

# **THE BOUGAINVILLE REFERENDUM**

## **AN OVERVIEW OF THE ARRANGEMENTS**

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### **A. INTRODUCTORY ISSUES**

This paper provides an overview of origins, intentions, sources, and main features of the constitutional arrangements for the ‘Referendum on the future political status of Bougainville’ (the Bougainville Referendum). It must include a ‘choice of separate independence for Bougainville’, and must be held before mid-2020. The paper also outlines work done so far to prepare for the Referendum, and identifies and discusses major steps required to prepare, conduct, and deal with the outcomes of, the Referendum.

A referendum is a process for making decisions, mainly about issues of great importance. The categories of issues dealt with in referendums (or referenda) is extensive. They include: approving new constitutions (as in Kenya in 2010), or amendments to existing constitutions (as under Australia’s Constitution); proposing or even making new laws (as in Switzerland and with citizens initiative referenda in some states of the United States); or resolving major divisive issues (as in Britain’s planned June 2016 referendum on exiting the European Union).

Since 1990 over 50 referenda have been held on independence for a country or part of a country. Usually such referenda are conducted as part of efforts to resolve disputes, often (though not always) violent conflicts. Examples include referenda on: Eritrea’s independence from Ethiopia, 1993; Quebec’s independence from Canada in 1995; East Timor’s independence from Indonesia, 1999; Scotland’s Independence from the United Kingdom, in 2014. Of course, issues about sovereignty can be particularly sensitive and divisive, and are often difficult to prepare for and manage.

Very few countries have ever included in a national constitution provision for a deferred referendum on separation of part of the country, required to be held within a specified period. The only examples we know of are: France (in relation to New Caledonia, where a referendum must be held by 2018); 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 such provision was included in the national constitution as 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 both New Caledonia and Sudan) that it would help resolve divisions before the referendum was held, perhaps leading to a situation where the referendum might not be necessary, or might be deferred, or perhaps contributing to a referenda outcome in favour of continued unity.

Although referenda can help resolve difficult conflicts, they can also carry risks. They can be complex and expensive to run. They can be divisive, in preparation, in conduct, and in implementation of results. Problems often arise from misleading and divisive campaigns by political leaders on the question in the referendum. Leaders can be under great pressure to attempt to influence the result through manipulation of the process, and intimidation of voters.

Although usually intended to resolve conflict, holding a referendum can contribute to conflict, especially in a country where there are pre-existing ethnic, religious, or other kinds of divisions. One particular danger is that the outcome of a referendum on a divisive matter leaves a significant minority feeling strongly that the majority vote causes them serious disadvantage. Violent conflict has occurred in the process of implementation of outcomes of referenda in the past 25 years, including in relation to independence referenda – for example, in East Timor and in South Sudan.

A difficulty associated with an independence referendum is that it involves a major decision on long-term arrangements being made at a particular time, often without adequate information about future circumstances. For example, Scotland relies heavily on revenue from petroleum resources, which it would have needed to rely upon if its 2014 referendum had resulted in independence. But little more than a year after the referendum, oil prices were about 25 per cent of what they had been at the time of the vote. A vote in favour of independence where voters had assumed the prosperity of Scotland was assured could have been ill-founded.

So in preparing for the Bougainville referendum, it will be important to consider both the advantages and disadvantages that can flow from them, learn from experience of referenda held elsewhere, and do everything possible to minimise the chance of serious problems occurring.

A starting point is to develop a clear understanding of the Referendum arrangements, so that in planning for and managing it, everything possible is done to ensure arrangements work as intended, potential problems are anticipated and contingencies provided for. As yet, however, the Referendum

arrangements are not widely known and understood. Important aspects are often the subject of confusion, uncertainty and misunderstanding.

For example, it has been widely believed in Bougainville that the BPA required the referendum be held in 2015, rather than in the five year window beginning in 2015 as is actually provided. Further, some Bougainvilleans have asked whether, in the absence of a decision by the PNG Parliament on the referendum outcome by 2020, the BPA and the PNG Constitutional Laws implementing it will cease to have effect, resulting in autonomy ceasing to operate, the immunity from prosecution for former combatants and other aspects of the BPA ceasing to have effect. In fact, there is no basis at all for such concern.

Perhaps the greatest confusion and uncertainty involves two sets of questions of great importance to continuing peace in Bougainville:

- (a) whether PNG has the authority to defer the referendum beyond 2020 – in particular, should it be determined that requirements as to weapons disposal and good governance have not been met; and
- (b) whether a vote in favour of independence requires PNG to implement the outcome, Bougainville then having an immediate right to independence.

Both sets of questions are discussed elsewhere in this paper.

Reasons for such confusion etc., include: most people involved having had no experience of referenda; the history of the arrangements for the Bougainville Referendum is complex; almost 15 years have elapsed since the BPA was signed, and few people other than some who were deeply involved in the negotiations have a clear memory and understanding of what was agreed; and the arrangement are set out in several documents, the details and relationships of which are little known.

This overview aims to provide information needed for improved understanding of the arrangements.<sup>1</sup> The history and intention of relevant parts of the BPA and the Constitutional Laws is a particular focus, for that is often little known, and when clarified often provides a good basis for improved understanding of the arrangements. Where relevant, the paper also examines the links between the referendum arrangements and other aspects of the BPA. It also:

- (a) identifies some risks involved in the Referendum in respect of which avoidance or management action may be needed, and

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<sup>1</sup> To assist readers to locate information, section numbers and pages of relevant laws and reports are included.

(b) outlines issues to be taken into account when considering whether the Referendum outcome will be credible, an issue likely to be of importance when consulting with the National Government (and the international community) about the results of the Referendum.

## **B. WHAT IS A REFERENDUM?**

### **1. Definitions**

A dictionary definition of the word 'referendum is 'a direct vote by the electorate of a country on a single political issue' (Oxford English Dictionary). A definition provided by a visiting UN specialist in December 2015 was: 'A form of direct democracy in which the electorate has a direct vote on a specific political, constitutional or legislative issue'.

Another way of describing a referendum is to see it as in many ways like an election, but instead of involving a choice of candidates, it involves a choice of options for dealing with one or more issues.

### **2. Legal Basis for a Referendum**

Provision that a referendum shall be held, and the details of the arrangements for its conduct, can be contained in a variety of documents. Sometimes they are in a 'post-conflict' peace agreement. More commonly they are in a national Constitution or an 'ordinary' law made by the national legislature. They can be found also in laws made by sub-national legislatures (as with a recent referendum in Catalonia Spain, on possible separation of Catalonia from Spain). The arrangements can also be in a combination of such documents.

Because of the sensitivity of issues often being dealt with in a referendum, very close attention is usually given by all parties to the need to adhere to the requirements set out in the arrangements. Disputes often occur over the meaning, intention and operationalisation of the requirements.

### **3. Mandatory or Consultative?**

In many instances where a referendum is used to resolve a divisive constitutional issue, such as whether part of a country should become independent, or secede, from that country, the outcome of the referendum is binding on the parties. For example, the constitutional provision for the referendum can specify that if the required percentage of voters supporting independence is achieved, the area proposing to separate gets a right to secede. The government of the country must take the steps necessary to facilitate independence of the part of the country concerned. Such a

referendum is sometimes described as being ‘mandatory’, or having a ‘mandatory’ outcome. In other cases, the outcome is not binding, and such a referendum is often described as ‘consultative’.

## **C. ORIGINS, & KEY FEATURES, OF THE BOUGAINVILLE REFERENDUM**

It is vitally important to have some understanding of the origins of the Bougainville Peace Agreement (BPA) in the more than two years of negotiations between divided parties from June 1999 to August 2001. Only by examining what happened in those negotiations is it possible to understand key features of the Bougainville Referendum, and in particular, the reason why it was deferred for 10 to 15 years after the Autonomous Bougainville Government (ABG) was established, and why the Referendum outcome is not binding on PNG (the referendum is, technically, ‘consultative’ only).

### **1. A Compromise, Balancing Previously Opposing Positions**

The Bougainville Referendum was originally provided for in the BPA signed in Arawa on 30 August 2001. The BPA was intended to resolve the Bougainville conflict. That conflict had resulted in deep divisions not only between Bougainville and the PNG Government, but also amongst Bougainvilleans. The possibility of a referendum on independence for Bougainville was viewed very differently by the various groups involved in negotiating the BPA.

In the early stages of negotiations, pro-secession Bougainvillean groups preferred immediate independence. They reluctantly accepted a referendum on independence as a democratic basis for making such a step, but wanted it held as early as possible (within say 3 to 5 years), and its outcome mandatory. Other Bougainvillean groups were open to a referendum, but feared domination of armed groups if an early referendum was held. So they argued for deferral of the proposed referendum for an extended 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 agree a common Bougainville position on this as well as other contentious issues. Most groups participated in internal Bougainville negotiations in May-June 1999 to develop a common negotiating position in advance of negotiations with PNG.

An eventual compromise was incorporated into the common Bougainville negotiating position presented to PNG negotiators in the first negotiating session (at Hutjena, Buka, on 30 June 1999). It demanded that the decision on

Bougainville's political future be made democratically, through a referendum. It should be deferred long enough for differences amongst Bougainvilleans to be resolved and trust restored, so that the decision-making process might be undertaken without risk of renewed conflict. So they proposed a constitutionally guaranteed referendum for Bougainvilleans held within 6 to 8 years. The outcome of the vote would be mandatory - binding on both PNG and Bougainville. In other words, PNG would be constitutionally obliged to implement a referendum vote in favour of independence.

PNG opposed a referendum, seeing it as an affront to PNG sovereignty, as likely to establish a dangerous precedent for other parts of PNG, and as a threat to Bougainvilleans opposed to independence.

The differences over the referendum issue were extremely difficult to resolve. Indeed, in the early stages of negotiations the PNG side sought to avoid discussion of the issue. When the referendum proposal was discussed, differences between the sides dominated most of the many negotiation sessions from June 1999 (a total of 26 negotiation sessions, varying from one day to over a month at a time). Without the efforts of the UNOMB director in chairing negotiations and mediating when he could, there would have been little progress. Despite his best efforts, by late 2000, differences over the referendum issue resulted in stalemate in the negotiations. Tensions were so high that a break-down in the peace process seemed likely.

## **2. Origins of the Referendum Compromise in the BPA**

It was an intervention by the Australian government in December 2000 that broke the deadlock. This mediation was possible only because of a little known but highly significant change in Australian policy announced early in 2000 by its then Minister for Foreign Affairs, Alexander Downer. Australia's previous position had been that Bougainville was an integral part of PNG (a view that caused grave concern to pro-secession Bougainvillean leaders). The new position was that Australia would accept whatever outcome on the political future of Bougainville was agreed between the parties in the negotiations.

The change in policy was largely the outcome of the close engagement of Australia in the Bougainville peace process, especially (but not only) through its leadership, from early 1998, of the regional Peace Monitoring Group. This engagement had helped the Australian Government better understand not only the depth of feeling underlying Bougainville's demands being advanced in the negotiations and the difficulties involved in bridging the gap between PNG and Bougainville positions, but also the difficulties involved in Australia playing

neutral peace monitoring or mediation roles if it was seen as having a predetermined position, and supporting one side, on the most divisive issue.

Downer made his compromise proposal in visits first to Bougainville and then to Port Moresby in December 2000. His advice came from then Australian High Commissioner to PNG, Nick Warner, and his First Secretary responsible for Bougainville matters, Sarah Storey. He proposed that the parties should agree to a constitutionally guaranteed referendum, deferred for a longer period than Bougainville was proposing - 10 to 15 years after an autonomous Bougainville Government was established. However, the outcome should not be binding, but rather, a matter for the PNG Parliament to decide after consultation with Bougainville.

The Australian proposal was intended to remove the immediate source of tension, and defer a decision on the most contentious issue. The aim was that in the meantime the parties could build trust and reach a better understanding, as the autonomy arrangements (already largely agreed by December 2000) operated. The inherent logic of providing for significant autonomy together with a guaranteed referendum on independence was that in the ten to fifteen years of operation of autonomy, PNG had the opportunity to make the arrangements work so well (through financial support, transfer of powers, capacity building etc.) that even many pro-secessionists would consider voting against secession.

The obvious example of such an approach in the region is the way that France has implemented the Matignon Accord (1988) and the Noumea Accord (1998) concerning New Caledonia's political future.

The compromise 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 got a constitutionally guaranteed referendum, and after 18 months of tense negotiations realized what a significant achievement that was. In doing so it conceded the loss of a binding outcome, which was a matter of concern reduced by what was seen as an assurance provided by Downer's arguments in favour of the compromise.

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. This the Bougainville negotiators saw as an assurance of similar international community support.

As for PNG, it 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.

This brief history of the negotiation of the Referendum arrangements highlights how the BPA, more generally, involves a carefully balanced, hard-won and thoroughly evaluated compromise between opposing parties, each with strong views on the issues involved. The compromise was intended to provide a careful balance between the interests and concerns of all parties.

#### **D. SOURCES OF THE REFERENDUM ARRANGEMENTS**

The Referendum arrangements are set out in four main documents:

- the BPA (paragraphs 309 – 330, and the BPA 'Introduction and Outline');
- the PNG Constitutional Laws giving effect to the BPA, namely:
  - Part XIV of the PNG *Constitution* (mainly sections 338-343), and also the Preamble to and first three sections (276 – 278) of the *Constitutional Amendment (Peace-building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum)* which inserted Part XIV into the Constitution; and
  - the *Organic Law on Peace-building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum* (the *Organic Law*), and especially sections 52 to 63, and *Schedule 1* (the 'Rules Relating to the Conduct of the Referendum');
- the *Bougainville Constitution*, and especially sections 193 and 194.

The key provisions are in the PNG Constitutional Laws. Under unique provisions in the PNG *Constitution* (345-6), Part XIV of the PNG *Constitution* and the *Organic Law* cannot be amended or repealed without the agreement of the Autonomous Bougainville Government (ABG). The *Bougainville Constitution* sets out the procedures for consideration and voting by the Bougainville legislature on any proposed alteration to the Bougainville related provisions of the PNG Constitutional Laws. In relation to proposed laws altering the referendum provisions of Part XIV of the PNG *Constitution*, in addition to widespread public consultation in Bougainville being required, a two thirds absolute majority vote in the Bougainville legislature would be required for

such a law to be passed. (This is a very strong and highly unusual form of constitutional protection, often referred to as ‘double entrenchment’.)

The BPA remains relevant to understanding the changes to the PNG Constitutional Laws for two main reasons. First, it is not only the source of those laws, but:

- (a) is also made available by the PNG *Constitution* as a source of interpretation of the constitutional laws (subsection 378(3)); and
- (b) is required to be ‘interpreted liberally, **by reference to its intentions** and without undue reference to technical rules of construction’ (subsection 378(4)) (emphasis added).

Second, the BPA is specifically referred to in some of the Constitutional Law provisions, in such a way that the provisions can only be understood by direct reading of the BPA (e.g. see subsection 338(3)(a) on setting of the date of the referendum by reference to adherence to the BPA provisions on weapons disposal – below).

While the BPA provisions are clearly relevant, it is important not to rely upon them too heavily when considering particular provisions of the Constitutional Laws on 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*. So excessive reliance on the BPA provisions can be misleading.

The constitutional arrangements for the Referendum are long and complex. The main principles are spelt out briefly in sections 338-343 of the PNG *Constitution* and sections 52 to 63 of the *Organic Law*. Detailed provisions on conducting the Referendum are set out in the detailed 65 page Schedule 1 to the *Organic Law*. Those rules were based heavily on the provisions of the then PNG *Organic Law on National Elections*. 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 had to be held, at least 10 to 15 years later.

## **E. REPORTS ON ASPECTS OF THE REFERENDUM ARRANGEMENTS**

Several reports or reviews have been written on various aspects of the Bougainville Referendum arrangements. As they will be referred to in subsequent parts of this paper, they are identified here with brief comments on their origins, and aspects relevant to issues discussed later in this paper.

Some of the reports originate in decisions of a joint National Government and ABG Referendum Committee (the Joint Bougainville Referendum Committee), established in 2009-10 by decision of the Joint Supervisory Body (JSB). The JSB is established by section 332 of the PNG *Constitution* as a joint institution to oversee implementation of the BPA, provide a consultative forum for the two governments and their agencies, and contribute to resolution of inter-government disputes. The Joint Bougainville Referendum Committee was established to ‘investigate constitutional, legal, administrative and financial matters that may need to be considered in preparing for the conduct of the referendum on the political future of Bougainville’. It is jointly chaired by the PNG and ABG Chief Secretaries, and supported by a Joint Referendum Technical Working Group.

### **1. The 2013 UN Report on Weapons Disposal**

In late 2012, the Joint Bougainville Referendum Committee requested the United Nations (UN) to provide a team to carry out ‘a thorough assessment of weapons disposal in Bougainville’. A UN team visited Bougainville in November-December 2012, and provided a 40 page report to the Committee early in 2013 (the 2013 UN Weapons Report). That report was noted and endorsed by the JSB in October 2014.

### **2. The 2013 Joint Review of Bougainville’s Autonomy Arrangements**

The BPA (paragraphs 298-308) and the PNG *Constitution* (section 337) require that a five yearly review of the autonomy arrangements under the BPA is carried out by the two governments after considering reports from experts on various aspects of the arrangements. The first review was required to be held ‘as close as is practicable to the fifth anniversary’ of the establishing of the ABG. After that, reviews are required five yearly.

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

The first review actually took place in 2013, with a report – ‘Joint Review of Bougainville’s Autonomy Arrangements by the National Government and the Autonomous Bougainville Government’ (the 2013 Autonomy Review Report) completed in October 2013. Curiously, in addition to reviewing autonomy, that 2013 Report also included a chapter on the Referendum arrangements (pages 87-95), the reason given being:

The autonomy Review is linked explicitly to the Referendum on the future political status of Bougainville through the ratification mechanism of Paragraph 312 of the *Bougainville Peace Agreement* and section 338 of the ... *Constitution*. The critical element is that the Referendum can only be held if the conditions in Sub-paragraph 312(b) have been considered by both governments. These are 'weapons disposal' and 'good governance'. Paragraph 313 [of the BPA] provides a definition of the 'good governance' condition. These provisions are entrenched in Section 338 of the ... *Constitution* (page 2, para.1.15).

In fact, beyond providing for a definition of 'good governance', both the BPA (paragraph 313(c)) and the PNG *Constitution* provide that the autonomy review process shall be used to determine whether the ABG 'has been and is being conducted in accordance with internationally accepted standards of good governance' (though the requirement is those standards 'as they are applicable and implemented in the circumstances of Bougainville and Papua New Guinea').

On that basis, the 2013 Autonomy Review Report includes both a discussion of the question 'How is good governance measured' (pages 62-69), and of the Referendum arrangements (pages 87-95). While the former is no doubt justified, there seems no sound basis for inclusion of the latter part.

That Report was noted and endorsed by the JSB in October 2013.

### **3. The 2014 Review of the Constitutional & Legal Issues**

In November 2013, one of the then co-chairs of the Joint Bougainville Referendum Committee, Sir Manasupe Zurenuoc, requested lawyer, Mr. Nemo Yalo, to 'review the constitutional and legal issues relating to the conduct of referendum in the Autonomous Region of Bougainville'. Mr. Yalo subsequently provided Sir Manasupe with a 34 page document, entitled 'Review of the Constitutional and Legal Issues Pertaining to the Conduct of Referendum for Bougainville' (the 2014 Constitutional Review).

The 2014 Constitutional Review covers a wide range of issues arising from what three main documents say about the Referendum arrangements – namely the PNG *Constitution*, the *Organic Law* and the *Bougainville Constitution*.

### **4. 2014 UNDP Report on Peace & 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* (the 2014 UNDP Report). That study was intended as a basis for a 'Peacebuilding Priority Plan to meet the requirements for funding to be provided through the UN

Peacebuilding Fund. In the course of the study over 1,000 Bougainvilleans and other were consulted.

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'. 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.

That Report has since been part of the process for the planning and allocation of funding by the UN Peacebuilding Fund, including funding intended to support preparations for the Referendum.

## **5. 2014 Report on Work-streams to Prepare for the Referendum**

In July 2014, on the advice of the Joint Bougainville Referendum Committee, the JSB directed that the 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 'work-streams' required for preparations. The report, by Mike Richardson, discussed what was required in terms of work, resources and timing in relation to seven distinct work-streams, namely:

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'.

## **6. 2015 UN Report on Electoral Scoping, & Referendum Preparation**

In March 2015, the UN provided a brief report on scoping of assistance for electoral support in relation to the 2015 ABG general elections and support for Bougainville Referendum preparations. On the Referendum issues, the report discussed issues about establishing 'the independent authority' to conduct the Referendum (which the report assumed was a choice already made), voter eligibility issues, and other matters. Attached to the report were two discussion papers prepared for the purposes of the report, entitled:

- ‘Independent Authority to Administer the Referendum on the future political status of Bougainville: Mandate, Structure and key issues to consider’; and
- ‘Referendum on the future political status of Bougainville - Voter Eligibility Criteria: Areas requiring further agreement and legislation’.

Both discussion papers made useful contributions to discussion of important and quite specific aspects of the arrangements. At the same time, the analysis in both papers reflected some misunderstandings of aspects of the issues discussed.

## F. MAIN FEATURES OF THE REFERENDUM ARRANGEMENTS

### 1. A Referendum When?

#### ***(a) Legal requirements – a five-year ‘window’, mid-2015 & mid-2020:***

The Referendum must be held no earlier than 10 years and no later than 15 years after the establishing of the ABG (BPA paragraph 312; PNG *Constitution* section 338(2)). The first ABG took office in June 2005. As a result, the five year ‘window’ within which the Referendum must be held began in June 2015 and ends in June 2020.

Paragraph 312(a) of the BPA provided that amendments to 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’ (emphasis added). The clear intention of the Bougainville negotiators, accepted by the PNG negotiators, and reflected in those 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. That 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.

Section 338 of the PNG *Constitution* gives constitutional effect to the guarantee in the BPA. Amongst other things, it requires 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’ (emphasis added). Those words ‘notwithstanding any other provision’ are clearly intended to honour the guarantee in the BPA.

In this context, the word ‘*notwithstanding*’ signals 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 it does not matter if some other provision of the Constitution or any other law might be interpreted as allowing a delay of the referendum, the requirement of ‘*not later than 15 years*’ must be followed.

**(b) 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 with the National Government on the criteria for enrolment of non-resident Bougainvilleans; and
- (b) consultation, as required by subsection 338(2).

There is no limit on what might be considered as part of that consultation. But subsection 338(3) makes it mandatory 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), and 338(4)-(5)).

(The *Organic Law*, section 55, also requires that before the date for the Referendum is agreed under section 338 of the *Constitution*, the two governments must consult and agree in writing on the criteria needed to determine the links that non-resident Bougainvilleans must have with Bougainville to be registered to vote in the Referendum. The issues involved in this further requirement are discussed later in this paper.)

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’, these are simply matters that must be considered in setting the date. If one or both of these determinations is or are negative, that will simply be an issue to take account in setting the Referendum date. Such determinations 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’.

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. Negative determinations on these issues cannot result in deferral of the referendum beyond the 15<sup>th</sup> anniversary of the establishing of the ABG.

No part of the referendum arrangements are more poorly understood than those on setting the date. For a long time after the BPA was signed many Bougainvilleans assumed that the referendum must be held in 2015. Many in the PNG government (as well as even some former BRA leaders) have at various points asserted that the referendum could be deferred if weapons are adjudged not to be secure, or standards of good governance adjudged as being poor. There is clearly a need for better awareness about the referendum arrangements.

**(c) Good Governance:**

Whether or not the good governance criterion has been met is to be determined by ‘the review and dispute settlement procedure’ provided for in the PNG *Constitution* (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.

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

... 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.

The 2013 Review of Autonomy discusses possible approaches to how good governance can be ‘measured’ (pages 62-9). It concludes that on the basis of the limited evidence available on various possible criteria that, assessment of the ABG ‘shows weak capacity and poor compliance with recognised good practice, even in the Papua New Guinea context. The ABG is significantly below some of the better performing PNG provinces in terms of public administration’ (page 69).

Under section 337, a second review is required, and probably should have been held about 2015 (though it could also be argued that the wording of

section 337 allows it to occur five years after the first review, which would be 2018). The conclusions of any subsequent review on the evaluation of good governance would clearly be a matter to be taken into account in setting the Referendum date. Any disagreement between the governments about such an evaluation can be dealt with by the dispute settlement procedure. But in any case, the evaluation of good governance is 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’).

**(d) Weapons Disposal:**

No mechanism is specified in the *Constitution* for deciding if ‘weapons have been disposed of in accordance with the Agreement’ (subsection 338(3)). The main reason is that the only issue is whether weapons disposal has occurred ‘in accordance with the Agreement’ (namely the BPA). Clearly, then, the ‘weapons’ in question are the firearms that were the subject of the Weapons Disposal Plan incorporated into the Agreement by BPA 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? That Plan contains a multi-stage disposal process, its own incentives for the parties to the Plan to implement it, and mechanisms for evaluation of whether the Plan has been followed.

When the BPA was signed (August 2001) and Part XIV of the PNG *Constitution* enacted (March 2002), implementation of the Plan was just beginning. No-one knew if weapons would be disposed of in accordance with the Agreement. Hence the issue about weapons disposal to be determined was set 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 in the BPA had been complied with.

There are strong arguments available 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 Me’ekamui Defence Force (MDF), comprised mainly of former Bougainville Revolutionary Army (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. So the weapons they held were never dealt with under the Agreement.

Nevertheless, in July 2003, the United Nations Observer Mission on Bougainville (UNOMB) verified the completion of stage two of the Plan, despite

acknowledging that MDF weapons, and some others, had not been dealt with. In December 2003 the parties to the Plan reached agreement on destruction of weapons as the final means of disposal. In the lead-up to the ABG elections, there was provision in the Weapons Disposal Plan for any of the parties to call on the UNOMB to 'verify and certify whether there has been substantial compliance' with the Plan, with a negative finding by the UNOMB giving it authority to defer the ABG elections. No such call was made on the UNOMB. Further, paragraph 324 of the BPA provided that: 'Agreed plans for weapons disposal will be fully implemented before elections for the autonomous Bougainville Government are held'. Clearly the PNG National Government would have been able to claim this requirement had not been met if it did not believe weapons disposal as required by the BPA had not been 'fully implemented'.

There are contrary arguments. For example, some would argue that weapons disposal in accordance with the Agreement was intended to be far broader than was actually achieved, and so can be assessed on that basis. Further, it is a fact that not all of the weapons contained under the Plan were in fact destroyed as they should have been in accordance with the decision on that matter of December 2003. Indeed, some weapons were withdrawn from containers and subsequently made use of by various Bougainvillean groups in the course of the complex conflict that occurred in parts of south and south west Bougainville between 2006 and 2011. 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' is assessed as having been incomplete, such an assessment cannot lead to deferral of the Referendum beyond the 15<sup>th</sup> anniversary of the establishing of the ABG. Once a determination has been made on whether or not weapons have been disposed of in accordance with the Agreement, that is simply a matter to be considered when the two governments consult and agree on the date within the five year window within 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 what aspects of weapons issues can be considered as part of the consultations under subsection 338(2).

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

- (a) the weapons still held by the various MDF factions, as well as some other weapons not disposed of as part of the BPA Disposal Plan;
- (b) other ('new') weapons believed to have been brought into Bougainville from various sources since the BPA was signed, (probably including some from Solomon Islands); and
- (c) WWII weapons dug up in Torokina and other parts of Bougainville and brought into circulation since 2001.

Some of the issues involved here were discussed in the 2013 UN Report on Weapons Disposal. 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.

Further, weapons disposal issues will also be highly relevant to planning and decision-making about other aspects of the Referendum, and in particular about seeking to ensure that the constitutional requirement that it be 'free and fair' is met – issues discussed later in this paper.

***(e) 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). There is no such requirement in the BPA or the Constitutional Laws.

There are provisions concerning self-reliance in the Peace Agreement and the Constitutional laws. They relate, however, to the financial arrangements for autonomy, and 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. At that point, additional revenues from those three sources must be shared between the two governments.

Beyond that technical meaning of fiscal self-reliance, there is a broader meaning to the phrase, which relates to whether Bougainville has the financial resources to be self-reliant, whether for the purposes of autonomy or for independence. Neither meaning of fiscal self-reliance is a legal pre-condition to either the Referendum or independence. However, the broader meaning of that expression may nevertheless be an issue of some practical significance. It might well be an issue suitable for consideration in the course of consultations about agreeing the Referendum date (under subsection 338(2)).

## ***(f) 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 (page 6) (emphasis added).

## **2. Decision not to Hold the Referendum?**

The only way a decision can validly be made to stop the referendum being held is decision of the ABG (BPA paragraph 312(a) and PNG *Constitution* subsection 338(7)). The PNG *Constitution* provides:

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.

In terms of the intention of the BPA in relation to this requirement, as noted already 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, that such a period would be strictly limited (no later than the end of the five year window from the 10<sup>th</sup> to the 15<sup>th</sup> 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'. They argued that in such circumstances it would be wrong to force Bougainville to hold the Referendum. The response of the Bougainville negotiators was that they 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 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 helps

understand the provisions of both the BPA and the **Constitution** as to the clear guarantee that the holding of the referendum cannot be deferred by PNG beyond the 15<sup>th</sup> 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*. It requires 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 undertakes 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.

### **3. A Referendum on What?**

The *Constitution* requires that the referendum be 'on the future political status of Bougainville' (subsection 338(1)). That is the broad issue for the Referendum. It will be dealt with through the 'question or questions to be put' to those entitled to cast their votes. The 'question or questions' shall:

- 'be agreed by' the National Government and the ABG,
- 'be formulated to avoid a disputed or unclear result', and
- 'include a choice of a separate independence for Bougainville' (PNG *Constitution* section 339)).

The *Constitution* clearly permits more than one question being asked. Further, either a single question or a series of questions could offer choices of options, provided always that one of the options is independence.

The 2014 UNDP Report on Peace and Development argues 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. (page 28).

In fact, if the two governments agreed, there could be 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). Despite this possibility, it has been widely discussed in Bougainville that the Referendum is likely to involve a choice between independence and autonomy.

In terms of possible options that could be offered, they might include:

1. the current autonomy arrangements;

2. a level of autonomy greater than under the current arrangements;
3. free association with PNG;
4. independence to be gradually attained over a period of years;
5. deferring a decision on independence until after another referendum is held.

There could well be other options too.

There are, however, strong arguments against having multiple questions, or a single question or several questions that give voters a choice from more than two options for future political status. Unless framed with immense care, such questions would probably be a significant source of confusion for voters. Further, and in particular, choice from several options for the political future could make it hard to get a clear result. For example, if there were to be a choice from the five options listed above, it would be quite possible that each of them options would receive less than 50 per cent support.

In general, multiple questions and multiple options would probably fail to meet the requirement in the BBA and the PNG *Constitution* that the question or questions must ‘be formulated to avoid a disputed or unclear result’.

The 2014 UNDP Report on Peace and Development notes that

The importance of the need for clarity in the question or questions asked cannot be underestimated:

It is well understood that, deliberately or by carelessness, how the question is put can affect the result. When Australians were asked about the abolition of the monarchy, it is probable that a majority favored this step, but the question as framed faced them with a choice about how to replace the British monarch as head of state. This issue divided the republican vote. In Kenya in 2010 the question “Do you approve of the proposed constitution?” was arguably less clear than one showing that the choice was between the existing constitution and the proposed one. The U.K. electoral commission criticized a referendum on powers for the Welsh assembly for being ambiguous and using phrases (such as “devolved powers”) that people did not understand. (Brandt, Cottrell, Ghai and Regan 2011).

To date there has been almost no consideration about how the question or questions might be decided, nor of the possible options that might be included.

#### **4. A Referendum for Whom?**

The BPA 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 (Paragraph 315).

As elaborated in the *Organic Law*, Sch.1.23 and section 55, voting eligibility requirements for Bougainville residents are different from those for non-resident Bougainvilleans. Curiously, while basic eligibility requirements such as PNG citizenship and minimum age must be met for Bougainville residents to qualify to vote in the Referendum, such requirements are not specified for non-resident Bougainvilleans. Further, while the Referendum is commonly referred to as being for Bougainvilleans, that is not completely correct. Some non-Bougainvilleans resident in Bougainville will be entitled to vote.

***(a) Residents of Bougainville:***

The Rules allow enrolment by any person with a right to vote under the PNG *Constitution* (section 50) who has been resident in Bougainville for at least six months before lodging their claim for enrolment (Sch.1.23(1)(b)). This means that being a Bougainvillean (as defined in the *Bougainville Constitution*) is not required (a matter the subject of misconceptions in discussion on page 3 of the discussion paper on voter eligibility attached to the 2015 UN report on electoral scoping and Referendum preparations). Rather, a person must be a citizen of PNG that has reached the voting age (18 years), and must not be under a sentence of death or imprisonment for a period of more than 9 months, nor convicted in the 3 years prior to polling day of a prescribed electoral offence.

The issue of non-Bougainvilleans resident in Bougainville being able 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 key issue to be decided by the Referendum. The Bougainvillean negotiators accepted that point and agreed to such persons being entitled to vote.

***(b) Non-resident Bougainvilleans:***

‘Non-resident Bougainvilleans’ are to be entitled to enrol to vote, subject to meeting eligibility requirements yet to be negotiated. At the time the BPA was negotiated, the parties agreed to defer the question of the links to Bougainville that a non-resident Bougainvillean would require to be enrolled. So the *Organic Law* (subsection 55(1)) provides that before the date of the Referendum is agreed between the two governments, they must ‘consult and agree, in writing, on the detailed criteria to determine the link or links with Bougainville that a person (referred to in the Agreement as a ‘non-resident Bougainvillean’) must have in order to be entitled to vote at the Referendum’. Once agreed, the ‘criteria shall be notified in the Gazettes and in an available newspaper’ (subsection 55(2)).

Surprisingly, there is no provision at all about citizenship, age or other eligibility requirements to be met by non-resident Bougainvilleans seeking to enrol. This appears to be an oversight in the arrangements for the Referendum.

## **5. Establishing Voter Eligibility – Rolls of Voters**

The electoral system used in PNG since the first National election in 1963 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 given responsibility to conduct the Referendum to ‘determine the areas that in its view are most appropriate to be voting districts for the purposes of the Referendum including one or areas outside Bougainville to be voting districts for non-resident voters’ (Sch.1.12(1)). Existing PNG electorates or ABG constituencies 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 in so doing would need to adopt the rolls for National elections (as the rolls for ABG elections have slightly different eligibility requirements). However, the rolls for non-resident Bougainvillean voters will have to be developed for the purpose of the Referendum.

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. An overview of experience of problems with rolls of voters in PNG, with particular reference to Bougainville, is attached to this paper as an Appendix.

Problems with rolls of voters in some parts of PNG have extended to manipulation of the rolls with a view to impacting outcomes in particular ways. There are obvious possible avenues of manipulation of the rolls for the referendum. One concerns non-Bougainvilleans resident in Bougainville, particularly bearing in mind the minimal six months residence requirement. Another concerns issues involved in defining criteria in relation to non-resident Bougainvilleans, and in the process for enrolling such persons.

Clearly, it will be essential that the necessary time and resources are made available to the Agency responsible for conducting the Referendum to enable preparation of accurate rolls of voters, both for residents of Bougainville and for non-resident Bougainvilleans. Issues about accuracy of the rolls also arise when considering questions about considering whether the Referendum is ‘free and fair, as well as evaluating the results of the Referendum. They are discussed later in this paper.

## **6. Ballot-paper, & Method of Voting**

### ***(a) The ballot-paper:***

The only provision about the ballot-paper to be used in the Referendum is contained in the Schedule to the *Organic Law*. Curiously there is a difference between 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:

- (a) is to be 'in the form determined by the Agency [the Agency with responsibility to conduct the Referendum]'; and
- (b) '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 there is separate provision for postal and 'normal' ballot papers, and why Sch.1.75(1) makes separate provision in relation for the possibility of more than one question.

### ***(b) Method of Voting:***

Voting is required to be secret, Sch.1.85 ballot-papers being marked in private.

A voter will 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).

### ***(c) Postal Voting:***

The Schedule includes extensive provision for postal voting (Sch.1.46-62), even though from the 1990s postal voting had been done away with in PNG national elections, mainly because of the administrative complexity involved. For the Bougainville Referendum, it was agreed that if non-resident Bougainvilleans, in particular, were to have a realistic right to vote, it would be essential to have postal-voting available.

Postal voting was made available, in some circumstances, in the 2015 ABG general elections. Lessons learnt from that experience might be of value in assessing whether the rules on postal-voting might benefit from some revision.

## **7. The Agency to Conduct the Referendum**

The negotiators for the BPA agreed that the PNG Electoral Commission and a new electoral authority expected to be established when the ABG was established should 'be jointly responsible for conducting the referendum' (BPA paragraph 318). A joint PNG/Bougainville technical team oversaw the drafting

of the Constitutional Laws intended to give effect to the BPA. In elaborating paragraph 318 they agreed four sets of institutional arrangements that could be used as a possible vehicle through which the two electoral bodies could exercise the required joint responsibility:

- the PNG Electoral Commission;
- the Bougainville Electoral Commission;
- those two electoral authorities working together;
- a special purpose independent authority.

The *Organic Law* (subsection 56(2)) provides for a series of steps for:

- choosing from those four possibilities for what it describes as the 'Agency' to conduct the Referendum;
- providing for administrative and other arrangements for the operation of the Agency,

but always reflecting the joint responsibility of the two electoral authorities.

***(a) An 'agreement' on how the Referendum is to be conducted:***

First, the two governments and two electoral authorities are required to consult and reach an agreement 'on the administrative requirements for conducting the referendum' (subsection 56(1)), which:

- (a) must reflect the joint responsibility of the two electoral authorities;
- (b) must choose from the four possible institutional arrangements listed above as the Agency through which 'to implement the agreement;
- (c) must provide for the inclusion on provisions for the Agency to manage its own finances;
- (d) may provide for appropriate staffing and administrative arrangements;
- (e) may provide for one or more members of the management of whichever institutional arrangement is chosen to be a PNG or a Bougainville constitutional office-holder (subsection 56(2)).

***(b) An 'arrangement' on implementing the 'agreement':***

Second, the two electoral authorities are required to consult and develop 'a draft arrangement to implement an agreement under section 56'. The draft is subject to objection by either government. Once finalised it must be published in the PNG and ABG Gazettes, and 'an available newspaper'. In implementing the agreement, the purpose of the 'arrangement' is to spell out the ways that the two authorities will cooperate and work together through the chosen institutional arrangement.

Such an 'arrangement' might cover a range of issues, such as:

- The roles and contributions of the two electoral authorities;
- Staffing arrangements;
- Provision of expert advisers from international technical support bodies;
- Funding contributions of the National Government and the ABG, and of the two electoral authorities;
- Roles of donors.

The provisions of the ‘arrangement’ will also need to take account of the complex roles and responsibilities of the Agency as provided for in the Schedule to the *Organic Law*. They extend well beyond those that an electoral authority normally manages, including responsibilities for ‘promotion’ of the referendum – a matter discussed more later in this paper.

***(c) A ‘charter’ to establish a new independent Agency:***

Finally, if the choice of institutional arrangement in the agreement is an independent body, then it must be established by a Charter made under section 58 of the *Organic Law*. The point here is that if any of the other three institutional arrangements listed in subsection 56(2) is chosen, they will involve existing institutions, and so there will be no need for any instrument establishing an institution. But if the new independent body is envisaged, then the Charter will be required to establish it. The Charter should not need to deal with much more than structures and decision-making processes of the new institution, as most other key administrative arrangements should be in the agreement under section 56 and the arrangement under section 57.

Section 58 does not provide much guidance on what the charter should contain on establishing the possible independent Agency. Clearly there is no need for it to repeat any material already provided for adequately in the agreement under section 56 or the arrangement under section 57. But there are some obvious issues about which it will need to make clear provision. It would need to deal with structures of the independent Agency. For example, will it be a commission or something similar, and if so, what will its composition be? Who will head the Agency? How will it make decisions? What will be its sources of fiscal and other resources, and so on.

***(d) Has a valid decision been made to establish an independent authority?***

It has been widely understood that the ABG and the National Government have already chosen, through an October 2013 decision of the JSB, to establish an independent agency under section 58. This decision is said to have been

made by virtue of a JSB decision that ‘noted and endorsed’ the Joint Resolutions of the 2013 Review. The Resolutions in the 2013 Review included one that the Referendum should be conducted by an independent agency (Resolution 19.2, page 94). (The discussion paper on ‘The Independent Authority to Administer the Referendum’ attached to the 2015 UN report on electoral scoping and Referendum preparations states on page 5 that a ‘a decision to establish an Independent Administrative Agency to conduct the referendum’ had been made by the Joint Bougainville Referendum Committee. It is not clear what decision was being referred to there. More important, a decision of those committees could not meet the quite specific constitutional requirements for agreement between the two governments on the issues involved.)

The JSB resolution in question was in very broad terms. Under the heading ‘Update on referendum committee work’, it stated that the JSB:

6.1 Noted and endorsed draft final report of the joint review of the Bougainville autonomy arrangements and referred to the Referendum Committee for the development of a detailed implementation plan.

6.2 Noted endorsed the UN weapons Situation Report [the 2013 UN Report] and endorsed the Action Plan and referred it to the governments for implementation.

6.3. Noted and endorsed that both governments brief their respective cabinets.

The decision by the JSB to note and endorse the 2013 Review is expressed in the most general terms. None of the documentation presented to the JSB in October 2013 indicates that the attention of those participating in the JSB meeting was specifically drawn to the fact that the Report contained a resolution on the choice of Agency to conduct the Referendum. I have been unable to find any Bougainville Executive Council (BEC) documentation indicating that attention of the BEC was ever drawn to that fact, either before the October 2013 JSB meeting or since.

A more important point, however, is that in any event the JSB resolution noting and endorsing the 2013 Review Report clearly fails to meet the specific requirements for an agreement under section 56, set out in that section. Further, the analysis of the referendum arrangements in the 2013 Review was beyond the mandate of the joint review (PNG *Constitution* section 337), and there is no basis in the very general 2014 JSB resolution for any specific attention being paid to the need to give attention to the requirements of section 56.

It is clear, then, that no agreement has been made between the governments and electoral authorities meeting the requirements of section 56. As a result, there has yet to be a valid choice of the independent Agency as the body to

conduct the referendum. Further, even once an agreement is made, there is also a requirement for the administrative arrangement under section 57 to be prepared.

The two governments and the electoral authorities need to jointly consult and reach agreement as envisaged by section 56. (While subsection 56(3) allows the consultation for the purposes of subsection 56(1) to be just between either the two governments or the two electoral authorities, for the sake of ensuring a clear understanding, it would be preferable that all four are involved in the process.)

***(e) Powers & functions of the Agency:***

The powers and functions of the institution to conduct the Referendum (which the *Organic Law* – including the Schedule – describes as ‘the Agency’) are set out already in the Schedule.

***(f) Resources for the Agency to conduct the Referendum:***

The schedule to the *Organic Law* provides:

It is the duty of the Governments, 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)).

***(g) Requirements of independence and impartiality of the Agency:***

The independence of the Agency with responsibility to conduct the Referendum is protected, section 59 of the *Organic Law* providing that the Agency is ‘not subject to direction by any person including the National Government or the Bougainville Government’. Independence will be a vitally important attribute for the Agency. That consideration is undoubtedly why there has been some consensus on the need for the Agency to be an independent body, 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)).

## **8. Awareness & Information**

In most referenda, the awareness and information provided to voters is a matter of great importance. People need balanced and accurate information if they are to make informed choices about difficult and potentially divisive

issues. So the content of, and the way information is distributed in a referendum can become significant issues. The information people need at is likely to change depending on the stage of the process. For example:

- (a) At the stage before serious preparation for the Referendum begins, people probably need general information about the BPA, what it says about the referendum, and about the nature of referenda generally.
- (b) Later there will probably a need for awareness about issues that need to be consulted about and agreed with the National Government (such as the Referendum date, the question or questions to be asked, the connections with Bougainville required for enrolment of non-resident Bougainvilleans, and so on).
- (c) Still later, there will probably be a need for comprehensive awareness about enrolment to vote in the election, information that will need to be different for potential voters in Bougainville and for non-resident Bougainvilleans.
- (d) As the date for the Referendum approaches, there'll be a need for balanced information on the cases for the main different positions on the question or questions to be asked.
- (e) There will also be a need for information about how to vote in the Referendum.
- (f) In the interests of avoiding conflict over the result of the information, it will be important that voters understand that the outcome of the Referendum is not binding on the National Government, and also about issues concerning possible transition in Bougainville after the Referendum.

In the interests of ensuring provision of balanced and accurate information, independent bodies responsible for conduct of referenda often are given responsibilities for provision of such information.

Under Sch.1.9 of the *Organic Law*, the roles of the Agency with responsibility for conduct of the Referendum include:

- Promotion of informed debate on each side of the question or questions to be put in the referendum;
- Encouraging wider public interest and involvement in ensuring that the referendum is free and fair;
- Holding public meetings, and distributing literature to raise public awareness about the referendum question, and the need for the referendum to be free and fair;

- Developing a policy for promoting public involvement, including criteria for recognition of groups whose members have a common interest in the referendum.

These provisions do not give the Agency a monopoly in promotion of public debate and provision of information, but they do provide it with important roles.

There are important issues still to be considered in detail about ensuring that information relating to the referendum is fair and balanced. Issues also arise about the need for accuracy and consistency in awareness and consultation information. Already there are reports of some presenters of awareness on referendum issues working with NGOs giving incorrect or confusing information. There may be a need for coordination of awareness and consultation efforts.

## **9. The Rules on Conduct of the Referendum**

The rules in the Schedule to the *Organic Law* are long and detailed. They cover both:

- (a) electoral process aspects of the referendum; and
- (b) some more political aspects (especially in relation to roles in awareness).

In relation to electoral process matters, the rules provide for a wide range of matters of a kind normally dealt with in an electoral law, including:

- dividing Bougainville into electoral districts;
- enrolment of voters;
- preparing rolls of voters;
- appointment of polling places;
- appointment of returning officers
- issue of a writ for the Referendum;
- postal voting;
- provision of directions to returning officers on polling schedules;
- provision of ballot-boxes;
- the conduct of polling;
- conduct of the scrutiny;
- reporting the Referendum results, and the return of the writ;
- illegal practices;
- disputed returns.

### (a) *Gaps or other Problems in the Rules?*

The provisions of the constitutional laws and the Rules are intended to be as extensive as was possible to decide at the time immediately after the BPA was negotiated. But it was also recognized that:

- a number of key issues could not be resolved at the time, and had to be left to later processes; and
- that 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;
  - problems identified and lessons learned through the conduct of both PNG and ABG elections might highlight the potential for improvements or changes to the rules.

Concerning issues left to later processes, some have already been noted (determining the question to be asked, setting the date, deciding if the criteria to be considered in setting the date have been met, deciding criteria for links that non-resident Bougainvilleans must demonstrate to qualify to enrol, deciding the agency that should conduct the referendum). There are others as well. Many of these are major issues, where there could be considerable difficulty in reaching decisions. There was little option, however, but to leave them to later processes. As with all other aspects of the arrangements, the PNG *Constitution* does provide that any differences between the two governments about any aspect of the Referendum arrangements shall be resolved through the dispute resolution procedure also set out in the PNG *Constitution* (section 343).

Concerning difficulties arising from gaps, errors etc., the *Organic Law* provides two possible remedies. First, the Courts, the two Governments or the Agency chosen to conduct the referendum can resolve any difficulty arising from them, in the light of the primary sources (PNG *Constitution* and the BPA) and ‘by way of analogy from relevant laws’. Second, in relation to ‘matters that cannot be anticipated at the time of making this law [Part XIV of the PNG *Constitution*]’, either government can make laws, but only after both consultation and agreement with the other.

## **10. Planning for & Conducting the Referendum**

Close examination of the source documents, and especially the Rules, highlights many issues that will need to be resolved in planning for and

conducting the referendum. Once choice of the Agency is made, it will need to be staffed and resources provided to it, and staff will need to be trained.

Under the Rules numerous steps are specified, most of them similar to those required for an election. But there will also be many differences to the requirements applicable any National or Bougainville election.

The steps will include:

- a. determining the voting districts for the purposes of the referendum, which they will be the basis for voter rolls and for polling (Rules section schedule 1.12-1.14);
- b. developing the most accurate possible voter roll for each voting district;
- c. enrolling non-resident Bougainvilleans all over PNG, and presumably those residing overseas;
- d. organizing awareness about both the conduct of the referendum, and about the issues to be decided in it;
- e. establishing polling booths, in Bougainville and perhaps elsewhere in PNG;
- f. setting up arrangements to handle postal ballots (as provided for in the Rules);
- g. making arrangements for international observers to be invited and facilitated;
- h. managing the scrutiny of the ballots, including possible recounts;
- i. maintaining security of the polling and scrutiny, and of the ballot papers following the scrutiny;
- j. handling the release of the results.

Clearly there are many capacity, planning, resource and similar issues that will require careful consideration well in advance of the referendum. Such considerations might suggest, amongst other things, the need to move quickly to establish the Agency and provide it with necessary resources.

## **11. 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.

A wide range of issues 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 since at least 2002 (as discussed earlier).

***(a) Weapons disposal - again:***

Is it likely that the continued presence of weapons in communities at their present level 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 since 2002, there's 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. First, 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. (page 17).

Second, 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 independence was denied. Assuming that such reports are true, some Bougainvilleans fear that there are former combatants ready to use weapons again. Third, 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 being 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 (page 28).

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

***(b) 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 earlier in this paper. 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. As discussed in the Appendix, 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. First, 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 per cent or 60 per cent turnout (even though any 'threshold' here will be informal). Second, as the number of names on the roll will be the basis for allocation of ballot papers to each voting district (and polling booth), inflated rolls can make excess ballot papers available, which can provide avenues for misuse of the excess papers. Any possible misuse of this kind could seriously erode confidence in the referendum being free and fair.

## **12. How Will the Referendum Result be Determined?**

### ***(a) Counting, & declaring the result:***

The result of the Referendum will be determined in much the same way as the results of a PNG or ABG parliamentary election are determined. The required steps under the Schedule to the *Organic Law* are:

- (a) conducting processes for each 'voting district' of 'scrutiny' of all ballot-papers cast for that 'district' (see Sch.1.94-1.119 of the *Organic Law*), which, amongst other things involves excluding informal ballot papers;
- (b) counting the valid (formal) ballot papers in each 'voting district', in much the same way as in an election, but in this case it 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);
- (c) the Returning Officer for each voting district notifying the Agency conducting the Referendum of the result for that district, upon which the Agency will be required to 'calculate the total number of votes given for each choice' in the question or questions asked (Sch.1.123);
- (d) the Agency publishing the results, which will include:
  - i. officially returning 'the writ' for the Referendum to the PNG Head of State (the Governor-General) with the results written on it;

- ii. publishing the results in both the PNG and Bougainville Gazettes, and in an 'available newspaper'; and
- iii. publicly declaring the result, which must occur as soon as convenient after the result has been 'ascertained' (Sch.1.123).

***(b) Challenging the Results:***

Under the Rules, the results of the referendum can be challenged in the National Court, by either the Agency or any voter, in much the same way as an election result can be challenged in a Court of Disputed Returns. The availability of such a process could add to the complexity and other difficulties of management of the process.

***(c) Roles of voter 'turnout' levels, & voter support for particular choices:***

For some referenda, minimum levels of voter turnout (i.e. the proportion of enrolled voters actually voting) are required for a referendum outcome to be valid. This is sometimes called a ***participation threshold***. 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, in some cases a minimum proportion of votes in favour is required for a valid outcome – sometimes called a ***result threshold***. Most commonly it is just one more than 50 per cent of votes cast (as was the case for the referenda in Eritrea, Timor, South Sudan and Scotland). There are cases, however, where a higher percentage is required.

One important aim of requirements for thresholds over 50 per cent is to reduce the chances of very divisive outcomes, as can occur where there are large minorities unhappy with the outcome.

The initial 'combined' Bougainville negotiating position in June 1999 was that if the outcome of the proposed referendum, in relation to the central question - independence - was to be binding it would be important that the result of the referendum should be clear. There was concern that, for example, a bare majority of say 51 per cent in favour of independence could be divisive for Bougainvilleans. It was therefore proposed that:

- (a) there could be no binding outcome unless there was a vote of 66 per cent or more, one way or the other; and
- (b) that in the absence of such a majority, Bougainville should have the option of holding a second referendum.

Similar provisions in New Caledonia's 1998 Noumea Accord were advanced as a precedent. PNG's negotiators were vehemently opposed to considering the

possibility of more than one referendum, and the proposals were abandoned as part of Bougainville efforts to find an acceptable compromise.

With the acceptance of the Downer compromise formulation that made the outcome non-binding, 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 of a required voter turnout level, or the percentage vote required in relation to a referendum result.

For both Governments, and the international community, however, issues about majorities for particular questions could be crucial. The issues considered here could include voter turnout (and the accuracy of the rolls), as well as whether or not the process has been free and fair.

When considering results of the referendum, there could be crucial issues arising about the percentage of voters supporting or opposing particular options put. In considering such issues, questions about voter turnout could be vital, and here also the accuracy of the roll would be a critical consideration. In this connection, the data presented in the following table 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 – see the Appendix to this paper) 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.

<b>Voter Turnout in Bougainville 2002-2015</b>			
<b>National Elections and Bougainville-wide ABG Elections</b>			
<b>Election</b>	<b>Total enrolled</b>	<b>Votes cast</b>	<b>“Turnout” Votes as % of Roll</b>
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%

This data suggests a major need not just to ensure the accuracy of the rolls, but to encourage much greater proportions of Bougainvilleans to vote, if there is

to be a truly representative reflection of the wishes of Bougainvilleans in the referendum, widely accepted as being credible and legitimate.

### **13. Is the Outcome Binding on the Governments?**

#### ***(a) The BPA & Constitutional Law provisions:***

The BPA provides:

- (a) The amendments [to the PNG Constitution] will provide that the outcome will be **subject to ratification (final decision-making authority) of the National Parliament.**
- (b) The autonomous Bougainville Government and the National Government will consult over the results of the referendum (paragraph 312) (emphasis added).

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) make it clear that ‘ratification’ here is intended to reflect the agreement reached between the BPA parties as a result of Downer’s mediation (above), and so clearly mean 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*. The PNG *Constitution* (section 342) states:

- (1) The National Government and the Bougainville Government shall consult over the results of the Referendum.
- (2) Subject to the consultation referred to in Subsection (1), the Minister responsible for the Bougainville Referendum shall take the results of the Referendum to 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.

There is no specific requirement in section 342, or anywhere else, that the Parliament must make a decision on the outcome, or must do so within a specified time. If there is a decision made that the ABG disagrees with, it could presumably be dealt with through the dispute resolution process (see section 343).

There remains also the issue of Alexander Downer’s assurances to the Bougainville leaders 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).

The silence of the BPA and the *Constitution* 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 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 in fact happen next.

***(b) Why no provision for a binding outcome?***

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 the then Australian Minister for Foreign Affairs, Alexander Downer, as outlined elsewhere in this paper.

***(c) Widespread expectation that a 'Yes' vote results in independence:***

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 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.

### **13. 'Implementation' of the Results of the Referendum**

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.

### **14. Transition**

The documents 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.

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.

Further, much improved awareness amongst Bougainvilleans about the role of fiscal self-reliance and 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 could 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.

## **15. Status of the BPA After 2020**

There is some uncertainty (as mentioned earlier in this paper) about whether the BPA, and the Constitutional Laws giving effect to it, lapse after 2020. The question here concerns what happens if there is no decision on the outcome of the Referendum at the end of the five year 'window' within which the Referendum must be held. The fear is that in the absence of specific provision as to what happens in such circumstances, 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 should no decision be made.

However, the existence of such concerns points again to the need for awareness about the Referendum.

## **16. Consultation: Issues, Timing, Mechanism & Characteristics**

As already noted, the BPA and the Constitutional Laws leave some critically important issues concerning the Referendum to be dealt with by consultation and agreement between the two governments. Most of those issues also involve matters of considerable political sensitivity for Bougainville. As a result, it will generally be necessary to ensure that there is a considerable amount of awareness and consultation carried out amongst Bougainvilleans on such issues in advance of consultation with the National Government.

### **(a) The Key issues:**

The arrangements under the BPA and the various constitutional laws deliberately left key matters about the arrangements for the conduct of the Referendum to be decided by consultation and joint decision between the parties. The main ones are:

1. Setting the Referendum date, which will include consultation on:
  - (a) Whether weapons have been disposed of in accordance with the Agreement;
  - (b) Good governance;
  - (c) Any other issues that are raised under PNG *Constitution* subsection 338(2);
2. Criteria to determine the links with Bougainville that a non-resident Bougainvillean must have to be enrolled to vote in the referendum;
3. The agreement and the arrangement in relation to joint responsibility etc. of the two electoral authorities for the conduct of the Referendum, and, if provided for in the agreement, the charter needed to establish an independent agency;
4. Provision of resources necessary for the conduct of the Referendum;
5. The question or questions to be asked in the referendum.
6. Reviewing and dealing with any gaps or changes needed to the rules for conduct of the Referendum.

There may also be a range of major issues where although consultation is not mandatory, it could be important in terms of reducing the risks of tensions and conflict after the referendum. One obvious area would be that of the options in relation to transition for Bougainville after the Referendum.

After the referendum, there will be requirements, or a need, for consultation about critically important issues, including:

1. Whether or not the Referendum has been free and fair;
2. Any challenge to the results of the referendum;

3. Any outcome of, or decision made, in any debate in the PNG Parliament on the Referendum results;
4. Implementation of any decision of the PNG Parliament or any consequential agreement between the two governments.

***(b) Awareness of, & consultation with, Bougainvilleans:***

Issues such as date of the referendum, whether weapons have been disposed of in accordance with the Agreement, whether good governance is being achieved, the eligibility criteria for enrolment of non-resident Bougainvilleans, and the question or questions to be asked in the referendum (as well as other issues) are ones about which many Bougainvilleans have strong interest and, in some instances, opposing positions. Some of the issues will be of concern to many Bougainvilleans, both those living in and those outside Bougainville. Others – such as the eligibility criteria for enrolment of non-resident Bougainvilleans – might be of particularly strong interest to the non-resident communities.

The ABG (inclusive of the President, Vice-President, BEC, Department of Referendum, Veterans and Peace and OBEC) will need to give careful and ongoing consideration to how best to provide awareness and to consult to the extent necessary to ensure that the issues involved are well understood and do not cause division and conflict.

***(c) Mode of consultation with the National Government:***

The Constitutional Laws provide some guidance about how consultation should occur concerning the numerous aspects of the Referendum arrangements where issues are left to later consultation between the governments. As many of these are of critical importance, 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 (i.e. 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. As yet, however, the committee has not been required to make decisions on substantive issues on which consultation is required.

Concerning the mechanism to be used for consultation, section 332 of the PNG *Constitution* provides 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 as stated in the BPA (paragraph 269) have been incorporated into Part XIV of the PNG *Constitution* (subsection 278(2)), which provides that where the *Constitution* or the *Organic Law* provides for consultation, it shall be conducted on the following basis:

1. views to be communicated in a timely manner in writing or electronic equivalent to a 'specified point of contact';
2. adequate opportunity to respond in similar manner;
3. 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;
4. a clear written record of the outcomes of the consultation is to be prepared and made available for all parties.

***(c) Where no agreement is reached:***

In such cases, the multi-stage intergovernmental dispute resolution process provided for in the PNG Constitution is available to the two governments.

## **G. PREPARATORY WORK UNDERTAKEN SO FAR**

Work to prepare for the Referendum began in 2009-10, with the establishing of the Joint Bougainville Referendum Committee. The discussions in that Committee have contributed to improved understanding of Referendum issues amongst the limited numbers of personnel and agencies involved. Further, that Committee has been involved in the commissioning of the 2013 UN Report on Weapons Disposal, the 2014 Review of Constitutional and Legal Issues, and the 2014 Report on Work-streams required for preparation for the Referendum.

Other important work towards preparation includes various aspects of 2013 Autonomy Review Report, and the material in the consultations with and views of Bougainvilleans contained in the 2014 UNDP Peace and Development Report.

A significant problem to date with the work of the Joint Committee and its Joint Technical Working Group has been the lack of any organisation, such as a secretariat, to implement decisions of and recommendations in reports to those bodies. This problem was identified in the October 2014 Work-streams Report. It recommended the setting up of a small joint National Government/ABG secretariat to coordinate efforts to begin work on each of the seven work-streams identified in the Report. No such joint secretariat has yet been established. Even though the Report made sensible recommendations about the main initial tasks involved in each work-stream, as well as timetable, resources and other issues, in the 18 months since the report was completed almost nothing recommended has been done. A major factor in the lack of action continues to be the absence of a joint implementation agency.

In whatever period remains before the Agency to conduct the Referendum is established, the lack of any form of joint implementation body is likely to remain a serious obstacle to coherent and coordinated action to prepare for the Referendum.

## **H. ENGAGING NON-RESIDENT BOUGAINVILLEANS**

There are aspects of both process for holding the referendum and the issues at stake in the Referendum that can be expected to be of special concern to non-resident Bougainvilleans. Particular attention may be needed to ensuring that programs and processes for awareness and consultation take account of their likely interests and concerns.

### **1. Process issues**

The most obvious issues concern the criteria for eligibility of non-resident Bougainvilleans to vote in the Referendum. While the *Organic Law* (section 56) requires consultation between the two governments to reach written agreement on 'the detailed criteria to determine the link or links with Bougainville' necessary for enrolment, it will clearly be most important that the ABG conducts consultation with non-resident Bougainville communities to seek their views on the issues involved.

Other issues about the process, such as the Referendum date (and associated issues about weapons disposal and good governance), the question or questions to be asked, and other matters are also likely to be of great interest to non-resident Bougainvilleans.

## 2. Issues at Stake in the Referendum

The choice between independence of Bougainville from PNG, and options involving Bougainville's continued integration into PNG clearly may have particular significance for non-resident Bougainvillea communities. That suggests there may be special needs for provision of awareness to such communities, and for consultation with them on critical issues, such as the question or questions to be asked, and the outcome of the referendum.

### I. GENDER ISSUES

The 2014 UNDP Report on Peace and Development 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, 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 (page 22) (emphasis added).

While valid criticisms can be made of some aspects of this assessment, in large part it rings true. It is an assessment which should sound warnings in relation to preparation for and conduct of the Referendum. Obvious questions that might be asked include:

- (a) To what extent are women being included in planning for preparation of the Referendum, including for the widespread public awareness and consultation programs that will need to be part of the preparations?

- (b) To what extent will awareness and consultation seek to engage direct with women and women's organisations both at the local and Bougainville levels?
- (c) To what extent will 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?
- (d) To what extent will attention be given to the obstacles that often prevent women from participating fully in all aspects of electoral processes?

## **J. SOME KEY RISKS IN THE PROCESS**

The Introduction to this paper noted some risks, or dangers, commonly associated with referenda used to resolve deeply divisive issues, such as those associated with possible separation of part of country. It should be clear that all of those risks are applicable to Bougainville. In particular:

- (a) Referenda are complex and expensive, and so can be difficult to conduct, especially where there are serious funding and capacity limits:* There is no doubt that there are serious constraints applicable to both PNG and the ABG. There are particular risks that problems caused by such constraints can cause delays and serious frustration that could contribute to conflict.
- (b) Referenda can be divisive in preparation, conduct and implementation:* The perceived threat to PNG sovereignty and the fears that some Bougainvilleans may have of what might occur under independence, and the limited understanding that many people on all sides have of the arrangements are all things that could contribute to even Referendum preparations being quite divisive.
- (c) Political leaders can contribute to division and conflict by misleading and divisive campaigns, and may be tempted to influence results by manipulation of the process and voter intimidation:* There is yet to be any evidence of such problems in Bougainville, but clearly it remains a risk as the time of the holding of the Referendum approaches.
- (d) A referendum can contribute to conflict particularly if a substantial minority in an already divided place feels aggrieved by the result:* In the light of the divisions amongst Bougainvilleans during the conflict, this remains a possibly serious risk.
- (e) A referendum where independence is an option involves a major decision made at a particular time when imperfect information is available on*

*what the future will be:* Bougainvilleans in general have limited understanding of the financial, institutional, and capacity needs of an independent Bougainville, and the ability of the Bougainville economy to provide the basis for the necessary degree of fiscal self-reliance.

The 2014 UNDP Peace and Development Report identifies and discusses a range of related risks, and risk scenarios that it suggests need to be taken into account in preparing for the Referendum

## **K. 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:

- (a) 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);
- (b) 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);
- (c) Whether the rolls of voters provide an accurate basis for determining voter turnout, and the proportions of voters supporting particular options;
- (d) Whether the results indicate strong support for the preferred outcome (and in all three regions), or show a significant minority (perhaps concentrated in one region) unhappy with the results.

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.

## L. CONCLUSIONS

The matters discussed in this paper 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 is such as likely to contribute to tensions and even violence if not addressed through extensive awareness and consultation programs.

The tasks involved in preparation for the Referendum will be numerous and (in many respects) complex. Many will involve consultation and agreement between the two governments. There will also be a necessity for prior awareness and consultation involving Bougainvillean communities before the ABG engages with the National Government in relation to such issues.

Despite the extent of the preparatory efforts required, very little has been done to initiate most of the necessary steps arising from the legal arrangements. If the Referendum is to be held before the end of the five year window (mid-2020), it is becoming increasingly urgent that preparatory work begin soon. The most obvious practical steps would involve establishing both:

- (a) the joint secretariat for implementation of decisions of the JSB, the Joint Bougainville Referendum Committee, and the Joint Technical working Group; and
- (b) the Agency required to conduct the Referendum.

Establishing the Agency is of particular importance because as an independent body, there will be much that it can do without the need for approval from either government, subject mainly to the availability of resources necessary to begin its work.

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## Appendix

### Experience of Rolls of Voters in Elections in Bougainville

**From: Nicole Haley and Anthony Regan “Bougainville Democratic Governance: Desktop Analysis”, 18 March 2014**

The main failing in relation to the conduct of both the ABG election and recent PNG general elections has however been the parlous state of the electoral roll. Indeed voters, observers and commentators alike have highlighted a lack of integrity with respect to the electoral roll as well as flawed voter registration and verification processes (see PIFS 2005; Gelu 2007; Haley and Anere 2009; PIFS 2010; Kelly 2010). As noted above the electoral roll needs to be addressed as a matter of urgency.

...

Voter qualifications for ABG elections enable PNG citizens who are Bougainvilleans (as defined in the Bougainville Constitution) but who are not resident in Bougainville to enrol to vote in the constituency of their birth, and the *Bougainville Elections Act 2007* provides for the BEC to make reasonable provision for voting by Bougainvilleans outside Bougainville. Further, citizens of PNG resident in Bougainville and qualified to vote in PNG National elections who are not Bougainvilleans (as defined in the Bougainville Constitution) are not qualified to vote in ABG elections. As a result the qualifications for enrolment for ABG elections are different from those for National elections.

We understand that in practice, the differences in qualifications are not always well understood by those carrying out enrolment exercises, and in any event rolls prepared for earlier National elections have so far been used as the basis for preparation of ABG rolls for the 2005 and 2010 elections. In addition supplementary rolls have also been utilised at polling stations. In the case of the 2005 ARB elections, for example, the BEC gave relief to use the “working roll”, namely the roll used in the 2002 PNG general elections (PIFS:4).

By all accounts the electoral rolls for both the National and ABG elections are seriously flawed. The ABG electoral roll is in need of cleaning and updating ahead of the ABG

elections. Further, to meet constitutional requirements (and reduce risks of challenges to rolls), it will be important that the preparation of the rolls for 2015 takes careful account of the Bougainville Constitution provisions on qualifications for enrolment for ABG elections. In the absence of a rigorous audit it is difficult to be sure of the full extent of the problems with existing ABG election rolls. In the course of the 2012 PNG general elections, however, it was reported that “Bougainville President John Momis and his wife are among prominent Bougainville citizens whose names are missing from the common roll” (The National 28 June 2012).

What is known from the Thelma Oberdorf’s<sup>2</sup> impressive roll work is that the PNGEC’s 2012 electoral roll for Bougainville listed 1200 electors with only one name (no surname or father’s name) and over 1000 whose family name was a female given name. Whilst parts of Bougainville are matrilineal such naming practices are certainly not customary.

The 2012 rolls for Bougainville also contained the names of 36 electors over 100 years old, including one who was 2000 and another who was 948 (Oberdorf, Pers. Com. March 2014). This suggests serious flaws with the roll verification processes, quite separate to any enrolment problems.

Indeed the creation of an accurate electoral roll is the most significant administrative challenge for the BEC, not least because the rolls have been developed using PNGEC procedures which have been found wanting. In many respects the credibility of the 2015 ARB elections and the referendum will depend on the accuracy of the electoral roll.

Observations and analysis of the PNG electoral roll has shown that over enrolment and under enrolment often occur side by side, and that manipulation of the roll is a particularly effective way of disenfranchising blocks of voters, and/or supporters of particular candidates (Haley and Anere 2009; Haley and Zubrinich 2013). Given the paucity of research on elections in Bougainville, we cannot be sure if this sort of manipulation is occurring and if it is, the extent to which it is occurring.

Certainly the 2010 PIFS Observation Team reported regular instances in which individuals were denied the vote on the basis that their name could not be found on the roll despite low voter turnout. Similar reports emerged in the course of the 2012 PNG general elections. It is also the case that in the lead-up to the 2012 PNG general elections there were significant additions and deletions (in the order of 1000 enrolments) to the electoral rolls for some wards (constituencies for the purposes of the ABG elections) against a backdrop of average ward enrolments of 4500. Specifically there were net increases of 1046 and 1019 in the enrolments for Ioro and Kokoda wards in Central Bougainville and increases of 1251 and 712 for Konnou and Makis wards in South Bougainville and net decreases of 1318, 964 and 722 in Rau, Nissan and Taonita Tinputz wards respectively (see Table 1). Variations of this kind certainly warrant further investigation.

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<sup>2</sup> Thelma Oberdorf is an Australian Electoral Commission (AEC) electoral roll expert. She was deployed to PNG in the lead up to both the 2007 and 2012 general elections, and is one of the AEC officers currently posted to the PNGEC. She provided the data contained in tables 1 and 2 below.

**Table 1: Updates to the Bougainville electoral roll in the lead up to the 2012 PNG general elections**

District	LLG	Ward	Working Roll	Total Deletions	Total Additions	Final Roll	Net Variation
Central Bougainville	Kieta	Eivo/Torau	6584	1140	886	6330	-254
Central Bougainville	Kieta	Ioro	4442	477	1523	5488	1046
Central Bougainville	Kieta	Kokoda	2770	98	1117	3789	1019
Central Bougainville	Kieta	Kongara	3276	415	801	3662	386
Central Bougainville	Kieta	North Nasioi	8018	989	952	7981	-37
Central Bougainville	Kieta	South Nasioi	3235	517	840	3558	323
Central Bougainville	Wakunai	Rau	5464	1852	534	4146	-1318
Central Bougainville	Wakunai	Terra	4576	889	1282	4969	393
North Bougainville	Atolls	Atolls	1729	531	361	1559	-170
North Bougainville	Buka	Hagogohe	3966	570	323	3719	-247
North Bougainville	Buka	Haku	6290	1219	796	5867	-423
North Bougainville	Buka	Halia	5256	1193	802	4865	-391
North Bougainville	Buka	Peit	6649	1611	1340	6378	-271
North Bougainville	Buka	Tonsu	3117	703	479	2893	-224
North Bougainville	Buka	Tsitalato	6708	1946	2118	6880	172
North Bougainville	Kunua	Mahari	3134	215	473	3392	258
North Bougainville	Kunua	Teua	4311	409	995	4897	586
North Bougainville	Nissan	Nissan	4108	1416	452	3144	-964
North Bougainville	Selau/Suir	Selau	6296	1260	855	5891	-405
North Bougainville	Selau/Suir	Suir	3145	806	642	2981	-164
North Bougainville	Tinputz	Taonita Teop	4334	1518	1448	4264	-70
North Bougainville	Tinputz	Taonita Tinputz	6008	1903	1181	5286	-722
South Bougainville	Bana	Baba	2812	866	1223	3169	357
South Bougainville	Bana	Bolave	4778	760	1185	5203	425
South Bougainville	Bana	Lato	5020	1476	1501	5045	25
South Bougainville	Buin	Baubake	4664	989	910	4585	-79
South Bougainville	Buin	Konnou	5922	1073	2324	7173	1251
South Bougainville	Buin	Lule	4331	1215	1487	4603	272
South Bougainville	Buin	Makis	3627	848	1560	4339	712
South Bougainville	Siwai	Kopii	4978	1372	1178	4784	-194
South Bougainville	Siwai	Motuna	4472	905	1402	4969	497
South Bougainville	Siwai	Ramu	2199	642	517	2074	-125
South Bougainville	Torokina	Torokina	3098	542	620	3176	78

Over-enrolment and under-enrolment will both impact upon the credibility of the 2015 ABG elections and more importantly upon the forthcoming referendum. Ideally a credible election/referendum would be one in which there is high voter turnout, few would-be voters turned away, and in which there are few claims of fraud and malpractice, in the form of multiple voting, underage voting and outside voting.

Electoral malfeasance of this kind has been facilitated in recent PNG elections by the poor state of the electoral roll (Haley and Zubrinich 2013). The electoral roll provides the basis on which ballot papers are allocated, and an inflated roll gives rise to excess ballot papers. Elsewhere in PNG we have also seen in recent elections, enterprising candidates ship/bus in outsiders to complete excess ballot papers to their advantage. The potential misuse of excess ballots represents a significant risk in relation to the credibility of the forthcoming referendum.

Based on the 2011 census figures, the electoral rolls for Bougainville appear to be significantly inflated (see Table 2, below). Indeed the 2011 census recorded a voting age population (17 years+) of 124,784, while the 2012 electoral rolls contained 151,793 names. In other words the rolls were seemingly inflated by 22%. On the other hand, it's also quite likely that the 2011 census figures are inaccurate, with population figures considerably lower than they should be. If so, then enrolled voter figures are likely to be more accurate, but voter turn-out (Table 3, below) would be worryingly low. Alternatively, if the rolls are artificially inflated, that too depresses voter turnout.

<b>Electorate</b>	<b>Declared</b>	<b>17 years+ 2011 Census</b>	<b>Total enrolled 2012</b>	<b>% Variance</b>	<b>Votes cast</b>	<b>“Turnout” Votes as % of Roll</b>
Central Bougainville	Jimmy Miringtoro	32,486	40,468	25%	16101	40%
North Bougainville	Louta Atoi	52,075	61,322	18%	33598	55%
South Bougainville	Steven Pirika	40,223	50,003	24%	24192	47%
<b>Bougainville Provincial</b>	<b>Joe Lera</b>	<b>124,784</b>	<b>151,793</b>	<b>22%</b>	<b>73886</b>	<b>49%</b>

Voter turnout in respect of the 2012 PNG general elections was officially 49%, but may have in fact been in the order of 59% if measured against the census population. Historically voter turnout has been higher in ABG elections than in PNG elections, although turnout in the 2012 PNG general elections showed significant improvement on earlier PNG elections (see the Table in the body of this paper).

Ensuring accuracy in measuring voter is particularly significant in the Bougainville case as the PNG government and indeed the broader international community will no doubt consider voter turnout when assessing the credibility of and nature of the mandate arising from the forthcoming referendum.