



# Department of Pacific Affairs

## The Bougainville Referendum Arrangements: Origins, Shaping and Implementation Part Two: Shaping and Implementation

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Having considered the origins and aspects of the shaping of the referendum arrangements in the first of these paired Discussion Papers, this paper presents an overview of the arrangements for the referendum as set out in the [Bougainville Peace Agreement](#) (BPA)<sup>1</sup> and the constitutional laws that give effect to that agreement. The arrangements include not only detailed provisions about the way in which the referendum is to be conducted, but also provision for agreement between the national government and the Autonomous Bougainville Government (ABG) in the lead up to the referendum on critical aspects of the referendum that the BPA deliberately left to later decision-making processes. These include issues of central importance in a referendum, such as which agency will have responsibility to conduct the referendum, the qualifications for voting by Bougainvilleans who are not resident in Bougainville, the question or questions to be asked in the referendum, the date of the referendum, and decisions about implementation of the outcome of the referendum. In general, the arrangements for the referendum are not well understood, in part because they were negotiated some 17 years ago, but also because they are scattered through different documents and are inherently complex. As a result, some serious misconceptions have emerged about key aspects of the arrangements.

Hence this second Discussion Paper seeks to not only clarify some of the complexity of the arrangements, but also to address a few major misunderstandings that have arisen in recent public debates about the referendum arrangements. It also provides an overview of some of the developing activity towards the holding of the referendum. Further, it interrogates the mixed messages about the referendum

emanating from Papua New Guinea (PNG) Prime Minister Peter O'Neill from late 2017, a period in which he has not only on several occasions:

- publicly promised that the referendum arrangements will be honoured in full by the national government (for example, *PNG Post-Courier* 19/3/2018; *The National* 3/5/2018 and 24/5/2018);
- promised that the referendum will not only be held but will be held on the 'target date of June 2019' (*PNG Post-Courier* 6/4/2018; *The National* 24/5/2018);

but has also:

- claimed that the referendum will not be about independence (*PNG Post-Courier* 8/5/2018; *The National* 3/5/2018); and
- implied that the referendum could be delayed beyond June 2020 in a number of statements, indicating that weapons disposal and attaining standards of good governance are prerequisites for the holding of the referendum (Tlozek 2017; *PNG Post-Courier* 8/3/2018).

Against this background, the paper asks whether the referendum arrangements have contributed to — and are likely in the future to contribute to — peace in Bougainville as was intended by their inclusion in the BPA.

### Where are the arrangements located?

The referendum arrangements are set out in several separate but closely related existing documents. In addition three other categories of document envisaged by the constitutional laws could also be used to make additional provision.

The main existing documents are [Part XIV of the Constitution of the Independent State of Papua New Guinea](#) (the Bougainville Government and Bougainville Referendum); [the Organic Law on Peace-building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum 2002](#) (the organic law) and [the Constitution of the Autonomous Region of Bougainville 2004](#). The provisions in the PNG constitution are a brief statement of the main principles governing the conduct of the referendum while the body of the organic law contains a brief filling out of details of some of the principles. The Bougainville constitution provides for several discrete matters and, notably, for the procedures to be followed should the ABG wish to consider the question of the referendum not being held (a matter discussed further below).

The longest and most detailed provisions are found in the 65-page schedule to the organic law. It contains the detailed arrangements for the conduct of the referendum, which are based on the provisions of the [Papua New Guinea Organic Law on National and Local-level Government Elections 1997](#). The PNG constitutional laws were passed by parliament early in 2002, while the Bougainville constitution was adopted by Bougainville's Constituent Assembly in November 2004.

The lengthy schedule was included in the organic law at the insistence of the Bougainville side of the negotiations for the BPA. The Bougainvillean negotiators were not willing to trust the PNG side to enact the necessary arrangements 10 to 15 years or more after the BPA was negotiated. At the same time it was recognised that there were risks in providing for the detail in an organic law enacted so far in advance of the referendum. Circumstances might change, new arrangements might be needed and mistakes, gaps or inconsistencies might be identified. As a result, when the organic law was being drafted, three separate mechanisms were included to enable either or both governments to deal with such problems if and when they arose. It is these mechanisms that give rise to the possibility that there could be new documents created which will make additional provision for the referendum.

First, section 62 of the organic law provides that where a 'difficulty arising from an inconsistency, gap or uncertainty' arises in the operation of its provisions on the referendum, then the difficulty can be resolved by either the courts or the two governments (ABG and the national government), or the agency established to conduct the referendum. It seems

likely that section 62 envisages mainly administrative arrangements for filling inconsistencies and so forth, but it is also possible that the section might be used by the agency, at least, to provide a basis for making rules about the conduct of the referendum. In the first half of 2018, officers of the PNG Electoral Commission and advisers from the International Foundation for Electoral Systems (IFES) and the United Nations Development Programme (UNDP) conducted a careful analysis of the 65-page schedule to the organic law, with a view to identifying potential difficulties that might be caused by any inconsistency, gap or uncertainty in the schedule. Initially they were proposing that extensive amendments might need to be made to the schedule. But as the procedures involved in making amendments to an organic law are onerous and time-consuming, and bearing in mind the limited time left within which the referendum must be held, they instead turned to section 62. Under a draft constitutional regulation being prepared in part as a result of the analysis of the schedule, provision is being included to the effect that the agency to conduct the referendum will have authority to make rules to deal with difficulties arising from any inconsistency, gap or uncertainty in the schedule.

Second, section 63 of the organic law provides that laws can be passed by either government which may 'confer powers, functions, duties or responsibilities on the agency or make other provision in relation to the conduct of the referendum', though any such law must be agreed to by the other government. To date there has not been any proposal for making such laws.

Third, section 389 of the national constitution and section 66 of the organic law empower PNG's National Executive Council (NEC) to make constitutional regulations prescribing all matters that, by part XIV of the national constitution or the organic law respectively, 'are required or permitted to be prescribed, or that are necessary or convenient to be prescribed, for carrying out or giving effect to' either part XIV or the organic law. In June 2018, the two governments agreed to develop a constitutional regulation under the organic law, largely to make provision for matters which the schedule indicates should be dealt with by later regulation, including making provision for the number of forms required by the schedule (for example, forms for enrolment of voters).

The fact that the referendum arrangements, as they exist at present, are contained in a number of different source documents is part of the reason why the arrangements are not very well understood. Another reason is that the BPA is not very well known. It was signed almost 17 years ago and even the events of the conflict period that gave rise to the BPA are largely forgotten by many involved in referendum-related activities. This passage of time has seen four general elections for the national parliament of PNG (2002, 2007, 2012 and 2017) and as there is a turnover of well in excess of 50 per cent of sitting members in most such elections, there are now almost no members of parliament (MPs) that have detailed knowledge of the peace process and the complex documents generated by it. The turnover of MPs tends to also be accompanied by quite a high turnover in senior officers in the national public service, and almost all officials now engaged in referendum-related activities had no involvement in negotiation of the BPA.

### Matters for later negotiation

Although the constitutional laws intended to give effect to the BPA contain a great deal of detail, it was agreed at the time the BPA was negotiated that several matters of central importance could not be decided then. Instead, these matters were left to be decided by the two governments through consultation and agreements much closer to the event of the referendum. These matters involve: the choice of the agency to conduct the referendum, the date of the referendum, the question or questions to be asked in the referendum, and the qualifications of non-resident Bougainvilleans to enrol to vote in the referendum. Each of these matters is discussed separately in the following sections of this paper.

The BPA and the constitutional laws do not specify how these matters are to be negotiated and agreed. However, section 332 of the national constitution provides the necessary machinery for the two governments to jointly oversee the implementation of the BPA: the Joint Supervisory Body (JSB). In addition, the constitution provides that where disputes arise between the governments in relation to the referendum, the two governments may make use of the multiple stage dispute settlement procedure set out in the constitution (see sections 343 and 333–336). The first stage of that procedure involves consultation through

the JSB. The constitution also specifies that the dispute settlement procedures apply to disputes in relation to the referendum (see section 343).

To date, two of the four major subjects left to later consultation and agreement have been resolved through the JSB. The first is the choice of agency to conduct the referendum, while the second is the criteria for enrolment of non-resident Bougainvilleans. The other two matters — the question or questions to be asked, and the date of the referendum — have both been the subject of brief consideration by the JSB without any decision as yet. There is, however, pressure from the ABG for an early decision on the question or questions to be asked, as discussed further later in this paper.

### Choice of agency to conduct the referendum

The BPA states that the PNG Electoral Commission and the authority established to conduct Bougainville elections ‘will be jointly responsible for conducting the referendum’ (para. 318). The organic law provides for an agreement to be reached between the two governments on how that joint responsibility should be exercised, listing four distinct options: by either of the electoral bodies on its own, or the two electoral bodies jointly, or a newly established independent agency. In the JSB meeting of May 2016, the governments agreed that an independent agency should be established to conduct the referendum, and in August 2017 the governor-general signed the charter made under section 58 of the organic law for establishing this agency. Called the Bougainville Referendum Commission (BRC), this new agency will comprise seven members, three each appointed by the respective governments and an independent chair appointed by the JSB. The three members appointed by each government must include that government’s electoral commissioner and each government is required to appoint at least one female. The ABG appointed two persons early in 2018 while the national government had not yet made its appointments by mid-August 2018.

The charter for the BRC requires that the BRC chair be appointed by the JSB and consensus has emerged that it should be an independent person with international standing. The December 2017 JSB meeting delegated authority to appoint the chair jointly to the PNG prime minister and the ABG president. While the ABG had expressed interest in seeking agreement for appointment of Helen Clark (former

New Zealand prime minister and former head of the UNDP), when Prime Minister O’Neill proposed the former prime minister of Ireland, Bertie Ahern, President Momis concurred, to a large extent on the basis that by proposing such a person as chair, the prime minister was taking an important degree of ownership of the referendum process. The offer from Prime Minister O’Neill and President Momis was made by a jointly signed letter in April 2018 and soon after Ahern was reported to be interested in the proposal (Dineen 2018). At the time of writing (late August 2018) Ahern’s acceptance of the appointment had not been finalised and so had not been notified in *The National* and the *Bougainville Gazette* (as required by the BRC charter).

Until Ahern’s appointment has been gazetted, he cannot preside at meetings of the BRC and the full BRC cannot begin meeting, nor can it make an appointment of the chief referendum officer who will head the staff of the BRC. In the interim, however, the charter provides for a BRC Transitional Committee (BRC-TC) to undertake the work of the commission. The BRC-TC comprises the chief secretaries of the national government and the ABG, and the respective electoral commissioners of the two governments. By mid-August 2018, the transitional committee had met seven times (5 December, 23 February, 15 March, 10 April, and 3 May, 29 May and 20 July), and has made a great deal of progress in advancing the planning of the referendum, in large part through the work of four committees established at the first meeting with inputs from IFES and UNDP advisers.

### Who will be entitled to vote in the referendum?

The introductory paragraphs to the BPA state that the ‘agreement provides ... for a referendum among Bougainvilleans’ (para. 2) and the same wording appears in the preamble to the law amending the national constitution by way of inserting part XIV. On the basis of this wording it might be assumed that only ‘indigenous’ Bougainvilleans would have the right to vote in the referendum. It was agreed during the negotiations for the BPA, however, that all persons in Bougainville qualified to vote in elections for the national parliament would be entitled to enrol to vote in the referendum (see BPA para. 315 and section 1.23 of the schedule to the organic law). This means that non-Bougainvilleans who have resided in

Bougainville for at least six months will be entitled to vote in the referendum. While that was something specifically agreed to during the negotiations for the BPA, awareness exercises carried out in Bougainville in 2017 and the first half of 2018 have shown that many Bougainvilleans were not aware that non-Bougainvilleans will have a right to enrol and to vote. It was something about which many were unhappy.

On the other hand, when it comes to persons who are not resident in Bougainville, only non-resident ‘Bougainvilleans’ who meet criteria for determining links to Bougainville that must be agreed between the two governments will be entitled to enrol (BPA para. 315 and organic law section 55). The requirement for agreement between the governments on the detailed criteria must be met before the date for the referendum is agreed (see organic law, section 55). In fact, the criteria were agreed to by the two governments at the June 2018 JSB meeting. It was agreed that a non-resident Bougainvillean will be entitled to vote in the referendum if they are a Bougainvillean as defined in section 7 of the Bougainville constitution. That section provides that to be a Bougainvillean, a person must be a member of a clan lineage owning land in Bougainville under customary arrangements, or must be adopted into such a clan, or must be married to or a child of such a person. In addition, it was agreed that to be enrolled a person will be required to be entitled to vote in PNG national elections, which will mean that they must be citizens of PNG aged 18 years or older and resident in PNG. One result of this agreement is that non-resident Bougainvilleans living outside PNG will not be able to vote in the referendum. The agreed criteria must be published in the *National Gazette*, the *Bougainville Gazette* and in a daily newspaper.

### Enrolment of voters

The BRC-TC, with assistance from advisers from IFES and the UNDP, has developed plans for enrolment of voters using the rolls from the 2015 ABG general elections as a starting point, subject to those rolls being updated. It is proposed that the updating exercise should use assistance from ‘ward recorders’ appointed to each of the approximately 450 wards in the ABG’s system of local level governments, called community governments. In addition, an entirely new roll will be needed for the non-resident Bougainvilleans.

In terms of timing of the enrolment process, early in 2018 the BRC-TC indicated that to be ready for the referendum to be conducted around the target date agreed to between the governments in May 2016 — that is, June 2019 — enrolment would need to commence in April 2018. In fact it was not possible to begin the enrolment process then because insufficient funds were available to meet the estimated cost of K6 million for the enrolment exercise. In the absence of the necessary funding, it is not possible to know when the enrolment process will take place.

### The subject of the referendum: The question or questions to be asked

The BPA (para. 309) and the national constitution (section 338) state that the broad subject matter of the referendum is the ‘future political status’ of Bougainville. This subject matter is to be addressed by a question or questions that will be put to voters, having first been agreed between the two governments. The BPA (para. 310) and the national constitution (section 339) require that the question or questions must include ‘a choice of separate independence for Bougainville’. In formulating the question or questions, the two governments are required to ensure that the terms of the question or questions ‘avoid a disputed or unclear result’ (section 339). The curious wording ‘separate independence’ was included in the BPA at the insistence of the national government’s negotiators on the basis that Bougainville is a part of PNG which had achieved independence in September 1975, so that what was being demanded by Bougainville was a referendum about a separate independence from that which PNG (including Bougainville) had already achieved.

Accordingly, while there have been some reports of views expressed by the PNG prime minister that the referendum will not be about independence (for example, Prime Minister O’Neill reported in the *PNG Post-Courier* 3/3/ 2018 and in *The National* 3/5/2018), the clear fact of the matter is that independence must be an option offered when the vote is held. It seems possible then that the comments in question are in fact merely intended to indicate that independence is not necessarily the only issue that will be put before voters when the referendum is held.

The ABG proposed in a paper presented to the JSB meeting of December 2017 that there should be a single question asked, along the lines of ‘Do you

want Bougainville to become independent?’ with just two possible response options, being ‘yes’ or ‘no’. The assumption was that a ‘no’ vote would effectively be a vote for continuing autonomy. As a result, this proposed question actually offers two options — independence and continued autonomy. The same proposal was put to the June 2018 JSB and the national government indicated it was not ready to discuss the question, because it believed legal advice should first be obtained about constitutional issues concerning the question. The ABG reluctantly agreed to defer discussion of the question provided that the deferral was for a short period. It was also agreed that joint legal advice would be obtained (between the national government and the ABG), with the JSB discussion deferred to a special JSB meeting to be held before the end of July 2018. At the time of writing (late August 2018) that JSB meeting had not occurred, despite considerable efforts by the ABG to secure agreement for a date.

It is not entirely clear what constitutional issues the national government wants to have considered through the proposed joint legal advice. However, it is clear that in general it has only been very recently that most ministers in the O’Neill government have become fully aware of the implications of the right that Bougainvilleans have to a referendum on independence, and that many ministers find it confronting that the national constitution makes such provision. Further, there is at least one commentator emerging who questions the constitutionality of the amendments in part XIV of the constitution that provide for the referendum. Social media posts by a former MP and lawyer, Daniel Tulapi, have been claiming that the amendments to the national constitution that provide for the referendum are themselves unconstitutional because the parliament has no authority to amend the constitution, as it can only be amended through a referendum (a claim that is entirely without foundation). He further claims that it is unconstitutional for the constitution to permit part of the country to secede (see Appendix 1).

Tulapi’s views on this last point are problematic in that the national constitution does not, at this stage, give a right to Bougainville to secede. It merely provides for a right to a referendum on the issue, leaving the matter of implementation of the referendum outcomes to consultation between the governments and final decision-making authority to the national

parliament (see below). It is not known yet if views of the kind being advanced by Tulapi are ones that the national government envisages being considered in the proposed joint legal advice called for by the June 2018 JSB meeting.

There has been some discussion of the possibility of more than two options being included in the question or questions asked. For example, in addition to independence or a continuation of the current autonomy arrangements, there could be an option or options involving Bougainville remaining part of PNG but with a further increased degree of autonomy. It is possible to conduct referendums that offer more than two options, but there are a number of practical difficulties involved which makes such referendums quite rare (Tierney 2013). The requirement in section 339 of the national constitution that the question or questions be formulated to avoid a disputed or unclear result may militate against inclusion of more than two options, in large part because where there are three or more options, it is possible that no option receives more than 50 per cent of the vote.

### Setting the date for the referendum

The provisions of the BPA and the national constitution about when the referendum shall be held are the most widely misunderstood of all the referendum arrangements. Because they include references to weapons disposal in Bougainville and the need for an assessment of whether or not the ABG is meeting good governance standards, these provisions have been widely misinterpreted as laying down conditions or prerequisites that Bougainville must meet before the referendum can be held. The clear implication of views of this kind is that, should these so-called conditions not be met, the referendum can be delayed beyond June 2020. Those advancing views of this kind include academic commentators (for example, Wallis 2012:37), the report of the Parliamentary Bipartisan Committee on Bougainville Affairs (PNG Parliament 2017:37) and the PNG prime minister (for example, *The National* 5/3/2018; *PNG Post-Courier* 8/3/2018, 3/5/2018). The prime minister's expression of these views in particular has given rise to some concerns amongst Bougainvilleans that the national government may be positioning itself to delay the referendum beyond June 2020.

In fact, neither the BPA nor the constitutional laws provide any basis for arguing that the referendum can be delayed beyond the end of the five-year period ending June 2020. Rather they provide that the referendum shall be held on a date agreed to by the two governments, no earlier than 10 years and no later than 15 years after the establishment of the ABG. As the ABG was established on 15 June 2005, the referendum must be held within a five-year window between June 2015 and June 2020. In reaching agreement on a date within that window, the two governments are required to take account of two things: whether the weapons held by the Bougainville Revolutionary Army (BRA) and the Bougainville Resistance Forces (BRF) have been disposed of in accordance with the BPA (section 338(3)(a)) and whether the ABG 'has been and is being conducted in accordance with internationally recognised standards of good governance' (section 338(3)(b)). The same understanding of the relevant provisions has been clearly stated by one of the advisers in the national government team that negotiated the BPA. Writing in 2007, he said that:

the timing of the referendum in the 5 year window allowed, 10–15 years after the establishment of the ABG – that is, between 2015 and 2020 — will be determined by reference to weapons disposal and good governance (in the case of the latter, defined with regard to international standards which are relevant in Papua New Guinea) (Wolfers 2007:92).

If negative assessments were to be made in relation to these two issues (weapons disposal and good governance), that could influence the governments to decide on a date closer to the end, or at the very end of the five-year window of 2015 to 2020. It cannot result in a delay or deferral of the referendum beyond the end of that window. The fact that there can on no account be a delay or deferral beyond mid-2020 is made clear by key wording in both the BPA and the national constitution. The BPA states that 'in any case' the referendum must be held no later than 15 years after the ABG is first elected, while the national constitution says that 'notwithstanding any other provision' the referendum must be held no later than the fifteenth year after the ABG's first election. This wording, in both cases, reflects the clear intention of those negotiating the BPA in the aftermath of the agreement by the parties to the compromise proposed

by Australian Foreign Minister Alexander Downer (discussed in Part One of these two Discussion Papers).

### *Determining whether or not weapons disposal has occurred in accordance with the BPA*

An obvious question is how the two governments are informed about whether weapons disposal has occurred in accordance with the BPA, and whether the ABG has been and is meeting the internationally accepted standards of good governance. On weapons disposal, the issue to be determined is whether the weapons have been disposed of according to the disposal plan in the BPA. In that connection, it should be noted that paragraph 324 of the BPA provides that the plan in the BPA is to be ‘fully implemented’ before ABG elections are to be held. As the first ABG elections were held in June 2005, the implication is that weapons were indeed disposed of ‘in accordance with the Agreement’ before the 2005 elections. Further, the United Nations (UN) certified in May 2005, shortly before that first ABG election, that the weapons disposal plan had been implemented (UN 2008:455). Hence there is no issue about whether implementation of the weapons disposal plan has been completed.

On the other hand, it is widely recognised in Bougainville that some weapons still remain available. For the most part they are weapons that were not disposed of under the plan of the BPA, largely because the former BRA elements associated with Francis Ona’s opposition to the peace process (from 1998 known as the Me’ekamui Defence Force) did not take part in the disposal plan that the UN supervised between 2001 and 2005, and because people have continued to refurbish World War II weapons. The ABG and former combatant groups, including those who supported Francis Ona, have on several occasions since 2016 openly acknowledged the need for disposal of these additional weapons and agreed to enter into a new disposal process. This new process was approved by the June 2018 JSB and the funding needed to complete it is estimated at K12 million. While provision of the necessary funding is in doubt because of the PNG government’s fiscal crisis, there seems little doubt that most of the relevant Bougainville groups are willing to discuss the disposal of these additional weapons as part of the consultation required to reach an agreed date for the referendum.

### *Determining the good governance issue*

In terms of the question of good governance, the national constitution provides that it will be determined by the process set out in the constitution for conducting five yearly reviews of the autonomy arrangements under which the ABG was established and is operating. The review process has two stages. The first involves reviews by independent experts on the financial aspects of autonomy, the Bougainville government’s services, and technical and legal aspects of autonomy. The second stage requires consideration of the expert studies by a meeting of the two governments as they jointly review the autonomy arrangements (see section 337 of the national constitution). The first such review should have been held in 2010, five years after the ABG was established, but was in fact held three years later in 2013. Efforts are currently being made to conduct the second such review later in 2018. At the June 2018 JSB meeting, the two governments agreed to an offer of UN support for the conduct of the first part of the review and approved UN nominations for the experts to undertake that part of the review. The JSB noted that the UN indicated that the reports of the experts should be available by the end of October 2018.

However, even if that review could not be held, it would simply mean that the two governments could not consult over good governance in the manner envisaged by the BPA and section 337 of the national constitution, and the likely outcome would be that the date of the referendum would be pushed back to the end of the five-year window — June 2020.

### *The ABG power to decide that the referendum shall not be held*

There is only one basis which would enable the referendum not to be held in the five-year window and that is where the ABG decides, in accordance with a procedure laid down in the Bougainville constitution (section 194) and after consultation with the national government, ‘that the referendum shall not be held’ (national constitution section 338(7)). The onerous requirements of section 194 of the Bougainville constitution are such that it is unlikely that the ABG would ever vote to stop the referendum being held. There is no other provision that enables the referendum to be deferred beyond the end of the five-year window within which the BPA and the national constitution state it must be held.

### *Are good governance and weapons disposal 'conditions' that must be met?*

The only place where detailed argument has been advanced in favour of the proposition that good governance and weapons disposal are conditions that must be met before the referendum can be held is a 2014 legal opinion by lawyer, Mr Nemo Yalo, who in 2014 provided legal advice to then PNG chief secretary, Sir Mansupe Zurenuoc; advice that was then shared with the Bougainville public service officers working on referendum issues (Yalo 2014). Amongst other things, Mr Yalo's advice asked whether weapons disposal and good governance were intended to be:

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

Mr Yalo's answer was that they were in fact intended to be conditions. His key argument concerns the use of the word 'conditions' three times in two paragraphs of the BPA (paras 312(a) and (b) and 321). In contrast, the word 'conditions' was not used in the provisions of the national constitution that give effect to the relevant BPA provisions on the referendum. However, as the PNG constitution (section 278) makes the BPA available '... as an aid to interpretation' when interpreting any provision of part XIV or any organic law authorised by part XIV, Yalo relied on those provisions to say that the use of the word 'conditions' with reference to weapons disposal and good governance in paragraphs 312 and 321 of the BPA allows the term 'conditions' to be read into subsection 338(2) of the PNG constitution.

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

In relation to the requirement for weapons disposal 'in accordance with the Agreement', Yalo examined the provisions for the disposal plan in the BPA and argued that it is not necessary to examine whether weapons have in fact been disposed of in accordance with that

plan. Rather, the complex and detailed nature of the plan indicated that weapons disposal is intended to be a condition to be met before the referendum can be held. On good governance, Yalo mainly discussed various approaches to how the achievement of good governance might best be evaluated.

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

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

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

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

1. While the BPA does use the word 'conditions' in relation to weapons disposal and good governance, as already noted, the term is not used in the national constitution provisions that give effect to the BPA. The omission of the term was a deliberate choice made by the joint national government/Bougainville team that oversaw the drafting of the constitutional laws giving effect to the BPA. The term was omitted precisely because its use could have given rise to confusion.
2. While it is true that BPA paragraph 312(b) describes weapons disposal and good governance

as conditions, it is far more significant that the paragraph makes them conditions to be taken into account when setting the referendum date. There is no place in the BPA where they are described as conditions that must be met before the referendum is held, nor is that clearly implied anywhere. In fact, the opposite is true.

3. The use of the word 'guarantee' in the opening words of paragraph 312 relates first and foremost to the period within which the referendum must be held. It is a guarantee that the referendum will be held no earlier than 10 years after and 'in any case, no later than 15 years after' the first ABG is elected. The use of the word 'guarantee' is a powerful signal of intent on the period within which the date can be delayed.
4. The word 'conditions' is used in the BPA with reference to the process of weapons disposal and the quality of government, known as good governance. The BPA requires that the questions of whether the process has been completed and the quality achieved be considered before the two governments agree a referendum date. That requirement does not of itself denote that the process must be evaluated as complete and the quality evaluated as having been achieved before agreement on the date can be reached.
5. The argument that use of the word 'conditions' in the BPA shows the intention of the BPA, thereby shedding light on the intended meaning of section 338 of the constitution, is misconceived. While section 278 of the national constitution makes the BPA available as an aid to interpretation of the constitution, it also specifies that the BPA must not be interpreted in a legalistic manner, but rather by reference to its intention. It is contrary to section 278 to interpret the intention of the constitution, and the BPA, by heavy reliance on the use of a single word — conditions — without reference to the intention of the broader set of provisions about setting a referendum date.

What do we know of the intentions in that regard? Ample evidence is available that the BPA provisions on the referendum represent a set of compromises amongst deeply divided parties directed to ending violent conflict. As discussed in Part One, in the early stages of the negotiations on the BPA, the strongly preferred position of Bougainvilleans supporting secession was that a

referendum be held on that issue at the earliest possible date, with the outcome binding on all parties. (In other words, a majority 'yes' vote would have given rise to constitutional obligations on PNG to implement it by facilitating Bougainville's independence.) But some Bougainvilleans were either opposed to independence or had concerns about a referendum being held too soon while PNG opposed a referendum, viewing it as undermining its sovereignty.

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

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

6. If Yalo's argument were to be correct and failure to meet the 'conditions precedent' for holding the referendum could result in deferral beyond the fifteenth anniversary of the first ABG election, it would be expected that the BPA and the constitution would deal with the consequences of such deferral. For example, provision would be expected about such basic matters as the process for making a decision on deferral, how long the deferral should be and what would happen in the meantime, and when a further evaluation of the conditions would occur.

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

### *Explanations of misinterpretation?*

If the arrangements as stated in the BPA and the constitutional laws are so clear, why then have so many people misinterpreted them? Possible reasons include the complexity of the provisions of the BPA and the constitutional laws and the fact that, at the national level, virtually no one (neither politician nor senior public servant) who participated in the negotiation of the BPA and the constitutional laws is now involved in their implementation, as mentioned earlier in this paper. A further significant consideration is that many in the national government are not familiar with the terms of the BPA nor the laws implementing it, and find it quite confronting that they apparently do require a referendum — and that independence for Bougainville must be an option.

### *Target date versus an actual date*

At the JSB meeting in Port Moresby in May 2016, the two governments agreed on what they termed a ‘target date’ of 15 June 2019 for the referendum, one year before the end of the five-year window within which the referendum must be held. The target date was set to enable planning for the referendum to begin, for at the same JSB the governments agreed that an extensive plan of activities was needed for the preparation and conduct of the referendum. Planning these activities was not possible without an indicative or target date. However, the target date is definitely not (or not yet) the actual date. The main reason is that there are some steps that the constitutional laws require to be taken before the actual date can be determined. Those steps involve determinations on the criteria for enrolment to vote of non-resident Bougainvilleans (something

only agreed at the June 2018 JSB meeting), on whether weapons disposal has occurred in accordance with the BPA, and on whether the ABG has been and is being conducted in accordance with internationally recognised standards of good governance, followed by consultation between the two governments on the date. Because the good governance issue has yet to be determined — through the process for review of the autonomy arrangements — it is not yet possible to begin discussing the actual date.

In proposing a target date in June 2019, the ABG and PNG governments consciously set a date a year before the end of the five-year window, the aim being to provide some flexibility for planning purposes. For example, if significant aspects of the agreed activities could not be completed in the time assumed in the planning documents, then by the time the actual date came to be determined, adjustments could be made to allow extra time to complete time-critical tasks. One problem arising from the setting of the target date is that the distinction between the target date and the actual date is not generally well understood. Rather, it has become widely understood in Bougainville that the actual date is now June 2019. In fact, it seems unlikely that the steps necessary for the conduct of the referendum can all be taken by mid-2019 and, as a result, it seems highly likely that the actual date will be later than that.

### *Referendum on the same date as the ABG election?*

Discussion of alternatives to the target date tend to assume that the referendum could be held as late as at the very end of the five-year window within which it must be held — that is, in June 2020. However, under the ABG constitution, the fourth general election for the ABG must be held at about the same time. The suggestion has sometimes been made that the referendum might be conducted together with that election, as there could be significant cost and administration advantages in holding them together.

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

The advantages and disadvantages of holding referendums and elections together were summarised in a 2006 advice on the ACE Electoral Knowledge Network (ibid.), which separates ‘practical’ from ‘political’ matters. Advantages of a practical nature in holding elections and referendums together relate mainly to cost savings in being able to distribute both sets of ballot papers at the same time, use of the same registers of voters, polling places and personnel, and so on. Political advantages relate mainly to the possibility of increased voter turnout due to voter interest possibly being amplified by the combination of the two processes. Practical disadvantages include the logistical and economic burden on the country, amongst other things, because processes such as counting, tabulation and reporting are more complex, take longer and be more costly. Voter education and information campaigns are also more complicated and costly. Political problems include risks of protest votes against government spilling over and having an impact on voting in the referendum. Further, campaign messages can be more difficult to convey, in part because there can often be cross-party campaigning (for example, parties opposing one another in the election may find themselves on the same side in the referendum or vice versa).

There could be a number of specific administrative problems involved in holding the Bougainville referendum and the ABG election together. For example, there would be two different administrative authorities involved, the Bougainville Referendum Commission for the referendum and the Office of the Bougainville Electoral Commission for the election. There would be different rolls of voters, and probably different voting systems (limited preferential voting for the ABG election and effectively the ‘first-past-the-post’ system for the referendum). There would be a need to differentiate the ballot papers, particularly to assist illiterate voters. In this context, it also needs to be remembered that each voter in an ABG general election receives four ballot papers (one each for the president, the regional women’s and ex-combatant’s seats and a single member constituency) and so requiring voters to receive an additional and rather different referendum ballot paper could be a significant source of confusion, especially for illiterate or semi-literate voters. There would be serious risks of administrative overload because of the different requirements.

A significant political consideration in relation to the Bougainville referendum is that there will be a need

for some certainty in ABG leadership in the immediate aftermath of the referendum, as it will be in this period that the national government and the ABG will need to consult about the results of the referendum. It normally takes some time after the return of the writ ends the ABG general election, before the newly elected president is able to put together his or her cabinet. This consideration alone suggests that it would be important that the referendum is held a few months before or after the ABG election. The period for the conduct of an ABG general election is usually around three months, taking account of the time needed for campaigning, voting and scrutiny.

The setting of dates for the ABG general elections is done under section 107 of the Bougainville constitution, which requires that they be held within three months before the fifth anniversary of the day fixed for the return of the writs for the previous general elections, or otherwise if the Bougainville legislature decides by a three-quarters absolute majority vote to call an earlier election. The date for the return of the writ in the last ABG election was 15 June 2015 and so it can be anticipated that the writs for the 2020 general election will be dated so as to be returned on or about 15 June 2020. In practice, then, it is quite unlikely that a general election will be held earlier than in the last three months of the five year term of the ABG. This means that if the referendum cannot be held on the current target date, it probably cannot be delayed much longer than six to seven months — to the end of 2019 or early in 2020. Alternatively, it would be possible for the ABG to amend its constitution to allow a short delay of the Bougainville elections until a little later than mid-2020, thereby allowing clear space for holding the referendum in the middle of 2020.

### *What about fiscal self-reliance?*

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

There are provisions concerning ‘fiscal self-reliance’ in the BPA and the constitutional laws. They do not relate, however, to the referendum arrangements. Rather they concern aspects of the financial arrangements for autonomy and in particular concern

the point where economic activity in Bougainville has expanded to a point where revenues collected in Bougainville from company tax, customs duties and GST are sustainably greater than the cost to the national government of its principal grant to the ABG (the annual recurrent unconditional grant; see the organic law, sections 39 and 40). At that point, additional revenues from those three sources must be shared between the two governments on a basis that must be negotiated, and the ABG gains the right to adjust the rate of personal income tax in Bougainville by as much as 5 per cent.

Beyond that rather 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 (see Chand 2017).

Neither meaning of fiscal self-reliance is a legal precondition to either the referendum or independence. Nevertheless, the broader meaning of that expression can be expected to be an issue of some practical significance when considering options to be included in the question or questions to be put in the referendum and when voters make choices between possible responses to any such question. It will need to be a consideration in the course of consultations on the referendum date (under subsection 338(2)) and can be expected to be of great importance in any post-referendum consultations about possible independence.

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

### Does autonomy continue after the referendum?

A major source of concern in Bougainville that has arisen at various times since 2015 is a misunderstanding about the period within which the autonomy and immunity from prosecution provisions

of the national constitution operate. A widespread concern has emerged that the BPA will cease to operate at the end of the five-year window within which the referendum must be held (by mid-June 2020). The suggestion is that at that point, if Bougainville does not become independent, the autonomy arrangements will cease to operate, as will the immunity from prosecution in relation to ‘offences arising from crisis-related activities in relation to the Bougainville conflict’ provided for under section 344 of the national constitution. In fact, there is no basis at all for any fears that the autonomy and immunity provisions will cease to operate. The national constitution makes no mention of any ‘cut-off’ date in relation to any of the provisions in question. Both autonomy and the immunity for prosecution continue to operate, unless an amendment to the constitutional laws is made. However, under section 345 of the national constitution, no such amendment can be made without the prior agreement of the Bougainville legislature, through a vote of the legislature which normally must follow an extensive process of negotiation (section 217 of the Bougainville constitution).

### Gender issues

Questions arise as to whether many women in Bougainville will enjoy full freedom to vote in the referendum. There is no doubt that the matriliney that operates in most Bougainvillean societies helps women in Bougainville to have a higher status than is commonly the case elsewhere in PNG. Further, there are some women that are able to operate relatively freely in the public sphere. They include senior women who have high standing in society in some areas as well as senior personnel in some Bougainville-based NGOs, the three women representatives in the Bougainville legislature, and the women members in the new system of community governments established by the ABG in 2017 to replace the previous councils of elders — although there is anecdotal evidence of former council of elders members resisting the changes under the community government system (George 2018). But as discussed in Part One, at the level of the family and the landowning clan lineage, many women are not free to play public roles. At the family level, many women are restricted in the roles that they can play in decision-making on such important matters as where they will reside and build houses (Hamnett 1977) and how the

financial resources of the family will be raised and used (Eves et al. 2018). This tendency to patriarchy in Bougainville's matrilineal societies seems to extend to most spheres of human activity. Although no research has been done on the issue in Bougainville, comments about how limitations on the roles of women in PNG extend to their roles in electoral processes made in the US State Department's 2016 report on human rights in PNG may well apply in Bougainville:

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

This aspect of the situation of women may need to be taken into account in awareness campaigns about enrolment to vote, voting, and making choices when voting. So far, these possible needs of women have not been taken into account in awareness exercises. The requirement that at least two of the seven BRC members must be women was presumably intended to ensure that gender issues in relation to the referendum are taken into account. But as yet the BRC has not met and there are no women on the BRC-TC.

### Are there prescribed voter turnout or results quorums?

There is no requirement for a minimum voter turnout for the referendum result to be valid (a turnout quorum), nor for a particular majority of voters who actually cast votes (results quorum). While there is no requirement for either a turnout or a results quorum, clearly the extent of the turnout will be a significant factor in determining the legitimacy or credibility of the outcome. In this connection it should be noted that turnout in ABG general elections, which has been higher than that in general elections for the national parliament, has never been higher than 63.6 per cent (the figure in the 2010 ABG general election).

### Cost of the referendum

The costs of conducting the referendum have been discussed by the BRC-TC and are estimated at K127 million, K90 million of which is classified as 'core' referendum costs, the balance being costs of such things as a weapons disposal program and meeting the PNG Electoral Commission's outstanding financial

claims. Under the organic law (schedule section 1.3), the two governments are required to ensure 'that all arrangements are made, staff, facilities and funding provided and all steps taken to enable and facilitate ... the proper and convenient performance of the functions of the Agency [the BRC] and of each Returning Officer'.

As of June 2018, no funding had flowed from the two governments to the BRC. One issue here has been a technical question of the steps involved in establishing the national government trust account which needs to be set up for the BRC to be able to lawfully receive funds. But an additional and more serious problem concerns the extreme fiscal crisis in which the PNG government finds itself in mid-2018. Of an announced K20 million said to have been allocated to referendum purposes in 2018, the June 2018 JSB was advised that just K1.2 million was available. That figure was nowhere near the K5–K6 million needed to undertake the first major BRC task, that of compiling the register of voters.

### Is the referendum outcome binding on the national government?

As was agreed between the parties negotiating the BPA, following the intervention of Alexander Downer (see Part One), the outcome of the referendum will not be binding on the national government. The BPA states that 'the outcome will be subject to ratification (final decision-making authority) of the National Parliament' (para. 311(a)) and that the two governments 'will consult over the results of the referendum' (para. 311(b)). The provisions of the national constitution giving effect to paragraph 311 of the BPA are worded differently. They state (section 342) that the governments 'shall consult over the results' and that the results shall be taken to the national parliament 'subject to the consultation'. In other words, if it were to be agreed to by the two governments in the course of the consultation that there is no need for the results to go to the parliament for the time being and, for example, that the governments agree to continue consultation on an annual basis, that would be permissible.

While it seems clear that there is no requirement that the results go to the parliament, it also seems that if there is to be any enforceable decision on the results, it is only the parliament that can make the decision. This point emerges from subsection 342(2),

which states that if the results go to the parliament, the speaker shall furnish the executive of the ABG a copy of the minutes of the relevant proceedings ‘and of any decision made in the National Parliament regarding the referendum’. It seems likely that any court called upon to interpret section 342 would be guided by the provisions of the BPA about ‘final decision-making authority’ being vested in the national parliament. (As discussed already, under national constitution sub-sections 278(3) and (4), the BPA can be used as an aid to interpretation of the relevant provisions of the constitutional laws and the BPA must be ‘interpreted liberally, by reference to its intentions.’)

The fact that the outcome of the referendum is not binding on the national government is still a surprise to some Bougainvilleans. Upon realising this fact, some tend to express the view that if the outcome is not binding then the referendum has little value. However, the leaders who negotiated the compromise on the referendum late in 2000 were clearly of the view that there was value in what was agreed. It must be emphasised that what is provided for is not merely the holding of the referendum, but also a constitutional requirement that the two governments consult about the results.

### Peaceful transition following the referendum

There is a range of ways in which the two governments (and other interest groups) could respond to developments after the referendum. For example, as discussed in the previous section of this paper, the two governments could consult about the outcome and might agree to consult over an extended period. Such consultation might lead to a range of possible outcomes including, perhaps, the negotiation of a new peace agreement. On the other hand, it would also be possible for the outcome to be taken quickly to the parliament. The PNG prime minister has made several statements in the first half of 2018 indicating that he expects the outcome to go to the parliament and for the members of the parliament to vote unanimously against independence.

Indeed, in some of the many statements he has made about the referendum in the first half of 2018, Prime Minister O’Neill has appeared to be mounting a campaign to encourage the national parliament to take a stand against independence. In September 2015, he emphasised that the question of independence was

ultimately a matter for the parliament which ‘would consider the question with great seriousness, with the backdrop of our understanding of the country. We have a diverse and tribal country, so we can ask ourselves, where does it stop?’ (Callick 2015). In March 2018 he was reported as saying that ‘any outcome of the referendum will have to be endorsed by Parliament, which basically means that the people of Bougainville will also [have to] convince the people of Papua New Guinea as well through their elected leaders’ (*PNG Post-Courier* 10/3/2018). In April 2018 he told the parliament:

If this Parliament does not ratify the outcomes of the referendum, we don’t want to create anxiety among our people. We must make sure that this is a realistic outcome that will happen in our country. So it must be discussed in a frank and open manner so that we are not going to build the hopes and aspirations of the people of Bougainville to a degree where when the Parliament does not ratify the outcome, people of Bougainville feel that they are being let down (*PNG Post-Courier* 13/4/2018).

On more than one occasion, he has stated that he expects that every MP will vote against independence when the referendum outcome is discussed in parliament. For example, in May 2018 he said:

After the vote in 2019, regardless of the question — the outcome must be tabled in Parliament ... I can assure you that every Member of Parliament will vote in the interests of a unified and harmonious country (*PNG Post-Courier* 3/5/2018).

At the same time, however, the two governments have given attention to the need to plan carefully to ensure that the period following the referendum is managed in a peaceful manner. In particular, at the JSB meeting in May 2016, the two governments agreed on a work program involving 11 separate work streams for preparations for the referendum (see Appendix 2), one of which involved preparations for a peaceful transition following the referendum. This work stream was closely related to those on reconciliations and weapons disposal. The main point of the work stream was to ensure that whatever happened after the referendum, the two governments would continue to deal with the situation in a peaceful way. At the June 2018 meeting

of the JSB, the two governments agreed to establish a joint taskforce to undertake ‘post-referendum scenario planning’ with a view to reporting to the governments before the end of 2018 ‘with a particular emphasis on’:

- ensuring peaceful acceptance of the referendum results
- timely consultation between the governments about the results of the referendum
- reference to the parliament for timely ratification only if the two governments agree
- developing an agreed basis for the ongoing relationship between Bougainville and PNG (JSB 2018:4–5).

They also agreed on the need to hold a joint ‘summit’ on post-referendum planning to be held in Bougainville before the end of 2018.

### Bougainville leadership unification around the referendum arrangements

As indicated in the introduction to Part One of these paired Discussion Papers, the referendum arrangements are part of a wider set of arrangements, all intended to promote peace in Bougainville — to transform a situation where divisive violent conflict previously prevailed. So far any assessment of the contribution of the referendum arrangements to bringing peace would be mixed. For several years after the BPA was signed, the Me’ekamui government led by Francis Ona continued to refuse to participate in the process in large part because they claimed that a referendum was not needed, because Bougainville was already independent under the unilateral declaration of independence (UDI) of May 1990. After Ona’s death, while part of the Me’ekamui factions began cooperating with the ABG, they all remained suspicious about the referendum. But since it has become evident that real progress is being made towards organisation of the referendum, the Me’ekamui factions’ leaders have gradually been working more closely with the ABG, especially in relation to planning the new weapons disposal process. In general they are no longer asserting that independence has already been attained through the 1990 UDI and are supporting the referendum.

On the other hand, the Me’ekamui leaders are all also watching closely what is being said and done in referendum preparations, and the sometimes mixed messages coming for Prime Minister O’Neill about whether the referendum will be about independence,

whether the referendum can be delayed beyond mid-2020 and what parliament will do following the referendum. So far, uncertainty sometimes caused by the mixed messages seems to be outweighed by the sense that there is general agreement between the governments that the referendum will be held. However, if the necessary funds for core referendum activities such as preparation of voter rolls do not begin to flow soon, there may be risks that the growing unity of the leadership will be undermined.

### Conclusions

In the two years since May 2016, when the JSB agreed on 11 work streams for preparation for the referendum, the record on progress in that preparation has been mixed. The May 2016 JSB decision setting a target date for the referendum of June 2019, the promulgation in August 2017 of the charter establishing the BRC, and the seven meetings of the BRC-TC in the period to mid-August 2018 have been the major positive factors in progress. However, the lack of funding for the BRC and the consequent delays in the BRC engaging in the process of updating the roll for voters in Bougainville and developing a new roll for non-resident Bougainvilleans is a worrying sign that the progress made to date may not be maintained. So far, these potential signals of concern have not seriously dented confidence amongst Bougainvilleans that the referendum will be held. But that situation is changing due to Prime Minister O’Neill’s mixed messages in the first six months of 2018 and delays in the grant of funds so badly needed by the BRC if it is to start fundamental steps such as enrolment of voters.

There are still important aspects of the quite complex referendum arrangements about which misunderstandings persist. They include issues about whether the autonomy arrangements in the BPA cease at the end of the five-year window within which the referendum must be held. Undoubtedly, however, the most serious misunderstanding are about whether negative assessments of not only weapons disposal but also good governance by the ABG could result in deferral of the referendum beyond the end of that same window. On the basis of the evidence and arguments presented in this paper, there is little room for doubt that such assessments do not permit such a deferral.

In terms of whether the referendum arrangements are contributing to peacebuilding in Bougainville,

there is no doubt that the very act of inclusion of the referendum arrangements in the BPA contributed to bringing the conflict to a peaceful conclusion. The fact that the referendum was promised by the BPA ensured that the majority of BRA members committed themselves to the peace process. Further, the progress made since 2016 in organising the referendum has been the main factor encouraging the Me'ekamui factions to support the peace process and commit themselves to participation in a new weapons disposal process.

In general, that progress towards holding the referendum has contributed to increased faith amongst Bougainvilleans in the willingness of the national government to honour the agreed arrangements. However, the prime minister's mixed messages and the lack of funds for the BRC are beginning to give rise to doubts amongst some Bougainville leaders about whether the referendum will be held within the time required by the BPA and the national constitution. Failure to hold the referendum within the five-year window of 2015 to 2020 would be a major setback to peacebuilding.

The biggest challenge in terms of the referendum arrangements contributing to peacebuilding could come after the referendum. There has been no opinion polling in Bougainville and amongst non-resident Bougainvilleans about how people propose to vote in the referendum and that fact, together with the lack of agreement to date on the question or questions to be asked, means that it is impossible to make confident predictions about the results of the referendum. Nevertheless, there are widespread assumptions that the likely outcome will be a vote heavily in favour of independence. Putting the results quickly to parliament and campaigning for a unanimous vote by the parliament against independence could seriously undermine the progress in peacebuilding in Bougainville. It is to be hoped that the work envisaged by the June 2018 JSB in relation to achieving peaceful transition after the referendum will help both the ABG and the national government to find ways to manage the post-referendum situation in a way that sustains progress in peacebuilding.

### Author notes

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peace process since 1994 and works as an adviser to the Autonomous Bougainville Government in relation to legal issues arising in the preparations for the referendum.

### Endnotes

1. The full text of the Bougainville Peace Agreement is available on a number of websites, for example on the [United States Institute for Peace](#) website.

### Appendix 1

Daniel Tulapi's posts about the Bougainville referendum have appeared on several different social media sites, including a WhatsApp group site (PNG Think Tank Group TTG1). The following is an unedited reproduction of his post on [The Voice-Bougainville Facebook](#) page (accessed 17/8/2018):

#### Daniel Tulapi, What's New in PNG

June 8

Can Parliament of Papua new Guinea Amend the Constitution of Papua new Guinea adopted in 1975 on independence day? No. Parliament has no power to amend the Constitution.

Does Parliament of Papua new Guinea have power to amend the Constitution to grant independence to a province (Bougainville) ???

No. Not at all. Period. Constitution of Papua new Guinea does not authorized independence and referendums.

Parliament has power only to make constitutional laws or organic laws but has no authority to amend the 1975 independence constitution that created Papua new Guinea and the National Parliament itself which is a creation by the 1975 independence constitution .

Any addition to the Constitution or any amendment to add new additional provisions to the 1975 independence Constitution requires referendum and vote by all the people of Papua new Guinea not by Members of Parliament.

The Bougainville referendum is unconstitutional and illegal. A province or a tribe of the 1000 tribes of Papua new Guinea has no right to seek independence from the independent State of Papua new Guinea under no special circumstances.

The military Forces or Defence forces of Papua new Guinea is established by the Constitution to protect the

1975 constitution and territorial boundaries of Papua new Guinea by use of military forces.

Any abuse of Parliament privilege to grant independence to any province or tribe in Papua new Guinea is unconstitutional Act and amounts to treason and the Defence forces shall arrest any executive government which proposes vote in Parliament to grant independence to any province or village in PNG.

In the case of Bougainville Julius Chan Prime Minister and his NEC & Cabinet did make the right decision to use force and the Defence forces to defend the Constitution territorial boundaries of Papua new Guinea.

In the case of Prime minister Bill skate he committed treason by promises of referendum and independence to Bougainville.

Bougainville and Parliament cannot and do not have constitution authority to discuss let alone vote on referendum and self determination and independence concerning a province of Papua new Guinea.

It was Bougainville through Honourable Sir Paul Lapun MP representing Bougainville and New Guinea who voted and signed for independent Papua new Guinea in 1973 under United Nations (UN) General Assembly resolution for self determination and independence.

When Bougainville is entertained by Parliament by threats by tags and tribal warlords for referendum flood gates for Independence by 1000 tribes in png will open and we will have one thousand 1000 tribes of independent States on the island of Papua new Guinea. This is reality which our Defence forces must discharge their constitution duty to protect disintegration of United Papua new Guinea God gracefully commissioned in 1973 and in 1975 independent State of Papua new Guinea.

I Daniel Bali Tulapi LLB.LLM was one of the Members of the cabinet of Prime minister Julius Chan that made the decision to protect the Constitution of Papua new Guinea on Bougainville conflict and any claim for Independence by tags must be met with military forces as commanded by our Constitution.

When we fight for ownership of our resources for example Bougainville copper and SHP oil and gas we fight for ownership and money of our resources and that is right and a constitution right to stop manipulations and stealing by foreigners through our politicians.

However the fight for resources ownership and fight against exploitation by Businesses and foreigners must not include fight for Independence from State of Papua new Guinea. The fight for resources is a fight for all PNG United we stand as one Nation including our Defence forces as one people PNG.

On this note the Bougainville copper mine the biggest in the world must be given ownership to Bougainville landowners. The PNG Government shall impose sales export earnings tax. Foreign multi national corporations like Rio tinto are free to invest through buying of shares from the customary landowners.

The PNG Government and foreigners like oil search and ExxonMobil must not own oil and gas and gold and copper in Papua new Guinea.

Constitution of Papua new Guinea says Papua new Guinea government shall buy copper. Gold. Oil. Gas from customary land title holders.

The government included provincial governments in PNG and foreign Multi national corporations do not own Oil. Gas. Copper. Gold resources in Papua new Guinea declared by Constitution of Papua New Guinea.

Spoken by Former Chairman of constitution and laws committee of Papua new Guinea National Parliament. Honourable Daniel Bali Tulapi LLB.LLM

## Appendix 2

### The 11 work streams approved by the May 2016 JSB meeting

Work stream	Anticipated output
1. Electoral process	Conduct of a free and fair Bougainville referendum
2. Weapons disposal	Conducive environment for a free and fair Bougainville referendum
3. Good governance assessment	Strong government systems to implement the Bougainville referendum process and the referendum outcomes
4. Civic education and engagement (awareness)	Better informed population to make an informed choice

5. Ongoing consultation and dialogue between political leaders, members of both governments and other key stakeholders particularly on referendum matters required to be agreed between the two governments	Joint participation and joint ownership of the Bougainville referendum outcome
6. Process for determining referendum questions	Clear and simple questions asked in the Bougainville referendum
7. Determining enrolment criteria of non-resident Bougainvilleans	All inclusive participation by all Bougainvilleans
8. Peace and stability	Peaceful referendum process and peaceful transition
9. Securing ex-combatant and Me'ekamui support for the referendum process	Addressing particular veteran interest on the Bougainville referendum
10. Process for promoting participation of Bougainville women and persons with disabilities	Incorporating women and gender issues on the Bougainville referendum support
11. Post-referendum transition and peace-building and political settlement	Sustainable Bougainville future and collaborative relationships with Papua New Guinea

Source: JSB 2016.

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