



INSTITUTIONAL ARRANGEMENTS FOR 'GREATER AUTONOMY' AND 'INDEPENDENCE' FOR BOUGAINVILLE: OPTIONS AND ISSUES

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Introduction

At a referendum to be held on 23 November 2019, the people of Bougainville will vote to choose between greater autonomy and independence for Bougainville.

For the purposes of the referendum, 'greater autonomy' has been defined, by agreement between the Prime Minister of Papua New Guinea (PNG) and the President of the Autonomous Region of Bougainville (ARoB), as 'a negotiated political settlement that provides for a form of autonomy with greater powers than those currently available under constitutional arrangements'. 'Independence' has been defined to require an 'independent nation state with sovereign powers and laws, recognised under international law and by other sovereign states to be an independent state, separate from the State of Papua New Guinea'.

Whatever the outcome of the referendum, three issues are clear:

- Whether as an autonomous region within PNG or as an independent state, it is critical for Bougainville to function peacefully and effectively as a polity for the benefit of all its people.
- Following the vote, there will be a period of consultation between PNG and ARoB over the results of the referendum, as required by article 311 of the Bougainville Peace Agreement (BPA) and section 342(1) of the PNG Constitution. Any 'differences' between the two governments is to be resolved in accordance with the dispute resolution procedure set out in section 333 of the PNG Constitution. Once an outcome is agreed, there will be a period of transition, during which the agreed outcome is implemented. Additional issues and possible responses are likely to emerge during this time.
- On either scenario, PNG and Bougainville will continue to have a close and ongoing relationship, whether as levels of government within a single state or as independent states with shared regional, social, economic and political interests.

Representatives of both governments have reiterated their commitment to a joint outcome, agreed together, in the spirit of the Peace Agreement and the Melanesian way. Consultation leading to agreement also is required by both the BPA and the PNG Constitution. No timeframe for the consultation is prescribed. Article 311 of the BPA requires 'ratification' of the outcome by the PNG Parliament. Whatever the precise meaning of this term in the context in which it appears, in practice it seems appropriate for the PNG Parliament to:

1. Formally acknowledge the results of the referendum when these become available, following the procedure in section 342(2) of the PNG Constitution; and
2. To receive and accept the agreed outcomes of the consultation in due course, and take whatever action is needed to give it effect.

While the Constitution refers only to a copy of the PNG Parliament's decision being provided to the Bougainville executive, it would seem appropriate for the House of Representatives of Bougainville to be involved at both these stages as well.

Outline of this Briefing Note

This Briefing Note provides a framework for understanding the kinds of legal, administrative and institutional issues implied by either 'greater autonomy' or 'independence' for Bougainville. The Note is deliberately short and drafted to be as accessible as possible to decision-makers in PNG and Bougainville at this next critical stage in the implementation of the BPA. The substance of the Note will be developed into a longer, fully referenced, Report for the National Research Institute (NRI) on *Institutional Arrangements for Greater Autonomy and Independence for Bougainville*.

The Briefing Note is divided into four main parts. Part 1 provides a timeline of some of the key events that will affect the structure and timing of consultation and, perhaps, implementation after the referendum on 23 November. Parts 2-4 identify the potential legal, institutional structures and administrative arrangements for Bougainville and PNG under three scenarios:

- Full implementation of the autonomy for Bougainville for which the BPA and the Constitutions of PNG and Bougainville already provide (part 2);
- Greater autonomy for Bougainville within PNG (part 3);
- Independence for Bougainville, including options for a continuing relationship with the separate state of PNG (part 4).

To assist in understanding and comparing the implications of each of these sets of options, the Briefing Note organises the relevant institutional and administrative arrangements across five aspects of governance:

- *Powers and functions*: the governmental powers available to the Bougainville government (legislative, executive and judicial) and the functions for which it is responsible.
- *Fiscal matters*: the manner in which Bougainville funds its governmental responsibilities and is accountable for its expenditure.
- *Institutions of government* within Bougainville and, to the extent that they are relevant, within PNG.
- *Intergovernmental relations* between the two governments of PNG and Bougainville.
- *Identity*: the development and expression of an inclusive Bougainville identity within or outside PNG.

In addition to assisting in the comparison of the three sets of options, this structure may assist to inform transitional arrangements in a move towards either greater autonomy or eventual independence. Most of the steps necessary to complete the present level of autonomy would be necessary as a foundation for greater autonomy. Many (but not all) of the options for greater autonomy would be necessary for an independent state of Bougainville, although additional changes also would be required.

Part 1: Timeline

This part identifies key events in the period immediately following the referendum which are likely to affect the structure and timing of the reactions of the two governments to the referendum result and consultations between them over an agreed response to it. It also suggests some of the issues that the two governments, separately and together, might need to consider during the post-referendum phase.

This timeline is intended only to identify some critical dates in order to structure thinking about how this period might be used. The timeline may also be useful for governments as they develop a roadmap for the consultation phase and, potentially, for transition and implementation.

A roadmap, setting out the steps and a timetable for the consultation period is needed for the internal purposes of the two governments, as they embark on negotiations and prepare the ground for the next phase in their changing relationship. Importantly, a roadmap is needed for public release as well, preferably shortly after the referendum results are known in order to:

- Provide reassurance to the people of Bougainville that all parties respect the results of the referendum and working towards implementation;
- Inform the people of PNG as a whole of the actions on these important issues that are being undertaken on their behalf;
- Manage expectations, including the idea that the result of a referendum of this kind can immediately be implemented, by providing a plan for consultation, transition and implementation, which might take some time, but is structured by an agreed timetable with clear objectives;
- Build on the success of the Peace Agreement and take maximum advantage of the Melanesian way, by demonstrating leadership on the part of both governments and trust between them.

Table 1: Timeline with critical dates and potential actions

Event	Likely dates	Actions in Bougainville	Actions in PNG
		Joint actions	
Referendum conducted	23 Nov 2019	Conduct poll	
Public announcement of the result of the referendum	Nov/Dec 2019, when available	Announce referendum results. This is an opportunity also to foreshadow the road map, including an indication of timing and of the manner in which consultations are intended to proceed.	
PNG Parliament and Bougainville House of Representatives recess	Nov 2019-Feb 2020	Continued work on uniting Bougainville (reconciliations); prepare position on referendum results; public information about road-map; continued work on implementing current level of autonomy	Prepare position on referendum results; public information about referendum result and roadmap; continued work on implementing current level of autonomy
		Agree a formal statement to the PNG Parliament about the results of the referendum, including the roadmap	
PNG parliament and Bougainville House of Reps reconvene	February 2020	Report referendum results and road map to Bougainville House of Representatives when it reconvenes.	Referendum results and road map formally reported to and accepted by PNG Parliament
ARoB election campaign	Jan-Apr 2020	Bougainville election (date in April 2020)	Preparation for consultations over referendum outcome
Post-ARoB election until new government takes office	Apr-Jun 2020	Develop a united negotiation position with incoming ARoB government; prepare for consultations	Preparation for consultations over referendum outcome
Consultation period begins, at the latest	June 2020	Consultation to agree a position that respects the referendum results, that is mutually agreed and that is workable.	
PNG national election	June/July 2022	Latest date for end of consultations Transition/implementation begins	

Part 2: Realising existing autonomy

The existing framework for autonomy, negotiated in the BPA, provides Bougainville with very extensive formal autonomy. The degree of autonomy that in principle is available to Bougainville is much deeper than that of the constituent units in most federations. PNG, apart from Bougainville, remains a unitary state, but Bougainville autonomy gains additional protection from the provisions of Part XIV of the PNG Constitution, which apply only to Bougainville. Many of these provisions are also reflected in the Bougainville Constitution. Entrenchment of Bougainville autonomy in the PNG Constitution was one of the key provisions of the BPA. Section 345 of the PNG Constitution provides that Part XIV cannot be altered without the agreement of the Bougainville Parliament.

Implementation of substantial new autonomy arrangements is always a difficult task. It involves not just legal and institutional change, but also cultural or attitudinal change within both levels of government. It is made more difficult still where (a) autonomy is a response to conflict and so is only one element of a broader exercise in peace-building; (b) previous arrangements provided only limited, if any, opportunity for self-government; and (c) the remainder of the state has a unitary system of government.

The deferral of the referendum for a period 10 to 15 years after the first ARoB elections provided both governments with an important opportunity to implement the autonomy arrangements. It also offered an opportunity to strengthen trust between the levels of government, to build peace within Bougainville, to develop the capacity of Bougainville to function as a polity, and to begin the attitudinal adjustments, in both PNG and Bougainville, on which autonomy depends.

During this time, significant progress towards implementing the agreed level of autonomy has been made.

- Much of the infrastructure in Bougainville destroyed during the conflict has been rebuilt, enabling a range of government services to be restored.
- A new Constitution for Bougainville has been made, with considerable community engagement, and put into effect.
- The Bougainville House of Representatives and Executive Council have been established, policies for Bougainville developed, and legislation passed.
- There have been three successful elections, the most recent conducted under the auspices of the Bougainville Electoral Commission
- A Bougainville public service has been established, after governing legislation was passed in 2014.

Much still remains to be done, however, to realise the level of autonomy provided in the BPA. The implementation of autonomy has been complicated by a range of factors. These include the ravages of conflict, including the destruction of infrastructure; continuing tensions within Bougainville in the aftermath of the conflict; the need for capacity-building in Bougainville to meet the demands of significant autonomy; and lack of familiarity within PNG with what is involved in relations with an autonomous region.

Elements of the autonomy offered by the BPA and the Constitution still not realised include:

Powers and functions

- Not all the functions and powers provided to the government of Bougainville by the Constitution have been fully drawn down by the ARoB. Further, some of the powers that have been drawn down have not yet been implemented through legislation and policy. Tracking the current position in detail is difficult, as the process for drawdown is complex, piecemeal and somewhat opaque. It also may be that there are good reasons why particular powers or parts of powers have not yet been drawn down. Some examples nevertheless may be given:

- Bougainville has powers in relation to land and section 44 of the Bougainville Constitution provides that the ARoB will develop a land policy. However, land titles continue to be held in PNG, inhibiting the ARoB's ability to deal with land in practice.
- The Bougainville Police Service (BPS) remains part of the Royal Papua New Guinean Constabulary. While there has been a conscious decision not to draw down powers relating to justice, this has led to difficulties co-ordinating the BPS with the Community Auxiliary Police.
- Legislative power with respect to fisheries has not yet been fully drawn down; this would represent a substantial source of revenue for the ARoB.

Fiscal matters

- While the ARoB relies on some sources of internal revenue, these so far fund only a portion of the recurrent budget. For the remainder, Bougainville relies on the transfer of some taxation revenue collected by the centre and a range of annual grants provided by the PNG Government. There are revenue sources currently available to the ARoB which could make it more self-sufficient, but a lack of administrative capacity presently constrains the ARoB from developing them. While the Panguna mine remains another potential source of income, its future has been too unsettled to be a solution so far.

Institutions

- The ARoB has not realised the full measure of institutional autonomy available under existing arrangements because some institutions have not yet been established and because some of those that exist have limited capacity. As a result, Bougainville continues to rely on some PNG institutions in areas where autonomy is available. In some cases, ARoB officials exercise authority under PNG laws. Examples include:
 - The Office of the Auditor-General is not yet established, although enabling legislation was passed by the ARoB House of Representatives in 2015. To complicate this issue further, after the enabling Act was passed, the PNG Auditor-General's Office formed the view that it had no authority to audit Bougainville accounts. As a result, the ABG does not regularly provide public accounts to the House of Representatives, nor is there an independent audit of financial reports.
 - There is provision in the Bougainville Constitution for a Bougainville Ombudsman, but it has not yet been established. The PNG Ombudsman established an office in Bougainville in 2017.
 - Bougainville's police and correctional services fall under the auspices of two national departments: the Royal Papua New Guinea Constabulary and Correctional Services PNG. These national bodies assist with training, pay employees' salaries, and deal with discipline and promotion. Additionally, New Zealand funds and trains Bougainville's Community Auxiliary Police. This system has resulted in blurred lines of accountability, a problem that is compounded by Bougainville's lack of an independent police investigation unit.
 - The Bougainville Courts provided for by the Bougainville Constitution have not been established. Judicial services continue to be provided by PNG.

Intergovernmental relations

- The current level of autonomy for ARoB provides for relations with the PNG government that are different from those with other provinces. These include but are not confined to the Joint Supervisory Body (JSB) and other arrangements specifically identified in Part XIV Division 6 of the PNG Constitution. Intergovernmental arrangements are needed (a) whenever joint action is required by PNG and ARoB to put arrangements for autonomy in place or to enable their operation in practice and (b) whenever the Constitution requires consultation between the two levels of government.
 - Intergovernmental relations in this sense require mutual respect and active co-operation on the part of the institutions of both levels of government. This mode of operation is new for both parties and is still evolving but necessary to realising the autonomy for which current arrangements provide.
 - For example, section 293(3)(a) of the PNG Constitution requires the government of PNG to consult

with the ABG where an international agreement is likely to affect the exercise of the functions and powers available to the ARoB. It is not clear whether and if, so, how this has occurred (although, if it has not, it may be because no relevant agreements have been negotiated over this period).

- The JSB itself has not been fully effective. It has met infrequently; difficult but critical decisions have been delayed; and the decisions that have been made sometimes are not implemented.

Identity

- Effective autonomy ultimately requires a cohesive polity. At least until recently, however, not all ex-combatants and factions within Bougainville have considered themselves part of the ARoB, inhibiting its capacity to take advantage of autonomy and potentially destabilising peace.
- Resolution of the contested issue of the Panguna mine ultimately requires acceptance by all parties of whatever solution is adopted by Bougainville institutions, properly exercising their authority under the Bougainville Constitution.

In summary, one strength of the BPA was that it recognised that it would take time for the ARoB to build the capacity to fully exercise the autonomy offered by the BPA and PNG Constitution and for both levels of government to adapt to these new arrangements. In 2019 this process is not yet complete. In consequence, the full extent of the autonomy legally available to Bougainville is yet to be realised in practice. Equally, neither PNG nor ARoB has yet fully recognised the implications of autonomy for the relations between the two levels of government and adapted their practices accordingly.

The incomplete implementation of the existing autonomy arrangements has implications for the evaluation of each of the choices before the people of Bougainville at the forthcoming referendum:

- Until the current arrangements are fully implemented, it is difficult to gauge the difference between this level of autonomy and 'greater autonomy'. Greater autonomy would entail the full implementation of the current arrangements in addition to the other measures identified in Part 3 below.
- Similarly, implementation of the existing arrangements is an important stage along the path to independence. Many outstanding aspects of autonomy would be assumed by an independent state and would need to be implemented for Bougainville to function as an independent polity.

Part 3: Greater autonomy

Part 2 of this Briefing Note demonstrated that Bougainville already has a significant degree of autonomy, which is still in the process of implementation. From that perspective, effectively implementing the existing arrangements would provide a 'greater' degree of autonomy than Bougainville presently experiences in practice.

This part of the Briefing Note outlines additional legal, institutional or administrative arrangements that might be made to provide 'greater autonomy' for Bougainville. It therefore also requires, and builds on, the effective implementation of existing autonomy arrangements.

Powers and functions

Enhancing the legal powers and functions of the ARoB under greater autonomy might be done through:

- Increasing the powers available to the ARoB.
- Removing legal constraints on the powers presently exercisable by the ARoB.
- Limiting the authority of the PNG government to legislate for Bougainville, generally or without ABG consent.
- Giving Bougainville more authority in drawing down powers legally available to it.

This section identifies possibilities under each of these headings. Whether such changes would be workable in

practice in the context of PNG and Bougainville, particularly in the short term, is an issue for consideration by governments.

† *New powers*

Most of the powers retained by the PNG government, and therefore not allocated to Bougainville under the existing autonomy arrangements, are listed in section 289 of the PNG Constitution. Under section 296, these powers may also be exercised by the ARoB, but not in a way that is inconsistent with national law.

Most of these powers have been retained by PNG either because they relate to the exercise of the external sovereignty of PNG when the state needs to speak and act as a whole (eg defence and foreign relations) or because it is more practicable to exercise them across the state as a whole (eg currency, central banking, quarantine, highly migratory fish stocks, aviation, international trade). The Constitution requires some of these powers to be exercised in consultation with the ABG in certain circumstances (eg entry into certain new international obligations under section 293(3) of the PNG Constitution). The effective operation of these and other requirements for consultation, which already are provided for in the Constitution, requires full implementation of the existing autonomy arrangements, in the manner described in Part 2.

It follows that the new powers potentially available to be allocated to Bougainville under greater autonomy arrangements can readily be identified from these sections of the Constitution. The effect of transfer would be to enable Bougainville to legislate in these areas without concern about consistency with PNG law. Examples of new powers that might be transferred wholly or in part on this basis, include:

- Industrial relations;
- Highly migratory and straddling fish stocks;
- Migration;
- Firearms control;
- State owned housing.

Unspecified or residual powers also might be allocated as a default position to Bougainville, rather than to PNG, as currently is the case under section 292 of the Constitution.

† *Full exercise of existing powers*

Another significant way of enhancing the powers and functions of the ARoB under greater autonomy arrangements would be to remove the legal constraints on the exercise of some of the powers presently available to Bougainville. Some of the constraints may be desirable to co-ordinate the laws of PNG and Bougainville; if they were removed, co-ordination may be needed in another form. Examples of current legal constraints that in principle could be removed include:

- The Bougainville Constitution might be able to be amended without PNG government approval (section 287 of the PNG Constitution).
- The ARoB might have full authority to amend the criminal law (section 291).
- The ARoB might be authorised to amend the public service law applicable to Bougainville without consultation with PNG (section 311(4)).
- The ARoB might have greater control over foreign investment in Bougainville, without the requirement to consult PNG (section 290(4)).
- The ARoB might have full or greater discretion to provide for a Bougainville Correctional Service than section 316 of the PNG Constitution presently allows.

† *Limiting PNG authority in relation to Bougainville*

In the exercise of its powers retained under the BPA, decisions of the PNG government apply in Bougainville in the same way as in the rest of PNG, unless there are provisions requiring prior consultation with the ABG in particular cases. Under arrangements for greater autonomy for the ARoB, there may be scope for extending the

requirement for consultation between PNG and the ARoB before PNG law or policy applies or for making it more effective. By way of example:

- The power of the PNG government to legislate in subject areas allocated to Bougainville by section 296(2) of the PNG Constitution might be altered to require consultation with the ABG (although note that the power in section 296(2) also is reciprocal, enabling the ARoB to legislate on PNG matters).
- The final appellate authority of the Supreme Court of PNG over the interpretation of the Constitution and laws of Bougainville (section 308 of the PNG Constitution) might be removed in favour of a final appellate court in Bougainville.
- Consultation with the ABG (or attempted consultation with the ABG) might be required before any national emergency is declared with effect in the ARoB, modifying the procedures set out in section 323 (which already provide for consultation in some circumstances).

† *Procedure for drawing down powers*

The current procedure for the ARoB to draw down powers and functions requires consultation with the PNG government and 12 months' notice, unless both governments agree (section 295 of the PNG Constitution). Under arrangements for greater autonomy, the ARoB might be given greater unilateral authority to require the transfer of powers. In this event, the ARoB would need to take full responsibility for ensuring that it had the capacity to exercise the functions and to be accountable for their exercise to its people.

Fiscal matters

Enhancing the fiscal authority of the ARoB under greater autonomy might be done by:

- Increasing the fiscal powers available to the ARoB.
- Removing legal constraints on the fiscal powers presently exercisable by the ARoB.
- Limiting or removing the conditionality of grants by PNG to ARoB.

In the interests of the people of Bougainville, enhanced fiscal authority for the ARoB in relation both to revenue raising and expenditure, necessarily must (a) be able to be exercised effectively by the ABG; and (b) be exercised in a way that is transparent and accountable to the House of Representatives, the people of Bougainville and relevant donors.

† *Increased fiscal powers*

The ARoB already has significant taxation powers legally available to it that are not yet used. The taxation powers that have been legally reserved to PNG by section 325 of the PNG Constitution – relating to customs duties, company taxation and VAT – are not suitable for exercise by a single region of a state, even in conditions of greater autonomy. New revenues may be available to Bougainville, however, from the transfer of other powers or functions, in particular, authority over certain migratory fish stocks.

† *Full exercise of existing fiscal powers*

The ARoB presently is constrained in the exercise of certain fiscal powers by the need to consult with, or obtain the approval of, the PNG government. For the purposes of greater autonomy, it may be that these constraints could be modified or removed. For example:

- There are some constraints on the ARoB in obtaining foreign aid, under section 327 of the PNG Constitution.
- The ARoB is obliged to consult with the PNG government in obtaining both foreign and domestic loans under section 328 of the PNG Constitution (this provision also requires borrowing to be consistent with the requirements of the Bank of Papua New Guinea).

† *Conditionality of grants*

Some grants from PNG to the ARoB under section 326 of the PNG Constitution are made for specific purposes or on condition, while others are unconditional. For the purposes of greater autonomy, it may be possible to expand the categories of unconditional grants, or to remove conditionality altogether. In these circumstances,

consideration would need to be given to full accounting for expenditure. Audit could be conducted either by the PNG Auditor-General or a Bougainville auditing authority or by both, under co-operative arrangements. Audit of expenditure by an ARoB authority alone would be more consistent with greater autonomy but would need to be transparent and effective, to satisfy the obligations of PNG to its own institutions and constituents.

Institutions

Greater institutional autonomy for the ARoB might be achieved by:

- The creation of new ARoB institutions, accountable for their effectiveness to the ABG, the House of Representatives and the people of Bougainville.
- Greater independence of ARoB institutions from supervision by PNG institutions.
- Delivery of PNG programs within Bougainville by ARoB institutions.

As with all other steps towards greater autonomy, for these to be effective the ARoB institutions would need to work well and to be accountable within Bougainville.

† *New institutions*

New ARoB institutions, or the extension of the authority of existing ones, would be necessitated by the transfer of additional powers and functions considered in the earlier sections of this part.

† *Greater independence of ARoB institutions*

The PNG Constitution provides for some oversight of ARoB institutions, directly or by controlling provisions in the Bougainville Constitution. This might be limited or removed in conditions of greater autonomy. For example:

- The appointment procedures for Bougainville constitutional office-holders generally require the involvement of persons appointed by the equivalent PNG body (section 321 of the PNG Constitution).
- The Bougainville Salaries and Remunerations Commission is required to take advice from the equivalent PNG Commission into account (section 319 of the PNG Constitution).
- There are legal constraints on institutional arrangements for the Bougainville Police, in the interests of alignment with PNG standards (section 313 of the PNG Constitution).

† *Delivery of PNG programs within Bougainville*

- The National Public Service presently operates in Bougainville both to deliver national programs and to deliver some programs under Bougainville law, pending the further development of ARoB institutions (section 312 of the PNG Constitution). The latter already lies within the control of the ARoB. In conditions of greater autonomy, some PNG programs also might be delivered in Bougainville by ARoB institutions, under arrangements that provide for broad consistency with the administration of such programs throughout the country.
- Similarly, the PNG Police presently operate in Bougainville both to enforce national laws and to enforce Bougainville laws under agreed arrangements (section 315 of the PNG Constitution). Under conditions of greater autonomy, it may be possible to reduce the role of the PNG police in Bougainville, if and when Bougainville police have the capacity to enforce national laws.

Intergovernmental relations and shared rule

Every system of multi-level government within a state has both formal and informal arrangements for relations between the levels of government and by which sub-state regions are represented in central institutions (a phenomenon sometimes described as 'shared rule'). The distinctive feature of multi-level government in PNG is that the ARoB has a significantly deeper degree of autonomy than regions elsewhere in the country. This seems unlikely to change, even if more extensive devolution occurs elsewhere in PNG.

Greater autonomy in this category might be achieved in ways that recognise and give effect to the distinctive character of the arrangements for government in the ARoB. In particular:

- If the ARoB is adequately responsible to its own people, through its own institutions, PNG supervision might be limited or removed altogether, generally or in particular areas. Examples have been given in the sections explored earlier in this part.
- Greater autonomy might be reflected in a more formalised intergovernmental relations mechanism, as a successor to the JSB, to facilitate government to government negotiations. This could take various forms, from standing committees on particular issues to an annual meeting of heads of government.
- If such a body is established, it might be useful to create an institution to support it, at arms-length from both the PNG and Bougainville governments. Such a body would at least partly assume the functions of the National Coordination Office of Bougainville Affairs (NCOBA).
- Under present arrangements, Bougainville is represented in the national Parliament in a similar manner to the provinces (with open constituencies and one ‘regional’ (cf ‘provincial’) representative. Greater autonomy might provide the opportunity for a different and distinctive arrangement for the representation of Bougainville in the National Parliament, consistent with Bougainville’s special status. Bougainville members of the National Parliament might, for example, represent Bougainville as a whole rather than separate constituencies. Alternatively, they might act as delegates of the Bougainville House of Representatives. In either case, the payment of Constituency Development Funds (CDF) to the Members would not be appropriate; an equivalent amount might be built into payments to the ARoB.
- There may be opportunities to represent Bougainville as a special polity within PNG in the other branches of government. Examples include a permanent position for a Bougainville Minister in the National Executive or the appointment of a judge from Bougainville on the PNG Supreme Court.

Identity

Greater autonomy for Bougainville within PNG would require ways to reinforce the identity of Bougainville as a polity and to reflect the links between Bougainville and PNG.

- A critical step in further reinforcing the identity of Bougainville as a polity is to build its internal cohesion, so that all citizens of Bougainville (including ex-combatants) participate in its collective life and accept the results of decisions that are properly made.
- This in turn requires the effective functioning of the institutions of the ARoB.
- Existing autonomy arrangements already make considerable provision for the use of Bougainville symbols although there may be scope to extend the use of symbols of identity further.
- Existing autonomy arrangements require the National Emblem to be used in particular cases, with other Bougainville markings, symbolising the identity of Bougainville within PNG (section 310(4) of the PNG Constitution).

None of the potential features of greater autonomy outlined here are necessary or essential to ‘greater autonomy’. ‘Greater autonomy’ is a broad category: the precise scope of Bougainville’s autonomy could range from powers not much greater than those it possesses under the current arrangements to a position that would entitle it to some but not all of the benefits of full statehood.

Ultimately, ‘greater autonomy’ is something for PNG and Bougainville to define together, drawing on the categories and the particular made in this part. This exercise requires an understanding of existing arrangements; an understanding of how existing arrangements might work if they were fully implemented; agreement on ways to deepen Bougainville autonomy within PNG; and agreement on changes in PNG governance that might better reflect, respect and support Bougainville autonomy. In the event of greater autonomy involving new initiatives of these kinds, amendments will be needed to the Constitutions of PNG and Bougainville to remove existing, inconsistent arrangements and to entrench the newly agreed arrangements.

Many of the potential features of greater autonomy outlined here also are relevant to independence, the properties of which are outlined in the next part.

Part 4: Independence

The core features of independent statehood are territory, people, government, and recognition by the international community (expressed, for example, through membership of the United Nations). The recognition of new states is relatively rare in recent times. Factors such as a vote for independence at a free and fair referendum authorised and governed by the PNG Constitution and the BPA and negotiation and agreement on the outcome between the governments of PNG and ARoB are likely to facilitate international recognition of independent statehood for Bougainville. Evidence of capacity to effectively carry out the functions of government also is likely to assist in state recognition.

It is important not to overestimate what independent statehood means in contemporary conditions of globalisation. In practice, no state operates in isolation from other states and some are more dependent than others. States share many connections, through membership of the international community and regional communities, international trade and investment, the multiple identities of peoples, and, relevantly to Bougainville, the provision and acceptance of foreign aid. Smaller states can be vulnerable in international negotiations with larger ones.

Increasingly, groupings of regions of states are used to assist states to further their interests in a globalised world. Smaller states sometimes enter into close relations with other states to conserve resources or for economic or security purposes. Some of the options currently in use in the Pacific are outlined towards the end of this part.

Powers

- An independent state of Bougainville would be responsible for all its relations with the rest of the world, including representation at the UN and in other international and regional fora, entry into international treaties and other arrangements, compliance with international law, international trade and defence.
- An independent state of Bougainville would be entitled to the same offshore rights as any other state, in relation to the territorial sea, the continental shelf and the exclusive economic zone. Maritime boundaries with neighbouring states would need to be negotiated.
- The Constitution of Bougainville would be the supreme law in an independent Bougainville. The PNG Constitution would have no effect in Bougainville and would no longer constrain the contents of the Bougainville Constitution. The Bougainville Constitution would need to be changed, quite substantially in parts, to meet the new realities of independence. PNG approval would no longer be required, if the changes are made after independence. Given the relatively inclusive process by which the Bougainville Constitution was initially made, consideration would need to be given to an appropriate constitution-making process.
- Under independence, the Bougainville Government would be fully responsible to its own people for all governmental decisions affecting Bougainville, externally and internally.
- Bougainville would formally assume all the powers and functions of government, including those retained by PNG in the existing autonomy arrangements, including, for example, customs, quarantine and international civil aviation.
- Bougainville would need to provide for its own citizenship, including arrangements for multiple citizenship. The latter would need to take into account the very significant intermingling of the populations of Bougainville and PNG.

Fiscal and monetary matters

- An independent Bougainville would have fiscal autonomy in the sense that the government of Bougainville would have full responsibility for the generation of revenue (taxation, other revenues, loans, foreign aid) and

would be fully accountable for its expenditure.

- It is likely that, at least in the short term, an independent Bougainville would require significant financial assistance from foreign sources, potentially including PNG. Foreign aid and other forms of foreign financial assistance, including loans and foreign investment, would require considerable negotiating capacity on the part of the Bougainville Government to ensure that it responds to Bougainville's own needs.
- To the extent that reopening the Panguna mine is a potentially significant source of revenue, this issue would need to be considered and resolved. Resolving it would require dealings with competitor companies.
- An independent Bougainville would need to decide whether to establish a central bank or to use other banking facilities (as is done, for example, in Tuvalu).
- An independent Bougainville would need to decide how to provide a currency. Options range from creating its own currency to adopting the currency of another state, in an exercise of 'currency substitution'. In the latter case, Bougainville could choose also to issue its own coins (as is done, for example, in Tuvalu).

Institutions

- A decision would need to be made about who would be the Head of State of an independent Bougainville: the President of Bougainville or a person representing the monarch, if the link with the monarchy based in the United Kingdom is maintained. In the latter case, this would be an issue to be negotiated with the representatives of the Crown and, potentially, the UK government.
- An independent Bougainville would be responsible for providing all necessary institutions of government – legislative, executive, judicial, independent agencies, police and security services, and other public services.
- No Bougainville institutions would be subject to supervision or approval by institutions of PNG.
- Bougainville would no longer be represented in the PNG Parliament or in other PNG institutions.
- There may nevertheless be joint action, shared services or shared personnel between Bougainville and other countries including, most obviously, PNG. Thus, for example, Bougainville could collaborate with PNG in relation to defence or border security. In an example of another kind, citizens of each state could continue to serve in the public services of the other, the judiciary, or security services. Importantly, however, any arrangements of this kind are subject to the agreement of the other state and are possible only if they are compatible with the Constitution and laws of the other state, including their citizenship provisions.
- Independent statehood requires diplomatic representation in regional and international institutions and in other states likely to be significant to Bougainville. It is possible to minimise the cost of this by sharing embassies with other states, with their agreement. It may also be possible to confer authority to exercise diplomatic functions on behalf of Bougainville on diplomatic representatives of other countries. On the other hand, if negotiations are likely to be needed to serve Bougainville interests, it will be important for these to be conducted by people who can speak on behalf of Bougainville.
- Bougainville could create its own court of final appeal drawing on its own judges and, if required, foreign judges. It could also designate a foreign court as its court of appeal as a transitional measure (as Nauru did until 2018).

Intergovernmental relations

- Intergovernmental relations between independent states differ from intergovernmental relations between different governments within the same states. They depend on the agreement of the other states, who may be guided by their own self-interest, exercising responsibility for their own peoples, and agreements will be governed by international law.
- The PNG and Bougainville governments are likely to maintain a special relationship, based on historical ties, geographical closeness and connections between their peoples. There are a range of different ways in which this connection can be expressed through formal and informal institutions and procedures, to the benefit of the peoples of both states. For example:
 - Some states make arrangements for the citizens of one state to have special access to services in another, sometimes but not necessarily on a reciprocal basis. Education and healthcare services in Denmark are

an example.

- Australia and New Zealand have a wide ranging ‘Closer Economic Relations’ agreement, designed to eliminate barriers to trade between the two states, which extends to intergovernmental agreements relating to the regulation of commerce across state boundaries. A similar approach for Bougainville could include harmonisation of rules (meaning the rules of each state are consistent) or mutual recognition (meaning that the state recognises the regulatory standards of the other state, even if they are not identical).
- Some states also provide special status to immigrants and citizens of other, specified states. For example, Australia and New Zealand have reciprocal visa categories for each other’s citizens.

Identity

- An independent Bougainville would need to work effectively for its own people, to develop a strong internal identity and as a foundation to its claim for legitimacy.
- An independent Bougainville would need to build a new identity as an equal sovereign state in the international community of states.
- PNG would also need to take steps to build a new identity without Bougainville, which potentially might extend to a new understanding of the unitary PNG state and the status of the provinces within it.

Part 5: Formalising interstate relations

There are myriad relationships that an independent Bougainville might forge with other, usually neighbouring, states for particular purposes, such as sharing of services, mobility of peoples, provision of currency and receipt of aid, to name only a few. Such arrangements would require the agreement of Bougainville and the other state or states. Usually, there is mutual benefit of some kind.

Sometimes such arrangements are more general and formalised. There is a variety of such relationships across the Pacific region. Two that may be of particular interest in Bougainville are explained in more detail below. Both are described as forms of ‘free association’ although their characteristics differ in some important ways.

The *Cook Islands* describes itself as having ‘full self-government in free association with New Zealand’. Under this relationship, Cook Islanders are citizens of New Zealand, with New Zealand passports. New Zealand carries out the functions of external affairs and defence on behalf of the Cook Islands, in consultation with it. The Cook Islands uses the New Zealand dollar as its currency.

One consequence of this arrangement is that the Cook Islands is not formally an independent state and is not a member state of the United Nations. The arrangement is very close to independence, however, so close that the Cook Islands is a party to some international treaties and represented on some UN treaty bodies. The Cook Islands explains its choice as enabling its people ‘at any time in the future, if they so desire, [to] move into full independence, or any other status that may become practicable, by a unilateral act, that is, one which New Zealand has denied itself the power to countermand’¹. In other words, acquisition of full independence lies entirely within the power of the Cook Islands; the current arrangement is one of convenience, which it considers suit its current circumstances. A similar arrangement applies in Niue.

The *Marshall Islands* has a Compact of Free Association with the United States. The United States provides the Marshall Islands with considerable financial support and is responsible for its defence. Citizens of the Marshall Islands may live and work in the United States and the Marshall Islands use the US currency. The Marshall Islands, for their part, house military bases for the United States, including a missile test site. Unlike the Cook

¹ Government of the Cook Islands, ‘Special Relationship with New Zealand’ <http://www.ck/govt.htm#nz>.

Islands, the Marshall Islands is a fully sovereign state and a member state of the United Nations.² The Compact of Free Association is negotiated periodically. Similar arrangements apply in the Federated States of Micronesia and Palau.

Part 6: Transition to independence

On any view, the referendum outcome in Bougainville will require a transitional period. The transition is likely to raise a wider range of issues if the decision involves Bougainville moving from an autonomous region within PNG to an independent state. These issues are canvassed below. Some are governed by international law relating to state succession.

Ownership and division of assets and liabilities

International law requires that parties must negotiate in good faith for an equitable division of assets and liabilities. While legal principles have been developed, these apply only if agreement cannot be reached. There is a further rule, subject to the principle of an overall equitable solution, that immovable property in the territory of the successor state (in this case, Bougainville) passes exclusively to that state without compensation. There are however moveable and non-physical assets to be divided (eg shares in nationalised companies, state archives). Ownership of offshore assets also becomes important in the negotiation of maritime borders.

Nationality/citizenship

After independence, people who hold a formal allegiance to one state may find themselves excluded or marginalised in the other, despite connections such as family ties, residence and work. The international law on the acquisition and loss of nationality following the separation of one part of the state is not settled. Arrangements in relation to nationality should take into account the wishes of the people affected and avoid creating the risk of statelessness. Depending on the way in which Bougainvillean and PNG citizenship is defined, it may be necessary to negotiate recognition of the rights of PNG citizens in Bougainville, and Bougainvillean citizens in PNG, or even a form of dual citizenship.

Laws

As an independent state, Bougainville would have the power to negotiate and enter into treaties with other states and to make its own national laws. Some transitional questions arise.

† *Is Bougainville bound by international treaties and commitments entered into by PNG prior to the date of Bougainville independence?*

There are few clear rules in international law governing state succession to international treaties. As such, states have some capacity to agree to the 'devolution' of existing treaty commitments held by the predecessor state (here, PNG) to the successor state (here, Bougainville). An independent Bougainville would have the right to declare its succession to multilateral treaties previously entered into by PNG. Succession of states does not affect treaties establishing land or maritime boundaries.

† *Could PNG laws continue to operate in an independent Bougainville?*

PNG laws could only continue to apply in an independent Bougainville if permitted by Bougainville laws. For example, upon becoming independent, several Pacific states picked up and fixed the laws of the colonial state (both statute and common law) as at a particular time, which apply until such time as they are amended or replaced by locally made laws.

† *Would a new constitution be required?*

² United States Department of State, 'US Relations with Marshall Islands' <https://www.state.gov/u-s-relations-with-marshall-islands/>.

Should Bougainville become independent, Part XIV of the PNG Constitution, which sets out the arrangements for the Bougainville Government and the referendum, would be regarded as 'spent'. The current Bougainville Constitution would need to be amended or replaced with a constitution that reflects the powers, functions and responsibilities of an independent state. However, many of the institutions and provisions currently included could be carried over into the constitution of an independent state.

Conclusions

There is much work to be done to realise in practice the autonomy that Bougainville already has, and to extend it to a form of 'greater autonomy' or independence. A long transition period, during which issues such as those identified here are negotiated, is not unusual in world experience, and is important to ensuring that the outcome works effectively for the people of Bougainville and maintains and fosters peace. In this, Bougainville and PNG can draw on the precedent of the negotiations that produced the Bougainville Peace Agreement, reinforced by the values of Melanesian leadership, consultation and consensus.

In many ways, the options set out here are cumulative. Adequate implementation of the existing autonomy arrangements is necessary as a foundation to greater autonomy (and, indeed, would provide greater autonomy than that presently experienced by the people of Bougainville). Deep and effective regional autonomy might enable Bougainville to achieve self-determination within PNG, and in any event is a prerequisite to independence. If, as a result of the referendum, independence is envisaged after a period of transition it would be useful to be clear about objectives and milestones, including what would happen at the end of that transitional process. For example, would there be a right for the Bougainville government to claim independence once certain milestones are reached? Would a second referendum be proposed, to enable new generations to have their say, taking into account prevailing conditions?

The issues identified in this Briefing Note will be amplified and further developed in the final Report. We hope that this will help the governments of Bougainville and PNG, and their peoples, to work towards a joint understanding of what 'greater autonomy' and independence would look like in practice, as well as to identify the key issues for consideration during the consultation period and the features of transition.

We welcome feedback on whether this framework for the report is useful; which of the options identified here are most relevant; whether other likely options have been omitted; how the final report should be framed so as to be as helpful as possible to stakeholders (within both governments and the public); and any additional questions or issues it might be helpful to cover.

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