of a particular option in the referendum.

RECONCILIATION AND UNIFICATION PRIOR TO THE REFERENDUM[47]

Post-conflict reconciliation, between both individuals and groups divided by conflict, plays a significant role in Bougainville societies and has been a major factor in the success of the Bougainville peace process.

Post-conflict reconciliation, between both individuals and groups divided by conflict, plays a significant role in Bougainville societies and has been a major factor in the success of the Bougainville peace process, as is discussed in chapter one. Localised reconciliations still continue today, 21 years after the conflict ended. In the lead-up to the referendum, it is widely acknowledged not only that many 'crisis'-related divisions remain unreconciled, but that unresolved divisions could create difficulties in the conduct of the referendum and in the post-referendum period. As a result, significant efforts are being made to achieve as much reconciliation as possible before the referendum is held. As discussed in chapter two, the referendum-ready program, in which all members of the ABG legislature are involved, includes a requirement to declare the status of each of the ABG's constituencies on reconciliation and unification processes. At this stage the efforts in reconciliation and unification mainly seek to resolve divisions amongst Bougainvilleans, but there is also interest amongst the Bougainville leadership in extending the efforts to not only divisions between Bougainville and the rest of PNG, but also divisions at the international level (for example between Bougainville and Australia). At the JSB meeting in March 2019, the two governments agreed to hold a national-level reconciliation on 15 June 2019.

The churches have long had roles in encouraging localised reconciliation in Bougainville and continue to do so, as do many leaders at the local level. But perhaps the best known work being done at this time is that undertaken by the District Peace and Security Committees established by the ABG, which operate in each of the 13 Bougainville administrative districts. Membership of the committee for each district is flexible and usually involves district executive managers (the senior ABG officers in the districts) as well

as heads of community governments and their executive officers, representatives of ex-combatants, women and youth, and sometimes of village courts and police. Total membership ranges from 10 to 20, depending largely on the number of community governments in the district. The committees are supported by an Australian-aid funded Bougainville Partnership (BP), which provides small grants that support the work of the committees as well as assisting them with access to trained mediators and some training programs. With the support of the BP, the district committees have provided the data for a register that the BP maintains of about 2500 matters for which reconciliations are or have been required The matters include a wide range of incidents, including deaths, torture, assaults and destruction of property. The register serves several purposes. Amongst other things it provides a checklist of what matters have been dealt with and what is outstanding, defines the work program for each District Peace and Security Committee and provides the basis for the allocation of BP grants.

The vast majority of reconciliations are local matters, concerning at most just a few people. A few are what are termed 'high profile' reconciliations, where well-known people or major events that divided large numbers of people are involved. One such high profile reconciliation took place in early 2018 about the death of John Bika, a minister in the 'North Solomons Provincial Government' who late in 1989 was murdered by BRA figures because of his work towards negotiation of autonomy arrangements as a settlement to the then burgeoning conflict. Another high profile reconciliation that occurred on 17 May 2017 concerned the resolution of differences between the BRA and MDF leadership over an incident in September 1997, very early in the peace process, when moderate BRA and BIG leadership associated with Joseph Kabui split from the leadership of Francis Ona when Ona refused to support the peace process. The split manifested itself at a meeting at Roreinang, in the mountains of central Bougainville, and was subsequently referred to by many of those involved as the 'Roreinang coup'. The reconciliation ceremony on 17 May 2017 involved, among other things, the signing of a 'Memorandum of Joint Commitment Between the Francis Ona Faction and the Joseph Kabui Faction' which recorded the unification of the Me'ekamui, Kingdom of Papala, BRA and BRF elements, and a commitment from the Me'ekamui and Kingdom of Papala factions to dispose of their weapons. The BP becomes much more directly involved in the high profile cases than it does in individual cases, in large part because they generally involve people from a number of different districts. At the time of writing, the BP had a number of outstanding high profile cases that it was dealing with.

Because of the quite large numbers of localised reconciliations required in some areas and the limited time left until the referendum will be held, some of the District Peace and Security Committees have developed the idea of holding mass reconciliations, where scores of localised issues are dealt with together. Three such mass reconciliations were held in 2018, before the end of August. One was in Siwai (southwest Bougainville), another in Torokina (central west Bougainville) and a third in Haku (nothern Buka island). At the Siwai event several high-powered weapons were handed in for disposal. The mass reconciliation ceremonies create a different dynamic to individual events. They bring together large numbers of people and appear to be helpful to people who have seen themselves as victims, for example of violence, as they see that they are not alone in their experience and that their communities need to move together to put the negative experiences of the conflict behind them.

WEAPONS DISPOSAL

As discussed in chapter five, although the UN-supervised weapons disposal process that ran from 2001 to 2005 was generally regarded as successful, it was always acknowledged that not all weapons in Bougainville had been disposed of. The continued availability of those weapons, and the need for their removal, is understandably a major focus in the preparations for the referendum. First, availability

of weapons and their possible use could seriously endanger the likelihood of the referendum being adjudged to be free and fair. Second, there is the risk that weapons-holders who are unhappy about the results of the referendum might be tempted to use them after the referendum. Third, the approach of the referendum offers the opportunity to use the need for Bougainville to be free of weapons as leverage on those former combatants who have so far been unwilling to dispose of weapons.

The UN-supervised weapons disposal plan (2001–05) had three stages. The first was storage in locked containers provided by the Peace Monitoring Group (PMG) with a single key held by the relevant factional commander. The second stage consolidated stored weapons into a smaller number of double-locked containers, with one key held by a commander and the other by the UN. The third stage was final disposition of the weapons, which in late 2003 was agreed to be by destruction. Almost 2000 weapons were destroyed through this process.

But, as discussed in chapter five, when the UN declared stages two and three of the process as complete, it was made clear that they were principally dealing with weapons disposed by the BRA and BRF elements that were participating in the peace process. Compliance by them with the agreed disposal process was adjudged to be substantial, but not complete, because some weapons had been removed from stage two containers by BRA or MDF elements and not destroyed. More significant was the fact that the former BRA elements loyal to Ona, and classified as MDF, never participated in the weapons disposal process and so openly retained their weapons. In its 2005 declaration of 'substantial compliance' with the weapons disposal plan, the UN indicated that it anticipated that the ABG would be able to deal with the remaining weapons (UN 2008:455).

Since 2005, however, several factors have complicated the position with weapons. First, weapons removed from containers by BRA elements in 2004–05 were subsequently distributed amongst a complex set of small factions that emerged in localised conflict in South Bougainville between 2006 and 2011 (Regan 2010:121–26). Second, the Me'ekamui faction, including the MDF, has splintered into several elements with varying degrees of independence one from another. They include:

- a Me'ekamui Government of Unity and the 'original' Me'ekamui, both based in the area around the Panguna mine, but with supporters from many parts of Bougainville.
- a former MDF element which is now associated with Noah Musingku, head of the self-declared Kingdom of Papala based at Tonu in southwest Bougainville.
- an MDF element based in the Konnou area in southeast Bougainville headed by Damien Koike, who has close links to Noah Musingku.

An unknown number of World War II weapons have been recovered, mainly from the Torokina area, and refurbished.

Third, an unknown number of World War II weapons have been recovered, mainly from the Torokina area, and refurbished. Fourth, an unknown number of weapons has been imported, mainly from Solomon Islands (although there have also been unconfirmed reports of the PNGDF supplying weapons to former BRF elements at various points since 2005). Fifth, a trade in weapons from all such sources has developed, some being sold to Bougainvillean businessmen and some being sold for transport to the PNG Highlands.

There have been a number of initiatives seeking to establish a follow-up weapons disposal program, but there were major obstacles to success in this regard. The intense factionalisation of the MDF that has occurred since 2005 has made it very difficult to get broad-based agreement for a new process.

Another obstacle has been the lack of faith among the Me'ekamui factions that the questions of independence would actually be dealt with by a referendum. Despite the signing of the BPA, they generally did not believe that a referendum would be held.

With the progress made towards holding the referendum, beginning with the agreement at the May 2016 JSB meeting on June 2019 as a target date for the referendum, there has been growing acceptance amongst the Me'ekamui factions that the referendum will actually take place. As a result, there has been increasing engagement between those factions and the ABG. The May 2017 unification initiative that was part of the outcomes of the high profile reconciliation and unification over the Roreinang coup was largely possible because of the progress towards the referendum. That progress has enabled the ABG's Department of Peace Agreement Implementation to work with factional leaders in developing a new four-phase weapons disposal process under which the original ambitious goal was for Bougainville to be 'weapons free' by December 2018. The four phases are:

- Preparation and awareness, designed to encourage commitment to the process and to enable agreement to be reached on the final fate or method of final disposal of the weapons.
- Collection, registration and secure storage of the weapons, which will be transferred to the custody of the Bougainville Police Service.
- Disposal of the weapons in accordance with the decision made in the first phase.
- Verification, declaration and reporting.

The plan proposed that at the same time, a program would be developed for rehabilitation and reintegration of former combatants, particularly those associated with the Me'ekamui factions.

Lack of funding to support the new program meant the work needed to meet the December 2018 target did not occur. The cost of the proposed weapons disposal process and the associated rehabilitation program was estimated at K12 million over three years, 2018–20. At the time of writing, the funding needed for the agreed process was not forthcoming from the national government. The lack of funding in the 2018 national budget, mainly because the disposal process was not finalised until after the 2018 budget, was understandable because the budget had been handed down before the weapons disposal costings were generated by the December 2017 JSB meeting. But it was surprising when, again, there was no funding in the 2019 budget handed down in November 2018. The hope now is that funding will be found in the form of savings in the budget. Despite the lack of funding, the four phased weapons disposal process has been approved by the JSB and initial steps have been taken to establish a Joint (ABG/national government) Weapons Disposal Secretariat to oversee the process. The secretariat has met and, at its most recent meeting (February 2019), welcomed the head of the MDF elements associated with the Me'ekamui Government of Unity as a member of the secretariat.

Despite the lack of funds for the weapons disposal process, some weapons have been disposed of, generally as part of the referendum-ready process discussed in chapter two. A report on weapons disposal prepared for the March 2019 JSB meeting indicates that 183 weapons have been destroyed or handed over to the police for storage pending a final decision on disposal of the weapons

One focus of the weapons disposal process is the fact that World War II weapons are being dug up and refurbished, thereby providing, perhaps, the major source of 'new' weapons. At a JTT meeting on 15 June 2018, chaired by both the national government and ABG chief secretaries in preparation for the JSB meeting held on 29 June, a resolution was passed which included provision for the two chief secretaries to jointly write to the Governments of the United States, Japan and Australia to seek funding and capacity building support to enable disposal of World War II remnants (JTT 2018:4).

Subsequently the two chief secretaries wrote joint letters to the heads of the diplomatic missions in PNG of Japan, the US and Australia, the three countries involved in combat in Bougainville during World War II.

Of particular interest here is a large area of Torokina, on the west coast of Bougainville, where a substantial US base operated from 1943 to 1944, with over 60,000 personnel stationed there. Australia took over the base in 1944. Large amounts of explosives and ammunition, as well as some weapons, were left behind at Torokina by both US and Australian forces. The US base was established despite serious opposition from Japanese forces that had occupied the whole of Bougainville in 1942. The Japanese did not have a large presence at Torokina before the US forces established their base there, but they subsequently massed thousands of soldiers to attack the US base in failed attempts to dislodge the Americans. As a result, there is also Japanese material around the perimeter of the US base as well as in former Japanese bases in other parts of Bougainville. During the Bougainville conflict, BRA elements put considerable effort into locating and using World War II weapons and ammunition and established workshops to make home-made firearms and refurbished World War II weapons, including those from Japanese, Australian and US forces. They also recovered ammunition, particularly from swamps and from a small lake into which it had been dumped and found that when it was carefully dried, the ammunition could be safely used.

Since 2008, both a US-funded team and an Australian military team have spent time at Torokina collecting and disposing of unexploded bombs and artillery shells. They were not interested, however, in attempting to do anything about firearms and ammunition, due to the sensitivity of weapons disposal activities and the difficulties of locating the material. The ABG proposal to the JTT and the JSB was for the three countries (US, Japan and Australia) to provide training to Bougainvilleans to assist in locating and dealing with not only unexploded bombs but also firearms and ammunition. While the letters from the chief secretaries to the US, Japanese and Australian missions were sent in June 2018, at the time of writing there has been no response.

GENDER AND REFERENDUMS

Research on gender in relation to referendums generally is limited, with the available evidence relating to western liberal democracies (and mainly countries in Europe). Obvious questions include whether or not there are gender differences in terms of participation (actually voting) in referendums, in choices made when voting in referendums and whether referendums offer opportunities for women seeking greater equality and improved social justice. In relation to levels of voting in referendums, although there is a gender gap in elections (that is, a lower voter turnout for women compared to men) the same is not true for referendums (Treschel 2007:115). On choices made in referendums, evidence from opinion polls in the debates before the 2014 Scottish and Catalonian referendums on independence indicates that early in the campaigns women were much more likely than men to oppose independence and more likely to be undecided. On the other hand, the 'gender gap in support for change shrank in the final stages of the referendum campaigns … as the salience of the debate increased' (Verge et al. 2015:517). Whether referendums offer opportunity for women's movements to seek greater equality and social justice, there was little evidence of such opportunities in the Catalonian and Scottish referendums. On the other hand, the women's movement in Scotland received a significant boost 'in terms of numbers of women involved and structures created' through the active engagement of women's groups on both sides of the issue (Verge and Alonso 1/12/2015).

Several authors have explored a range of possible explanations for the apparent gender gap in support for independence in the Scottish and Catalonian referendums of 2014 and 2017 respectively. They include the possibility that women are more risk-averse than men (Verge et al. 2015) or that in early stages of the debates the focus was on legality and process, with which many people are unfamiliar, and little focus on the economic and political dimensions and with very few women involved in the debate[48] (Bell and Mackay 2013).

In the absence of the constant opinion polling that informed much of the debate about gender in the Scottish and Catalonian referendums, it is not possible to know if there are significant gender differences in the Bougainville referendum.[49] Nevertheless, there is some resonance with some of the observations for Scotland and Catalonia. For example, the referendum debate in Bougainville has so far to a large extent been about process and constitutional issues and has yet to deal substantively with the social, economic and political implications of the choices likely to be available in the referendum. In these circumstances, if the experience of Scotland and Catalonia is of any relevance, it might be expected that women may be less certain about whether they will vote in the referendum and what choice they will make if they do vote. To date there has been no indication of any move by women's leaders to take the opportunity of debate about constitutional change to explore the possibilities of change in social justice and equality. A factor that could limit women's engagement in referendum debates so far may be the relative lack of women's voices. All the main voices on the referendum at both the national level and in Bougainville are male and even the processes involving the constituency referendum-ready committees are in constituencies mostly headed by men, and overseen by committees in which women constitute a small minority. It is true that two members of the BRC must be women, although in fact only one has been appointed.

The 2014 UNDP Report on Peace and Development (see chapter two) observes that:

> Post-BPA women have lost the prominence that they had before and during the crisis and in the peacemaking process. They need to reunite in their pursuit of equal representation, and also get support from men … Some of the contributing factors to the current marginalization of women seem to have been: (1) the quick shift of attention [early in the peace process] to the ex-combatants; (2) their exclusion from the first weapons disposal programme; (3) the reassertion of traditional gender roles that orient women more towards subsistence farming … rather than cash-cropping; (4) cultural bias against education for women (especially in south Bougainville); (5) a climate of threat from guns but also other weapons; (6) high levels of domestic violence and gender-based violence; (7) lack of support for crisis-widows, teenage pregnancies and marriages; and (8) very limited political representation at all levels (in the COEs [councils of elders], the House … the Bougainville Executive Council, top jobs in the public service). Though the matrilineal nature of Bougainville society … is often mentioned, actual respect for women, even in matrilineal areas, seems to be diminishing. Outside actors have sometimes unwittingly contributed to this, by falling into the pattern of men doing business with men. So too has the marginalization of women from critical policy and legal discussions and negotiations, such as those regarding the Panguna Mine, the Mine Bill, Land Policy etc … there remain three reserved seats in the House … for veterans and women each, though veterans amount to a few thousand and women make up half the population. This is a stark reminder of the

> marginalization of women, and of the continued legacy of the crisis where much voice and power was obtained from holding a gun (UNDP 2014:22).

While valid criticisms can be made of some aspects of this assessment and some things have changed since 2014 (including a move to fully equal representation of women in the system of community governments that replaced councils of elders (COEs) early in 2017), in large part it rings true. It is an assessment which should sound warnings in the preparation for and conduct of the referendum. Obvious questions that might be asked are to what extent will:

- women be included in preparation for the referendum, including for the widespread public awareness and consultation programs that are a critical part of those preparations?
- awareness and consultation seek to engage directly with women and women's organisations both locally and more broadly in Bougainville?
- the need to engage with women (half the population) be recognised in efforts to get the best possible rolls of voters, as well as voter turnout?
- attention be given to the obstacles that often prevent women from participating fully in all aspects of electoral processes?

Questions arise as to whether many women in Bougainville will enjoy full freedom to vote in the referendum. The holders of the three ABG regional women's constituencies have been conducting awareness as part of the constituency referendum-ready process, but have pointed out the difficulties in direct engagement with the large populations of each region. There is no doubt that the matriliny that operates in most Bougainvillean societies helps women in Bougainville to have a higher status than is commonly the case elsewhere in PNG. Further, there are some women who are able to operate relatively freely in the public sphere. They include senior women who have high standing in society in some areas, senior personnel in some Bougainville-based NGOs, the three women representatives in the Bougainville legislature and the women members in the new system of community governments established by the ABG in 2017 to replace the previous COEs — although there is anecdotal evidence of former COE members resisting the changes under the community government system (George 2018). But, as discussed briefly in chapter one, at the level of the family and the landowning clan lineage, many women are not free to play public roles. With family, many women are restricted in the roles they can take in decision-making on such important matters as where they will reside and build houses (Hamnett 1977) and how the financial resources of the family will be raised and used (Eves et al. 2018). This tendency to patriarchy in Bougainville's matrilineal societies seems to extend to most spheres of human activity. Although no research has been done on these trends in Bougainville, observations in the US State Department's 2016 report on human rights in PNG about how limitations on women in PNG extend to their roles in electoral processes may well apply there:

> the deeply rooted patriarchal culture impeded women's full participation in political life. The political participation of women was often limited, since there were social expectations for them to vote along tribal and family lines (US State Department 2016:13).

This aspect of the situation of women may need to be taken into account in awareness campaigns about enrolment to vote, voting and making choices when voting (this has not happened so far). The requirement that at least two members of the seven-member BRC must be women was presumably intended to ensure that gender issues in the referendum are taken into account.

THE ROLES OF THE CHURCHES

Christian churches in Bougainville have high levels of adherents and a history of extensive influence. The three churches with earliest access to Bougainville have had the strongest impact. The Catholics arrived first in 1901, followed by the Methodists in 1917 and the Seventh Day Adventists in 1924 (Oliver 1991:58–64). By the 1960s the Catholics had 'converted up to 80 per cent of the people …. with the Methodists — later the Uniting — Church 15 per cent and the Seventh Day Adventists five per cent' (Griffin 1995:10). In the 30 years since the conflict began, growth of fundamentalist Christian churches has reduced percentage memberships, especially of the Catholic and Uniting Churches, but nevertheless they remain influential.

Both the Catholic and Uniting Churches gave support to the first UDI in 1975 and to the second one in 1990, and the bishops of both churches joined the BRA's civilian government (the BIG) in mid-1990.

Both the Catholic and Uniting Churches gave support to the first UDI in 1975 (Regan 2017:369) and to the second one in 1990, and the bishops of both churches joined the BRA's civilian government (the BIG) in mid-1990. However, the Catholic bishop soon withdrew from the government, in recognition of the dangers for the church if it became too close to government and politics. However, the bishop also nominated his representative who continued to serve in his place. This was the secretary to the Bougainville Peace and Justice Commission, Bart Kigina. As mentioned in chapter one, church support greatly enhanced the legitimacy of the BRA and its 'civilian' government. By the mid-1990s, however, the ongoing internal conflict amongst Bougainvilleans gave rise to considerable criticism of the bishops, with Kigina's role ensuring that the Catholic bishop was perceived as supporting the BRA and its civilian government. Ever since, the two churches have generally been careful not to be seen as supporting any political group.

With the approach of the referendum, the Catholic bishop, Bernard Unabali, announced in May 2018 that his church would remain neutral in relation to the referendum. He was quoted as saying:

> We'll not tell you to vote for independence or vote for autonomy. We'll only support whatever the outcome is — independence or autonomy.[50]

Bishop Unabali was further reported as stating that neutrality on the part of the church was 'crucial for a peaceful post-referendum period'. He 'would not let his church involve in (sic) politics as it was the work of government. 'There should be a clear line of demarcation between the church and the government. The church should keep a fair distance from politics and only engage in the spiritual aspects.'[51] The bishop also indicated that there had been similar events in the world where the Roman Catholic Church being deeply engaged in politics had caused factional conflicts which resulted in violence and killings.[52]

The report of the bishop's comments noted that there would be some 'spiritual events' in the lead-up to the referendum that the church would organise, notably a Bougainville-wide prayer vigil, to be held the night before the referendum vote (PNG Post-Courier 14/5/2018). So clearly neutrality does not necessarily involve complete disengagement from the referendum process. Similarly, the church has facilitated funding for PACSIA to undertake referendum-related awareness dialogue. In June 2018, the composition and distribution of a referendum prayer was announced (see appendix 2), with church members encouraged to make use of the prayer. Bishop Unabali has also taken the lead in publicising the Bougainville Council of Churches' decision to establish a fund for public donations towards meeting the cost of the referendum. This move was a response to reports about the national government's failure

to provide the necessary funding for the conduct of the referendum. When announcing the opening of this account to which Catholics were encouraged to donate, the bishop spoke of the referendum as 'our baby from history' and it being a 'first responsibility' for Bougainvilleans to ensure that it happened.[53]

The Uniting Church has not made the same announcement of neutrality. While the pamphlet it put out for the public launch in Buka on 3 August 2018 of its referendum awareness campaign does not explicitly call for independence, there are parts of the text that seem to lean that way while at the same time calling on church members to be ready to accept the result without violence:

> Whichever way our vote goes we all must refrain from taking up arms or any form of hostility. Allow our Government (ABG) to take it on from there, and importantly "Allow God to complete the process His Way". Our cultural uniqueness, our experiences during the Crisis, and history are our pride that must not be tarnished by acts of rebellion and violence. Attaining our heartfelt desire for self-determination through peaceful means will tell the world that we are serious with our dream (Uniting Church 2018).

SPOILERS

There are those who are opposed to the referendum being held. At the national level some who claim that weapons disposal and good governance are preconditions for the holding of the referendum (see chapter five) are hoping that such an analysis of the requirements of the BPA and the national constitution might prevent the referendum being held, or at least could result in its being delayed for an extended period.

There is at least one voice that presents a more radical interpretation of the constitution, a voice that for a period seemed to be having some influence on national government decisionmakers. This voice is that of Daniel Tulapi, a lawyer, and formerly a member of the national parliament and a minister in the government led by Sir Julius Chan from 1994 to 1997. Aspects of his claims were discussed in chapter four. In fact, he makes two main claims. The first is that the PNG constitution can only be changed through amendments that have been approved by a national referendum and that because part XIV of the national constitution, which implements the BPA, was not supported by a referendum, it has not been validly enacted. His second claim (discussed in chapter four) is that part XIV is invalid because it allows for part of the country to become independent, something which he claims in itself is unconstitutional. Both of these claims are entirely without foundation.

Amendments to the national constitution are required to be made by two separate votes of the national parliament, separated by at least two months, and usually supported by two-thirds absolute majority votes. There is no requirement for a referendum to approve any amendment. Over 40 amendments have been made since PNG became independent in 1975, none of which have been supported by a referendum. In relation to his second claim, part XIV of the constitution does not allow a part of the country to become independent. Rather, it provides for a referendum on the possibility of Bougainville becoming independent and leaves the outcome of the referendum to consultation between the governments and vests final decision-making authority in the parliament. But even if the constitution did provide for a part of the country to become independent, that would not itself be unconstitutional. As mentioned in chapter three, there are three national constitutions elsewhere in the world that permit parts of the country to secede – Ethiopia, St. Kitts and Nevis and Liechtenstein — and the Canadian Supreme Court has ruled that there is 'an implicit right to secession' (Radan 2012:15).

There are also potential spoilers in Bougainville, who oppose the referendum. The key figure here is Noah Musingku, whose role in relation to the U Vistract ponzi scheme and claims to be the king of a Bougainvillean Kingdom of Papala were discussed briefly in chapter one. Musingku is supported by an armed force, with some links to the Me'ekamui Defence Force. The 50 or so members of his force are trained by a former member of the Fiji Army special forces unit. Musingku also has significant influence over some other MDF elements and especially over the group in Konnou in southeast Bougainville headed by Damien Koike. As touched on in chapter one, the speculation in Bougainville is that Musingku's opposition to the referendum derives from his fear that a post-referendum Bougainville government, with enhanced legitimacy and authority, might be able to take action against U Vistract and the Kingdom of Papala. While Musingku's claims to be a 'parallel' government to the ABG do cause confusion for some village people, in general his support has been waning for some time, largely because his many promises about payments of what is owed under his U Vistract scheme have never borne fruit.

REGIONAL SUPPORT FOR REFERENDUM SECURITY

Until mid-2018, there was little discussion of how security in relation to the referendum might be provided. In general it seems to have been assumed that the Bougainville Police Service (BPS) will be responsible for security, much as it has done for elections held in Bougainville over the past 20 years. But from mid-2018 concern has begun to emerge about whether the BPS has the necessary capacity to manage the security needs of the referendum on its own.

Despite the name, the BPS is not an autonomous police service. Rather, it continues to be an element of the Royal Papua New Guinea Constabulary (RPNGC) and continues to be mainly controlled and directed from RPNGC headquarters in Port Moresby. Under the BPA, however, provision was made for a separate police service to be established in Bougainville, answerable mainly to the ABG. In the interim, before the separate service is established, the RPNGC is required to work with the ABG in developing the autonomy of the RPNGC elements in Bougainville. The first steps towards autonomy were taken in 2004, just before the ABG was established. The name 'Bougainville Police Service' was adopted and it was agreed that police officers in Bougainville would wear a different coloured shirt from standard RPNGC issue — which should also display the Bougainville emblem — and some administrative powers were delegated to the commander of the RPNGC members in Bougainville. No further steps towards greater autonomy have been taken in the fifteen years since then.

In terms of capacity, the BPS's Strategic Development Plan 2016–2020: To the Referendum and Beyond summarises the position. The challenges facing the BPS include 'a lack of administrative and technical skills as well as significant shortages in police accommodation, infrastructure and equipment' (BPS 2016:5). It goes on to say that 'the BPS remains under-staffed and under-resourced with little, if any organizational capacity to manage police powers without the support of the RPNGC' (ibid.:6). BPS capacity problems go back to the period of conflict and particularly from March 1990 when RPNGC personnel were withdrawn from Bougainville, leaving no police presence there. While a limited RPNGC presence developed after PNGDF personnel had returned to Bougainville, numbers were only about 70 by the time the BPA was signed. A major recruitment and training exercise was undertaken in 2004–05 which saw police numbers increased to over 300, but they remain operational mainly in the three main towns (Buka, Arawa and Buin) with a very limited presence in just a few rural areas. Further, the PBS lacks the leadership and accountability that would normally be provided by middle and senior managers. It is generally accepted that performance of the BPS is inadequate.

At the 29 June 2018 JSB meeting in Arawa, in his opening statement, ABG President John Momis expressed his concern about the capacity of the BPS to provide the required security for the referendum. He asked for discussion of:

> the possibility of an invitation being given to the United Nations to provide an international security force for the referendum, perhaps one that could work closely with the Bougainville Police Service (Momis 2018:7)

In a paper for the October 2018 JSB meeting, the president's proposal was developed and identified concerns about the security situation:

> Bougainville is a post-conflict society, where guns are still held by members of factional groups. The situation is fragile, and many people still traumatised by what happened during the crisis. The rule of law is still in the process of being re-established. There are still "parallel" governments to the ABG. The approach and the conduct of the referendum, and the immediate post referendum situation are likely to be times of heightened tensions, where there will be increased risks of violence. (ABG 2018:4)

The paper then outlined what a security force might look like and what it might do:

> There would be major advantages in having a small but highly professional international security force to work closely with the Bougainville Police Service in providing security. The goal would be for such a security force to assist the Bougainville Police Service personnel, and provide them with training and support. However, it should also have the capacity to operate independently of the Bougainville Police Service to the extent needed depending on the circumstances at any particular time.
>
> Such a security force should be unarmed, in the same way that the New Zealand-led Truce Monitoring Group (TMG) and the Australian-led Peace Monitoring Group (PMG) operated when they were in Bougainville from late 1997 to mid-2003. As was the case with the TMG and the PMG, the very presence of an international force will send signals in Bougainville that good behaviour is expected.
>
> A formal request should be made to either the UN or member countries of the Pacific Islands Forum as soon as possible, with a request that a mission be sent to Bougainville to scope the needs for and the requirements of such a referendum security force (ibid.).

Subsequently, in a jointly signed letter of 31 October 2018 to the New Zealand High Commissioner to PNG, the chief secretaries of the PNG government and ABG requested that New Zealand take the lead in putting together a small regional security team comprising police from several Pacific Island neighbours. The role of the team would be to support the BPS in providing security for the various phases of the referendum. On 16 January 2019, the New Zealand High Commissioner hosted a working dinner comprising personnel from the PNG national government, the ABG, diplomatic missions to PNG from Fiji, Solomon Islands and Australia, and the UN office in Port Moresby. Those present discussed

the mandate, composition, size and duration of such a mission. The general view was that the mission could be quite small and could comprise police officers from the countries that were signatories to the Bougainville Peace Agreement (Fiji, Vanuatu, Solomon Islands, New Zealand and Australia). On the duration of the proposed security support mission, while some of those present indicated that the focus should be on the polling period, others indicated that the mission should be present during the campaign and should remain for a period after the referendum, when tensions might be elevated.

FUNDING FOR THE REFERENDUM AND INTERNATIONAL COMMUNITY ROLES

The national government has pledged K30 million and, as at April 2019, had committed over K17 million with the promise of at least a further K10 million.

The budget for the conduct of the referendum prepared by the BRC estimates a total cost of K45 million (US$13.9 million). The national government has pledged K30 million and, as at April 2019, had committed over K17 million with the promise of at least a further K10 million. The ABG has committed K2 million and, with very limited funding available to it, is unlikely to be able to commit more than that. The Australian government has committed K5.3 million and in addition has provided funding through the UN Peacebuilding Fund. It is not clear yet from what source the BRC may be able to find the shortfall in funding for the total budget. However, the UN remains committed to ensuring that the referendum is credible and so is likely to be willing to meet essential costs, such as for indelible ink, voting screens (to enable a secret ballot) and so on. Further, the UNDP has established a Bougainville Referendum Support Project as a flexible response and funding vehicle and is approaching potential donors to either donate funds to the BRC or to the procurement of goods and services for the BRC by the UNDP.

It is clear, then, that the international community is heavily involved in referendum preparations. In particular the United Nations is assisting in numerous ways. In addition to the Bougainville Referendum Support Project, the UN has seconded six advisers (through the UNDP) and operates a UN Peacebuilding Fund program of activities, which includes funding for the Post Referendum Transition Taskforce — a training program for PNG journalists who will cover the referendum — and funding for equipment for the ABG legislature as well as other referendum-related expenses.

Photo: Richard Eves

CHAPTER NINE
AFTER THE VOTE

The outcome of the referendum is not binding, but rather is subject to a requirement for consultation between the governments and possible debate in the national parliament.

As discussed in chapter one, the outcome of the referendum is not binding, but rather is subject to a requirement for consultation between the governments and possible debate in the national parliament. Hence, although the referendum outcome is not binding, these requirements mean that the referendum is not merely consultative (for the national government is not free to simply ignore the results of the referendum). Consequently, and particularly because Bougainville involves a post-conflict situation where the referendum arrangements were agreed as part of a political settlement to a violent conflict, questions about what will happen after the referendum outcome is known are of great significance. Questions that arise include: is the outcome in any way binding on the national government and the ABG, and are particular voter thresholds involved? What are the processes that must be followed immediately after the referendum? What is the likelihood that the outcome will be debated in the national parliament? What are the implications of the requirement that the referendum be free and fair? If the majority vote is in favour of independence and the national government agrees with that outcome, what would the next steps be? If the national government rejects independence despite a vote in favour of that outcome, what would be its prospect of negotiating greater autonomy with a Bougainville leadership that presumably will remain committed to independence?

WHAT STEPS ARE REQUIRED AFTER THE VOTE?

The schedule to the organic law (sch. 1.122) provides that the returning officer from each voting district is required to notify the BRC of the results for that district as soon as is practicable. The BRC is then required to calculate the total number of votes given for each choice. The outcome is then to be noted on the original writ for the referendum (see chapter seven), which is then to be returned to the head of state. The BRC is also required to publish the result in the national and Bougainville gazettes and in an available newspaper. In addition, as soon as is convenient, the BRC is required to publicly declare the result at a place of its choice (sch. 1.123).

It should be noted that there is provision in the schedule to the organic law (sch. 1.152–1.164) for the result of the referendum to be disputed by means of a petition to the National Court, by either the BRC or by any voter. A petition must be filed within 40 days after the result of the referendum has been declared (sch. 1.157(4)). The court is empowered to make any order or exercise any power in relation to the petition that the court considers just and equitable. The organic Law does not specify the grounds on which a petition may be made. Presumably, grounds will relate to a failure (e.g. by the BRC) to meet a requirement of the PNG constitution or the organic law that may impact on the outcome. Failure to meet a requirement could include a failure in respect of the referendum being free and fair (which is required by section 341 of the PNG constitution).

The main provision of the PNG constitution on what happens after the results of the referendum have been determined is section 342, which states:

- The National Government and the Bougainville Government shall consult over the results of the referendum.
- Subject to the consultation referred to in Subsection (1), the Minister responsible for the Bougainville Referendum shall table the results of the Referendum in the National Parliament and the Speaker of the National Parliament shall furnish to the Bougainville Executive a

copy of the minutes of the relevant proceedings and of any decision made in the National Parliament regarding the referendum.

Presumably, the results would also need to be tabled in the Bougainville legislature, though no specific provision is made in that regard.

Clearly, once the results have been notified, the two governments are required to consult. It would be expected that the consultation would take place through the JSB, but there is no specific provision in that regard in the constitution or the organic law. No provision is made for what issues must be considered by the parliament or how the issues are to be dealt with.

While the consultation after the referendum is between the executive elements of the ABG and the national government, it is the national parliament that exercises final decision-making power.

While the consultation after the referendum is between the executive elements of the ABG and the national government, it is the national parliament that exercises final decision-making power. It is quite possible that the parliament will take a different view of the issues than the national government.

Neither the constitutional laws nor the BPA lay down any timetable for the steps required to be taken after the referendum. However, former PNG prime minister Peter O'Neill has indicated that he expected the outcome of the referendum would be debated in the PNG parliament in November 2019.[54]

It is not essential, however, that the outcomes go to the national parliament. The introductory words of subsection 342(2) – 'subject to the consultation' – mean that whether or not the results of the referendum are taken to the parliament will depend on what is agreed or decided in the course of the consultation between the governments about the results. Particularly in relation to a vote of 'yes' to independence, it would be possible for the two governments to defer a final decision and instead agree to implementing increased autonomy on the understanding that they would consult every two to three years on the implementation and the final outcome. With this approach, it might be some years before the two governments would consider the possibility of independence for Bougainville. This might be the most practicable approach in light of the transition issues that are discussed later in this chapter. However, it is not an approach that either government has yet explored and the indications at this stage would suggest that the national government proposes to move quite quickly after the referendum to a vote in the parliament.

There will be an ongoing need for awareness about issues to do with the outcomes of the referendum and their implementation.

IS THE OUTCOME BINDING ON THE GOVERNMENTS?

The outcome of the referendum is not binding on either government. The BPA (paragraph 312) provides that:

- The amendments [to the PNG Constitution] will provide that the outcome will be subject to ratification (final decision-making authority) of the National Parliament.
- The autonomous Bougainville Government and the National Government will consult over the results of the referendum.

The use of the word 'ratification' in that paragraph has caused considerable confusion, with both some Bougainvilleans and international community actors assuming that use of that term indicates that ratification — involving approval — of the outcome is the only option available to the national parliament.

In fact, the words in brackets in paragraph 312(a) are intended to make it clear that ratification here is intended to reflect the agreement reached between the BPA parties as a result of mediation in December 2000 by then Australian minister for foreign affairs Alexander Downer (see chapter one), and so clearly means that national parliament has the final decision-making authority. Further, the words 'subject to' indicate that ultimate decision-making authority lies with the parliament.

Because of the likelihood that the word ratification could cause confusion, it is not used in the relevant provisions of the PNG constitution (notably in section 342).

There remains also the issue of the assurances to the Bougainville leaders from Downer about what the international community could be expected to do in the case of an overwhelming vote in favour of independence (an assurance often referred to by Bougainvilleans in discussion of the referendum). At the same time, it should be remembered that the reasons why there is no provision for a binding outcome arise from the history of the negotiation of the BPA and the December 2000 mediation by Downer, as discussed in chapter one.

The reasons why there is no provision for a binding outcome arise from the history of the negotiation of the BPA and the December 2000 mediation by Downer, as discussed in chapter one.

Section 343 of the PNG constitution provides that any differences between the governments 'in relation to the referendum shall be resolved in accordance with the dispute resolution procedure' — a reference to the procedure set out in sections 333 to 335 of the constitution. There is no obvious reason why that section should not apply to differences over the implementation of the outcome of the referendum. The process involves several possible steps. In the case of differences over the referendum outcomes, they would involve firstly consultation through the JSB and, if that does not resolve the issue, mediation and arbitration. If the dispute cannot be resolved by mediation and arbitration, or if the two governments agree, the dispute may be submitted to the courts. Further, if the dispute involves a point of law, it may be submitted straight to the courts without reference to either consultation or mediation and arbitration.

Apart from the provision of section 343 regarding dispute settlement procedures applying to the referendum, the BPA and the constitution are silent about what happens if there is no decision about, or if there is no agreement on, what should happen in relation to the result of the referendum. This does not mean the end of the issue. Rather, it would suggest that the two governments will need to continue to engage in an effort to reach an understanding on what should happen next.

Many Bougainvilleans have the expectation that if there is a strong majority vote for independence that independence is then assured. There is a need for much improved awareness about this aspect of the referendum arrangements. Further, awareness is also needed about related issues such as the importance of fiscal self-reliance and the basic needs (in institutional and capacity terms) for an independent Bougainville government, and the options and likely timetable for achieving the necessary degree of fiscal self-reliance for independence.

When (and if) the national parliament does reach a decision on what should happen in light of the results of the referendum, the documents are silent about how a decision should be implemented. Again, silence suggests that the two governments will need to continue to engage in an effort to reach an understanding on what should then happen.

ARE PARTICULAR VOTER TURNOUT OR APPROVAL LEVELS REQUIRED?

For some referendums, minimum levels of voter turnout (i.e. the proportion of enrolled voters actually voting) are required for a referendum outcome to change the status quo (usually a vote for the 'yes' option). This is sometimes called a participation threshold or a turnout quorum. For example, in the 2011 South Sudan referendum, the participation threshold for the referendum to be valid was 60 per cent (actual turnout was over 97 per cent). In addition, while it is common for the outcome to be determined by which option gains the support of a majority of the actual voters (i.e. a simple majority), in some cases a minimum proportion of votes in favour is required for a valid outcome.[55] This is sometimes called a result threshold or an approval quorum. Far from being oddities, quorum rules of these kinds are 'relatively common in many established democracies' (Aguiar-Conraria and Magalhaes 2010:64).

The reasons for the adoption of such quorum rules involve 'avoiding distortions in outcomes resulting from low turnout' (ibid., and see LeDuc 2003:172) and 'as a safeguard against minority exploitation of voter apathy' (Aguiar-Conraria and Magalhaes 2010:64, citing Qvortrup 2005a:173).

However, the Venice Commission's *Code of Good Practice on Referendums* recommends against adoption of either turnout or approval quorums. In relation to turnout quorums, the code notes that the operation of such a quorum 'means that it is in the interests of a proposal's opponent to abstain rather than vote against it. For example, if 48% of electors are in favour of a proposal, 5% are against it and 47% intend to abstain, the 5% of opponents need only desert the ballot box in order to impose their viewpoint, even though they are very much in the minority' (Venice Commission 2007:22–23, and see Aguiar-Conraria and Magalhaes 2010). In relation to the approval quorum, the code points out that, 'It may be so high as to make change excessively difficult. If a text is approved — even by a substantial margin — by a majority of voters without the quorum being reached, the political situation becomes extremely awkward, as the majority will feel that they have been deprived of victory without an adequate reason; the risk of the turnout rate being falsified is the same as for a turnout quorum' (Venice Commission 2007:23).

As discussed in chapter one, the initial combined Bougainville negotiating position in June 1999 included proposals for a high approval quorum (either 66 per cent or 55 per cent if approved by the ABG legislature). However, this proposal was abandoned by the Bougainville negotiators, and with the acceptance of the December 2000 Downer compromise formulation that made the outcome non-binding (see chapter one), the issue of what level of vote for or against independence might be needed for a result ceased to be central. As a result, there is no mention in the BPA or the constitutional laws of either a voter turnout or approval quorum.

On the other hand, for both of the governments and for the international community, issues about both turnout and approval levels could be of central importance, not for legal reasons, but rather in terms of whether the outcome can be validly claimed to reflect the views of the people of Bougainville. In fact, even if the referendum is evaluated as being free and fair, if turnout and approval levels are low, the referendum may not be regarded as being a true reflection of the views of Bougainville's people. So turnout and approval levels will presumably be central issues when the two governments consult about the results of the referendum.

Of great importance here will be issues about the accuracy of the roll of voters. In this connection, the data presented in Table 3 shows that (putting aside issues about the accuracy of the rolls in these elections and whether the rolls are likely to have been significantly inflated in some elections) voter turnout in most elections in Bougainville since 2002 has been less than 50 per cent and has been as low as 29 per cent.

Table 3: Voter turnout in Bougainville 2002-2017

National elections and Bougainville-wide ABG elections

Election	Total enrolled	Votes cast	'Turnout' Votes as % of roll
2002 National General Election	129,330	49,668	38%
2005 ABG General Election	133,000	69,343	52%
2007 National General Election	126,127	55,458	44%
2008 ABG By-election- President	126,127	37,126	29%
2010 ABG General Election	133,180	82,545	62%
2012 National General Election	151,793	73,886	49%
2015 ABG General Election	172,797	104,300	60%
2017 National General Election	156,100	92,408	59%

Source: OBEC and PNG Electoral Commission.

These figures suggest a major need to ensure the accuracy of the rolls. They also point to the possible difficulties that may exist in achieving the levels of turnout needed to substantiate claims that the outcome truly represents the views of the people of Bougainville.

REQUIREMENT THAT THE REFERENDUM BE FREE AND FAIR

The BPA requires that the 'referendum will be free and fair' (paragraph 317), while the PNG constitution (section 341) requires the two governments to 'cooperate to ensure that the Referendum is free and fair'. This requirement is one that will be of great importance to voters, as well as to those assessing the result of the referendum — including Bougainvilleans, the national government and interested international community actors.

The principles laid out in the Venice Commission's* Code of Good Practice on Referendums *are now widely accepted as providing guidance on the standards for the conduct of referendums.

The principles laid out in the Venice Commission's *Code of Good Practice on Referendums* are now widely accepted as providing guidance on the standards for the conduct of referendums. In relation to suffrage, the code makes provision for suffrage as universal, equal, free and secret. As discussed in chapter six, the Bougainville referendum arrangements seek to provide for universal suffrage by allowing non-Bougainvillean residents of Bougainville to vote provided they have been resident in Bougainville for at least six months. In relation to equal suffrage, this extends to voters having equal voting rights (one vote per person) as well as to equal opportunity being guaranteed for the supporters and opponents of the proposal being voted upon. That includes requirements for administrative authorities to be neutral with regard to the referendum campaign, media coverage, public funding of campaign and its actors, bill-posting and advertising and the right to demonstrate on public thoroughfares. No provision is made in relation to these matters in the Bougainville referendum arrangements.

In relation to suffrage being free, this relates to voters having the freedom to form an opinion, as well as to the freedom of voters to express their wishes and action to combat fraud in voting and counting. Freedom to form an opinion extends to a prohibition on the use of public funds by the authorities for campaigning purposes, something also not dealt with in the Bougainville referendum arrangements. It also extends to requirements that the question asked in the referendum must be clear and not misleading, and 'voters must be able to answer the questions asked solely by yes, no or a blank vote'

(Venice Commission 2007:8). The code also deals with the need for objective information as part of the freedom of voters to form an opinion. It provides that the text submitted to the referendum and an explanatory report or balanced campaign material from the proposal's supporters and opponents be made available to voters at least 14 days before the referendum. While the organic law requires that the functions of the agency conducting the referendum include 'the promotion of informed debate on each side of the question or questions to be put in the referendum' (sch. 1.9(1)(a)), it does not extend to sending each voter an explanatory report, something which practicalities would make very difficult to do in Bougainville. Provision of the code on the secrecy of suffrage includes the secrecy of voting and a requirement that voting must be individual, with family voting or any other form of control by one voter over another required to be prohibited. These are measures provided for on the schedule to the organic law.

The code of good practice also includes provision for both domestic and international observation (and observation of all phases of the referendum, not just the polling and the scrutiny), no turnout quorum nor approval quorum and an effective system of appeal on whether the text is valid. In general, as the analysis in preceding chapters of this volume indicates, the arrangements for the Bougainville referendum adhere to most of these principles. An exception may be the effective system of appeal. However, even in that regard, there is provision for conflict resolution between the governments in relation to disputes about the referendum which include resort to judicial interpretation.

A wide range of other issues beyond those covered by the Venice Commission's code can influence assessments about whether a referendum is free and fair. They could include: the general law and order situation; the wider security situation; conduct of awareness; impartiality of the institution conducting the referendum; the freedom of international and other observers to carry out their work; the accuracy of the voter rolls; voter turnout; the conduct of the polling and the scrutiny and so on.

In the Bougainville context, there may be some specific issues such as the conduct of individual former combatants and former combatant organisations and the availability and use of firearms. The state of the electoral rolls can also be expected to be a matter of some attention, given the poor record of accuracy of rolls used in both ABG and national general elections since at least 2002.

Weapons disposal — again

Is it likely that the continued presence of weapons at their present level in communities would provide the basis for the national government or international observers to conclude that the referendum was not free and fair?

It is often argued that although weapons have continued to be present in Bougainville since the UN-supervised weapons disposal ended in mid-2005, there has been little or no evidence of their being used in relation to either PNG or ABG elections. On that basis, it is sometimes claimed that there should be no concern that firearms could affect an assessment about freedom and fairness.

There are problems with this argument. Firstly, just because such weapons have not been used in the context of elections does not mean that they could not be used in the context of the referendum, where there might be much stronger motivations for weapons to be used. The 2013 UN weapons report discussed reasons why some weapons that should have been disposed of during the 2001–2005 disposal process incorporated into the BPA were not destroyed:

> The political motivation for holding weapons stems from uncertainty about the political future of Bougainville, in particular uncertainty about: (1) whether a

> referendum on the [future political] status of Bougainville will be held; (2) what will be the outcome of such a referendum; (3) whether the PNG Parliament would endorse the outcome of the referendum; and (4) whether the PNG Defence Force (PNGDF) would be redeployed to Bougainville in the event that the PNG Parliament does not endorse the outcome of the referendum. Under this motivation, weapons are essentially considered to provide insurance against Bougainville not being allowed to gain its independence from PNG. (UNDP 2013:17).

Secondly, the commitments made in the BPA concerning weapons disposal were not fully met. It is widely believed that some weapons of groups participating in the weapons disposal plan were not contained because some ex-combatants claimed they needed to retain their weapons in order to have them available should the referendum need protecting, or if independence was denied following the referendum. Assuming that such reports are true, some Bougainvilleans fear that there are former combatants ready to use weapons again. Thirdly, there are reports of Bougainvilleans saying that they will not participate in the referendum if weapons are not disposed of. They say that while weapons remain their security is not guaranteed, and/or that they fear what may happen after the referendum.

The approach of the referendum offers a significant opportunity for achieving renewed progress with weapons disposal. The opportunity arises should former combatants and others holding weapons agree that a far more complete renewed disposal process is necessary in order to offer the best chance of the referendum being declared free and fair. The weapons disposal plan incorporated into the BPA offered significant incentives for ex-combatants to dispose of their weapons, for unless stages in the disposal plan were verified as occurring, constitutional laws did not take effect and ABG elections might not have occurred. The interest of ex-combatants in seeing the referendum be declared free and fair could offer a similarly important incentive. The incentive will only be possible if ex-combatants fully understand the importance of the referendum being declared free and fair.

In this connection, the 2013 UN weapons report noted a general:

> lack of awareness [in Bougainville] of the link between weapons disposal and the conduct of a referendum on the future political status of Bougainville. A broader understanding of this linkage could lead to broader popular support for completing the weapons disposal process in order to clear a path to a referendum (UNDP 2013:28).

Significant developments have occurred since late 2015. First, former combatant leaders participating in ABG-organised ‘Consultations on Referendum’ at Tsiroge in November 2015, committing ‘themselves to complete weapons disposal as an internal Bougainville activity to strengthen good governance thus instilling confidence of the people in the institutions of government to protect their safety and welfare’.[56] Further, the Me’ekamui Government of Unity has committed itself to participating in a weapons disposal process.[57]

The state of the rolls of voters

The central importance of rolls of voters in establishing the entitlement of voters to cast their vote was discussed in chapter six. In addition, aspects of the state of the rolls could be of great relevance when judgments are made about whether the referendum has been free and fair. Rolls used in both ABG and PNG general elections have been ‘seriously flawed’, so that the state of the rolls will need to improve significantly for the election. Problems include:

- many persons who believed they were validly enrolled being turned away when their names could not be found on the rolls (including the ABG president and his wife in the 2012 PNG general elections)
- apparent problems with many names and the ages of some voters recorded in the rolls
- possible evidence of both over and under enrolment in various areas
- incompatibility of the 2011 census figure of 124,784 for Bougainville's voting age population compared to voter roll figures of 151,793 names, suggesting either grossly inaccurate census data, or rolls inflated by 22 per cent (or some combination of census data and voter roll inaccuracy).

There are at least two separate problems with inflated rolls. Firstly, it would impact on voter turnout, for if rolls are inflated by as much as 22 per cent, then a higher number of voters than should be needed will be required to meet thresholds such as 50 or 60 per cent turnout (even though any threshold here will be informal). Secondly, as the number of names on the roll will be the basis for the allocation of ballot papers to each voting district (and polling booth), inflated rolls can make excess ballot papers available, which can provide avenues for their misuse. Any possible misuse of this kind could seriously erode confidence in the referendum being free and fair.

TRANSITION

It is quite likely that following the referendum there will be a period of transition. The three most probable referendum outcomes will be a 'yes' vote in favour of greater autonomy, which the national government endorses; a 'yes' vote for independence, which the national government endorses; or a 'yes' vote to independence, which the national government opposes. For the two scenarios where the national government says 'yes', there would be little doubt that implementation of the new arrangements would require some time, resulting in a period of transition from existing to new arrangements. A 'yes' to independence, in particular, would require significant new institutions to be established. These could be expected to include a judiciary, a public prosecutor and a public solicitor, an auditor-general, a taxation collection agency, a foreign affairs agency and so on. The experience of the ABG in establishing new agencies where none existed is that it takes time and resources. The prime example is the ABG Department of Mineral and Energy Resources, which took about five years to be fully established. Issues involved in establishing that department included identification of the categories of staff required, recruitment of such staff, establishing office procedures, providing staff with offices, housing, training, and office equipment and so on. Most of these aspects of establishing institutions require funding. While greater autonomy has not yet been defined, it would also be expected to require the establishing of some new institutions. While the national government would be expected to provide funding for new institutions required for greater autonomy, the situation could be quite different for institutions established as part of a move to independence.

It is evident that both greater autonomy and independence would not be able to be established immediately, but would in fact probably require extended transition periods within which to establish the new institutions required.

The BPA and the constitutional laws that give effect to it are silent about any transition from current political arrangements to any new arrangements following the referendum or any decision on the referendum. All such matters are left to consultative and political processes. That approach was probably the only possibility in the circumstances of 2000–2001.

Further, much improved awareness amongst Bougainvilleans about the role of fiscal self-reliance and the development of institutions and capacity necessary for independence should be important in building understanding of the issues likely to be involved in discussion with PNG of transition issues. The significance of such issues can be highlighted by reference to the extreme degree of current reliance by the ABG on grants from the national government. If a strong level of 'yes' votes for independence were to result in PNG agreeing to, say, immediate independence, it would be possible for it to agree only on the basis that all grant funding from PNG cease immediately. The current and projected levels of economic development in Bougainville offer no real prospect of a self-sustaining tax base for many years to come.

If a strong level of 'yes' votes for independence were to result in PNG agreeing to, say, immediate independence, it would be possible for it to agree only on the basis that all grant funding from PNG cease immediately.

STATUS OF THE BPA AFTER 2020

There is some uncertainty amongst Bougainvilleans about whether the BPA, and the constitutional laws giving effect to it, lapse after 2020. The assumption made here is that the peace agreement is intended to operate only until the end of the five-year window within which the referendum must be held, and indeed expires at that point. The fear is that in the absence of specific provision as to what happens at the end of the window period, the autonomy arrangements under the PNG constitution and the organic law might cease to operate, as might other provisions such as those in relation to immunity from prosecution in relation to 'certain offences arising from crisis-related activities in relation to the Bougainville conflict' (PNG constitution section 344).

Such concerns are, in fact, completely unfounded. The only way such outcomes could occur would be if the constitution and the organic law specifically provided that the arrangements under those laws ceased to operate from 2020 if a decision on the referendum had not been made. There is no such provision. Quite clearly, the BPA and the constitutional laws envisage the autonomy and other arrangements that they provide for continuing whether a decision is made for change or not. If a decision for change is made, it will be the legislation or other action implementing the change that will terminate or otherwise change such constitutional provisions as are necessary for the change. However, the existence of concerns about the continuity of the legal arrangements points again to the need for awareness about the referendum.

A CREDIBLE REFERENDUM

As the national government will have final authority to determine what outcome will follow the referendum, if the ABG is to be in a strong position to argue for its views on what should happen to be agreed to, it will be vital that the whole referendum process is credible. On this basis, the ABG will be able to argue that the results of the referendum truly represent the views of the people of Bougainville. If the result is clearly credible, the likelihood of the international community supporting the clearly expressed wishes of the people of Bougainville will be greater.

Credibility of the referendum will depend heavily upon the assessments made of such critically important matters as:

- whether Bougainvilleans really understand the referendum process, and the issues involved in the choices being made in it (for credibility could be challenged if there are serious doubts about the general levels of understanding of process and the issues)

- whether the referendum is truly free and fair (taking account of all the various issues that could be involved in assessing whether it is free and fair)
- whether the rolls of voters provide an accurate basis for determining voter turnout, and the proportions of voters supporting particular options and
- whether the results indicate strong support for the preferred outcome (and in all three regions of Bougainville) or show a significant minority (perhaps concentrated in one region) unhappy with the results.

A great deal of concentrated preparatory effort will be required to ensure a credible referendum, and much of the effort involved will need to be directed to greatly improved awareness.

Clearly, a great deal of concentrated preparatory effort will be required to ensure a credible referendum, and much of the effort involved will need to be directed to greatly improved awareness, so that Bougainvilleans are much better informed than they are now about the referendum arrangements.

Matters requiring negotiation after the referendum

Whatever the outcome of the referendum, it is likely that the two governments will need to be ready to negotiate some significant matters. For example, in relation to a 'yes' vote for independence that is agreed to by the national government, there will be a wide range of matters requiring negotiation. They will include:

- doing away with existing Bougainville-related provisions of the PNG constitution and replacing them with whatever provisions are necessary to effect Bougainville's independence
- the steps that will be needed for Bougainville to achieve the degree of fiscal autonomy needed to support independence
- the apportioning of assets and liabilities between the national government and Bougainville
- determining Bougainville's maritime boundaries and defining the extended economic zone connected to Bougainville;
- issues connected with citizenship, inclusive of defining rights of Bougainvilleans in PNG, and of PNG citizens in Bougainville.

In addition, there will be significant constitutional changes required in relation to the Bougainville constitution, which is currently a sub-national constitution, reliant on the national constitution for its authority. While there is much of the existing ABG constitution that could be retained, there is also much that would require change. There would also be much work needed by Bougainville to establish the institutions of an independent state.

If there is a 'yes' vote for independence and the national government opposes the change, it is most likely that, having offered greater autonomy in the referendum, the national government would seek to negotiate such an arrangement. It would be wise for the two governments to clarify what would be offered in relation to greater autonomy, both so voters have a good understanding of both options that they will be voting on, and because it would also provide a guide to what aspects of the existing autonomy arrangements might be subject to change. On the basis of experience learnt from the operation of the existing arrangements in the 14 years since 2005, matters that could be changed could include:

- tightening up of arrangements for grants to the ABG
- extending Bougainville's maritime boundary from three to 12 nautical miles
- more clarity in relation to the ABG's shares of revenue derived from fishing licences granted in relation to ocean waters associated with Bougainville
- making available for transfer to Bougainville some of the powers reserved for the national government under section 289(2) of the national constitution and
- an accelerated pace for draw down of both new powers and functions and ones already available to the ABG but not yet transferred.

It is most likely that detailed and difficult negotiations will be required whatever the outcome of the referendum.

Planning for post-referendum circumstances

One of the 11 workstreams identified by and provided for by the decisions of the JSB in May 2016 was 'post-referendum transition and peace building and political settlement'. No work of this kind was undertaken until the JSB meeting of June 2018, when the ABG submitted a paper proposing the establishing of a post-referendum planning taskforce. The main goal in both instances was to initiate work well in advance of the referendum directed towards ensuring that peace would be maintained irrespective of possible pressures that might occur in the post-referendum period.

In the absence of any funding for the purpose in either the national or ABG 2018 or 2019 budgets, the two governments requested that the UN both fund and facilitate the first meeting of the proposed task force. That meeting took the form of a three-day workshop held in January 2019. Chaired jointly by the national government's Minister Assisting the Prime Minister in Relation to Bougainville and the ABG Minister for Peace Agreement Implementation, the workshop was attended by about 15 officers of and advisers to both governments. Facilitation was provided by a senior lawyer from the Mediation Support Unit in the UN's Department of Political and Peacebuilding Affairs, and the South East Asia director of London-based NGO Conciliation Resources.

Those in attendance worked through the main scenarios for the post-referendum situation in Bougainville. The conclusions of the workshop were consolidated into a matrix entitled 'Draft Framework for Workplan and Allocation of Responsibility for Task Force'.[58] It was agreed that the task force should meet monthly in the period up to the referendum. It seems likely that it will be required to keep working after the referendum.

POST-REFERENDUM SECURITY

The regional police group proposed to assist the Bougainville Police Service (see chapter eight) should remain in Bougainville for a time after the referendum, mainly because this is the period when tensions can be expected to be highest.

ROLES OF THE INTERNATIONAL COMMUNITY

The question arises as to what roles the international community might play following the referendum. In part, the issue here is whether the international community can be expected to fulfil the prediction made by the Australian minister for foreign affairs in 2000, Alexander Downer, when he pointed to the experience of East Timor, thereby being taken by the Bougainville leadership to be indicating that if Bougainvilleans voted overwhelmingly for independence that the international community could be expected to ensure that the outcome would be given effect by a transition to independence (see the

discussion of Downer's role in chapter one). This is a crucially important aspect of the referendum arrangements, particularly, as Qvortrup emphasises, the fact that the factor of greatest significance in determining whether a referendum on independence results in a transition to independence concerns whether the three democratic member states of the UN Security Council support the 'yes' votes in the referendum. He suggests that:

> Winning the support of the people is important, but to be certain of independence you need friends in high places. Secession is not just won in referendums; it is also won by successfully lobbying in Paris, Washington and London (Qvortrup 2018:13).

Support from those three countries is most unlikely. Perhaps the role of Australia as the major regional power would become pivotal. As discussed in chapter one, since 2000, Australia's position has been that it will support whatever the two governments agree to. That position has enabled Australia to be neutral on the question of independence while still actively engaged in funding for the referendum. If it continues to adopt that position after the referendum, then it would presumably only support independence if that is the outcome agreed to by both governments.

CONCLUSIONS

The matters discussed in this book highlight both the complex origins of the referendum arrangements and the complexity inherent in the arrangements.

The matters discussed in this book highlight both the complex origins of the referendum arrangements and the complexity inherent in the arrangements. These factors contribute significantly to the confusion and misunderstandings about fundamentally important aspects of the arrangements, not only amongst Bougainvilleans, but also at the national government level. The extent of confusion and misunderstanding on some issues is considerable.

The referendum in Bougainville is unusual but not exceptional in not being a stand-alone process. Instead it is closely linked to the operation of autonomy arrangements and a weapons disposal process. Together, the linkages are underlined by the requirement that the holding of the referendum is deferred for an extended period of 10 to 15 years after the coming into operation of the autonomy arrangements. In fact, because it took almost four years from the signing of the BPA till the establishing of the autonomy arrangements, this means the referendum must be held 14 to 19 years after the BPA was signed. The close relationship of the referendum arrangements to the autonomy and weapons disposal arrangements undoubtedly adds to the complexity of the referendum arrangements.

Hence the first purpose of this book is to promote a better understanding of the referendum arrangements, there being a clear need for this. There are misunderstandings and confusion about what the holding of the referendum requires and what happens after it is held. By setting out the requirements with reference to their origins and intent, and drawing on comparative international experience, the book seeks to promote a better understanding of the referendum requirements.

The second purpose of the book is to examine what is needed to ensure that the referendum is free and fair. Although the BPA and the constitutional laws require the two governments to cooperate to ensure that the referendum is free and fair, there is no definition of free and fair. Here the analysis is guided by emerging international standards, and in particular those established in 2007 by the Venice Commission in its *Code of Good Practice on Referendums*. Of course, the principles enunciated in the code are not binding, not even for the governments that are members of the European Commission for Democracy through Law (the Venice Commission). Further, the Venice Commission code of good practice was only formulated in 2007, six years after the BPA was signed. It was based on an earlier report that analysed the legal rules applied by European states to the holding of referendums (Venice Commission 2005). It is clear from that document that few if any European states would be completely compliant with the code. Nevertheless, the code of good practice is a useful guide to what is meant by the expression free and fair as used in the PNG constitution.

The discussion in chapters four to nine indicates that the provisions of the laws in relation to the holding of the Bougainville referendum meet several but not all of the key principles laid down in the Venice Commission code of good practice. In particular, the constitutional laws provide for universal and secret suffrage, organisation of the referendum by an impartial body and international observation, though the recommendation here is limited to the polling and the scrutiny and does not include domestic observation. The provision on the referendum is contained in constitutional laws rather than in ordinary statutes. There is no provision for either a turnout quorum or an approval quorum. Aspects of the Venice Commission's code that are not adhered to by the Bougainville arrangements include:

- provision on equality of suffrage, which extends to requirements for neutrality by administrative authorities, particularly in relation to public funding of the campaign and its actors, advertising and the right to demonstrate

- freedom of suffrage, which extends to freedom to form an opinion, inclusive of a prohibition on the use of public funds by the authorities for campaigning purposes and to a requirement to provide the public with a set of balanced campaign material from the proposals and supporters
- provision for a system of appeal on the referendum text
- provision for local (national) as well as international observers, and provision for them to have access to voter registration as well as polling and scrutiny.

It is interesting to compare the Venice Commission's code with the ten points on the regulation of referendums on 'ethnic and national issues' compiled by Qvortrup (2014a:124–137). Being drawn from a much wider group than just the European countries whose experience was drawn upon for the Venice Commission's code, Qvortrup's list is far less detailed and prescriptive than the code:

- **Defining the geographic area of registration for voting**. Clear agreement on that area is necessary to prevent obstruction of the holding of a referendum (as in the case of the Western Sahara), and potential voters need ready access to registration processes if problems such as occurred with the 1999 East Timor referendum are to be avoided.
- **Who can vote**. Determining who can vote, and in particular whether members of the diaspora associated with the area where the referendum is being held should be allowed to vote, Qvortrup's view being that there is no consensus on the issue and no automatic voting entitlement for those residing outside the jurisdiction (see also Tierney 2004:306–8).
- **Referendum Commission**. International practice is for an independent referendum commission to conduct the referendum whose members should not be overtly political figures — for example, former high court judges and others of similar stature, as in Ireland.
- **Turnout and approval quorums**.[59] While such quorums are common, though far from universal, in independence and other ethno-national referendums (because they involve once and for all decisions on issues of such significance), Qvortrup (2014a:132) concludes that 'a result endorsed by 50 per cent of those voting plus one should be accepted, as long as a majority of those eligible (and registered) to vote have cast a ballot'.
- **The voting system**. Various ideas for simplifying systems of voting to make them more manageable for illiterate voters have been suggested, but 'anecdotal evidence … indicates that voters, even in illiterate societies, are perfectly capable of understanding the different options' (Qvortrup 2014a:133), though they might be helped by the use of symbols on the ballot paper, as in East Timor.
- **Referendum security**. Security in independence and many other ethno-national referendums can be of great importance for avoiding disruptions and violence, and as a result 'the recommendation — indeed the imperative — is that the United Nations (or another relevant body) be given a key role in the security operations pertaining to the vote' (ibid.).
- **Government use of public funds**. Active government support for favoured positions in the referendum campaign does occur, but following Irish high court rulings against it, 'there is an emerging consensus that it is illegal for governments to spend taxpayer money on partisan information, or other partisan activities using the state apparatus. It is thus generally to be expected that during the last weeks of the campaign there is a purdah, that is, a period during which any [partisan] governmental activities … are halted or suspended' (Qvortrup 2014a:134).

- **Campaign spending**. Issues about campaign expenditure limits remain contentious. Some say that without limits the wealthy elite are favoured, while others say that such limits prevent 'a truly effective information campaign' (ibid.) Restrictions are in fact common, including those in the PPERA.
- **Disinformation**. Although 'in the democratic context of free speech, the danger of disinformation is real' (Qvortrup 2014a:136), the issue receives little attention in referendum legislation, but short campaign periods are seen as a particular problem, with such a period needing to be 'long enough for false information to be countered and proven wrong', though 'even a long campaign cannot prevent one side from presenting disinformation late in the process' (ibid.).
- **Equal broadcasting rights**. While it is generally only public broadcasters that are 'expected to strike a quantity balance (i.e., in terms of print space or airtime) between the contending sides for referendum-related content, the matter is generally not the subject of formal regulation, although under PPERA, 'the two designated yes and no umbrella organisations[60] are allocated equal broadcasting time'.

It is evident, then, that there is as yet no definitive international guidance available as to what is essential in terms of evaluating whether a referendum is free and fair.

The criteria for judging whether the referendum is free and fair will not be determined solely by reference to international experience. The discussion in chapters four to nine also makes it clear that in the particular circumstances of Bougainville weapons disposal and the state of the roll of voters can also be expected to be important factors in the assessment of whether the referendum is free and fair.

The third purpose of the book is to examine the impacts on peacebuilding involved in inclusion of a deferred independence referendum as part of a long-term peace process. The Bougainville referendum was envisaged as a peaceful way of resolving the longstanding issue of Bougainvilleans' demands for separation from PNG, but only after the other two main pillars of the BPA had been operating long enough to enable development of relationships between Bougainville and the rest of PNG quite different from those existing in the immediate post-conflict situation. What is not yet clear is whether the deferral of the referendum for 18 years after the BPA was signed has contributed to peacebuilding or not. It must be noted here that it was assumed that when the BPA was signed that the PNG government would take the opportunity to implement the autonomy arrangements in full, thus making autonomy as attractive as possible. The expectation was that PNG might be able to persuade supporters of independence to vote for autonomy. However, implementation of autonomy has been far from complete. As a consequence, there is a risk that deferral of the referendum on independence has merely deferred a serious risk of renewed conflict. At the same time, however, the experience of negotiating the BPA and the operation of the autonomy arrangements between 2005 and 2019 has resulted in not just the disposal of a significant proportion of weapons held by Bougainvilleans, but has also developed new relationships between Bougainville and the rest of PNG. The process of negotiating the aspects of the referendum arrangements has itself contributed to the development of more robust relationships. The hope is that the totality of this experience will have equipped both PNG and Bougainville leaders with the skills necessary to negotiate whatever is necessary in the period after the referendum.

ENDNOTES

[1] See, for example, Boege 2009; Braithwaite et al. 2010; Connell 1991; Griffin and Togolo 1997; May and Spriggs 1990; Oliver 1991; Regan 1998; 2001a; 2001b; 2002; 2003; 2010; 2013a; 2013b; 2014; Spriggs and Denoon 1992; Wesley-Smith 1992.

[2] See, for example, Adams 2001; Boege 2009; Boege and Garasu 2004; Braithwaite et al. 2010; Carl and Garasu 2002; Ghai and Regan 2006; Hayes 2005; Mortlock 2005; Regan 2001a, 2001b, 2002c, 2010, 2013a, 2013b, 2014; Wehner and Denoon 2001.

[3] In particular, see Ellwood 2014; Regan 2010:88–91; 2013a, 2013b 419–422; Wallis 2012, 2013; Woodbury 2015.

[4] As discussed later in chapter two, it is likely that the review of autonomy should not have considered the referendum arrangements.

[5] For discussion of the roles played by one such NGO, see Hakena et al. 2006.

[6] Leo Hannett, 10 November 2010, personal communication.

[7] Dennis Kuiai, June 2018, personal communication.

[8] Dennis Kuiai, June 2018, personal communication.

[9] The difficulties determining the number of deaths arise from the lack of statistics on BRA and BRF casualties, as well as on deaths caused by or contributed to by the PNG-imposed blockade.

[10] For more on the role of localised reconciliation, see Howley 2002; Regan 2010: 36–41; Tanis 2002.

[11] The Joint Supervisory Body comprises ministers of both the national government and the ABG and is responsible for supervising the implementation of the BPA. It also has responsibility to play a role in resolving conflicts between the governments.

[12] See, for example, *Papua New Guinea Post-Courier* 28/10/2018. Me'ekamui Agree to Dispose Arms.

[13] See Bougainville Peace Agreement — Provisions on the Referendum.

[14] See PNG Constitution — Provisions Relevant to the Referendum.

[15] See Organic Law on Peace-building in Bougainville — Autonomous Bougainville Government and Bougainville Referendum — Provisions Relevant to the Referendum.

[16] See The Schedule to the Organic Law — Rules Relating to the Conduct of the Referendum.

[17] See The Constitution of the Autonomous Region of Bougainville — Provisions Relevant to the Referendum.

[18] See Bougainville Referendum Commission Charter.

[19] The BPA is not the only source of the constitutional law provisions because a joint technical committee that oversaw the drafting of those provisions was also responsible for elaborating some of the BPA provisions.

[20] For example, see subsection 338(3)(a) of the BPA on setting the date of the referendum which refers to adherence to the BPA provisions on weapons disposal.

[21] *Namah and Geno v. O'Neill* (2015) SCA 165 of 2013/SCA/177.

[22] An anonymous reviewer pointed out that this report also covers aspects of international experience and concludes by suggesting how the Bougainville referendum could be a model for other countries.

[23] This report draws on international comparative experience to inform the conditions for effective administration of referendums, including how political will and timely release of resources are essential. Clear lessons can be drawn from the Bougainville referendum. My thanks to an anonymous reviewer who made this point.

[24] With citizen-initiated referendums (extensively used in Switzerland and some states of the US):

a number of citizens present a political proposal (e.g. draft legislation) and register public support by obtaining a required number of signatures, thereby forcing a popular vote (referendum) on the issue. Initiatives can be either direct or indirect. In a direct initiative, the popular vote will take place without any further intervention by the authorities. An indirect initiative involves a procedure whereby the legislative authorities may either adopt the proposal or have the option of presenting an alternative proposal to the popular vote. A citizen-demanded referendum is an optional referendum initiated, or triggered, by a number of citizens referring to existing laws or political or legislative proposals. One version allows repeal of an existing law or parts thereof (the abrogative referendum). The other allows citizens to demand a popular vote on a new piece of legislation that is not yet in force (the rejective referendum) (IDEA 2008:61).

[25] See *Reference re: Secession of Quebec* (1998) 2 SCR 217.

[26] For an earlier summary of arguments for and against referendums, see Butler and Ranney 1994.

[27] See, for example, Bishop and Hoeffler 2016; Bjornlund 2004; Elklit and Svensson 1997; Goodwin-Gill 2006. There are also a number of guides on what constitute free and fair or good practice elections, such as Inter-Parliamentary Union 1994 and Venice Commission 2002. Additionally, there is extensive literature on the extent to which particular elections in a country or the record of a country over a series of elections shows that election to be free and fair, or the record can be similarly adjudged.

[28] Amongst the few exceptions of earlier studies of regulation of referendums were Ranney 1981 and Seyd 1997.

[29] Aspects of the origins and intentions of the *Code of Good Practice on Referendums* are outlined in Council of Europe (2008). A brief overview of the history of the code and of the ACEEO recommendations can be found in Zwelleger et al. (2010:204–5). The status of the various codes of conduct promulgated by the Venice Commission is discussed in Craig (2017); De Visser (2015); Fasone and Piccirilli (2017). My thanks go to an anonymous reviewer who stressed that the Venice Commission's *Code of Good Practice on Referendums* has no legal authority in PNG, although the country is a signatory to international treaties and agreements on electoral standards which are applicable to the referendum given Article 55 of the BPA (see Ellis 2018:1–3).

[30] For a brief discussion of this referendum, see Morris 2014:240.

[31] Speaking mainly about citizen-initiated referendums in the United States, these authors note that: 'This concern is particularly pressing in the context of direct democracy elections, featuring short summaries describing policy proposals printed directly on the ballot that may be open to manipulation by political elites … Indeed, observers routinely claim that politicians and interest groups use the institutional tools at their disposal to tailor confusing or outright misleading ballot text to describe initiatives and referendums that voters see on their ballots' (Burnett and Kogan 2015:109).

[32] I have not been able to find a definitive estimate of the number of multiple question or multiple option referendums, but debate around the issue arising in the UK Brexit referendum of 2016 suggested that there may have been as many as 19 such referendums held between 1931 and 2000 (Blake 11/11/2016).

[33] The following discussion of the New Zealand and Puerto Rico referendums summarises Tierney (2013b:11–12).

[34] The question in the ballot text was: 'Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?'

[35] The JSB is a body comprising ministers of the national government and the ABG; it supervises the implementation of the BPA and meets once or twice per year.

[36] For the text of some of the material that Tulapi posted through social media, see Regan 2018:16–17.

[37] Under the Bougainville constitution, seats for ex-combatants will cease to exist from the time an ABG election occurs after the referendum.

[38] See Bougainville Referendum Commission Charter.

[39] A set of draft regulations was developed late in 2018 but, as discussed in chapter seven, at the time of writing (March 2019) they have not been approved by the national government.

[40] For those expecting polling and scrutiny periods of one day, the periods specified in the schedule are taken straight from the organic law on national elections and reflect the major logistical problems involved in conducting elections for the dispersed PNG population.

[41] Qvortrup (2014a:136) notes a similar provision in NSW election law and the fact that no litigation on the provision means that 'it remains to be seen how it will be enforced'.

[42] Curiously, there is a difference in the wording of the provision for the ballot paper to be used for a postal vote. That is required to 'be in the prescribed form' (sch. 1.49(1)). By contrast, a ballot paper to be used in voting at a polling station is to be 'in the form determined by the Agency' and 'where more than one question is to be voted on … the ballot-papers shall be prepared in accordance with the directions of the Agency (sch. 1.75.(1)). It is unclear why slightly different provision for postal and normal ballot papers, and in particular why sch. 1.75.(1) makes separate provision in relation to the possibility of more than one question.

[43] The wording of section schedule 1.23(3) could suggest that voting is compulsory, as it says, 'A person whose name is on the roll for a voting district shall, subject to this Schedule and to the provisions of any other law in force, voted in the referendum'. However, in contrast to the provision requiring people to enrol, no penalty is provided for a person who does not vote.

[44] IFES advisers have been advising the PNG Electoral Commission and OBEC. The work of IFES and UNDP advisers is funded by donors, mainly Australia.

[45] Thanks to Adrianna Schmidt and Jeremy Miller for the information on communications and awareness.

[46] See JSB 2018b. Bougainville Referendum, Key Messages and Frequently Asked Questions: A Guide for Awareness Materials and Activities (Draft).

[47] Thanks to Martin Syder for information about the reconciliation processes supported by the Bougainville Partnership.

[48] In discussing possible reasons for the gender gap in voter turnout, Trechsel (2007:116) notes the argument proposing 'a positive relationship between a female political supply and demand. The fundamental idea is that the more female politicians in general, and in particular the more female candidates in elections, the greater the stimulus for women to participate in elections.'

[49] The June 2017 *Bougainville Audience Study*, which included a survey of 1114 people with 55 per cent male and 45 per cent female respondents, did not indicate gender differences in responses (Thomas et al. 2017). Further research of the same kind was carried out late in 2018, with a report expected to be released in the second half of 2019.

[50] See *Papua New Guinea Post-Courier* 14/5/2018. Church Neutral on Vote, Says Bishop.

[51] Ibid.

[52] Ibid.

[53] *Papua New Guinea Post-Courier* 8/3/2019. Church Opens Account to Assist BRC.

[54] *Papua New Guinea Post-Courier* 11/3/2019. Awareness on Referendum Process, Outcome Crucial.

[55] Ellis (2018:8) points to there being a third possible threshold, namely 'a requirement that to be carried, the Yes option requires both a majority of the valid votes cast and the support of a pre-specified proportion of the whole electorate'. Such a threshold would be subject to the same critique as is offered by the Venice Commission.

[56] See https://www.abg.gov.pg/uploads/documents/Fact_sheet_No.1_-_Referendum_-_English.pdf

[57] See *Papua New Guinea Post-Courier* 28/10/2018. Me'ekamui Agree to Dispose Arms.

[58] See https://openresearch-repository.anu.edu.au/bitstream/1885/157218/9/Constitutional_Documents-Referendum-File8.pdf.

[59] A turnout quorum refers to a minimum percentage of the registered voters. An approval quorum refers to a minimum percentage of the voters casting a ballot. Issues about such quorums will be discussed later in this chapter.

[60] Arrangements for recognising such organisations are discussed elsewhere in this book.

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APPENDIX 1
QUESTIONS ASKED IN SOME INDEPENDENCE REFERENDUMS

QUEBEC 1980

The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad — in other words, sovereignty — and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?

CROATIA 1991

Do you approve that as an independent and sovereign state, the Republic of Croatia, which guarantees cultural autonomy and civil rights to the Serbs and other nationalities in Croatia, can unite with other republics (as has been proposed by the Republics of Croatia and of Slovenia for the solution of the state crisis of the SFRY)?

Are you in favour that the Republic of Croatia remains in Yugoslavia as a federal state (such as the Republic of Serbia and the Socialist Republic of Montenegro, so as to solve the state crisis of the SFRY?)

SLOVENIA 1990

Should the Republic of Slovenia become an independent and sovereign state?

ESTONIA 1991

Do you want the restoration of the national independence and sovereignty of the Republic of Estonia?

LATVIA 1991

Do you support the democratic and independent statehood of the Republic of Latvia?

LITHUANIA 1991

Should the Lithuanian State have an independent, democratic government?

UKRAINE 1991

Do you support the Act of Declaration of Independence of Ukraine?

USSR 1991

Do you consider necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics in which the rights and freedom of an individual of any nationality will be fully guaranteed?

FYR MACEDONIA 1991

Are you in favour of the establishment of an independent and sovereign republic of Macedonia, and its right to join a future union of sovereign states of Yugoslavia?

ERITREA 1993

Do you want Eritrea to be independent?

QUEBEC 1995

Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

EAST TIMOR 1999

Do you ACCEPT the proposed special autonomy for East Timor within the unitary state of Indonesia? Or

Do you REJECT the proposed special autonomy leading to East Timor's separation from Indonesia?

MONTENEGRO 2006

Do you want the Republic of Montenegro to be an independent state with a full international and legal personality?

SOUTH SUDAN 2011

Voters— many of whom were illiterate — were presented with two images with text in both Arabic and English saying 'secession' or 'unity'.

SCOTLAND 2014

Should Scotland be an independent country?

CATALONIA 2014

Do you want Catalonia to become a State? And if you do, do you want this State to be independent?

KURDISTAN 2017

Do you want the Kurdistan Region and the Kurdistani areas outside the Region to become an independent state?

CATALONIA 2017

Do you want Catalonia to become an independent state in the form of a republic?

APPENDIX 2
BOUGAINVILLE REFERENDUM PRAYER

God papa,

Yu strong olgeta na Yu stap oltaim. You mekim kamap olgeta samting long Heven na long graun i kamap na bihainim laik na save bilong yu.

Mipela i asking Yu,

Givim gutpela save na stretpela tingting long mipela. Helpim mipela pipol bilong Bogenvil long dispela taim bilong wok redi na long taim bilong vote long "Referendum".

Givim mipela olgeta long gutpela save na gutpela tingting bai mipela i ken skelim gut tru "choice" mipela i vote long en.

Stiaim mipela wantaim helpim bilong Holi Spirit bai mipela i ken mekim gutpela "choice" na vote long tingting we bai inapim tru gutpela sindaun bilong mipela na ol pikinini bilong mipela nau na bihain taim.

Gutpela Papa long Heven,

Yu as tru bilong bel isi na bung wantaim bilong ol pipol, na em i laik tru bilong yu long dispela ol samting i mas kamapa lon olgeta hap bilong graun.

Mipela i askim Yu,

Givim bel isi long mipela na pulumapim olgeta manmeri bilong Bogenvil na Papua New Guinea tu wantaim marimari bilong yu, bai mipela olgeta i ken luksave long wanpela narapela olsem piksa bilong yu, na mipela i bratasusa insait long pikinini bilong Yu Jisas Krais.

Strongim mipela long sanap wantaim olsem wanpela pipol bai mipela i ken redi long sapotim wanpela narapela long wok bung bilong kamapim "choice" mipelai vote long en. Mipela i askim olgeta dispela prea long nem bilong Jisas Krais na Sevia bilong mipela …

Amen.

Source: Catholic Church of Bougainville, June 2018.

English translation of Bougainville referendum prayer

God our Father

You are most powerful and eternal. You created everything in Heaven and on Earth by your will and wisdom.

We ask you

Give wisdom and faithful thoughts to us. Help us the people of Bougainville at this time of preparation and at the time for voting in the 'Referendum'.

Give all of us wisdom and goodwill so we can weigh properly the choice we vote on

Steer us with the help of the Holy Spirit so that we can make good choices and vote with the forethought that will enable a good life for ourselves and our children, now and for the time to come.

Good Father in Heaven,

You are the true source of peace and unity amongst peoples, and it is Your will that must be done at all places on Earth.

We ask You

Give us peace and fill all people of Bougainville and also Papua New Guinea with your blessing, may we all look upon each other as in your image, and we each as brothers and sisters in Jesus Christ Your Son.

Strengthen us to stand together as one people that we can ready ourselves to support each other to work together towards the choice we vote for. We all make this prayer in the name of Jesus Christ, Our Saviour.

Amen.

English translation: With thanks to Thiago Oppermann

APPENDIX 3

BASIC DOCUMENTS ON THE CONSTITUTIONAL ARRANGEMENTS FOR THE BOUGAINVILLE REFERENDUM

The following documents referred to in this book are available on an ANU website. Individual documents can be accessed through the following links:

1. Bougainville Peace Agreement— Provisions on the Referendum.
2. PNG Constitution — Provisions Relevant to the Referendum.
3. Organic Law on Peace-Building in Bougainville — Autonomous Bougainville Government and Bougainville Referendum — Provisions Relevant to the Referendum.
4. The Schedule to the Organic Law on Peace-Building in Bougainville — Rules Relating to the Conduct of the Referendum (Schedule 1).
5. Constitution of the Autonomous Region of Bougainville — Provisions Relevant to the Referendum.
6. Bougainville Referendum Commission Charter.
7. Draft Framework for Workplan and Allocation of Responsibility for Taskforce.
8. Bougainville Referendum: Key Messages and Frequently Asked Questions. A guide for awareness materials and activities. (Draft only).

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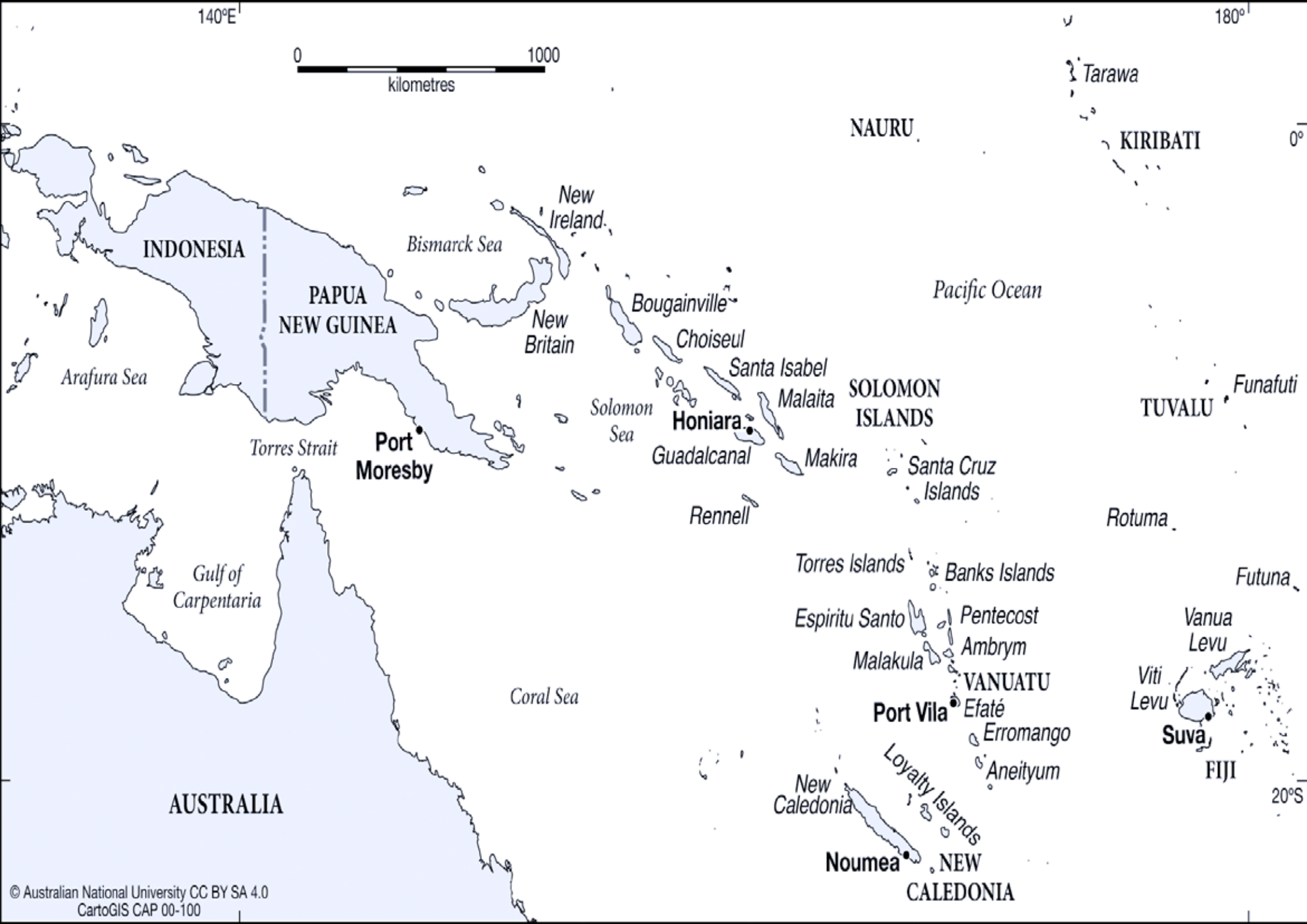

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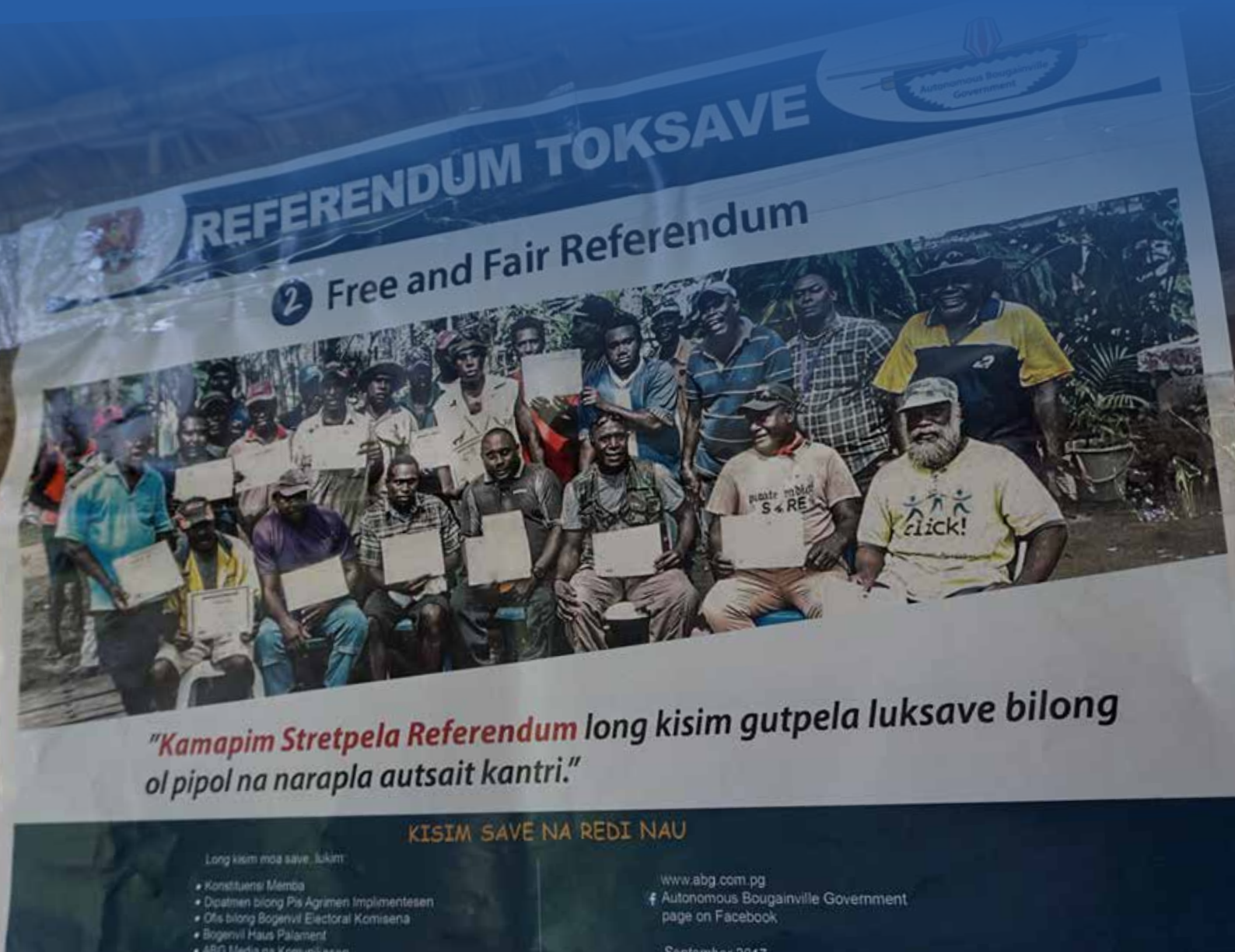
It is impossible to think of a single issue to do with the forthcoming Bougainville referendum that is not dealt with exhaustively in this comprehensive guide and handbook. This is scholarship at the highest level, deeply informed not only by the extensive written record which has been comprehensively mined here, but also by the author's decades-long familiarity with Bougainville, the Bougainville War, the peace process, the peace agreement and the contemporary political situation there and in PNG more broadly. The story is updated to March 2019 and highly relevant to the numerous policy makers in PNG, Bougainville, Australia, the UN and elsewhere who will be involved. Set against a wide-ranging international background on referendums, the book is useful also for political scientists interested in voting phenomena.

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