



THE NATIONAL  
RESEARCH INSTITUTE  
PAPUA NEW GUINEA

# RESEARCH REPORT

## INSTITUTION BUILDING IN POST-REFERENDUM BOUGAINVILLE

Anna Dziedzic  
Cheryl Saunders

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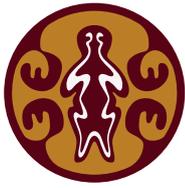
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The Constitution Transformation Network at Melbourne Law School supports the development and implementation of constitutions globally, with a particular focus on Asia and the Pacific: <https://law.unimelb.edu.au/constitutional-transformations>.

# Abbreviations & Acronyms

ABG – Autonomous Bougainville Government

BPA – Bougainville Peace Agreement

JSB – Joint Supervisory Body

NRI – National Research Institute

PNG – Papua New Guinea

## Executive Summary

At a referendum in 2019, the people of Bougainville voted in favour of independence. Under the Bougainville Peace Agreement (BPA), the governments of Papua New Guinea (PNG) and Bougainville must consult over the results. As mandated by the BPA, the consultations will culminate in a vote in the PNG Parliament. The outcome will involve a form of self-determination for Bougainville, whether outside or inside the state of PNG, or in another form of special relationship with it. A decision for self-determination outside PNG would need the support of the international community as well.

The central question to be determined through these consultations is the future relationship between Bougainville and PNG. This report groups the broad options for this relationship in the three categories identified above: self-determination outside PNG, inside PNG, or in a special relationship with it. The report notes, however, the potential for considerable variation within each of these categories. The report also notes that the relationship could be designed to provide for the possibility of moving from one category to another over time, by agreement or at the option of Bougainville alone.

The matters for discussion in the consultations are too important to be decided in the abstract without a clear understanding of what different options might involve. To this end, the report outlines a range of issues for institution building in Bougainville that will or may require attention for the purposes of self-determination. Institution building is defined to refer not only to the offices and agencies that Bougainville might want or need, but also to broader questions about Bougainville as a political community, which are equally important for self-determination.

Bougainville and PNG face a formidable task in the period that lies ahead. This report suggests that a useful way to begin would be to clarify the key questions for decision and to agree on some principles to guide the consultations. Thereafter, the report canvasses options for the following aspects of institution building:

- Defining and strengthening the political community of Bougainville.
- Changing the Constitution of Bougainville, to reflect the shift from autonomy to self-determination.
- Establishing and operating institutions of government for self-determination. These are grouped as governance institutions; public sector institutions; and other institutions that perform a significant role in public life.
- Establishing arrangements to support relationships between Bougainville and external actors.
- Providing for a continuing and mutually beneficial relationship between PNG and Bougainville, tailored to the agreed form of self-determination.

The future relationship between Bougainville and PNG is a matter for the two governments to decide, as is the pace of change. Post-referendum Bougainville is presently in transition to a form of self-determination that will continue during the course of the consultations. After the consultations there will be a further period of transition, which must be sufficient to bed down the agreed arrangements. Even after a formal period of transition is over, Bougainville's movement towards a final form of self-determination could occur in stages. It is not necessary for Bougainville to establish all its own institutions at the same time, and it could continue to rely on certain PNG institutions for a period. It is possible to envisage a situation in which the relationship between Bougainville and PNG itself evolves over time, culminating in a final phase that Bougainville itself could initiate when the time is right to do so.

# Ch.1 Introduction

This report sets out issues and options for building the institutions of government in post-referendum Bougainville. It defines institution building to refer not only to creating and maintaining the offices and agencies necessary for Bougainville's internal governance and its relations with the outside world but also to broader questions about Bougainville as a political community.

The report was commissioned by the National Research Institute of Papua New Guinea (NRI) to assist decision makers in PNG and Bougainville as they begin consultations about the way forward, following the referendum on independence that took place in Bougainville in late 2019. The referendum was mandated by the Bougainville Peace Agreement (BPA) and the Constitution of PNG, after a transitional period of autonomy for Bougainville envisaged to last between 10–15 years.<sup>1</sup> Consistent with the BPA and the Constitution, the referendum offered voters a choice between 'greater autonomy' and 'independence'. In the result, 97.71% of those who voted chose 'independence'. The referendum is not binding, and the BPA and the Constitution require the governments to 'consult over the results of the referendum'.<sup>2</sup> The consultations are scheduled to begin after the Bougainville general elections, which were delayed by the response to the COVID-19 pandemic, but completed on 1 September 2020.

The consultations are the responsibility of the governments of PNG and Bougainville. The result of the consultations is subject to ratification by the Parliament of PNG<sup>3</sup> and may also be affected by the views of the international community. This report makes no assumptions about what the outcomes of these processes will be. On any view, however, the outcomes will involve a form of self-determination for Bougainville, whether outside or inside the state of PNG or in another form of special relationship with it. The range of possibilities inherent in the theory and practice of *self-determination* make the concept particularly apt for present purposes (Summers, 2013). Self-determination is used as a neutral, umbrella term throughout this report to characterise the outcome of the intergovernmental consultations on Bougainville.

The central question to be determined through the post-referendum consultations is the future relationship between Bougainville and PNG. The decision on this question will shape the form of self-determination for Bougainville. The question is too important to be decided in the abstract without considering what different options for self-determination involve or might involve. To assist the consultations, this report canvasses a range of institutional issues and options for Bougainville that are potentially relevant from the standpoint of self-determination, in ways illustrated in Figure 1.1.

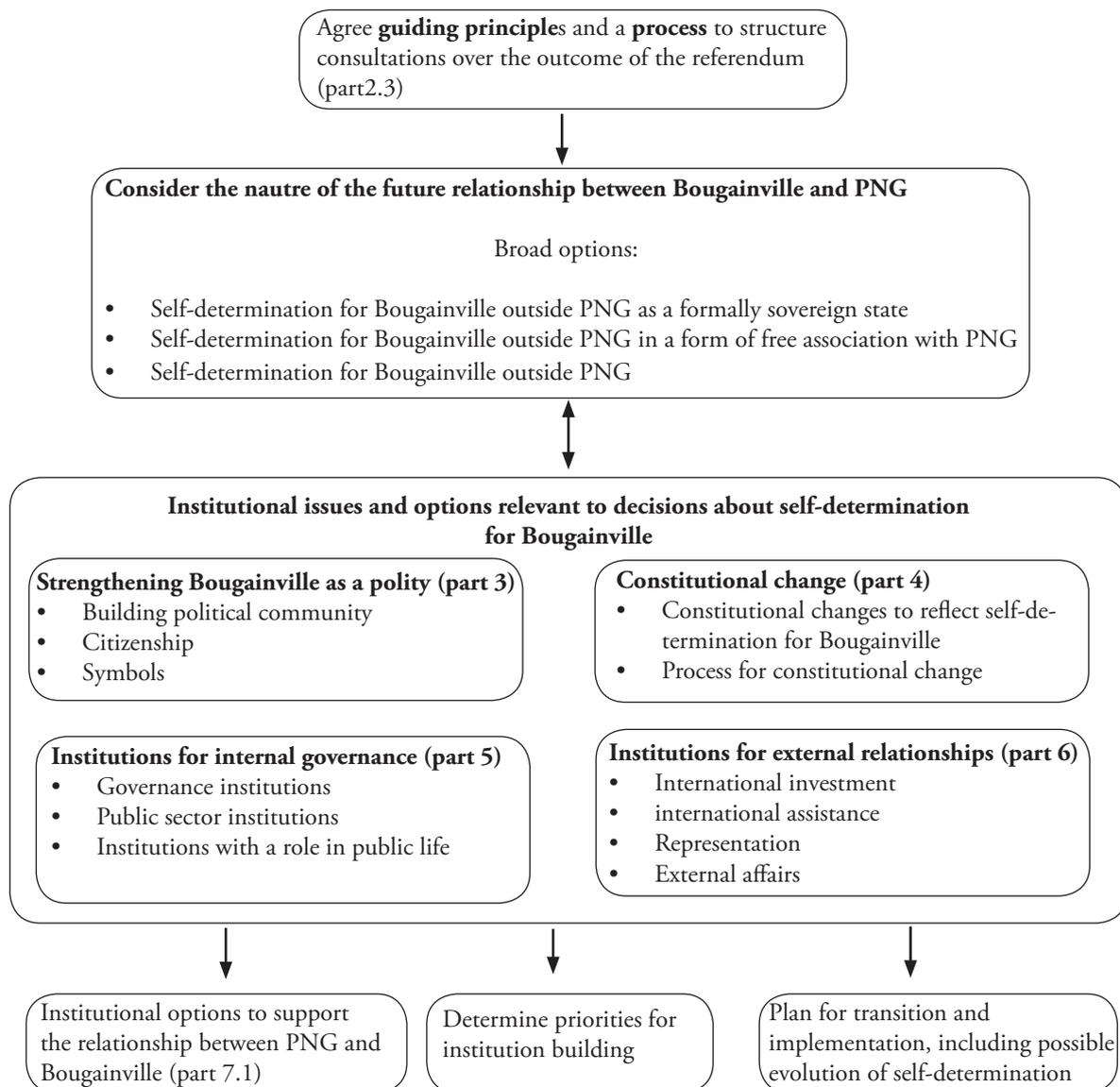
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<sup>1</sup> BPA arts 310-312; *Constitution of PNG* ss 338, 339.

<sup>2</sup> BPA art 311(b); *Constitution of PNG* s 342(1).

<sup>3</sup> BPA art 311(a); *Constitution of PNG* s 342(2).

Figure 1.1. Key issues to be considered in consultations on the outcome of the referendum.



This report sets out the issues that the governments of Bougainville and PNG will need to address as they consult on the outcome of the referendum, including the form of self-determination and the institutions of government that will need to be created or strengthened to implement self-determination in a way that is effective for the people of Bougainville. The structure of the report is as follows.

- Part 2 deals with some critical issues to be considered at the start of the consultations. It outlines broad options for the future relationship between Bougainville and PNG, which is the key question for decision in the consultations (2.1); explains three sets of considerations that are likely to influence the choices made (2.2); suggests principles on which the consultations might usefully be based (2.3); and draws attention to the insights that the experiences of other countries might provide (2.4).
- Part 3 focuses on what is required to strengthen Bougainville further as a political community or polity through which effective self-determination can be achieved. This part deals with the nature of political community (3.1); citizenship (3.2); and the use of symbols to reflect Bougainville’s identity, internally and externally (3.3).

- Part 4 examines the changes to the Constitution of Bougainville that might be needed to provide a framework for self-determination and draws attention to features of the process by which such changes might be made.
- Part 5 deals with the institutions that need consideration for the purposes of self-determination for Bougainville. It groups institutions in three categories for this purpose: governance institutions (5.1), public sector institutions (5.2), and other institutions that perform a significant role in public life (5.3).
- Part 6 considers the kinds of external relationships Bougainville might have in conditions of self-determination and what would be needed to deal with these relationships effectively.
- Part 7 returns to the future relationship between PNG and Bougainville, to consider the institutional implications of the changes that are made.
- The final part draws some brief conclusions and makes some observations about the timing of the changes that are agreed.

This report is written as a companion to another report for NRI by Satish Chand, Ronald Duncan and Theodore Levantis, titled *Increasing Revenues for the Bougainville Government* (Chand et al., 2020). That report deals, critically, with issues relevant to fiscal and economic independence for Bougainville, on which substantive self-determination ultimately will depend. It notes that revenue generated within Bougainville presently makes up just 15.6 percent of the Bougainville government's total recurrent budget and outlines a range of possible sources for increased revenue. The measures canvassed in *Increasing Revenues* necessitate a range of institutions, operating effectively, along the lines identified in this report. Conversely, the institutions and processes canvassed in this report depend on funding provided by or through Bougainville, for which Bougainville is accountable, in the ways described in *Increasing Revenues*.

This report builds on an earlier report that we prepared for NRI before the Bougainville referendum. *Greater Autonomy or Independence for Bougainville: Institutional Options and Issues for Transition* (Dziedzic & Saunders, 2019a) was written to inform understanding of the two choices before the people of Bougainville in the referendum in late 2019. It identified and compared governance arrangements across three scenarios: realisation of the level of autonomy for Bougainville for which the BPA provided; greater autonomy for Bougainville within PNG; and independence. This earlier report therefore offers a useful and detailed introduction to many of the issues and options that are on the table for the consultations between governments over the forms and practices of self-determination for Bougainville.

The analysis in this report is based on research into the laws and institutions of Bougainville and PNG and their operation in practice. It draws on the previous reports and studies commissioned by the PNG NRI's Bougainville Referendum Research Project as well as the scholarly literature. Comparative insights from the experiences of other states and polities are also identified where relevant. An outline version of this report on institution building was provided to NRI in mid-May 2020 and shared with stakeholders. The final report incorporates feedback from the NRI and stakeholders and responds to suggestions about areas of interest and calls for further detail.

## Ch.2 Critical issues to guide the consultations

### 2.1 Determining the relationship: key questions and broad options

There will be four key questions before decision-makers in the post-referendum consultations. While the primary focus of the consultations will be the future relationship between Bougainville and PNG, the other questions are necessarily linked to this relationship. The questions are identified separately below, to ensure that each is actively considered, in the interests of workable and lasting outcomes. The questions are:

- What should be the **future relationship** between Bougainville and PNG, following the referendum?
- What **changes** are necessary to achieve that relationship, in both PNG and Bougainville, in terms of governing authority and the way in which authority is exercised?
- **How** should these changes be made, to ensure that they work as effectively as possible from the standpoint of both Bougainville and PNG?
- Over what **time frame** should change occur and in what **order of priority**?

The institutional issues and options canvassed in this report are intended to inform decisions on each of these questions. Their relationship to each other and to the key questions for decision-makers are illustrated in Figure 1.1.

The **future relationship between Bougainville and PNG** might take different forms, with multiple different features, all of which are consistent with self-determination. For the purposes of this report, as an aid to understanding the options, the possibilities are grouped into three broad categories. We note, however, that there may be variations within each. These categories are:

- Self-determination for Bougainville outside PNG, as a **formally sovereign state**.
- Self-determination outside PNG, but in a form of **free association** with it.
- Self-determination in a form that leaves Bougainville **formally part of PNG**.

These categories are elaborated in greater detail in Part 7 in order to demonstrate the institutional relationships between PNG and Bougainville in each case. Two further observations about the choice between them should be made here:

- The form of self-determination that emerges from the consultations need not be fixed, but could be planned to evolve over time, even after an extended transition period, as Bougainville's capacities develop.
- Progress through the stages of an evolving relationship between Bougainville and PNG could depend on the initiative of Bougainville itself, subject to any agreed form of consultation with PNG.

### 2.2 Three influential factors

There are at least three contextual factors that are relevant to the form and outcomes of the consultations.

One is the **nature of the existing relationship between PNG and Bougainville**. These two territories have been connected for the purposes of governance for over 100 years. The legacies of this connection include both long collaboration and significant conflict (Regan & Griffin, 2015). Both legacies are evident in the considerable achievements of the BPA, which brought a bitter conflict to a close in a way that has proved both manageable and lasting. Bougainville's peace process provides a model from which others might learn. Nevertheless, from the standpoint of the consultations, these legacies tend to pull in opposite directions. Complicating resolution

further, a century of governance of PNG and Bougainville as a single entity also has encouraged the intermixture of peoples and the interdependence of economies. Self-determination for Bougainville will require these to be disentangled to some degree, whatever form it takes. On the other hand, geography, shared history and the realities of globalisation suggest that a close relationship of some kind will continue.

A second contextual factor that demands consideration is **Bougainville's capability**, now and into the future. Capability should be understood for this purpose as a combination of the knowledge, skills and integrity needed to develop policies, manage programs and run institutions in ways that work for the people of Bougainville and for the polity as a whole. Capability, including ways in which it might be developed, is relevant to all the key questions for decision in the course of the consultations.

Capability is an issue that arises when any political community acquires major new responsibilities for which it has final authority. In one sense, Bougainville has an advantage in this regard over many other newly empowered political communities, thanks to the experience of nearly two decades of autonomy since the signing of the BPA. Capability is nevertheless a major issue for Bougainville, in ways that are documented in a range of relatively recent reports and reviews (Government of Papua New Guinea and Autonomous Bougainville Government Joint Supervisory Body, 2018; Government of Papua New Guinea and Autonomous Bougainville Government Joint Supervisory Body, 2013; McKenna, 2019; Nisira, 2017; Peake, 2019). Ironically, the extent of the problem is demonstrated by the difficulties encountered in attempting to realise even the degree of effective autonomy for which the BPA provided. Capability has a bearing both on the ambition for self-determination for Bougainville and the speed at which it can effectively be achieved. To ignore it, or even to underestimate it, would be to jeopardise the project of self-determination and the wellbeing of the people of Bougainville for whom self-determination is designed.

A third factor concerns the need for **international support** for any decision in favour of self-determination for Bougainville outside PNG, as an independent state. As we noted in our earlier report, while Bougainville can be regarded as having key attributes of statehood, in terms of territory, a people and a government, independent statehood depends in practice on recognition by other states (Dziedzic & Saunders, 2019a). It may be that the link between a successful peace process and the independence referendum in accordance with its terms favours international recognition, especially if this form of self-determination is supported by PNG. On the other hand, recognition of new states is rare in the contemporary world, and there are no guarantees that it will be forthcoming in the case of Bougainville.

Economic viability and capability in governance are likely to weigh heavily in the decision about recognition by other states. While there are polities in the world that claim statehood but have not attracted significant international recognition, this would not seem either practicable or desirable in the case of Bougainville. This consideration underscores the importance of Bougainville's institutional capability, in the sense discussed in the preceding paragraph. It may reinforce the attraction of a phased approach to a final form of self-determination while capability is built. The need for international support for self-determination outside PNG, as an independent state, suggests that it may be prudent to have discussions with other states about their attitude to recognition at an appropriate point in the consultations, before final decisions are made.

## 2.3 Principles

Deliberation on major questions about state-building, of which self-determination for Bougainville is an example, can be assisted by agreeing on guiding principles at the outset. In this case, agreement on guiding principles would provide a shared reference point for all parties in considering the form that self-determination for Bougainville should take and how to move to the new arrangements. A selection of principles, intended to reflect the needs and aspirations of Bougainville in the light of the results of the referendum, are set out below for consideration.

***The dignity of the referendum vote should be respected.*** Whatever the outcome of the consultations in terms of the detail of self-determination, due respect should be paid to the referendum vote.

***The ultimate goal is an effective polity.*** The end goal of the consultations is to ensure that Bougainville is a political community or ‘polity’ that functions effectively in the interests of all of its people and local communities.

***A polity requires internal cohesion and capable, accountable institutions.*** For the goal of an effective polity to be achieved, Bougainville needs internal cohesion and public institutions that are capable and accountable in carrying out their functions within Bougainville and in managing Bougainville’s relations with the outside world.

***Bougainville does not need to do everything itself.*** In an interdependent world, many polities share functions across borders. The challenge is to manage those relationships in ways that are mutually beneficial.

***Institutions should be tailored to fit the realities of Bougainville.*** The choice, design and operation of Bougainville’s institutions should match the characteristics and realities of Bougainville. These features include Bougainville’s culture, geophysical features, population size, stage of economic development, fiscal capacity, and preferences. Bougainville does not necessarily need all the same institutions, in the same forms, that exist elsewhere. It can take advantage of strong customary institutions when creating, designing and operating the institutions of state.

***Relations between Bougainville and polities outside its borders also should be tailored to Bougainville’s characteristics.*** Whatever the final details of self-determination, Bougainville will have significant relationships with states and other bodies outside its borders, including PNG. These should reflect geopolitical realities. Bougainville is a relatively small, if distinct, polity. It is susceptible to international pressures that it will need to manage. It is located in a region of other small island states and self-governing territories that offer opportunities for collaboration and sharing.

***Achieving self-determination will take time.*** On any view, there will be a transition period before, during and after the consultations between governments. Implementation of agreed decisions is likely to take longer still, to ensure that the new arrangements are effective. Not everything needs to be done at once. Implementation may be phased over a considerable period of time, in accordance with procedures agreed by the governments.

***The processes of consultation and implementation set the tone for the future.*** The processes followed during the consultations between PNG and Bougainville and in the subsequent transition phase during which the results of the consultations are given effect, will be critical for several purposes. These include creating an inclusive, responsive and effective system of government; building cohesion across communities; and giving the people of Bougainville a sense of ownership of their own governing arrangements.

## 2.4 Comparisons

Bougainville and PNG have distinctive features and a distinctive history that must guide both the decisions that are made in the course of the consultations and the ways in which they are put into effect. Properly used, however, the experiences of other countries can be a valuable source from which insights for the consultations between governments can be drawn. The companion report, *Increasing Revenues for the Bougainville Government* (Chand et al., 2020), identifies 57 states that, like Bougainville, have small island territories, in order to examine their relevance as comparators for the purposes of Bougainville’s own economic and fiscal futures. From this range, the report ultimately identifies 18 such states that are broadly comparable to Bougainville in terms of size and economic opportunity (Chand et al., 2020).

This section of this report identifies three ways in particular in which comparative experience might be useful for the institutional and related issues covered by this report.

First, the experiences of other countries may provide useful insight into each of the broad options for the relationship between Bougainville and PNG. Some examples are given below.

- Timor Leste and South Sudan are both states that have separated from larger states in relatively recent times and have achieved self-determination as independent states in their own right.<sup>4</sup>

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<sup>4</sup>Timor Leste became an independent state in 2002 and South Sudan in 2011.

- Cook Islands, Niue, the Federated States of Micronesia, Marshall Islands and Palau are examples of states that are not part of a larger state but operate in ‘free association’ with one.<sup>5</sup>
- Greenland is formally part of the Kingdom of Denmark, but it enjoys self-government on a basis that includes a right to secede and so offers an example of self-determination while formally remaining part of a larger state (Ackrén, 2017).

The experiences of these and other states show how each of the broad options for self-determination works, as a basis for determining their suitability for Bougainville.

Second, polities that are broadly similar to Bougainville in terms of geographic and population size, stage of development, and perhaps culture, offer insights into such matters as the range of institutions that Bougainville might need; the challenges of operating them; and the extent to which governance can be enhanced by local cultural practice. A subset of the states identified in the report *Increasing Revenues* (Chand et al., 2021) is most likely to be relevant for these purposes. States that might offer particular insights into the design and operation of institutions in Bougainville include Fiji, Kiribati, the Federated States of Micronesia, Samoa, Solomon Islands, Timor Leste, Tonga and Vanuatu. While each of these polities is different to Bougainville in many respects, all are island states, all are relatively small in global terms, and all are in the same region of the world, with similar neighbours, some shared historical experiences, significant distinctive cultures and broadly similar aspirations.

Third, comparative experience can be useful also to demonstrate how smaller states, with limited resources, share institutions of various kinds, including by using institutions of others. Examples that will be given in the course of this report include currency, courts and diplomatic representation. There is no shortage of public institutions that might be organised in this way, however, in the short term or even indefinitely. These practices are familiar in smaller states throughout the world, but the same range of Pacific states might be most useful comparators for Bougainville’s purposes.

It is not practicable in this report to canvass comparative experiences in any depth. Once the consultations get underway and the direction of the consultations becomes clear, more specific questions can be formulated. There may be value in organising a forum of representatives of selected states to provide detailed information on institutions and their operation in practice.

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<sup>5</sup> New Zealand, in the case of Cook Islands and Niue; the United States, in the case of the Federated States of Micronesia, Marshall Islands and Palau.

## Ch.3 Developing Bougainville as a polity

This part deals with three issues that are relevant to the further development of Bougainville as a distinct polity for the purposes of self-determination. These are: the strength and cohesion of political community; citizenship and the related issue of passports; and Bougainville symbols. Each of these is potentially relevant for self-determination, whatever the decision about the future relationship between Bougainville and PNG. One, the issue of citizenship, is much more pressing if self-determination takes place outside PNG as an independent state.

### 3.1 Political community

Creating a polity to realise self-determination requires an effective political community, in addition to the institutions and other trappings of statehood (Bogdandy et al., 2005). An effective political community requires cohesion between peoples, trust in public institutions and a shared commitment to the polity. In an effective political community, disagreement is resolved through processes provided by or under the auspices of the state, potentially including customary law and practice. Members of a political community will not always be pleased by an election outcome, a new law or policy, or a decision of a court or other arbiter. Where a political community is working well, however, people accept such outcomes as part of a system to which they belong and on which they are prepared to rely, even while working to change decisions for the future.

Bougainville already has a political community; however, greater demands will be placed on it by self-determination as Bougainville becomes increasingly self-reliant. Progress towards self-determination will require the political community to be strengthened, with the demands of self-determination in mind.

Bougainville has many advantages in strengthening its political community for the purposes of self-determination. It has a relatively homogenous population. It has enjoyed over two decades of peace since the ceasefire in 1998 and the BPA in 2001, during which its political community has developed to adapt to autonomy under the BPA. It has cultural traditions and institutions that saw Bougainvilleans through the conflict, when the formal institutions of the state broke down. Although institutions based on western constitutional models have been established, customary institutions, such as councils of elders and chiefs, customary law, and customary methods of decision making and dispute resolution are recognised in Bougainville's constitution and laws. Customary institutions have a high degree of legitimacy and operate alongside state institutions in what has been described as an example of successful 'hybrid' state building (Boege et al., 2008). Customary institutions and processes have played a crucial role during the period of autonomy under the BPA. Bougainville can continue to draw on these institutions to develop a political community that suits its new circumstances and needs.

But there are challenges in building political community in Bougainville as well. Regionalism and factionalism are as present in Bougainville as elsewhere (Bougainville News, 2019). The animosities of the civil war are not entirely overcome and continue to affect the cohesion of local communities (Autonomous Bougainville Government Department of Peace and Conciliation Resources, 2019). Divisions could be exacerbated by future initiatives including, most obviously, reopening the Panguna mine. The struggle for self-determination has been a catalyst for unity of purpose within Bougainville that could be weakened once that struggle is over. Governance in Bougainville in conditions of self-determination is certain to be difficult, has the potential to give rise to dissatisfaction among sections of the people, and could undermine the solidarity on which political community depends. Homogeneity can encourage a sense of exclusiveness vis-à-vis the rest of the world, at a time when what is needed is a combination of a sense of belonging to a well-functioning polity combined with the self-confidence to work effectively with others, for mutual benefit.

Building and maintaining political community is a continuing task in any polity. In Bougainville's case it can be advanced in several ways through the process of change that will begin with the consultations. These include the following:

- Developing a shared vision for Bougainville, internally and in its relationships with the rest of the world,

in the course of considering the institutions that Bougainville needs and how they should operate.

- Adopting approaches to governance and administration in Bougainville that are adapted to local needs, expectations and practices, consistently with their effectiveness.
- Ensuring a sense of community ownership of public institutions through inclusion of the people in initial design and ongoing decisions about them.
- Establishing programs and institutions that operate in ways that are effective and fair, and prioritise people.
- Ensuring that the benefits of resource development are shared across Bougainville in ways that are accepted as equitable.

### 3.2 Citizenship and passports

Any political community has rules or practices that identify its members. At present, Bougainville's Constitution recognises the legal status of a 'Bougainvillean'. Section 7 of the Constitution sets out the way in which Bougainvillean status is acquired. Section 8 identifies key rights held by Bougainvilleans to own customary land and to stand for election. Section 9 sets out the obligations of a Bougainvillean. The terms of sections 7 and 8 assume that most Bougainvilleans will also be citizens of PNG. As citizens of PNG, Bougainvilleans are eligible to receive passports from PNG.

One issue for the consultations over self-determination is whether there should be a distinct citizenship of Bougainville. The answer depends to some extent on the form of self-determination. Self-determination outside PNG would require a distinct Bougainville citizenship. In this event, Bougainville would also need to issue its own passports. A status of Bougainville citizen would be possible also if Bougainville were in a form of free association with PNG or remained formally within PNG, but it would not be essential.

The remainder of this section considers what is or might be involved in:

- creating a distinct status of Bougainville citizen; and
- deciding the relationship between citizenship of PNG and any separate Bougainville citizenship.

#### **Status of Bougainville citizen**

The legal status that formally signifies membership of a state and some other forms of polity is usually described as citizenship. Citizenship has both symbolic and practical significance. For example, some rights and duties, including the right to vote, typically are held exclusively by those who are citizens of the polity concerned.

The term 'citizen' is most commonly used to describe membership of separate countries. Citizens of a state also can acquire passports from their state to enable them to leave and return to the country and to move around the world. If Bougainville were to become a polity outside PNG, it would be necessary to create a status of Bougainville citizen and to provide for a system of Bougainville passports. By contrast, if Bougainville were to achieve a form of self-determination in free association with PNG, it could have its own citizenship and issue its own passports, but it need not do so. So, for example, Niue, which has a form of free association with New Zealand, relies on New Zealand citizenship and accepts that its people use New Zealand passports, as convenient but not necessary attributes of free association (Angelo, 2009).<sup>6</sup>

Ideas about membership and belonging are not exclusive to independent countries, however. They also apply in distinct political communities within countries. Some of these use the terminology of 'citizenship' to describe the status of belonging. In these cases, people may have multiple citizenships within the same country, at different levels of government, each of which is meaningful and valued in its own way. A similar idea of multiple citizenships within the same polity can be found in some supra-national arrangements. For example, someone who lives in France may be a citizen of both France and the European Union. It follows that even if Bougainville were to achieve self-determination in a form that meant it formally remained part of PNG, a status of Bougainville

<sup>6</sup>Broadly similar arrangements apply in the Cook Islands.

citizen could be created; although, in this case, passports would continue to be issued by PNG.

If a new status of citizen of Bougainville were created, it would be necessary to decide who is entitled to it. A broadly similar issue was faced in many Pacific states as they obtained independence from colonial rule.

One possibility would be to define citizenship of Bougainville by reference to the previous status of belonging, as a 'Bougainvillean'. With this approach, anyone who meets the definition of 'Bougainvillean' in the current constitution could automatically become a citizen of Bougainville on a specified date. The existing criteria would prescribe the bases on which citizenship of Bougainville might be acquired in the future. If this approach were adopted, consideration should be given to whether place of birth or other connection with the territory of Bougainville should be added to the criteria for Bougainville citizenship. Under the current provisions, the requirement for Bougainvilleans to be citizens of PNG before exercising political rights ensures a territorial connection, which would be lost if the two citizenships are separated from each other.

An alternative would be to define citizenship of Bougainville by reference to the standard criteria of place of birth and descent that are used in a variety of combinations in most countries in the world. This approach was taken by PNG on independence in 1975. PNG conferred automatic citizenship at the date of independence on any person born in PNG who had two grandparents born in PNG or in specified neighbouring islands.<sup>7</sup> Under current PNG law, a person acquires PNG citizenship if he or she is born in PNG and has at least one parent who is a PNG citizen; is born outside of PNG but has at least one citizen parent and is registered; or has had some connection to the people and territory of PNG before naturalisation.<sup>8</sup> Bougainville could develop citizenship requirements of its own, broadly along these lines, possibly accepting that birth in PNG and the 'adjacent area' as well as in Bougainville is acceptable for the purpose.

With either approach, there are likely to be cases where a person's citizenship status is unclear. To accommodate these cases, other states in the Pacific also have set out a process for certain classes of people to register or to apply for citizenship (Dziedzic, 2020). Flexibility of some kind would be useful for prescribing the citizenship requirements for Bougainville.

### **Relationship between citizenship of Bougainville and PNG**

If Bougainville were to create its own citizenship status, it would be necessary to determine its relationship to citizenship of PNG. The nature of that relationship would depend on whether Bougainville remains inside or outside PNG or in some form of free association with it.

If PNG and Bougainville remain part of a shared, umbrella state, the two citizenships can easily coexist, just as PNG citizenship and the status of Bougainvillean do now. Some questions might still need to be resolved if, for example, Bougainville seeks to grant citizenship status in Bougainville to someone who is not a citizen of PNG. In a sense, though, this possibility already is accepted under the current relationship between Bougainville and PNG. Section 7(3) of the Bougainville Constitution makes someone who is not a PNG citizen a Bougainvillean, if adopted 'as a member of a Bougainville clan according to custom'.

If Bougainville achieves self-determination outside PNG or in a form of free association with it, Bougainville citizenship would be distinct from membership of PNG. Decisions would need to be made about dual citizenship, by both PNG and Bougainville. Options include the following:

- Either or both PNG and Bougainville might prohibit dual citizenship. This is the default position in PNG at the moment, where PNG law provides that a person who is not a dual citizen will automatically lose their PNG citizenship if they obtain or fail to renounce a foreign citizenship.<sup>9</sup> On this basis, current citizens of PNG who also are 'Bougainvilleans' would need to choose which citizenship to adopt.<sup>10</sup> Given

<sup>7</sup> *Constitution of PNG* s 65(1).

<sup>8</sup> *Constitution of PNG* ss 66, 67.

<sup>9</sup> *Constitution of PNG* s 70(1)(a)-(d). Under these sections, a person may also lose their PNG citizenship by serving in a foreign armed service without express approval, voting in another country or travelling on a foreign passport.

<sup>10</sup> This was the approach taken when Czechoslovakia was divided into two independent states of Czech Republic and Slovakia in 1993. There was no agreement on citizenship between the two states, and legislation made by each state permitted citizens of the former Czechoslovakia to choose to become either a Czech or Slovakian citizen (i.e. dual citizenship was not permitted). In the late 1990s, however, legal changes in each state permitted dual citizenship.

their historical relationship, however, and the considerable intermingling of peoples, this might not be a satisfactory solution.

- An alternative is for PNG and Bougainville to accept dual citizenship, at least to the extent of allowing their own citizens to also be citizens of the other. This might be done as part of general acceptance of dual citizenship or in special recognition of each other. This would also fit with current practice in PNG, where a ‘registered dual citizen’ may be a citizen of a prescribed country without losing their PNG citizenship. Prescribed countries presently include Australia, Fiji, Germany, New Zealand, Samoa, the United Kingdom, the United States and Vanuatu.<sup>11</sup> Bougainville could be added to the list and make reciprocal arrangements for citizens of PNG.

Even if dual citizenship of Bougainville and PNG were recognised, further decisions may need to be made by each of them about whether dual citizens are subject to any restrictions that do not apply to people who hold only one citizenship. At the moment, for example, the PNG Constitution prohibits dual citizens from voting or standing for election to public office.<sup>12</sup> Decisions would need to be made about whether restrictions of this kind should apply to persons holding citizenship in both PNG and Bougainville and whether the restrictions should be reciprocal.

### 3.3 Symbols

Every polity uses symbols to reinforce its sense of political community and for use on official occasions. Symbols usually reflect the polity’s sense of its own identity, in terms of its people and their culture, its territory, its history and its place in the world. Bougainville already has a distinctive identity, which is the product of its story so far. A move to self-determination, whatever form it takes, will change Bougainville’s identity in some ways while leaving it unaltered in others.

There is no exhaustive list of the symbols that a polity may have for these purposes. Bougainville already has many of the usual symbols: a flag, emblem, motto and anthem.<sup>13</sup> Bougainville also celebrates commemorative days, including Autonomous Bougainville Government Foundation Day and Peace Agreement Commemoration Day. In connection with a move to self-determination, consideration might be given to whether these symbols adequately reflect the identity that Bougainville wishes to project, internally and externally.

The answer could depend on the chosen form of self-determination. For example, the BPA and PNG Constitution presently require that official markings of the Bougainville Police and Bougainville Correctional Service include the national PNG emblem.<sup>14</sup> Changes in the relationship between PNG and Bougainville in consequence of self-determination may affect this practice and certainly would do so if Bougainville achieved self-determination outside PNG, whether as an independent state or in a form of free association. Self-determination may have other implications for Bougainville’s identity as well, which could be reflected in the symbols used by Bougainville and the circumstances in which they are used.

Self-determination may ultimately lead to the creation of new symbols. A Bougainville system of honours or awards is a possible example. In addition, self-determination may bring other changes to Bougainville that take on a symbolic character. To take one example: currency, which is considered further below in Part 5.2, can have a symbolic as well as practical function. As Part 5.2 explains, countries do not need to have their own currency; this is a choice for each to make. Some countries with their own currency also use it as a symbol. The currency may be designed by using national symbols to distinguish the polity from others.<sup>15</sup>

<sup>11</sup> *Constitution Amendment (No 37) (Citizenship) Law 2014 (PNG); Citizenship (Amendment) Act 2016 (PNG) s 6C.*

<sup>12</sup> *Constitution of PNG s 50(1)(ba).*

<sup>13</sup> These and other symbols are provided by *the Constitution of Bougainville 2004 s 4; Bougainville Flag, Emblem and Anthem (Protection) Act 2018.*

<sup>14</sup> BPA arts 225, 249, *Constitution of PNG s 310(4).*

<sup>15</sup> Some groups within Bougainville have in the past sought to create a ‘Bougainville kina’, but lacking constitutional responsibility over currency, the ABG quickly declared it illegal (Autonomous Bougainville Government, 2016).

## Ch.4 Constitution and constitution making

Whatever the outcome of the consultations between the two governments, some changes to the Constitution of Bougainville are needed. The existing Constitution was made within parameters agreed in the BPA and reflected in the Constitution of PNG. It is expressly transitional, bridging the period of autonomy following the BPA and a decision on Bougainville's future political status.

Both the Constitution itself and the process of making or changing it are relevant to self-determination for Bougainville. A new or renewed constitution would mark the beginning of a new collective identity for Bougainville, symbolising the unity of the people and signifying Bougainville's new status to the rest of the world (Haysom, 2005). The Constitution also has practical significance for institution building, providing the basic framework for institutions of government and setting out their powers and functions. Any form of self-determination will require some new institutions for Bougainville and some changes to existing ones, all of which will need a foundation in Bougainville's Constitution.

Exactly what changes are made, how they are made, and the future relationship between the Constitutions of Bougainville and PNG will depend in part on the form of self-determination.

- If Bougainville achieved self-determination outside PNG, with no formal relationship with PNG other than as a close neighbour, this would be reflected in the terms of the Constitution, the range of matters for which it provides, and the mechanisms that it establishes for political and legal accountability.
- If Bougainville achieved self-determination in a form of free association with PNG, this would be likely reflected in the Constitutions of both PNG and Bougainville, although the Constitutions need not otherwise be dependent on each other.
- If Bougainville achieved self-determination on a basis that left it formally within PNG, significant constitutional changes still would be needed. In these circumstances, however, there would be a relationship of some kind between the two Constitutions, although it may not be the same as exists at present.<sup>16</sup>

On any of these scenarios for constitutional change, there is a further question for decision about whether Bougainville should amend the existing Constitution or make a new one. In principle, either is possible and there are advantages and disadvantages to both.<sup>17</sup> Making a new Constitution is a major enterprise, at a time when Bougainville is dealing with many other things. On the other hand, a new Constitution could have symbolic significance. Existing institutions that have worked well could be carried over from the old Constitution to a new one. A new Constitution could make it easier to ensure that all the provisions of the Constitution fit together in a way that is appropriate for Bougainville's new status.

The remainder of this part is divided into two sections. The first section outlines some issues and options for the process of making new constitutional arrangements for Bougainville. The second section identifies potential changes to the substance of the Constitution arising from the move from Bougainville's current status to self-determination.

### 4.1 Constitution-making process

The process by which constitutions are made or changed is important. An inclusive process can help to strengthen collective identity and foster a sense of ownership of the constitution. Inclusiveness here means that everyone has the opportunity to participate in the constitution-making process in a way that is meaningful. An inclusive process is all the more relevant when a Constitution is being developed for the purposes of self-determination.

<sup>16</sup> At present, the Constitution of Bougainville is a subnational Constitution, which draws its legal authority from the Constitution of PNG: *Constitution of the Autonomous Region of Bougainville 2004 ss 206 and 213. This was confirmed in Special reference re s 89(2) and 91(4)(f) of the Bougainville Constitution*, Supreme Court of Papua New Guinea, 29 May 2020.

<sup>17</sup> On the choice between amendment and making a new Constitution see *Constitutional Beginnings* (Constitutional INSIGHTS No 1, Constitution Transformation Network and International IDEA, 2018).

The process by which the 2004 Constitution of Bougainville was made is widely regarded as having been effective and inclusive (Regan, 2013; Wallis, 2014). Drawing on that experience, a new process, to prepare the Constitution for self-determination, might have the following features (although there are other possibilities as well).

- A **draft** might be prepared by a representative Constitutional Commission. Represented groups might include the different regions of Bougainville, churches, and interest groups (e.g. business, trade unions, women, youth and Bougainvilleans living outside Bougainville).
- **Public consultations** with local communities and stakeholder groups might be conducted by the Commission. These could take the form of face-to-face meetings, although a call for written submissions might also be made. In making the 2004 Constitution, there were several rounds of public consultations, and the draft constitution was amended in response to concerns raised (Kuiai, 2019; Wallis, 2014). Bougainville's laws already set out principles and standards for public consultation and these could be used to guide consultations on new constitutional arrangements.<sup>18</sup>
- The draft could be **debated and adopted** by a Constituent Assembly that is broadly representative of the people of Bougainville. For the purposes of the 2004 Constitution, the Constituent Assembly was appointed: this time around, the Assembly might be appointed, or elected, or a mixture of both.
- A referendum to **indicate approval** of the new or changed Constitution is also an option. Although a referendum was not used in the constitution-making process that led to the 2004 Constitution, it was used to ascertain the people's support for independence in 2019. A referendum on new constitutional arrangements has the advantage of directly involving the people. There are costs and risks, however (Suksi, 2010). A referendum is a blunt tool that results in a 'yes-no' answer. It cannot isolate the issues that are the most contentious or problematic. It may be that a deliberative constituent assembly, with time to debate the issues and develop consensus, is more consistent with Bougainvillean experience and values.

An inclusive process is important whether a new constitution is made or the old one is changed. In either case there may be an additional question about whether legal continuity with the previous constitution should be maintained, following the process for constitutional change that that constitution prescribes. In the case of Bougainville, this question is complicated by the nature of the existing process, as laid down by section 219 of Bougainville's Constitution and section 287 of the Constitution of PNG. These provisions require any change to the Bougainville Constitution to comply with the BPA, as implemented in Part XIV of the PNG Constitution. The PNG government must be notified and consultation with the PNG government may be required.

These are technical legal issues that may need more detailed examination in due course as the direction of change becomes clear. Some generalisations may be useful at this stage, however.

- If the decision that emerges from the consultations is that changes to constitutional arrangements in Bougainville require continuity with their foundations in the Constitution of PNG, section 219 of the PNG Constitution would need to be altered to provide a new amending procedure and corresponding changes would be needed to the Constitution of PNG as well.
- If legal continuity is not required, Bougainville would need to identify suitable alternative procedures to change the existing Constitution or make a new one.
- In either case, an inclusive process is desirable, drawing on the features suggested earlier in this part of the report.

The course ultimately adopted will be affected to some degree by the form of self-determination. A legal break is more likely if self-determination takes place outside PNG or in a form of free association with it, particularly if a new Constitution is made. There is a parallel here with the manner in which PNG adopted its Constitution in 1975 (Lynch, 1980). A legal break is less likely if self-determination takes place within PNG, particularly

<sup>18</sup> *Constitution of the Autonomous Region of Bougainville 2004* ss 195 and 196; sch 2.19.

if changes are made through amendment of the existing Constitution. Whatever course of action is chosen, it should be guided by the need to ensure that new constitutional arrangements in Bougainville enjoy a high degree of legitimacy in the eyes of its people and relevant stakeholders, both within Bougainville and outside it.

## 4.2 Substantive changes to Bougainville's constitution to reflect self-determination

Some aspects of the current Constitution of Bougainville will require reconsideration and change, whatever the future relationship between Bougainville and PNG. This section provides an overview of the areas of the Constitution that are likely to need changing to respond to Bougainville's new status and those that might be retained, if they are otherwise working satisfactorily. The changes actually made will depend on the form of self-determination on which the two governments agree and on decisions within Bougainville during the constitution-making process. A change in the status of Bougainville will require changes to the PNG Constitution as well, of the kinds outlined in Part 7.

The table in the Appendix identifies more than 30 areas of the current Constitution of Bougainville that will need reconsideration in the context of the move to self-determination. Because the table is long, it has been placed at the end of the report, but the detail gives an indication of what is likely to be involved. In summary, the provisions likely to be affected in some way include:

- The definition of the polity of Bougainville as reflected in the preamble, the name of the polity, boundaries, citizenship and symbols.
- The status of the Constitution and its relationship with the PNG Constitution and the application of PNG laws including the PNG Constitution, human rights provisions, leadership code and underlying law.
- Provisions that reflect the autonomy arrangements agreed in the BPA (such as the transfer of functions and grants).
- Provisions in relation to customary criminal law, foreign affairs, international agreements, appointments, police and corrections, fiscal matters and emergencies that require consultation with, or involvement of, PNG officials.
- The judiciary and the jurisdiction of Bougainville courts.
- Spent provisions relating to the conduct of Bougainville's first elections and the referendum.

Many of these issues are discussed in greater detail in this and other NRI Reports. To assist the reader, the right-hand column of the table in the Appendix cross references these discussions.

There are other aspects of the current Constitution that will not necessarily be affected by self-determination or a change in Bougainville's political status. These could be carried over into a new constitution or retained in an amended constitution, if they are deemed to have worked well. They include:

- Objectives and Directive Principles (Part 3).
- Local level and regional government (sections 49–50).
- Recognition and support of traditional systems of government (section 51).
- Principles and provisions for consultation and participation (sections 195–6).
- The essentials of the system of government, including the composition and structure of the House of Representatives and Bougainville Executive Council (Part 5 and Part 6).
- The framework and regulation of elections (Part 8).
- General principles for financial management (section 153).

- Provisions for independent institutions and ‘fourth branch’ institutions, such as the Public Prosecutor and Public Solicitor (sections 128–9), Auditor General (sections 158–9), the Public Accounts Committee (sections 160–1) and the Ombudsman (Part 12). The protections relating to the appointment, tenure and remuneration of constitutional office holders (sections 189–90) could also be retained.

While these aspects of the Constitution might not require change in a move to self-determination, the constitution-making process could provide an opportunity to consider whether they should be changed as well, in the light of how they have worked so far and what is thought to be necessary or useful for Bougainville in the future.

## Ch.5 Institutions

This part outlines the implications of self-determination for Bougainville's institutions. For this purpose, it canvasses a wide range of formal state institutions, of the kind commonly found in constitutions around the world. Most of these have potential relevance for Bougainville, whatever form self-determination takes. In some cases, the institution or the manner of its operation will depend on whether self-determination takes place outside or inside PNG or in a form of special relationship with it and this is noted in the report. The report seeks only to identify options—the choice of institutions is a matter for Bougainville to decide, bearing in mind its own local context and likely future needs.

The focus of this part of the report should not be taken to overlook that what are sometimes labelled 'informal' or non-state institutions have a critical role in the governance of Bougainville. This role is longstanding. During colonial rule and again during the conflict, community institutions such as churches, customary clan and family groups and, for a while, combatant networks, provided essential services for their peoples. These institutions still have a major role in Bougainville, which would continue. For example, under current arrangements, the ABG has involved local governments and communities in the provision of government services, most notably health and education (Ugyel, 2018), while ex-combatants have sometimes taken on roles assisting police (Forsyth & Peake, 2019). One of the challenges of designing new or renewed institutions in Bougainville for the purposes of self-determination is to ensure that they fit smoothly into the network of existing institutions, informal as well as formal.

Section 5.1 of this part deals with governance institutions, through which the legislative, executive and judicial powers of Bougainville are exercised. Section 5.2 considers public sector institutions, including government services and independent agencies, through which government is administered. Section 5.3 identifies some other institutions that perform a significant role in public life that might also be considered in the context of self-determination.

In relation to each of these categories, each section addresses a set of three questions:

- a. What institutions might Bougainville need or want, in conditions of self-determination? This segment takes account of the institutions Bougainville has already.
- b. What are the implications of self-determination for the design and operation of institutions? This segment deals in particular with current arrangements under which PNG has a supervisory role.
- c. What should be the priorities for institutional development during the transition phase and afterwards, to ensure that institutions work as effectively as possible?

This last question raises the issue of the **timeframe** within which self-determination occurs. We noted earlier that transition to self-determination will come in two stages and may be followed by a third post-transition stage.

The **first transition stage** began as soon as the referendum results were known and leaders in Bougainville and PNG began to give thought to what should happen next. This stage will continue after the Bougainville elections, during the consultation period.

A **second transition stage** will begin when the outcomes of the discussions between governments are known and steps are taken to put them in place. There is no fixed time period for either of these stages. Both depend on resources and capacity, and are likely to require consultations with the communities of Bougainville and PNG.

It may be helpful to envisage a **third 'post-transition' stage** after any formal transition period has passed but during which self-determination continues to evolve. During this phase, institutions that were not initially deemed essential may be established and Bougainville may assume full responsibility for institutions being run on its behalf by other governments. Depending on the matters agreed in the course of the consultations, Bougainville's own status might change during this period. Possibilities range along a spectrum that extends

from self-determination within PNG, to self-determination in a form of free association with PNG, to self-determination as a formally independent state, with international recognition.

The discussion of institutional priorities that follows briefly maps onto these stages the institutions that need immediate attention, those that might be entrusted to others (at least for a period), and those that might be postponed for later consideration.

## 5.1 Governance institutions

This section considers governance institutions for Bougainville in conditions of self-determination. Many of these institutions already exist in Bougainville. Some could already be established by Bougainville under the existing Constitution. Others are suggested by self-determination, depending on the form that self-determination ultimately takes, and would need to be established. Not all institutions need to be run by Bougainville, at least in the short to medium term, and some could be provided through cooperation with PNG or other states.

### a. What governance institutions might Bougainville want or need, in conditions of self-determination?

Bougainville already has many governance institutions under the 2004 Constitution. These include a unicameral (single chamber) legislature called the House of Representatives, with responsibility for law making and oversight of the executive, and an Executive Council consisting of a directly elected President, and a Vice-President and Ministers drawn from the House of Representatives. Bougainville has also established a system of local government comprising wards and community government areas led by locally elected or chosen representatives.<sup>19</sup> There are several political parties in Bougainville, registered under the provisions of the Bougainville Constitution.<sup>20</sup>

There are some governance institutions for which the Constitution provides but which have not yet been established. For example, the Bougainville Constitution makes provision for an Advisory Body consisting of representatives of traditional chiefs and leaders to advise the House of Representatives and Executive Council,<sup>21</sup> but a law to establish such a body has not yet been made. In the context of a move to self-determination, consideration should be given to whether the Advisory Body is still needed and, if so, whether its establishment is a priority.

Some other governance institutions for which the Constitution provides continue to be managed by PNG. Most notable among these are judicial institutions. A move to self-determination makes it necessary to consider whether, to what extent and when Bougainville should assume responsibility for its own courts. This issue is considered further below, together with the related issue of an apex court.

If self-determination takes place outside PNG or in a form of special association with it, two further governance institutions require consideration: a head of state and an apex court.

#### *Head of state*

As matters presently stand, Queen Elizabeth II is the head of state for the whole of PNG, including Bougainville. If self-determination occurs outside PNG or in free association with it, Bougainville will need to consider arrangements for its own head of state. This issue raises a wider question of whether, in these circumstances, Bougainville would become a republic or seek to use the Queen or her successor as the head of state.

The head of state has a symbolic role as the representative of the state or polity. The position of the head of state varies across countries, depending on the system of government. In parliamentary systems, the head of state generally is separate from the head of government. For example, in PNG the head of state is Queen Elizabeth II, who is represented by the Governor-General, while the head of government is the Prime Minister. In such systems, the head of state is usually unelected and has a largely ceremonial role. In contrast, in presidential systems such as the United States, an elected President is both the head of state and head of government and has

<sup>19</sup> *Bougainville Community Government Act 2016*. See also 'Department of Community Government' <http://www.abg.gov.pg/government/departments/community-government>.

<sup>20</sup> *Constitution of the Autonomous Region of Bougainville 2004* s 111; *Political Parties (Registration) Act 2006*.

<sup>21</sup> *Constitution of the Autonomous Region of Bougainville 2004* s 52.

substantial political and governmental powers.

Under its current constitution, Bougainville's system of government combines features of the Westminster parliamentary system and a presidential system. The President is directly elected and has powers equivalent to a head of government. The President also represents the Bougainville government and the people of Bougainville on ceremonial occasions.<sup>22</sup> All other members of the executive are drawn from sitting members of parliament, as in the Westminster system. Assuming that these arrangements continue under self-determination, Bougainville would need to make arrangements for a head of state that suits this mixed system of government. The principal options include the following.

*Constitutional monarchy with Queen Elizabeth II and her successors as head of state.* The monarch would be represented by a local official (usually called the Governor-General) with largely ceremonial functions. This is the arrangement in PNG and Solomon Islands. This new position would need to be negotiated with the representatives of the Crown and, potentially, the United Kingdom government.

*Republic with a combined head of state and head of government.* In some republics in the Pacific region, the head of state and head of government are combined in the one official (usually called the President). For example, in Kiribati—a Republic with an elected president and Westminster style government—the Beretitenti is head of state and head of government.<sup>23</sup> Nauru and Marshall Islands are republics with parliamentary systems that combine the head of state and head of government in the President. If this option were adopted, the President of Bougainville also would perform the function of head of state.

*Republic with separate head of state.* If Bougainville were a republic, it would also be possible to create a separate office for the head of state. Decisions would need to be made on a range of matters. These include: what to call this office, its powers and functions, the qualifications required to hold office, how the head of state would be chosen (e.g. appointed by the President or Executive Council, or elected by the Parliament), term of office (including any limits on the number of terms a person could serve) and how the head of state could be removed from office. In the region, republics with a separate head of government and head of state include Fiji, Samoa and Vanuatu.

Whichever option is chosen, it would need to be reflected in the Constitution. The Constitution also should specify the powers of the office of head of state. If self-determination takes place outside PNG or in free association with it, new arrangements for the head of state would need to come into effect at the same time.

### ***Bougainville judiciary and apex court***

The current Constitution provides for the establishment of a Bougainville court system, comprising a Bougainville High Court, village courts and other courts established by law. Under current arrangements, both the Supreme Court and the National Court of PNG have jurisdiction to determine and enforce human rights claims alongside the Bougainville High Court.<sup>24</sup> The Supreme Court of PNG is the final court of appeal for all matters arising in Bougainville. All Bougainville courts are expressed to be part of the national PNG judicial system.<sup>25</sup>

The Bougainville High Court has not yet been established. Instead, under present arrangements, the National Court and District Courts of PNG operate in Bougainville. Village magistrates and land mediators are appointed by the PNG government, from persons nominated by local community governments in Bougainville. The Constitution of Bougainville anticipates the establishment of the office of a Bougainville Public Prosecutor and Public Solicitor, but these services are currently provided by PNG institutions as well.<sup>26</sup>

The point was made earlier that whatever form self-determination takes, consideration should be given to whether and, if so, when Bougainville should assume responsibility for its own court system and ancillary institutions.

<sup>22</sup> *Constitution of the Autonomous Region of Bougainville 2004* s 93(c).

<sup>23</sup> *Constitution of Kiribati* s 30(2).

<sup>24</sup> *Constitution of the Autonomous Region of Bougainville 2004* s 183.

<sup>25</sup> *Constitution of the Autonomous Region of Bougainville 2004* s 112.

<sup>26</sup> *Constitution of the Autonomous Region of Bougainville 2004* s 128.

These include a judicial appointment process, a public prosecutor and a public solicitor. Running these services requires organisational capacity and involves cost. To be effective for the purpose, courts need legal expertise, independence and adequate infrastructure. Subject to the agreement of PNG, the current arrangements could continue for some time. Bougainville might assume responsibility for these institutions gradually, as part of the transition. Nevertheless, under almost any conception of self-determination, the assumption of responsibility for at least the lower and intermediate courts in the judicial hierarchy would seem to be an obvious step for which provision should be made. Whether the courts in Bougainville should continue to remain part of the PNG judicial system and whether PNG courts should continue to deal with human rights claims arising in Bougainville are different questions. The answers to these depend on the form that self-determination takes.

A decision about an apex court for Bougainville requires separate consideration. Currently, the PNG Supreme Court is the final court of appeal for Bougainville, as required by the BPA.<sup>27</sup> Questions of constitutional interpretation are to be determined exclusively by the (as yet unestablished) Bougainville High Court or the PNG Supreme Court.<sup>28</sup> Self-determination for Bougainville will require a decision about whether Bougainville should continue to use the Supreme Court of PNG or whether it will create its own apex court. In either case there is a range of options as to the composition of the court and its jurisdiction.

If self-determination occurs within PNG, the Supreme Court of PNG will remain, at least formally, the final apex court for the whole country. In recognition of self-determination, however, consideration might be given to ending the final appellate authority of the Supreme Court of PNG over the interpretation of Bougainville's Constitution and laws, conferring the jurisdiction instead on a final appellate court of Bougainville. Whether this step is advisable depends on whether the necessary expertise and capacity is available within Bougainville. If this step were to be taken, it would be necessary to work out a way of resolving conflicts that might arise between the laws of PNG and Bougainville or disputes between the two governments. This would require jurisdiction to be conferred on a court in which both governments had confidence. One possibility might be a special division of the Supreme Court of PNG, or another configuration of that Court, on which a judge or judges from Bougainville also are represented.

If self-determination occurs outside PNG or in a form of free association with it, Bougainville will need to consider how to create an apex court for itself. This apex court could be a separate court, or an appellate panel of the Bougainville High Court. Given that the Bougainville High Court is yet to be established, there may be concerns that Bougainville does not yet have lawyers who are suitably qualified and willing to take up high judicial office on such a court, or the resources and personnel to support the administrative work of a court. Experiences in other Pacific states suggest two transitional options, for the short or longer term.

- *Foreign judges.* One option is to permit the appointment of foreign judges to the apex court. The current Constitution of Bougainville already anticipates this possibility, and schedule 5 expressly sets out the qualifications required for appointment as a Bougainville judge, covering both PNG citizens and non-citizens. It also makes provision for acting judges who are non-citizens and permits a judge to concurrently hold appointments as a judge of the National and Bougainville courts.<sup>29</sup> The use of foreign judges is common in new states, particularly those emerging from conflict and/or colonial rule. Foreign judges were used in Timor Leste from its independence until 2014, and are still used in all Pacific island states including PNG (Dziedzic, 2019). This option would require Bougainville to establish and run an apex court, including the infrastructure, procedures and personnel required for the court to hear and determine cases.
- *Overseas court.* A second possibility is to designate a court of another country as the apex court of Bougainville. This court would be constituted by judges appointed by the other state but would hear Bougainville cases and apply Bougainville law. An example of this kind of transitional measure was provided by Nauru, which designated the High Court of Australia as its final court of appeal. This

<sup>27</sup> BPA arts 127, 285; Constitution of PNG s 308(5); *Constitution of the Autonomous Region of Bougainville 2004* s 120.

<sup>28</sup> BPA art 286; *Constitution of the Autonomous Region of Bougainville 2004* s 209.

<sup>29</sup> *Constitution of the Autonomous Region of Bougainville 2004* ss 117(2), 118, 122.

arrangement was formalised by a treaty between the two states and reflected in legislation.<sup>30</sup> In 2018, Nauru withdrew from the Treaty and amended its Constitution to establish its own Court of Appeal, composed of senior judges from other Pacific island states, including a judge from PNG. If Bougainville chooses to pursue this option, the government would need to consider which overseas court might be appropriate and engage in consultations with that state. The Supreme Court of PNG is an obvious choice, but not necessarily the only one.

**b. What are the implications of self-determination for the design and operation of governance institutions?**

Under current arrangements, the PNG government has some involvement in running, monitoring or approving the operation of some institutions in Bougainville. In conditions of self-determination, Bougainville will have greater, or even sole responsibility for the operation of all its governance institutions. The extent to which this is so depends to some extent on the form of self-determination, as well as on the institutional arrangements agreed by the two governments.

On any view, self-determination thus has the following implications for the design and operation of governance institutions in Bougainville.

- It suggests that existing institutions should be reviewed, to determine whether they are working as well as they could in the interests of the people of Bougainville. This could be part of the discussions on constitutional change (see Part 4.2 above).
- It suggests that existing institutions should be strengthened and new institutions should be designed to ensure their effectiveness and integrity and appropriate levels of accountability.
- It suggests that all institutions should be tailored to the needs, capabilities and expectations of Bougainville, to the extent that that is consistent with their effective operation.
- It suggests a need for caution in creating new institutions to be run in and by Bougainville unless and until Bougainville has the capacity to operate them effectively.
- It suggests that consideration should be given to whether some new institutions, or Bougainville's assumption of responsibility for some institutions, should be phased in over time and, if so, what the interim arrangements should be.

**c. What might be the priorities for institutional development, during the transition phase and afterwards?**

Decisions about priorities ultimately are matters for discussion between governments or, in some cases, for Bougainville alone. Some observations about priorities during the successive transition periods nevertheless may be useful.

In the first transition stage, **before the consultations between governments end**, consideration could be given to:

- the manner and extent of constitutional change (see Part 4 above);
- the adequacy of existing governance arrangements including whether and, if so, how they could be improved;
- activity at the community level in Bougainville to ensure understanding of the issues involved in the consultations and in self-determination;
- continuing improvement of relations between central and local community institutions;
- whether the Advisory Body contemplated by section 52 of the Bougainville Constitution is needed or not.

<sup>30</sup> *Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru*, 6 September 1976.

In the transition stage that begins **after the consultations end**, it will be necessary to:

- decide on, and take steps to give effect to, new arrangements for a head of state if self-determination takes place outside PNG or in a form of free association with it; if Bougainville seeks to continue an association with the monarchy, this will require discussions with the Queen and her advisers;
- carry out the necessary changes to the Bougainville Constitution, including provision for Bougainville citizenship, if required;
- develop a plan to build capability to gradually assume responsibility at least for the system of intermediate courts in Bougainville, for the offices of public prosecutor and public solicitor and for adjudication of human rights issues in Bougainville

Matters that could be **phased in over time**, in a post-transition stage, potentially include:

- establishment of an apex court for Bougainville, run by Bougainville and staffed by Bougainville judges. If self-determination takes place outside PNG or in a form of free association with PNG, provision of some kind must be made for an apex court for Bougainville. As the earlier section shows, however, Bougainville could continue to use the Supreme Court of PNG, with or without modification of existing arrangements; could use the court of another country; or could run the court itself, but appoint foreign judges. Any of these options would require consultation with the country or countries concerned.

## 5.2 Public sector institutions

This section considers public sector institutions in Bougainville in conditions of self-determination. It covers agencies that provide government services as well as independent commissions such as the Auditor-General and the Ombudsman. While some of these institutions have been established and are operating in Bougainville, several are still provided by PNG, by law or as a result of the transitional arrangements under the BPA. Others depend on the form that self-determination takes and would need to be newly established, if they are required.

### a. What public sector institutions might Bougainville want or need in conditions of self-determination?

Bougainville already has a significant range of public sector institutions. Many of these are linked to the functions that have been transferred from PNG to Bougainville under the BPA. This is because the assumption of new governmental functions necessarily requires an institutional framework to give them effect. Up until now the focus has, quite understandably, been on services to support human development and recovery from the conflict. Health and education have been a particular focus. In conditions of self-determination, economic development with a view to greater fiscal independence is likely to need greater attention.

Bougainville presently has 14 public service departments responsible for different areas of government, including community development, economic development, education, health, lands and environment, mineral and energy resources, primary industries and justice. Another set of public sector institutions is designed to support and maintain the integrity of public institutions. Institutions of this kind already established in Bougainville include an Electoral Commissioner, who has managed Bougainville elections since 2015, and an Auditor General, whose office was established by legislation in 2014, although the position is currently vacant.<sup>31</sup>

Institutions that do not presently exist in Bougainville, at least as Bougainville-owned institutions, but which deserve consideration in the context of self-determination, fall into two broad categories.

In the **first category** are institutions for which the current Bougainville Constitution provides but which have not yet been established, or which continue to be provided by national PNG institutions. These require attention in the context of self-determination to determine whether and, if so, when, the institution should be established and run by Bougainville. Institutions in this category include an Ombudsman, a human rights enforcement body, a Land Board, and police and corrections services.

<sup>31</sup> *Public Finances (Management and Administration) Act 2014.*

In the **second category** are public sector institutions that do not presently exist in Bougainville because they are not necessary for the functions exercisable by Bougainville under the BPA. Establishment of these institutions by Bougainville therefore depends on decisions between the governments about what self-determination involves and decisions by Bougainville about the institutions that it requires and which it can support. Institutions in this category include monetary and financial institutions, defence forces, external affairs agencies and a diplomatic corps.

Each of these institutions is canvassed briefly below. The report returns to the issue of external affairs agencies in Part 6.4, as institutions relevant to the external aspects of self-determination.

**Ombudsman.** The role of the Ombudsman is to ensure that all government agencies are responsive to the needs of the people and that they treat people fairly. In Bougainville, as in PNG, the Ombudsman is also given specific responsibility to enforce the Leadership Code, which ensures that those who hold high public office comply with their legal and ethical responsibilities. The Constitution provides that the office of the Bougainville Ombudsman may be established ‘at such time as is considered by the House of Representatives to be suitable’.<sup>32</sup> This office has not yet been established. As a result, the Leadership Code set out in Part 13 of the Bougainville Constitution is also not yet in operation. In the meantime, Ombudsman functions are provided by the national Ombudsman, which established an office in Bougainville in 2017. The Leadership Code in the PNG Constitution still applies in Bougainville.<sup>33</sup>

The Ombudsman has developed as an important mechanism for government accountability in PNG and Bougainville. It provides an avenue for members of the public to raise concerns about the actions of government agencies as well as independent oversight of Bougainville’s leaders. The role of the Ombudsman could become even more important as Bougainville assumes greater governmental functions and powers as part of self-determination. If Bougainville does not provide for an Ombudsman, it would be necessary for provision to be made for the core functions of Ombudsman to be provided in some other way. It would be possible for the PNG Ombudsman’s office to continue to operate in Bougainville as a transitional measure pending the establishment of a Bougainville office, although this would obviously require agreement between the PNG and Bougainville governments.

**Human rights enforcement body.** Section 185 of the Bougainville Constitution permits the establishment of a specialist human rights enforcement body with powers to protect and enforce human rights; encourage respect for human rights; provide human rights education; and encourage reconciliation among parties involved in abuses or infringement of human rights. Such a body has not yet been established.

The NRI Report on *Bougainville Referendum Outcomes Issues* identified a range of human rights issues that may be important as Bougainville moves from its current arrangements to self-determination and recommended that Bougainville establish a human rights enforcement body (Bell & McVeigh, 2018). If Bougainville chooses to establish such a body, international and regional assistance is likely to be available. There also are international standards that guide the international recognition of national human rights institutions.<sup>34</sup>

A human rights enforcement body requires both expertise and dedicated resources. Only a few of the Pacific island comparator states have established distinct national human rights institutions. Fiji has a Human Rights Commission, while in Timor Leste and Samoa, the Human Rights Commission is combined with the office of the Ombudsman.<sup>35</sup> There may be value in considering whether in Bougainville such a combination would be cost-effective as well.

Under the current Bougainville Constitution, the basic rights set out in the PNG Constitution are applied to

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<sup>32</sup> *Constitution of the Autonomous Region of Bougainville 2004* s 165.

<sup>33</sup> *Constitution of the Autonomous Region of Bougainville 2004* s 169. For the PNG Leadership Code see *Constitution of PNG* s 27; Organic Law on the Duties and Responsibilities of Leadership (PNG).

<sup>34</sup> *Principles relating to the Status of National Human Rights Institutions*, adopted by the UN General Assembly resolution 48/134 of 20 December 1993 (Paris Principles).

<sup>35</sup> In Fiji: *Fiji Human Rights and Anti-Discrimination Commission*; in Timor Leste: Office of the Ombudsman for Human Rights and Justice; in Samoa: Office of the Ombudsman and National Human Rights Institution.

Bougainville.<sup>36</sup> As Bougainville considers a new or amended Constitution for the purposes of self-determination, the inclusion of constitutionally entrenched rights provisions should be considered too. In drafting these, Bougainville could draw on the rights provisions of the PNG Constitution or pick up some of the provisions of international human rights treaties,<sup>37</sup> adapted to the Bougainville context. A body with some of the developmental functions of a Human Rights Commission might be useful in these circumstances, whether it stands alone or is combined with another institution.

**Land Board.** The Constitution of Bougainville directs the ABG to develop a land policy for Bougainville ‘as soon as practicable’, providing for the protection of customary land owners and records of land ownership.<sup>38</sup> To do so required the transfer of powers from the national PNG government to Bougainville and the creation of a Bougainville Land Board. Following a decision of the Joint Supervisory Body in March 2020, both are now proceeding under the current autonomy arrangements,<sup>39</sup> and land policies and institutions to administer them can be expected to apply under future arrangements for self-determination.

**Police and corrections services.** The BPA permitted the creation of an Autonomous Bougainville Police Service and for the Royal PNG Constabulary to exercise its functions in Bougainville.<sup>40</sup> It also anticipated the establishment of a Bougainville Corrections Institution.<sup>41</sup> Both services are currently provided in Bougainville with the assistance of PNG. The Bougainville Police Service, including a Community Auxiliary Police, is formally part of the Royal Papua New Guinea Constabulary. Corrections services are provided by national PNG Correctional Services. The Chief of the Bougainville Police Service is a Deputy Commissioner of the PNG Police and reports to the PNG Police Commissioner.

These arrangements are likely to require reconsideration for the purposes of self-determination. If self-determination occurs within PNG, these arrangements might reasonably continue, with the agreement of both governments, at least as an interim measure. If self-determination occurs outside PNG, or in a form of free association with it, Bougainville would need to plan to assume greater responsibility for the legislative framework, appointments and control of the police service and corrections services. Cooperative arrangements with other states, including PNG, would be possible; for example, the Community Auxiliary Police is presently supported by the New Zealand government.

**Currency and monetary institutions.** Under current arrangements, the PNG government is responsible for currency and has a role in overseeing Bougainville’s budget and financial investments.<sup>42</sup> Bougainville’s currency is the Papua New Guinea kina.

Currency is potentially an issue for consideration whether self-determination is achieved inside or outside PNG or in some form of association with it.

Even if self-determination is achieved inside PNG and the kina is retained for this reason, it would be possible for some of the currency to be issued with Bougainville symbolic markings. There is an example of an arrangement of this kind in the United Kingdom, where Scottish and Northern Irish banknotes of a different design but the same value as the British pound are accepted as legal currency throughout the United Kingdom. This arrangement has a long history; however, whether the cost and trouble would be justified in relation to Bougainville would require serious consideration.

<sup>36</sup> *Constitution of the Autonomous Region of Bougainville* 2004 s 178.

<sup>37</sup> For example, the Hong Kong Bill of Rights Ordinance 1991 basically reproduced the provisions of the International Covenant on Civil and Political Rights in domestic Hong Kong legislation.

<sup>38</sup> *Constitution of the Autonomous Region of Bougainville* 2004 s 44.

<sup>39</sup> Official Joint Statement of the Joint Supervisory Body Meeting in Port Moresby by Co-Chairs Hon James Marape PM, Prime Minister of Papua New Guinea and Dr Chief John Momis GCL MHR, President of the Autonomous Region of Bougainville (12 March 2020) agenda item 11.

<sup>40</sup> BPA arts 210-32.

<sup>41</sup> BPA arts 241-52.

<sup>42</sup> While central banking is included in the constitutional list of powers allocated to the national PNG government, the BPA art 91 provided for a future possibility that ARoB might, after it has achieved fiscal self-reliance, assume some responsibilities for central banking. ‘Fiscal self-reliance’ has a technical definition: it is the ‘year in which the revenue from company tax, 70 per cent of Value Added Tax and customs duties is equal to the value of the recurrent grant on a sustainable basis’: BPA art 137.

If self-determination for Bougainville is achieved outside PNG or in a form of free association with it, Bougainville will need to consider what currency to have. Practice varies across Pacific states. The principal options are:<sup>43</sup>

- Bougainville might have its own currency. This is the case in Fiji, Samoa, Solomon Islands, Tonga and Vanuatu. If this option were adopted, it will be necessary to determine issues of monetary policy, including whether to peg the value of Bougainville currency to that of a larger economy or major trading partner to create greater stability for foreign trade and investment.
- Bougainville might adopt the currency of a larger state, of which PNG or Australia are possibilities. By way of example, Kiribati, Nauru and Tuvalu use the Australian dollar; Timor Leste uses the U.S. dollar officially and some other currencies unofficially. Even if this option were adopted, Bougainville might decide to issue its own coins as is done, for example, in Tuvalu.

Decisions about currency involve important economic questions about monetary policy, which in turn have implications for institutions. They require consideration of the financial costs of production and administration of currency.<sup>44</sup> They also require consideration of whether to create a central bank and what its powers and functions should be. A central bank is an independent institution responsible for managing monetary policies, such as currency, exchange, inflation and money supply, and might also be responsible for regulating commercial banks. Most states have a central bank. Six of the few states that do not have a central bank are Pacific island states (Kiribati, Nauru and Tuvalu; and the three states in free association with the United States, Marshall Islands, Micronesia and Palau), although all have smaller populations than Bougainville and more stable sources of revenue.

If decisions about self-determination involve Bougainville moving away from the kina, it is suggested that a special report be commissioned to explore the logistics, costs and economic implications of the various currency options in greater detail.

**Defence.** Under the BPA, the PNG government has responsibility for defence, but any defence activities in Bougainville must proceed on ‘a cooperative basis following consultation’ between the two governments. Given the legacies of armed conflict in Bougainville, the creation of a Bougainville defence force is likely to be a sensitive issue.

Defence is unlikely to be an issue if Bougainville remains formally within PNG. If Bougainville were to achieve self-determination in a form of special association with PNG, it is likely that defence would be one of the services that PNG would provide for Bougainville. But if Bougainville achieved self-determination outside PNG, as an independent and formally sovereign state, it would need to consider what steps to take in relation to defence.

Even in this situation, it would not be necessary for Bougainville to have a military or standing army. Several countries in the Pacific region do not have a regular military; these include Kiribati, Federated States of Micronesia, Samoa and Solomon Islands. Some of these states have small maritime surveillance units to monitor ocean territories. Some have formal or informal agreements with Australia, New Zealand or the United States to provide defence assistance if it is required. Bougainville could follow these precedents, in the short or even the longer term.

**Foreign affairs and international relations.** Under current arrangements, the government of PNG is generally responsible for foreign relations involving Bougainville, subject to obligations to consult on particular issues (see Part 6.4 below). This would be likely to continue if self-determination were achieved within PNG, although the obligations to consult might be extended, strengthened, and made more effective. Similarly, if Bougainville were to achieve self-determination in a form of free association with PNG, it is likely that PNG would remain largely responsible for foreign affairs, subject to consultation and, perhaps, participation with Bougainville on particular issues.

If Bougainville were to achieve self-determination outside PNG, it would be responsible for its own foreign

<sup>43</sup> For examples from across the Pacific region see Jayaraman and Narayan, 2011.

<sup>44</sup> For example, PNG coins are produced in Canada and banknotes in Australia.

relations. What this would involve is canvassed more fully in Part 6 of this report. It would have institutional implications, however, which should be mentioned here. Bougainville would need a more developed capability within the public service to manage its foreign relations and a diplomatic corps to represent Bougainville in other countries and in regional or international organisations. Both would require skilled personnel and considerable resources.

As the example of some other states show, a diplomatic corps can be relatively small and focused on those international relationships and issues most important to Bougainville (e.g. major trading partners, proximate states and international organisations). It is possible to share resources and functions with other states (e.g. shared consular services or embassy premises). There are also non-profit organisations that provide diplomatic advice and assistance; for example, to lobby internationally on particular issues on behalf of states that require assistance.<sup>45</sup>

**b. What are the implications of self-determination for the design and operation of public sector institutions?**

Any form of self-determination requires Bougainville's public sector institutions to work effectively for and with the people of Bougainville. To that end, institutions should be tailored to fit the realities of Bougainville. From these starting points, self-determination has a range of implications for the design and operation of public sector institutions in Bougainville.

While Bougainville has several public sector institutions, they face a range of practical challenges. Many are very small, personnel are inexperienced in both administration and financial management, and systems for information management, human resources and accountability are inadequate (Autonomous Bougainville Government, 2018). In some cases, of which the Auditor-General seems to be an example, the institution is not functioning at all. Incoming President Ishmael Toroama has identified law and order as an urgent priority (Jorari & Doherty, 2020). Self-determination will create additional functions, which will need to be performed by new government departments or conferred on existing departments. In developing its public sector institutions for the purposes of self-determination, Bougainville can draw on the recommendations of previous reviews to ensure that its institutions work as effectively as they should (see Autonomous Bougainville Government, 2018; Government of Papua New Guinea and Autonomous Bougainville Government Joint Supervisory Body, 2018; Government of Papua New Guinea and Autonomous Government of Bougainville, 2013).

The situation is complicated further by the role that PNG presently plays in some of the public sector institutions that Bougainville has, or might have, under the BPA. For example, the Bougainville Police Service is part of the Royal PNG Constabulary, and Ombudsman services for Bougainville are provided by the PNG Office. In examples of a different kind, the institutional arrangements for the Bougainville Public Service, Police and Corrections must align with PNG standards in certain areas, and PNG authorities are entitled to monitor some Bougainville institutions for compliance with national laws (Dziedzic & Saunders, 2019a).

A change to any or all of these arrangements for the purposes of self-determination would require Bougainville to take final responsibility for operation of these institutions, for their compliance with the laws operating in Bougainville and for the standards set out in those laws. In these circumstances, institutions to ensure effectiveness, integrity and accountability, such as the Auditor-General and the Ombudsman, become all the more important.

The size of Bougainville and the resources available to it also need to be considered in the choice, design and operation of public sector institutions. The limited revenue available to the Bougainville government will constrain the public sector institutions that Bougainville can adopt, when they are established and how they are designed. Public sector institutions should be established or continued only when they are necessary for functions that need to be performed within and by Bougainville. A single institution may be able to perform multiple functions; to repeat an example cited earlier, an Ombudsman could also perform some of the functions of a human rights body. Some institutions and decisions can be deferred, even beyond the transition stage. Decisions about currency and monetary institutions are an example. Some institutions may be able to be shared with

<sup>45</sup> For example, Independent Diplomat <https://independentdiplomat.org/>.

PNG or other countries indefinitely, under arrangements that would need to be worked out. Some functions may be able to be performed for Bougainville through cooperative arrangements with PNG or other countries. Currency, defence and diplomatic representation are examples currently in use in other Pacific states. None of these choices need be permanent. They could be reviewed within Bougainville over time as conditions change.

Foreign aid, in the form of funding and technical assistance, is likely to be available to help Bougainville in establishing and operating new public service institutions. The question of how Bougainville might obtain and manage offers of external assistance is canvassed in Part 6. It is relevant in the present context as well, however, because it has potential implications for public service institutions. Integrity institutions, such as the Auditor General and Ombudsman, must operate with a degree of independence from government, an independence that is partly ensured by secure government funding. Funding through foreign aid may meet an immediate need but may also be time-limited and insecure, introducing vulnerabilities to the independence of these institutions. In addition, foreign donors have their own agendas and may want to control the kind of programs provided using their aid. This can result in uneven institution building. For example, in Timor Leste, an early focus by donors on human rights rather than governance led to fragmentation and gaps in the capacity and work of the Office of the Ombudsman for Human Rights and Justice which, under Timorese law, had responsibility for both (Nicolau, 2007).

The relationship between PNG and Bougainville, and between the institutions and personnel in each government, will also have a bearing on Bougainville's public sector institutions. Notwithstanding self-determination, PNG and Bougainville will have a close geographical and historical relationship. A degree of interdependence is likely to continue, not only as a transitional measure as Bougainville implements self-determination, but also because of the significant mobility of peoples across their shared borders. Bougainville public sector institutions are likely to need to coordinate with institutions in PNG, in the interests of the people of Bougainville. This might be relevant in the provision of education and, in particular, secondary and tertiary education; in the provision of health services, with the current pandemic showing how significant coordination and sharing might be; with the maintenance of common regulatory standards to facilitate trade; and with the implementation of special visa arrangements. We return to these issues again in Part 7 in connection with the relationship between PNG and Bougainville. We note here that Bougainville's public sector institutions will likely have to work closely with their PNG counterparts in many areas, and need to be equipped and supported to do so.

**c. What should be the priorities for the development of public sector institutions during the transition stages and after?**

As explained in the introduction to this Part 5, transition to self-determination will come in at least two and perhaps in three stages. The first covers the period of the consultations, as the leaders of Bougainville and PNG consider the response to the referendum. The second covers the period after the outcomes of the consultation are known, as steps are taken to put them in place. The third runs over a longer period of time, as self-determination for Bougainville continues to evolve.

The **first transition stage** is already underway, following a decision of the Joint Supervisory Body in March 2020.<sup>46</sup> This stage does not presently involve new decisions about substance. It is proceeding with the transfer of functions already agreed under the BPA, although the speed and manner of the transfers nevertheless is important. The Joint Supervisory Body (JSB) meeting of March 2020 identified transfers in policing and land matters as priorities.

Other immediate priorities during this phase might respond to urgent issues facing Bougainville. One urgent issue is Bougainville's fiscal position. This requires attention to the development of activities within Bougainville that may generate revenue and the capacity of Bougainville institutions to raise revenues from these activities. The *Increasing Revenues* report (Chand et al., 2020) identifies fishing, agriculture, industry and tourism as areas for potential development in Bougainville. The development of public sector institutions to encourage and

<sup>46</sup> Official Joint Statement of the Joint Supervisory Body Meeting in Port Moresby by Co-Chairs Hon James Marape PM, Prime Minister of Papua New Guinea and Dr Chief John Momis GCL MHR, President of the Autonomous Region of Bougainville (12 March 2020).

support development of this kind could be a focus of attention during this initial period.

Other early priorities, for which current constitutional arrangements already provide, include the establishment and effective functioning of integrity institutions. In particular, a functioning Auditor-General is a necessary corollary of the government's power to raise, receive and spend public money. It provides accountability for the ways in which the government handles public money. In this way, it helps to maintain public confidence in the government's fiscal management, in ways that will be all the more critical under self-determination. Concerns about a shortage of qualified personnel could be addressed through recruitment of personnel from outside Bougainville (perhaps on a part-time basis). Bougainville might also take advantage of technical support provided by regional networks such as the Pacific Association of Supreme Audit Institutions.<sup>47</sup>

The ongoing implementation of autonomy under the BPA means that decision makers already have experience of the challenges that arise in the transfer of functions and institutions. These include the need to ensure that Bougainville has adequate capacity and resources (financial, physical and human) to exercise new functions and institutions; that key actors in both governments are on the same page about the scope of the functions to be transferred; and that both jurisdictions are committed to making the new arrangements work. Both governments can learn from past experience to improve the process of transfers during transition to self-determination. Guidelines to that end include the following:

- A clear but sufficiently flexible timetable for the transfer of functions and institutions, which enables the effective transfer of functions from the national PNG government to the Bougainville government. In this regard, we note that the former Minister for Post Referendum Consultation and Dialogue and his department already have reported that they are identifying milestones and setting benchmarks for the transition.<sup>48</sup>
- The need to ensure that those responsible for implementing transfers, in both PNG and Bougainville, understand and act on the new relationship between PNG and Bougainville, rather than on the basis of earlier assumptions about the place of Bougainville within PNG.
- Providing governments with adequate financial, physical and human resources, and administrative and legal systems, to conduct the transfers and to implement new responsibilities in ways that serve the interests of the peoples of PNG and Bougainville.

The **second stage** of the transition will begin after the consultations are complete and will require effect to be given to the decisions about self-determination that have been agreed.

Priorities during this period might include the following:

- Continue the process of transferring functions and institutions that took place during the first stage of the transition, in a manner that builds and supports Bougainville's capability to exercise them effectively.
- Finalise the establishment of a range of government departments and agencies capable of dealing with all the functions for which Bougainville will be responsible under the agreed form of self-determination. The amalgamation of related agencies to maximise available resources, including human capital, could be considered. Functions that deserve particular attention include education, health, land management, law enforcement, economic development and fiscal management. As Bougainville develops its court system, a public sector agency capable of administering courts appropriately and effectively will need to be built as well.
- Ensure the effective functioning of key accountability institutions, including the Auditor-General and Ombudsman or equivalent institutions.
- Develop an ethos of service by public sector institutions to the people of Bougainville, to head off any tendencies to top-down service delivery or bureaucracy for bureaucracy's sake.

<sup>47</sup> Pacific Association of Supreme Audit Institutions <https://www.pasai.org/about-pasai>.

<sup>48</sup> Minister for Post Referendum Consultation and Dialogue, Ministerial Statement to the Bougainville House of Representatives, 20 February 2020, 13.

- Provide a public sector agency with adequate capability to deal with Bougainville's international relations, to the extent this is required by the form of self-determination. As outlined in Part 6, such relations potentially include approvals of proposals for foreign investment and the receipt of foreign aid, as well as international and regional relations more generally. In each of these areas, Bougainville needs to be able to develop relations that assist the transition to self-determination, are compatible with local needs and conditions, and that build capability within Bougainville.
- If self-determination is achieved outside PNG, develop the capability to issue passports to Bougainville citizens.
- If self-determination is achieved outside PNG or in a form of free association with it, formalise Bougainville's maritime boundaries in agreement with neighbouring states.

Some other institutional arrangements could be phased in after the transition, if required for the form of self-determination. So, for example:

- If the form of self-determination requires Bougainville to provide for its own currency, it could adopt another currency, at least in the short term or indefinitely.
- The function of human rights monitoring could be combined with the office of Ombudsman or equivalent, at least in the short term or indefinitely.
- If self-determination occurs within PNG or in a form of free association with it, Bougainville could continue to rely on PNG for the management of its international relations, with appropriate consultation with Bougainville.
- Even if self-determination occurs outside PNG or in free association with it, Bougainville could combine with other states to provide diplomatic representation.
- If self-determination takes the form of free association with PNG, Bougainvilleans could use PNG passports, if PNG agrees.

As noted earlier, the final form of self-determination could itself be phased in over time, on the initiative of Bougainville, if PNG and Bougainville take the view that self-determination outside PNG is not immediately practicable.

### 5.3 Institutions that perform a significant role in public life

In addition to the institutions that form part of the structures of government, other institutions are commonly found in substantial political communities that function for the benefit of the community, but are not necessarily public in form. Such institutions might be government-owned and run, wholly private, or a mixture of the two. There are many such institutions. This section focuses on two: media and higher education. The issues raised may be applicable to other institutions of these kinds as well.

Institutions in PNG currently provide both media and broadcasting and access to higher education for Bougainville. In conditions of self-determination, Bougainville might consider, over time, whether to establish comparable institutions of its own, or foster their development through private investment.

#### a. What other institutions might Bougainville want or need in conditions of self-determination?

**Media and broadcasting.** Significant investments in media and government communications were made to ensure that Bougainvilleans had sufficient information to make an informed choice in the 2019 referendum (Thomas et al., 2019; Thomas et al., 2017). The need for communications between government and people will continue into the consultations and transition to self-determination. Media provides a way for government to communicate essential information about government programs and services, and for the people to discuss and develop their own views.

Bougainville is currently served by a range of state-owned and private media. The National Broadcasting

Corporation, PNG's state-owned broadcaster, runs Radio Bougainville, which is regarded by most as the station that relays government information. There is evidence that Bougainvilleans also particularly value education programs broadcast by this and other private and community radio stations (Thomas et al., 2017). The Bougainville Bulletin is a free government newspaper, available in print and online. PNG newspapers are also available in Bougainville. Access to radio, print and online media varies across the different regions of Bougainville (Thomas et al., 2017).

In conditions of self-determination, the government of Bougainville might consider the benefits and costs of a public broadcaster for Bougainville. The benefits of a public broadcaster would be the provision of accessible information, education and entertainment designed specifically for the people of Bougainville, distinct from what any private broadcaster might provide. The costs are high, however: a public broadcaster is usually predominantly funded by the government and/or directly from the public (e.g. through licence fees). Nevertheless, a public broadcaster may be a worthwhile future investment, taking into account the practical realities that many in Bougainville face in accessing information and education.

***Tertiary education and universities.*** Forty percent of Bougainville's population is under the age of 15. Education and youth development have therefore been key priorities of the ABG, and receive a high proportion of the ABG's budget (Chand, 2018). Access to higher education is likely to be important in providing education and opportunities for young people in Bougainville and for building the human capacity of Bougainville. In addition, universities perform important public functions, educating not only their students but others in the community and providing independent expert advice and research in collaboration with government, business and the community.

Currently, the University of Papua New Guinea has a campus in Buka. However, there is a shortage of places available in upper secondary schools, a prerequisite for access to tertiary education, which should be a priority for Bougainville until the shortfall can be met. Nevertheless, access to tertiary education is important for Bougainvilleans and might be provided in various ways. In addition to maintaining its links with the University of PNG, Bougainville could examine ways for Bougainvilleans to access higher education by distance learning; for example, at the University of the South Pacific and the Australia-Pacific Technical College. In the future, it might consider establishing its own university, and could look to comparable institutions in Timor Leste, Fiji, Samoa and Solomon Islands for potential models.

#### **b. Priorities**

A public broadcaster, a university and other institutions that perform a significant role in public life are unlikely to be immediate priorities for Bougainville, especially where they require ongoing government funding. In the short term, whatever form self-determination takes, Bougainville can share such institutions with other states, including PNG and other Pacific neighbours. These issues should be on the radar for Bougainville's leaders, however, as a plan for the future and in case opportunities arise. There are many options for providing institutions of this kind, to enrich the lives of people in Bougainville. These range from establishing the institutions as public agencies funded directly by government; to creating incentives for private actors and institutions to assume public functions; to merging both in public-private partnerships.

## Ch.6 External aspects of self-determination

Arrangements for the governance and administration of any autonomous political community have both internal and external aspects. Internally, they provide government for the people and the territory. Externally, they are the conduit for relations with the rest of the world. The latter are more important than ever in the world of the 21st century. There is a multiplicity of cross-border connections, an urgent need to collaborate to deal with shared problems, and growing numbers of international and regional organisations. This part of the report identifies the issues that require consideration to ensure that Bougainville is prepared for this aspect of self-determination as well.

Exactly what is required for this purpose depends on the decisions about self-determination still to be taken by the governments of PNG and Bougainville. It depends, in particular, on whether Bougainville ultimately has full international personality of a kind that enables it to enter into arrangements that are binding in international law and requires some provision for diplomatic representation. Even in this case, there are further decisions to be made about the extent to which Bougainville conducts its own relations with other states or collaborates with others, generally, in the form of 'free association' with another larger state, or for particular purposes, including diplomatic representation in other countries.

Whatever the final decision about the form of self-determination, Bougainville will have significant external dealings with other parts of the world, quite apart from the rest of PNG. These are examined in this part in four categories:

- International investment;
- International assistance;
- Representation in other states and in regional and international organisations;
- External affairs generally.

In relation to each of these, consideration needs to be given to the constitutional and legal framework, Bougainville's policy stance and Bougainville's institutional capability. In determining these and ordering its priorities, Bougainville needs a clear view of its place in the world, as a Melanesian island state in the Pacific region, with a relatively small population and land mass, but considerable natural and ocean resources.

Bougainville's relations with PNG are the subject of Part 7.

### 6.1 International investment

Bougainville already has experience with the challenges international investment brings, not least in relation to the Panguna mine. It has an Inward Investment Bureau, established under legislation in 2013.<sup>49</sup> Officially, at the moment, foreign investment initiatives are coordinated with the national PNG government, although what happens in practice is another matter. In any event, self-determination will increase international interest in investment in Bougainville and Bougainville's interest in securing it. Chand et al. (2020) point to the significance of foreign investment for Bougainville's economic development, including in promising areas such as mining, fisheries and tourism. They also point to the potential for loans to underpin the development of public infrastructure in relation to, for example, transport and communications, both to benefit the people of Bougainville and to create conditions for foreign investment growth (Chand et al., 2020).

A threshold issue for the consultations is whether the current requirement for consultation with PNG will continue, and if so, in what form.<sup>50</sup> As matters presently stand, the PNG Constitution requires applications for foreign investment in Bougainville to be lodged also in PNG, to meet PNG's 'reasonable' foreign investment requirements and to be subject to consultation between the two governments at all stages. If these requirements

<sup>49</sup> *Bougainville Inward Investment Act 2013*.

<sup>50</sup> *Constitution of PNG* s 290(4).

continue after self-determination, steps should be taken to ensure that they work effectively in the interests of both polities. If they do not continue after self-determination, Bougainville's own standards and processes become all the more important. In this case, it might also be useful to consider whether informal procedures for consultation between the two governments should take their place, for mutual benefit.

More than ever, in conditions of self-determination Bougainville will need capabilities both to attract appropriate foreign investment in areas that are a Bougainville priority and to manage it in the interests of Bougainville. To this end, it would be desirable to review both the inward investment legislation and the bureau that administers it to ensure they are suited to meeting these new, more significant demands. The dynamics of international investment are complex in any event, because Bougainville's priorities and interests will not necessarily match those of foreign investors. To deal with these issues, Bougainville will need institutional arrangements that can make workable policy decisions about investment generally and about particular investment initiatives. It will also need capable advice in specialist areas in which investment is most likely, including natural resource development, tourism and fisheries.

A revised legal framework for investment, building on insights from the current legislation, and possibly with a foothold in the Constitution to increase its visibility, could assist to provide Bougainville with consistency and leverage in decisions about foreign investment. Of course, such a framework should be crafted so as to encourage and not to deter appropriate foreign investment. If the right balance is struck, however, it should assist to ensure that investment takes place in a way and on conditions that bring positive benefits to Bougainville; that it respects the interests of Bougainville's communities and future generations; that decisions are transparent; and that there is ongoing accountability for them. There is some support for such a framework already in the directive principles in the Bougainville Constitution dealing with natural resources (section 23), development (section 24), and the environment (section 27). While these directive principles presently are not legally enforceable, they point to the importance of planning, equity, consultation and consent and transparency in making decisions about foreign investment that affect the environment or have other intergenerational implications.

## 6.2 International assistance

A parallel set of issues arises in relation to international aid and assistance projects, some of which may also take the form of foreign investment.

Bougainville already receives significant international assistance and is familiar with both the benefits and the challenges that it brings. In the *Increasing Revenues* report for NRI, Chand et al. (2020) show that Bougainville is likely to continue to rely on foreign aid to a significant degree after self-determination, even if there are also options for increasing Bougainville's financial autonomy. If self-determination is achieved outside PNG, assistance from PNG technically will be foreign aid as well, increasing its significance for Bougainville, at least in the short to medium term. There are many potential recipients of foreign aid, so that Bougainville will be in competition with others.

Under current arrangements, the government of PNG is supposed to be involved in seeking and approving foreign aid for Bougainville and in assisting with negotiating necessary international agreements.<sup>51</sup> A threshold issue for the consultations in considering foreign aid and other forms of international assistance in Bougainville is whether the current requirement for consultation with PNG is effective and if it will continue. If Bougainville becomes autonomous in managing foreign aid, it will need the capabilities to attract appropriate international assistance on conditions that meet Bougainville's priorities and to manage projects so that they satisfy donor requirements.

As with foreign investment, these dynamics are complex. However well-intentioned, donors necessarily have an eye to what is acceptable to their own taxpayers and consistent with their own priorities. Bougainville's own priorities and interests may be different.<sup>52</sup> Bougainville needs assistance for projects that fit with its own

<sup>51</sup> *Constitution of PNG* s 327.

<sup>52</sup> Current priorities are set out the Bougainville Strategic Plan 2018-2022, although these might change with the implementation of self-determination.

developmental priorities, that are delivered in a manner that suits Bougainville's culture and circumstances, that assist to build capacity within Bougainville and that are not tied by conditions that Bougainville does not want. To attract donors while safeguarding its own interests, Bougainville will need institutions that have a clear sense of Bougainville's own needs, and that have developed capacities to negotiate with potential donors and the skills to manage international assistance projects effectively and with appropriate accountability.

The effectiveness of aid is an issue that has bothered both donor and recipient states for decades. Bougainville may derive some benefit from associating itself with the ideas in the Dili Declaration, including its commitment to the Paris Declaration on Aid Effectiveness.<sup>53</sup> As with foreign investment, a revised legal framework for the acceptance of aid and other forms of international assistance may be helpful, both to Bougainville and to the donor community. In this case, the framework might provide for a deliberative process in determining the acceptance of aid conditions; transparency in aid arrangements; and mechanisms to ensure accountability for receipts from aid, as another form of income for Bougainville.

Drawing on the Dili Declaration, the principles on which such a framework might be based include the following:

- Assistance is sought and accepted only for projects that are useful to Bougainville and meet its priorities.
- Assistance is tailored to the Bougainville context, culturally and practically.
- Arrangements for international assistance, including conditions on which it is offered and accepted, are transparent, so that institutions can be held accountable, within and outside Bougainville.
- Assistance projects should build Bougainville's capacity, rather than prolonging Bougainville's dependence on international assistance for particular purposes.

### 6.3 Representation in other states and in regional and international organisations

Whatever form of self-determination is agreed in the consultations between the two governments, there may be opportunities for Bougainville to play a greater role than it has before on the international and regional stage, if it wishes to do so. The existence of these opportunities depends on the membership rules of the organisations concerned and, at times, the political interests of the members. A decision by Bougainville to participate would require a commitment to develop the capacity to exercise its membership in a way that contributes to the wellbeing of Bougainville and the wider group. Membership may also require a financial commitment.

Membership of many of the regional organisations of the Pacific is open to states as well as to territories that do not have formal statehood. Depending on Bougainville's status, full membership or observer status of a range of regional organisations may be open to it, including:

- Pacific Islands Forum, an intergovernmental organisation for cooperation between Pacific governments, with key activities in trade, security and the environment. All Pacific island states and territories are either members or observers. Timor Leste is an observer state.
- Melanesian Spearhead Group, an intergovernmental organisation of Melanesian states and peoples. Its original focus was decolonisation, but it also works on regional trade, security and governance issues. Its members are PNG, Solomon Islands, Vanuatu, Fiji and the Kanak and Socialist National Liberation Front of New Caledonia. The United Liberation Movement for West Papua is an observer, while Indonesia is an associate member as the official representative of West Papua.
- Secretariat of the Pacific Community (SPC), which provides scientific and technical expertise to address development challenges faced by Pacific polities. Its membership includes states and territories.

Other regional organisations are devoted to particular issues. Three that may be of particular interest to Bougainville are:

<sup>53</sup> Dili Declaration: A New Vision for Peacebuilding and Statebuilding (10 April 2010) <http://www.oecd.org/dac/gender-development/45250308.pdf>.

- Forum Fisheries Agency, which provides technical assistance to members to manage fishing resources. Its members include states and territories.
- Secretariat of the Pacific Regional Environment Programme (SPREP), an intergovernmental organisation for environment and sustainable development. Its members include states and territories.
- University of the South Pacific (USP) is an intergovernmental organisation with 12 members, including states and territories. These governments jointly own the university, which provides tertiary education across the region, with campuses in Fiji, Samoa and Vanuatu and centres in all other member states and territories.

A host of other organisations are available at the international level, with varying membership rules. While membership of the United Nations officially requires statehood, some states in relationships of free association with a larger state, including Federated States of Micronesia, Marshall Islands and Palau, are members as well. The United Nations also permits polities that are not fully recognised as states, such as Cook Islands and Niue, to participate in its specialist agencies.<sup>54</sup> If it were to become an independent state, Bougainville would also be eligible for membership of the Commonwealth; an issue that might be negotiated at the time a decision about the head of state is made (see Part 5.1).

As noted earlier in Part 2.2, self-determination for Bougainville outside PNG would require recognition of Bougainville's statehood by other states. If PNG and Bougainville agree that self-determination should take this form, recognition of Bougainville statehood would require significant diplomatic engagement, to ensure the support of enough states. Even once recognised as a state, Bougainville would not need to play a full role in the international state system. There are various arrangements in use across the world whereby smaller states entrust the exercise of their external sovereignty to others, specifically in relation to defence and international affairs. Three that are in use in the Pacific were canvassed in our 2019 report, involving the Cook Islands,<sup>55</sup> the Marshall Islands<sup>56</sup> and Samoa<sup>57</sup> (Dziedzic & Saunders, 2019a). An arrangement that draws on these existing practices may be of interest to Bougainville, at least in the short term. As the example of the Cook Islands demonstrates, states in free association retain the right to unilaterally move to exercise their own external sovereignty, should they choose to do so.

If Bougainville achieves self-determination outside PNG, is recognised as a state by the international community and decides to exercise its own external sovereignty, it will have important decisions to make about priorities. In particular, it would need to decide: (a) the countries in which it should have diplomatic representation; and (b) the regional or international organisations of which it should be an active member. In either case, Bougainville would need the personnel to effectively represent its interests, and the governance and administrative capacity to support its representatives adequately, in order to secure positive outcomes for Bougainville. These decisions are likely to be driven both by consideration of capacity and calculation of costs and benefits. There is likely to be advantage in Bougainville collaborating with others to ensure that its interests are represented in a wider range of states and forums than otherwise would be practicable.

## 6.4 External affairs

Fully independent statehood requires the capacity to enter into relations with other states; in other words, to make and to fulfil commitments, bilaterally or multilaterally, that are binding in international law.<sup>58</sup> If Bougainville achieves self-determination outside PNG it will have this capacity. It will also become responsible

<sup>54</sup> For a description of the tiers of membership in the United Nations and the many different variations in the status of states and quasi-states see Keating, 2018, 60–61.

<sup>55</sup> Government of the Cook Islands, 'Special Relationship with New Zealand' <http://www.ck.govt.htm#nz>.

<sup>56</sup> United States Department of State, 'US Relations with Marshall Islands' <https://www.state.gov/u-s-relations-with-marshall-islands/>; *Compact of Free Association Amendments Act 2003*, <http://www.uscompact.org/files/RMI%20Publications/Compact%20Documents/Amended%20Compact%20Act.pdf>

<sup>57</sup> *Treaty of Friendship between the Government of Samoa and the Government of New Zealand*, signed 1 August 1962, Apia Samoa <https://treaties.un.org/doc/Publication/UNTS/Volume%20453/volume-453-I-6515-English.pdf>.

<sup>58</sup> Montevideo Convention on the Rights and Duties of States 1933 art I.

for carrying out international obligations previously undertaken by PNG on behalf of the whole country, to which Bougainville will succeed.

By contrast, under current arrangements, the government of PNG is formally responsible for most of Bougainville's foreign relations.<sup>59</sup> Both governments may seek and obtain foreign aid, and the national government is bound to approve foreign aid obtained by Bougainville if certain conditions are met.<sup>60</sup> The government of PNG is supposed to consult with the government of Bougainville on certain new international obligations.<sup>61</sup> Bougainville's agreement is required before PNG becomes bound by certain treaties<sup>62</sup> and Bougainville may request the assistance of the government of PNG to participate in the negotiation of certain agreements or even to negotiate agreements on its own behalf.<sup>63</sup> Nevertheless, assuming full international legal personality to act on behalf of Bougainville is a major step, requiring considerable expertise, in a world where states have formal legal equality but unequal resources and bargaining power.

In this event, Bougainville will need to develop the constitutional and legal framework within which Bougainville enters into international agreements and that determines their status in domestic law. Section 117 of the Constitution of PNG presently provides a framework for these purposes for the country as a whole. It confers power to commit PNG to treaties on the Head of State or an authorised Minister, subject to a requirement for proposed treaties to be tabled in the Parliament and to an opportunity for Parliament to disprove the giving of consent.<sup>64</sup> It also provides that treaties have no direct effect in PNG law, unless given such effect by the Constitution or an Act of Parliament. If Bougainville achieves self-determination outside PNG, it will be necessary to decide whether these, or other, procedures should be introduced into the Bougainville Constitution. As suggested in the earlier sections of this part, consideration might be given to whether a general provision of this kind should be supplemented by particular procedures for approving foreign investment or accepting foreign aid.

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<sup>59</sup> *Constitution of PNG* s 289(2)(e).

<sup>60</sup> *Constitution of PNG* s 327.

<sup>61</sup> *Constitution of PNG* s 293(3). It is not clear that this requirement has always been met in practice: Government of Papua New Guinea and Autonomous Bougainville Government Joint Supervisory Body, 2018, 129.

<sup>62</sup> *Constitution of PNG* s 293(4).

<sup>63</sup> *Constitution of PNG* s 293(7).

<sup>64</sup> These requirements can be waived by the Parliament under s 117(5) or avoided in cases of urgency or 'national interest'

## Ch.7 Relations between Papua New Guinea and Bougainville

This part elaborates the three broad options for the future relationship between Bougainville and PNG that have informed the analysis in this report and considers the implications of each for intergovernmental relations.

As noted in Part 2, while the future relationship between Bougainville and PNG might take a variety of different forms in matters of detail, it is possible to group them in three broad categories. These categories are:

- Self-determination outside PNG, as a formally sovereign state;
- Self-determination outside PNG, but in a form of free association with it;
- Self-determination in a form that leaves Bougainville formally part of PNG.

Which of these broad options is chosen, and the precise form that the chosen option takes, are matters for decision by the two governments in the course of the consultations. It should be noted also in this regard, however, that establishing Bougainville as a sovereign state with recognised international personality in its own right does not depend on decisions by PNG and Bougainville alone but also requires acceptance by key players in the international community.

In relation to the timing of the new relationship between Bougainville and PNG, two further observations were made in Part 2:

- The form of self-determination that emerges from the consultations need not be fixed, but could be planned to evolve over time, across two or even three of the options for the relationship as Bougainville's capabilities develop.
- Progress through the stages of this evolution could depend on the initiative of Bougainville itself, subject to any agreed form of consultation with PNG.

History, geography, shared interests and the intermingling of peoples suggests that there will be a close relationship between PNG and Bougainville in the future, whether self-determination occurs outside, inside or in special association with PNG. The details of the institutional framework for that relationship will differ, however, between different forms of self-determination. The next section investigates the options for such an institutional framework, with reference to the three broad categories of self-determination. The final section in this part briefly draws attention to the need for corresponding constitutional change in PNG, the details of which again will depend on the form that self-determination takes.

One overarching point, governing the institutional arrangements for all three categories, should be made first. On any scenario for self-determination, the relationship between PNG and Bougainville will be different from what it is now and has been in the past. The changes, whatever they are, will need to be supported by resources and the development of capability within Bougainville. Equally importantly, they will require cultural change on the part of all actors, in both PNG and Bougainville. Culture here refers to the ingrained attitudes of leaders, government officials and the general public that influence the institutional norms and the practices of government (Dziedzic & Saunders, 2019b). It is hard to change, particularly where there is a move from a relatively centralised system in which a national government has assumed ultimate responsibility and control for government decisions and another, formerly subnational government, has not had to assume full responsibility for governance.

There are ways to support attitudinal change for this purpose. Constitutional literacy and training about the changing status of Bougainville and the relationship between it and PNG is a necessary starting point. Identifying shared goals and the principles on which they are based may help to guide future relations between the two governments, from political leaders, to constitutional officeholders, to bureaucrats. Agreed procedures for consultation and joint decision making can assist to support a shared view of how decisions about contested

issues may be made, even where there is no clear agreement on what that decision will be. In all of these respects, Bougainville and PNG can draw on their experiences in implementing the BPA, and more deeply, on Melanesian approaches to decision making.

## 7.1 Institutional options to support the ongoing relationship

### *Self-determination outside PNG*

If self-determination for Bougainville occurs outside PNG, following the consultations or at a later, agreed time, PNG and Bougainville would be separate and independent, although neighbouring, states. They would have no legal obligations to each other, except through bilateral arrangements or under international law. Bougainville would be fully responsible for its own affairs, including internal governance and external relations. Within the region, Timor Leste offers a relatively recent example of a state that achieved self-determination in this form.

In these circumstances, it would not be appropriate for Bougainville and PNG to be represented in each other's institutions. Many of the factors that make a close relationship between the two polities inevitable nevertheless would remain, suggesting the usefulness of institutional arrangements to deal with these.

Dealings between the two polities are likely to be intense during the transition. PNG is likely to continue to provide some services for Bougainville. The transfer of authority from PNG to Bougainville would require planning and coordination, through consultations and agreement. A dedicated taskforce, involving representatives of both polities, operating at multiple levels, under the authority of senior ministers would be useful at this time.

The relationship would change after Bougainville separated from PNG, but would nevertheless continue to be significant. For example:

- Reciprocal arrangements would be likely to be needed to facilitate the mobility of people between Bougainville and PNG, including the configuration of citizenship laws that account for Papua New Guineans in Bougainville and Bougainvilleans in PNG, standardised regulations, and access to services for citizens of the other polity.
- There would be likely to be a need for collaboration, cooperation and information sharing between the two polities in the development of policy and the delivery of services on matters where PNG and Bougainville have shared interests (e.g. economic cooperation, the management of public health emergencies).

To these ends, it would be useful to institutionalise a regular meeting of heads of government of Bougainville and PNG in a form that also allowed for meetings between line ministers where that is appropriate for particular purposes.

### *Self-determination in free association with PNG*

If Bougainville were to achieve self-determination in a form of free association with PNG, now or after a period of time, PNG and Bougainville would formally be distinct states. Depending on the agreement between them, however, PNG would continue to perform at least some state-type functions for Bougainville; typically, external affairs and defence, in consultation with Bougainville. The agreement also would determine when and how the arrangement for free association would end, whether by a unilateral decision on the part of Bougainville or by agreement between the two states. Until that occurred, Bougainville might not yet be recognised as having full international legal personality.

Institutional arrangements to reflect this relationship would depend on the detail of free association. All sorts of variations are possible. If arrangements between Cook Islands and Niue on the one hand and New Zealand on the other are used as a guide, however, possibilities include:

- Bougainville might use the PNG currency, PNG citizenship and PNG passports for its own purposes.
- A shared citizenship would facilitate the mobility of people between Bougainville and PNG and access to PNG services by Bougainvilleans (e.g. health and education services).

- PNG might assist Bougainville in a range of ways, including with development assistance.
- A Joint Ministerial Forum might be established, to meet regularly to discuss bilateral issues and priorities. In relation to the Cook Islands, for example, an extraordinary Joint Ministerial Forum was held on 5 July 2020 to consider issues concerning COVID-19 (Rex, 2020). Similarly, joint committees have been established for two of the states in free association with the United States, with mandates to oversee the Compact relationships and, in particular, the management of economic assistance provided by the United States.<sup>65</sup>

It is less likely to be appropriate in these circumstances for Bougainville to be represented in PNG institutions, or vice versa, although it is not impossible if that were thought to be useful. Forms of free association, involving the Cook Islands and New Zealand or between Marshall Islands, the Federated States of Micronesia and Palau and the United States, do not provide for representation in this way. Instead, these states maintain embassies or high commissions in the other country, as they would with other independent states. New Zealand has no unilateral authority over the Cook Islands and the Cook Islands has a ‘continuing right to self-determination’ (Government of the Cook Islands, 2019).

### *Self-determination within PNG*

If Bougainville remained formally within PNG after self-determination, it would be likely to have a very high degree of independence, given the referendum result. It would be a matter for agreement between the governments whether and, if so, on what issues, consultation between the governments was necessary on matters of internal concern to Bougainville. Such an agreement might also specify whether and how this arrangement might be brought to an end, if Bougainville wishes to pursue self-determination outside PNG. The relationship between Greenland and Denmark provides an example.<sup>66</sup>

In these circumstances, there would be likely to be significant interdependence between Bougainville and PNG. For example:

- PNG may continue to provide services for Bougainville, during and after any period of transition, until Bougainville is in a position to take them over. Intermediate courts and the Ombudsman are possible examples.
- The Supreme Court of PNG would be likely to continue to act as an apex court for Bougainville as well as the rest of PNG. It is possible, in these circumstances, that one or more justices may be appointed in consultation with Bougainville.
- PNG may continue to provide financial assistance to Bougainville as Bougainville becomes more financially independent.
- PNG may be required to consult with Bougainville on matters for which PNG retains responsibility but that affect Bougainville’s interests. On some such matters, Bougainville may have a veto.
- PNG and Bougainville may collaborate on matters of mutual interest including, for example, foreign investment, climate change, resource development and public health emergencies.

Two possible institutional options deserve more detailed attention.

One concerns the provision of **formal procedures for intergovernmental relations**. Before the referendum, the main formal institution for intergovernmental relations between PNG and Bougainville was the JSB, consisting of equal numbers of members from the governments of PNG and Bougainville.<sup>67</sup> The JSB was established by

<sup>65</sup> In Marshall Islands: Joint Economic Management and Fiscal Accountability Committee <https://www.state.gov/u-s-relations-with-marshall-islands/>; in the Federated States of Micronesia: Joint Economic Management Committee <https://fm.usembassy.gov/our-relationship/policy-history/jemco/>.

<sup>66</sup> *Self-Government Act of 2009* (Denmark), described in Ackrén, 2017, 6. For other examples see Kössler et al., 2018.

<sup>67</sup> BPA art 264; *Constitution of PNG* s 328.

the BPA as the forum for intergovernmental decision making in the implementation of the BPA. Following the referendum, the JSB was renamed the Joint Consultative Body with a mandate to ‘continue to provide oversight to the post referendum consultation phase’.<sup>68</sup>

If self-determination for Bougainville takes shape within PNG, even on assumptions of continuing evolution, the two governments might consider the establishment of a permanent intergovernmental body, to provide a formal institution for consultations and joint decision making between them. There are various options for the membership and structure of such a body, but PNG and Bougainville are in a good position to draw on their experiences with the JSB and the Joint Consultative Body to preserve what worked well and to develop the arrangements further. Possible new features might include:

- Equal membership of PNG and Bougainville, to reflect the status of each government in this forum.
- Institutional support (a ‘secretariat’) at arm’s length from both governments.
- Specialist subcommittees to deal with particularly important and complex issues (e.g. economic relations, citizenship).

A second institutional arrangement to explore further is **representation in each other’s institutions**. Under present arrangements, Bougainville is represented in the PNG Parliament by members elected from the three open constituencies in Bougainville and one regional member. This arrangement is similar to those that apply to the PNG provinces. If self-determination for Bougainville were formally within PNG, it would be important for Bougainville to have a voice at the national level, especially on issues that affect Bougainville. There are several ways in which this might be done. Members of the national Parliament might be elected in such a way that they represent Bougainville as a whole, rather than separate constituencies. Alternatively, representatives in the national Parliament might act as delegates of the Bougainville House of Representatives. Certain kinds of decisions taken by the PNG government and the Bougainville government might require prior consultation and consent by the other government before they can proceed. The other government might even have a power of veto on issues that are essential to maintaining each polity and the relationship between them. Representation can extend to other institutions in PNG and in Bougainville. For example, there could be a permanent position for a Bougainville Minister in the National Executive Council, or a requirement that judges from Bougainville sit on the PNG Supreme Court, and PNG judges sit on any Bougainville apex court.

## 7.2 Constitutional change in PNG

Part 4.2 of this report outlined the kinds of changes that might need to be made to the Constitution of Bougainville to give effect to self-determination. A change in the political status of Bougainville will require changes to the PNG Constitution as well.

One issue that has already received some consideration is whether the PNG Constitution will require amendment to implement a change in the status of Bougainville. In a statement to the PNG Parliament, the Minister for Bougainville Affairs foreshadowed the need for amendments to the PNG Constitution, stating that ‘the National Constitution does not provide for separation or secession of a part of the country’.<sup>69</sup> The assumption is that if the PNG Parliament were to agree to ratify the referendum outcome in favour of self-determination outside PNG, the National Constitution would have to be amended to allow for it to be granted. Other changes to the status of Bougainville within PNG or in a form of association with it would require constitutional changes as well.

Any constitutional amendment to facilitate Bougainville’s self-determination within or outside PNG, or in a form of free association with it, is likely to be *sui generis*, or specific to Bougainville. There is precedent for this in Part XIV of the PNG Constitution, which sets out special arrangements, applicable only to Bougainville, to

<sup>68</sup> Official Joint Statement of the Joint Supervisory Body Meeting in Port Moresby by Co-Chairs Hon James Marape PM, Prime Minister of Papua New Guinea and Dr Chief John Momis GCL MHR, President of the Autonomous Region of Bougainville (12 March 2020).

<sup>69</sup> Sir Puka Temu Minister for Bougainville Affairs, Statement to Parliament, Hansard, 11 February 2020, p 24.

implement the BPA. A similar approach, confining the changes to Bougainville, could be undertaken again, following the results of the consultations.

Self-determination for Bougainville would mean that many provisions of Part XIV of the national Constitution would be regarded as no longer applicable because they are spent, or would require change for some other reason. Those in the former category include the rules for making the Bougainville Constitution and holding the referendum. Those in the latter category will depend on decisions still to be made through consultations between the governments, but are likely to affect at least the distribution of powers and resources, institutional arrangements, and procedures for intergovernmental cooperation. Once these changes are known, rather than amending Part XIV, consideration should be given to drafting a new, probably shorter, Part XIV, to reflect the new relationship between PNG and Bougainville.

Amendments to Part XIV of the PNG Constitution require support from two thirds of the vote of the members of parliament and, depending on the provisions to be amended, a two thirds or ordinary majority of the Bougainville House of Representatives.<sup>70</sup> Special parliamentary forms and procedures are also required, for both ordinary amendments and for amending laws that qualify human rights.<sup>71</sup>

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<sup>70</sup> *Constitution of PNG* ss 13-14, 345.

<sup>71</sup> *Constitution of PNG* s 38.

## Ch.8 Conclusions

The purpose of this report is to outline issues and options for institution building in Bougainville under a new relationship with PNG in conditions of self-determination. We have interpreted the idea of institution building broadly to include not only the structure and functions of institutions but the constitutional framework that governs them, their operation in practice and their relationship with the people of Bougainville. In this way, the report speaks to the goals of self-determination. It is not only about securing a new status for Bougainville, significant though that is. It is also about arrangements that work for the people of Bougainville, as a strong political community, and for generations still to come.

The future relationship between PNG and Bougainville is a matter to be determined in the consultations between the two governments and, ultimately, in a vote by the PNG Parliament. It is not appropriate for this report to make assumptions about what the outcome might be. Because there is a range of possible outcomes, the report has needed to deal with each of them. Institutional options vary to some degree, depending on the form that self-determination takes.

To deal with these issues, the report has adopted two strategies.

First, it identifies three broad categories, which span a wide range of possibilities for self-determination in the wake of the referendum vote. These are: self-determination outside PNG, as an independent sovereign state; self-determination in a form of special relationship, or free association with PNG; and self-determination in a form in which Bougainville remains formally part of PNG. While there may be many variations within each of these categories, they are useful as a way of explaining the institutional options that might be necessary or useful within each.

Second, the report assumes that the incidents of self-determination, or even the form of self-determination itself, may evolve over time, at the instance of Bougainville, or through a shared decision-making process. To this end, the report identifies three stages. One is the current transition stage, which will last until the consultations between governments are complete and the Parliament of PNG has voted on the outcome. The second is the transition phase that will follow the end of the consultation period as the agreed form of self-determination is put in place. The third is what might be called the post-transition phase, during which Bougainville might progressively take responsibility for institutions that were not an initial priority and self-determination might continue to evolve. Whether the government parties want to adopt the idea of an evolutionary relationship, and on what terms, is a matter for them. Our only purpose in using it has been to explain the possibilities.

In preparing the report, we have been asked from time to time whether we could estimate how long each of these periods might be. We have not done so in the report, however. This also is a matter for governments to decide, and the duration of any of these periods depends in any event on choices still to be made.

We note, however, that there is much to be done in each of these periods. In relation to the first, which presently is underway, the issues to be discussed in the course of the consultations are complex. It is likely to be necessary to consult with the peoples of both communities or at least to keep them informed. It may be necessary to seek further information on particular issues or on the experiences of other states. In the second transition stage, following the consultations, there will be a great deal to be done to put new arrangements in place to ensure that Bougainville can govern effectively for its people. Transition can be assisted by careful planning around an agreed and workable timetable. Nevertheless, the second stage may take some years. And, in a sense, the third, post-transition phase, is indefinite. Progress would depend on initiatives taken by Bougainville itself. From this perspective, the duration of this phase is unimportant, because Bougainville would hold its own future in its own hands.

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# Appendix

## Provisions of the current Bougainville Constitution and changes for consideration

Type of provision	Current provision	Changes for consideration	Cross-references <sup>72</sup>
Preamble	The preamble sets out the history of Bougainville and its values.	References to the history of Bougainville might be updated to encompass self-determination.	
Description of Bougainville	Bougainville is described throughout as an 'autonomous region' (section 1(2)(a)).	A new description that reflects the chosen form of self-determination for Bougainville may be required.	
Name of the Bougainville government	Section 2 provides that the government established by the constitution is known as the 'Autonomous Bougainville Government'.	The official name of the government might change to align with the description of Bougainville. <sup>73</sup>	
Boundaries	Section 1(1) provides that Bougainville is made up of the areas of land of the former Bougainville province and of sea extending three nautical miles from the low water mark.	Depending on the form of self-determination, the maritime boundaries of Bougainville might be redefined to include a greater sea area. Any changes would need to be negotiated with PNG and, potentially, neighbouring states.	NRI report, 'Greater autonomy or independence for Bougainville' (Dziedzic & Saunders, 2019a, p. 23).
Symbols	Section 4 lists a range of symbols of Bougainville.	Consideration of new symbols; for example, currency.	This report, Part 3.3.
Citizenship	Sections 7, 8 and 9 define 'Bougainvillean' and confer rights and obligations on persons who hold that status. Some rights (e.g. to vote and stand for election) require PNG citizenship (sections 8 and 110(1)).	Depending on the nature of self-determination, the Constitution might need to provide for the citizenship of Bougainville, including rules for its acquisition and loss, dual citizenship, and the rights and duties of citizens. References to the citizenship of PNG may require review.	This report, Part 3.2.

<sup>72</sup> The full references are as follows: "NRI Report, 'Greater autonomy or independence for Bougainville'" - Anna Dziedzic and Cheryl Saunders, 'Greater Autonomy or Independence for Bougainville: Institutional Options and Issues for Transition' (National Research Institute Papua New Guinea 2019); "NRI Report 'Increasing Revenues for the Bougainville Government'" - Satish Chand, Ronald Duncan and Theodore Levantis, 'Increasing Revenues for the Bougainville Government' (National Research Institute Papua New Guinea 2020); "NRI Report, 'Bougainville Referendum Outcomes Issues'" - Christine Bell and Robbie McVeigh, 'Bougainville Referendum Outcome Issues' (National Research Institute Papua New Guinea 2018).

<sup>73</sup> Following the referendum, the name of the government was changed to the 'Bougainville Constitutional Transitional Government' to reflect its new status. No formal constitutional amendment was made.

Type of provision	Current provision	Changes for consideration	Cross-references <sup>72</sup>
Status of the Constitution	<p>Section 206 refers to the status of the Bougainville constitution in relation to the BPA and Constitution of PNG.</p> <p>Section 213 provides that the Constitution shall be read and construed subject to National Constitutional Laws.</p>	<p>These provisions make it clear that the Bougainville Constitution is made pursuant to the Constitution of PNG. Depending on the form of self-determination, a new basis for the legal authority of the Bougainville Constitution may need to be identified.</p> <p>If Bougainville’s self-determination is within PNG, the relationship between the PNG and Bougainville constitutions will remain but might be changed. If self-determination occurs outside of PNG, there would be no link between the two constitutions.</p>	This report, Part 4.1.
Constitutional amendment	<p>Section 219 sets out the procedures for amending the Constitution of Bougainville. Section 222 sets out the procedures for making constitutional regulations. Both require Bougainville to give notice to the relevant PNG Minister, and in some circumstances to consult with the PNG government.</p>	<p>The broad procedures for making and amending constitution laws might be carried over into a new or amended constitution.</p> <p>The requirements to notify and consult the PNG government might change to reflect the form of self-determination. Such consultation would not be required if Bougainville were an independent state.</p>	This report, Part 4.1.
	<p>Sections 217–218 set out the procedures that the Bougainville government and PNG government must follow if Part XIV of the Constitution of PNG is to be amended.</p>	<p>These requirements are likely to change, depending on the form of self-determination for Bougainville. Provisions for consultation and consent of this kind will be appropriate if Bougainville continues to be a part of PNG; but should be removed if Bougainville becomes an independent state.</p>	This report, Part 4.1.
Transitional provisions	<p>Eight provisions of the constitution expressly apply ‘until any change in the status of Bougainville that may occur following the Bougainville Referendum’ and subject to the BPA and Part XIV of the National Constitution” (sections 41, 74, 141(b), 199, 205, 206, 209, 213).</p>	<p>Some of these provisions might require significant change. Those that do not require substantive reconsideration could be placed on a permanent footing and, depending on the nature of self-determination, subject to the Bougainville Constitution alone.</p>	

<b>Type of provision</b>	<b>Current provision</b>	<b>Changes for consideration</b>	<b>Cross-references<sup>72</sup></b>
Powers defined by reference to the BPA and/ or Part XIV of the PNG Constitution	<p>Section 42 states that the functions and powers of the ABG are set out in Part XIV of the PNG Constitution.</p> <p>Section 47 states the ABG can exercise powers with respect to fisheries under certain provisions of the BPA.</p> <p>Section 148 describes the powers functions of the Bougainville Police Service by reference to the BPA as implemented in Part XIV of the PNG Constitution.</p>	The BPA, and its implementation in Part XIV of the PNG Constitution, will continue to be an important historical resource. However, in a move to self-determination, consideration may be given to setting out the powers and functions of the ABG in the Bougainville Constitution as the supreme law and primary source of government power. Depending on the nature of self-determination, this might mean conferring new powers on the Bougainville government	
Transfer of functions and powers	<p>Under the BPA, the Government of Bougainville was to incrementally assume functions and powers transferred from PNG.</p> <p>Section 43 sets out matters to be considered by the ABG before requesting a transfer of functions and powers.</p>	This provision might be redundant or subject to revision, depending on the nature of self-determination. Arrangements for the transfer of functions of PNG to ABG might be set out in a transitional provision of the Constitution.	NRI report, 'Greater autonomy or independence for Bougainville' (Dziedzic & Saunders, 2019a, pp. 15–18).
Customary criminal law	Section 45 empowers the ABG and PNG government to establish a joint commission to consider customary non-custodial options for criminal offenders.	It is not clear that such a commission was established. Assuming this issue continues to be important but unresolved, section 45 could be replaced by a provision permitting laws to regulate customary non-custodial obligations for persons convicted of criminal offences. This would place responsibility solely in the hands of Bougainville law-makers, rather than shared with the PNG government.	
Foreign Affairs	Section 46 requires the ABG to consult the PNG government before it participates in regional or international engagements.	Depending on the nature of self-determination, consideration might be given to a provision that positively sets out the powers and functions of the Bougainville Government with respect to foreign affairs.	This report, part 6.

<b>Type of provision</b>	<b>Current provision</b>	<b>Changes for consideration</b>	<b>Cross-references<sup>72</sup></b>
Underlying law	Section 48 provides that the underlying law of PNG will apply until a Bougainville law is made on the issue.	Consideration could be given to making this a provision that empowers the Bougainville government to make laws relating to the underlying law of Bougainville, with a transitional provision to apply the PNG underlying law in the meantime.	NRI report, 'Greater autonomy or independence for Bougainville' (Dziedzic & Saunders, 2019a, p. 32).
House of Representatives	Part 5 establishes the House of Representatives and provides for its composition and procedures.	Many of these provisions might be carried over into a new or amended constitution for Bougainville under self-determination.  Depending on the nature of the future relationship between Bougainville and PNG, consideration might be given to amending or removing section 55(3) which permits Bougainville members of the PNG parliament to sit in the Bougainville House of Representatives.	NRI Report, 'Greater autonomy or independence for Bougainville', (Dziedzic & Saunders, 2019a, pp 21 and 27).
International agreements	Section 74 sets out the procedure that the House of Representative must follow if the PNG government requests the ABG's agreement to an international agreement.	This procedure may change or be made redundant, depending on the nature of self-determination.  If Bougainville assumes full independent statehood, it will need a constitutional framework governing entry into and ratification of international agreements and their effect in domestic law.	This report, Part 6.
The Executive	Part 6 establishes the Bougainville Executive Council, the office of the President and Vice President.	Many of these provisions might be carried over into a new or amended constitution for Bougainville under self-determination.  If it is decided that Bougainville will be an independent state, the position and functions of the head of state will need to be set out in the Constitution.	On the head of state, see this Report, part 5.1(a).

Type of provision	Current provision	Changes for consideration	Cross-references <sup>72</sup>
Appointments committee	<p>Section 102 establishes the Bougainville Senior Appointments Committee.</p> <p>Section 121 establishes the Bougainville Judicial Appointments Committee.</p>	<p>Currently, appointment committees include two members appointed by PNG authorities. Depending on the nature of self-determination, consideration might be given to changing or removing PNG representation in Bougainville appointments process</p>	<p>NRI Report, 'Greater autonomy or independence for Bougainville', pages 20 and 28.</p>
Judiciary	<p>Part 9 enables Bougainville to establish its own courts located within the national judicial system (eg sections 112(4), 120).</p> <p>The Supreme Court of PNG is the final court of appeal for Bougainville (section 112(c)).</p> <p>The Supreme and National Courts of PNG, and the Bougainville High Court, have jurisdiction to determine and enforce rights claims (section 183).</p> <p>The Supreme Court and the Bougainville High Court have original and exclusive jurisdiction to determine any question relating to the interpretation or application of the Constitution (section 209).</p>	<p>Depending on the nature of self-determination, consideration might be given to establishing and vesting jurisdiction in Bougainville courts that are independent of the national judicial system. Consideration could also be given to the creation of a Bougainville court of final appeal.</p> <p>Provisions relating to the appointment and removal of judges could be largely carried over into new constitutional arrangements.</p>	<p>This report, part 5.1(a).</p>
Police and correctional services	<p>Sections 150 and 151 require that laws relating to the Bougainville Police Service and Correctional Service must be consistent with those of the National Police Force and Correctional service.</p>	<p>It might be envisaged that in self-determination, Bougainville will have its own institutions and need not mandate consistency with PNG institutions.</p>	<p>NRI report, 'Greater autonomy or independence for Bougainville', (Dziedzic &amp; Saunders, 2019a, p. 17).</p>

Type of provision	Current provision	Changes for consideration	Cross-references <sup>72</sup>
Grants	Section 154(1)(a) makes provision for grants from the PNG government.	<p>The nature and provision of financial grants from PNG to Bougainville will be matter for consultation. The agreed arrangements might be reflected in a new constitutional provision, a transitional provision or in ordinary law.</p> <p>Other sources of revenue (taxation, customs, fees) might be identified in this provision.</p>	NRI report, 'Greater autonomy or independence for Bougainville', (Dziedzic & Saunders, 2019a, p. 19), and NRI report 'Increasing revenues for the Bougainville Government' (Chand et al., 2020, Part 2.3).
Foreign aid and loans	<p>Section 154(1)(e) includes in the sources of revenue foreign aid 'obtained in accordance with s 327 of the National Constitution'.</p> <p>Section 154(1)(f) requires loans to accord with PNG banking regulations.</p>	It might be that under self-determination, Bougainville will not need to consult PNG in relation to foreign aid and loans. Consideration could be given to replacing this provision with Bougainville's own guidance on obtaining financial support from outside sources.	This report, Part 6.2.
Fisheries revenue	Section 154(1)(g) refers to fishing revenues distributed by the PNG government.	It might be that under self-determination Bougainville will generate its own revenues from fishing. This provision may need to reflect agreement with the PNG government on this issue.	NRI report. 'Increasing Revenues for the Bougainville Government' (Chand et al., 2020, Part 2.4.2).
Deficit budget	Section 155(3) prevents the ABG proposing a deficit budget without approval from the relevant PNG Minister.	Under self-determination, this provision might be amended or removed, reflecting responsibility for government revenue and spending to the House of Representatives and the people of Bougainville.	NRI report, 'Greater autonomy or independence for Bougainville', (Dziedzic & Saunders, 2019a, p. 17).
Provision of government services by PNG	Section 138(3) provides that until a Bougainville Public Service, Police Service and Correctional Service are established, the BPA, as implemented in the national constitutional laws, shall determine the extent to which the state services of the national government operate in Bougainville.	Consideration could be given to making this a transitional provision. Its substance would depend on the nature of self-determination and the transitional process.	

<b>Type of provision</b>	<b>Current provision</b>	<b>Changes for consideration</b>	<b>Cross-references<sup>72</sup></b>
Leadership code	Under part 13, the PNG Leadership Code applies in Bougainville until the establishment of the Bougainville Ombudsman.	Under self-determination, the Bougainville leadership code might be directly applied in Bougainville. The application of the PNG Leadership code may be made in a transitional provision.	This report, Part 5.2(a).
Human rights	Section 178 applies the basic rights set out in the PNG Constitution to Bougainville.	Consideration might be given to creating a Bougainville Bill of Rights for inclusion in the Bougainville Constitution.  If Bougainville adopts its own Rights provisions, existing references to rights provisions of the PNG Constitution could be updated. These include sections 44(2) and 223 regarding protection from unjust deprivation of property; section 45(2)(b) reference to the national human rights regime; sections 56(12), 60(5), 91(5), 110(3), 111(6) references to section 50 of the National Constitution.	This report, Part 5.2(a).  NRI Report, 'Bougainville Referendum Outcomes Issues' ch 5.
Emergencies	Part 19 sets out the procedures for declaring an emergency in Bougainville. It includes provision for the PNG government to declare an emergency in Bougainville.	Depending on the form of self-determination, the procedures for declaring an emergency might be amended to limit or remove involvement by the PNG government.	NRI Report, 'Greater autonomy or independence for Bougainville' pages 17-18.
Principles of intergovernmental relations	Section 205 sets out general principles for the relationship between the PNG government and ABG.	These principles may require amendment to reflect with the final form of self-determination for Bougainville and the nature of the relationship between Bougainville and PNG.	This report, part 7.1.  NRI Report, 'Greater autonomy or independence for Bougainville' pages 20-21 (greater autonomy); page 29 (independence).

<b>Type of provision</b>	<b>Current provision</b>	<b>Changes for consideration</b>	<b>Cross-references<sup>72</sup></b>
Referendum on the future political status of Bougainville	Part 17 sets out the procedures in relation to the Bougainville Referendum.	These provisions will be spent once the outcome of the referendum is ratified by the PNG Parliament. They could be removed from a future Bougainville constitution.	
First Bougainville general election	Part 25 sets out the procedures for the first Bougainville general election and meeting of the House of Representatives.	This part is now a spent provision and might be removed. Depending on the nature of transitional measures agreed by the governments, it may be that a similar provision is required to manage the process for the first elections and meeting of parliament under new constitutional arrangements.	





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