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# Election Petitions in Papua New Guinea

A Review of the Literature

for the National and  
Supreme Courts of Papua  
New Guinea

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# Election Petitions in Papua New Guinea: A Review of the Literature

Election petitions allow individual electors to challenge the election of their parliamentary representatives if they have timely evidence of breaches of electoral law sufficient to have affected the result. In doing so, they may be considered a notable mechanism for accountability of electoral processes.

This review will consider the key literature on contested electoral returns in Papua New Guinea (PNG) in four parts. Part 1 undertakes a general overview of the law concerning contested electoral returns in PNG. Part 2 compares the PNG contested returns system with the similar common law jurisdictions of the United Kingdom and Australia, and highlights particular cases of interest from both. Part 3 proceeds to briefly explore the Samoan system as a Pacific Island nation with shared colonial history. Finally, Part 4 outlines key factors experienced by PNG which contribute to the high number of electoral petitions its court currently sees. It will also undertake a brief review of the conduct of the most recent 2022 election period.

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# I. Overview of Election Petition Process in Papua New Guinea

## A. Petition process in PNG

### 1. Petition requirements and jurisdiction

PNG electoral law allows individuals to dispute the outcome of an electoral district by way of petition to the judiciary.<sup>1</sup> The National Court is vested with jurisdiction to hear election petitions under section 135 of the PNG *Constitution*. This provision also establishes the grounds for disputing electoral returns: that the person whose election is being challenged was not validly elected, including where the person lacked the requisite qualifications to sit as a member of parliament. The *Organic Law on National and Local-level Government Elections* further empowers the National Court to declare a candidate's election void if the candidate is found to have committed or attempted to commit bribery or undue influence.<sup>2</sup> Bribery or undue influence (e.g., intimidation), or the disqualification of the winning candidate necessarily leads to their unseating. In any other cases of breach of the electoral law such as maladministration or campaign breaches, the breaches must have been likely to affect the result of the election to declare the candidate's election void. The Court should also be satisfied that it is just to declare the candidate's election void in such circumstances.<sup>3</sup>

The Supreme Court is empowered to undertake judicial review of decisions made by the National Court on election petitions.<sup>4</sup> Review is limited to jurisdictional errors and questions of law, and excludes consideration of the merits of the decision itself unless there has been a "gross (factual) error clearly apparent or manifested on the face of the evidence".<sup>5</sup> The scope of the Supreme Court's review is thus narrower than a 'true' appeal.<sup>6</sup>

Petitions may also be brought to challenge the results of elections at the local and provincial government levels.<sup>7</sup>

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<sup>1</sup> *Organic Law on National and Local-level Government Elections* (PNG) div 1 s 206.

<sup>2</sup> *Ibid* pt XVIII s 215(1).

<sup>3</sup> *Ibid* pt XVIII s 215.

<sup>4</sup> *Constitution of the Independent State of Papua New Guinea* s 155(2)(b).

<sup>5</sup> *Jurvie v OVERRAYA* [2008] PGSC 22, [9].

<sup>6</sup> *Avei v Maino* (2000) PNGLR 157.

<sup>7</sup> *Organic Law on National and Local-level Government Elections (Organic Law)* (PNG) div 14 s 287.

## 2. Submission process

Electoral petitions must meet statutorily enshrined form and content requirements to be validly brought before the National Court. More particularly, a petition shall –

- (a) set out the facts relied on to invalidate the election or return; and
- (b) specify the relief to which the petitioner claims to be entitled; and
- (c) be signed by a candidate at the election in dispute or by a person who was qualified to vote at the election; and
- (d) be attested by two witnesses whose occupations and addresses are stated; and
- (e) be filed in the Registry of the National Court at Port Moresby or at the court house in any Provincial headquarters within 40 days after the declaration of the result of the election in accordance with Section 175(1)(a).<sup>8</sup>

At present, petitions attract a filing fee of K1,000.00<sup>9</sup> and are accompanied by a deposit of K5,000.00 as security for costs.<sup>10</sup> This sum primarily acts to cover administrative costs, and may be an attempt to deter unworthy election petitions and lessen the exorbitant volume of petitions that the National Court typically sees.<sup>11</sup>

Noting the importance of definitive election outcomes to the stability of governance and the wider community, the Supreme Court has emphasised that the court’s interference in the election process is limited to petitions that meet “a very high standard of certain well-established principles” as laid down in the Organic Law.<sup>12</sup>

### B. Frequency of Electoral Petitions in PNG

Despite the restrictive criteria and significant costs incurred in bringing forth an election petition, PNG continues to experience a notable volume of disputed returns. The 2017 election generated 79 petitions, challenging the results of 71 out of 111 electorates.<sup>13</sup> The number of petitions filed in the most recent 2022 election period rose even further to 102<sup>14</sup>, though this can be partially explained by the inclusion of 7 new electorates.<sup>15</sup>

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<sup>8</sup> Ibid pt XVIII s 208.

<sup>9</sup> *Election Petition Rules 2017 Consolidated to Election Petition (Miscellaneous Amendments) Rules 2022* (PNG) (*Election Petition Rules*) s 6.

<sup>10</sup> Ibid Part XVIII s 209.

<sup>11</sup> Graeme Orr, ‘Integrity On The Line: Judicial Power Over Elections in Papua New Guinea,’ (2017) *3rd National Conference on the Underlying Law*.

<sup>12</sup> *Balakau v Torato* [1983] PNGLR 242, 254–5 (per Andrew J).

<sup>13</sup> Nicole Haley and Kerry Zubrinich, ‘2017 Papua New Guinea General Elections: Election Observation Report’ (Department of Pacific Affairs, November 2018) 76.

<sup>14</sup> ‘Papua New Guinea Election Petitions 2022,’ *Papua New Guinea Election Petitions* (Web Page) <<https://www.pngep.com/>>.

<sup>15</sup> Terence Wood, ‘Candidates and competition in the 2022 election in Papua New Guinea,’ *The Development Policy Centre Blog* (Blog Post, 6 July 2022).

## II. Comparative Review with the United Kingdom and Australia

Australia and the UK share a general process for submitting an election petition. After determining which court has jurisdiction over the election in question and identifying adequate grounds for the petition, a series of strict filing rules must be adhered to when serving the petition to the relevant parties. Responses must be received within stipulated time frames, and may be followed by a court hearing and decision. PNG jurisdiction draws on 'colonial' law from Australian stewardship, which in turn was inherited from the Westminster system of the United Kingdom (UK).<sup>16</sup> Through a comparison of the electoral laws of PNG, the UK, and Australia, this report identifies the strengths and weaknesses of each system to inform best practices and future improvements. Recent cases of interest are also included for comparative purposes.

### UNITED KINGDOM

#### A. Similarities and differences between the UK and PNG systems

The shared history and overlapping legislation of the UK and PNG have resulted in numerous procedural similarities. However, distinct legal systems, electoral laws, and procedural requirements have resulted in some noteworthy differences.

##### 1. Petition requirements and jurisdiction

UK election petitions must be submitted on specific legal grounds, such as allegations of illegal practices or mistakes in the conduct of the election. While electoral bribery is an ancient phenomenon, the shift from cultural acceptance to ethical condemnation in the UK can be pinpointed to the late 19<sup>th</sup> century with the introduction of the categorical rule that bribery or undue influence by a candidate or agent voided their election.<sup>17</sup> As previously mentioned, there are comparable legal grounds for unseating an elected MP in PNG relating to bribery and undue influence in the *Organic Law on National and Local-Level Government Elections*.<sup>18</sup>

In the UK an Election Court will hear a petition – the make-up of which depends on whether the election in question is for a seat on a local council or the parliament. For parliamentary elections, under section 123 of the *Representation of the People Act 1983*, petitions are presented to the relevant High Court: the Queen's Bench Division of the High Court of Justice in England, the Court of Session in Scotland, or the High Court of Justice in Northern Ireland.<sup>19</sup> For local government elections, under section 130 in England and

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<sup>16</sup> Orr (n 11) 4.

<sup>17</sup> Graeme Orr, 'Suppressing Vote-Buying: the "War" on Electoral Bribery from 1868,' (2006) 27(3) *Journal of Legal History*.

<sup>18</sup> pt XVIII s 215 (1).

<sup>19</sup> *Thomas Erskine May*, 'Treatise on the Law, Privileges, Proceedings and Usage of Parliament,' (25 ed.)

Wales and section 134 in Scotland, High Court judges appoint a commissioner to hear the case. As previously mentioned, the National Court has jurisdiction in PNG. Another relevant difference is that the UK has no national election authority for running an election. Instead it relies on an ancient method of each constituency election being managed by a returning officer who is usually a local government official. Whereas, like Australia, PNG has a dedicated election commission to run national elections.

In both the UK and PNG, it is recommended that petitioners seek legal representation during the process of submission, as the procedure can be complex and require legal expertise. In the UK, legal aid is generally not available in petition cases.<sup>20</sup>

In their work on the continuing role of election petitions in the UK, Caroline Morris and Stuart Wilks-Heeg note that electoral petitions are private legal actions initiated by individuals only, and cannot be brought by political parties. This “highly individualized approach to petitions stems from the era in which the legislation was framed, when political parties were far less significant as organized actors in the electoral field.”<sup>21</sup>

Although formal law in both the UK and Australia dictates that an election petition may only be brought by an individual elector, in practice petitions are typically brought by either candidates or party activists. Any serious petition is invariably funded by a political group; otherwise, lone ‘officious bystanders’, often as litigants-in-person, are generally doomed to lose.<sup>22</sup> In contrast, in Papua New Guinea there is a greater role for bystanders to engage in election petitions owing to parties being less resourced and campaigns being more localised.

## 2. Submission process

While both UK and PNG processes are subject to temporal restrictions, the specific time limits for filing an election petition differ. In the UK, petitions must generally be filed within 21 days of the election being held, or within 28 days in certain circumstances.<sup>23</sup> In PNG, the petition must be filed within 40 days of the declaration of the result. The simpler process of counting of ‘first past the post’ ballots and the small, densely populated geographical nature of the UK likely expedites the process of finalising election results and justifies the UK’s shorter time limit. Petitioners must adhere to these strict temporal requirements, and “no extension to these time limits is possible.”<sup>24</sup> Once submitted, petition grounds may only be amended in particular situations.<sup>25</sup>

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<<https://erskinemay.parliament.uk/section/4926/procedure-under-the-representation-of-the-people-act-1983#footnote-link-2>>.

<sup>20</sup> *Hussein v Khan* [2006] EWHC 262.

<sup>21</sup> Caroline Morris and Stuart Wilks-Heeg, “‘Reports of My Death Have Been Greatly Exaggerated:’ The Continuing Role and Relevance of Election Petitions in Challenging Election Results in the UK,” (2019) 18(1) *Election Law Journal* 34.

<sup>22</sup> Conversation with Graeme Orr, Professor at the TC Beirne School of Law (University of Queensland, 13 September 2023).

<sup>23</sup> *Representation of the People Act 1983* (UK) (*RP Act*) s 129.

<sup>24</sup> *Ahmed v Kennedy* [2002] EWCA Civ 1793, cited in Morris and Wilks-Heeg (n 21) 32.

<sup>25</sup> Ministry of Justice, *Part 17 – Amendments to statements of case* (Web Page, 6 April 2023)



In the UK, a fee of £569 is incurred to issue a petition, and a further £108 is required to apply for 'security for costs.'<sup>26</sup> After applying, the Election Petitions Office will bill for security for costs which differs depending on the nature of the election. At present, the following maximum fees apply: £5,000 for a UK Parliament election, £2,500 for a local government election, and £1,500 for a parish council election.<sup>27</sup> As noted above, PNG petitions attract a filing fee of K1,000 and a deposit of K5,000 as security for costs.

### 3. Hearing and appeal process

The hearing process for election petitions differs between the UK and PNG. In UK parliamentary petitions, two of the High Court or Court of Session judges who are on the rota will preside over the trial.<sup>28</sup> For local government petitions, the same judges will appoint a commissioner to hear the matter.<sup>29</sup> The procedure for a trial of petition is outlined in section 139 of the *Representation of the People Act 1983*, which includes features such as proceedings without a jury. After determining whether the successful candidate was validly elected in a parliamentary election, judges will issue a certificate of their decision to the Speaker of the House of Commons.<sup>30</sup> Alternatively, in local government elections in England and Wales, the commissioner issues a certificate of their decision to the High Court,<sup>31</sup> and in Scotland the commissioner's determination does not need to be certified to the Court of Session. This can be contrasted to PNG where the election petition hearing is typically conducted before a panel of resident judges who comprise the National Court, with the number of judges dependent on the Provincial Registries.<sup>32</sup>

In the UK, the superior court of record resolves election disputes internally and without avenue for review. This differs from PNG where, as previously mentioned, the Supreme Court has jurisdiction to review National Court decisions on election petitions when jurisdictional errors and/or questions of law are of concern. In his 2018 article exploring the law on election petitions in PNG, Graeme Orr attributes this difference to the frequency of election petitions in PNG and the benefit of trials in a lower court to the expeditious resolution of disputes - an acute priority when resolving challenges to election outcomes, noting their political consequences.<sup>33</sup>

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<<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part17>>.

<sup>26</sup> UK Government, 'How to make a challenge,' *Challenge an election result* (Web Page)

<<https://www.gov.uk/challenge-election-result/how-to-challenge>>.

<sup>27</sup> UK Government, 'Pay "security for costs,"' *Challenge an election result* (Web Page) <<https://www.gov.uk/challenge-election-result/pay-security-costs>>.

<sup>28</sup> *RP Act* (n 23), s 123.

<sup>29</sup> *Ibid* s 130 (England and Wales) and s 134 (Scotland).

<sup>30</sup> *Ibid* s 144(2).

<sup>31</sup> *Ibid* s 145.

<sup>32</sup> National & Supreme Courts of Papua New Guinea, *National Court*, (Web Page)

<<https://www.pngjudiciary.gov.pg/national-court>>.

<sup>33</sup> *Ibid*.

## B. Contextual differences between the UK and PNG

In terms of legislative framework, the systems of the UK and PNG are largely comparable. In effect, the systems are vastly different. The UK receives far fewer petitions, and those that are received are quickly resolved. There are multiple contributing factors to why the UK's electoral laws and processes have proven more effective, which will be discussed below.

### 1. Number of petitions

Electoral petition legislation in the UK has remained virtually unchanged since the Victorian period, and up until recently its “petition mechanism was treated as essentially redundant.”<sup>34</sup> There has been renewed interest in the UK process, particularly prompted by the introduction of postal voting in 2001 and a corresponding increase in allegations of registration and voting offences.<sup>35</sup> The comprehensive data collated and analysed by Morris and Wilks-Heeg supports this. At all levels of elections, the 51 petitions lodged in the 10 years from 2000 to 2009 not only represent the highest during any single decade since 1900, but also exceeded the total submitted during the 40 years from 1930 to 1969.<sup>36</sup> Even with this renewed interest, the UK generally receives significantly fewer petitions than PNG.

### 2. Trust in and comfort with existing election system

In comparison to PNG, which has had little legislative reform of electoral procedures since its independence in the 1970s, the UK has spent 150 years modernising its election processes. One implied result of this is the population is generally more trusting of established political parties and their electoral administration and contests. The UK has a relatively stable political environment and a long-standing democratic tradition which allows for greater acceptance of election results and reduced willingness to challenge results through petitions. There is more developed infrastructure and resources that facilitate elections with greater efficiency and accuracy, and reduce the likelihood of errors and irregularities. Whilst the influence of ‘big money’ remains a problem in the UK (as in most other Western elections), issues like direct vote-buying or intimidation are essentially unheard of today in comparison to the 19<sup>th</sup> century. These overt threats to political stability and democracy remain prevalent in PNG.

Furthermore, the UK generally uses a first-past-the-post system which requires voters to select one candidate only, and the candidate receiving the most votes wins the seat.<sup>37</sup> This is more straightforward than PNG's preferential voting system, which has led to voter confusion in expressing intent and errors by those counting votes, particularly in light of the

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<sup>34</sup> Morris and Wilks-Heeg (n 21) 32.

<sup>35</sup> Ibid 43.

<sup>36</sup> Ibid 38.

<sup>37</sup> UK Parliament, *Voting systems in the UK* (Web page) <<https://www.parliament.uk/about/how/elections-and-voting/voting-systems/>>.

multi-lingual nature of PNG society where literacy is neither simple nor singular. Moreover, the lower levels of literacy and education in PNG may result in electors struggling with the ballot, and naturally relying on assistance from their community.

### 3. Focus of petitions

There are two trends apparent in UK petitions, depending on which level of government the petitions pertain to and what error it targets.

Firstly, the UK's petitions have a heavy focus on local elections: 79% of successful petitions in the past 40-years concerned errors in local elections.<sup>38</sup> Morris and Wilks-Heeg remark that the rise in the number of petitions alleging corrupt and illegal practices in local elections "has been associated with the availability of postal voting on demand."<sup>39</sup> It is interesting to note that there is a clear shift over time in the localities from which the election petitions originate – petitions that were once more likely to originate rurally have shifted to metropolitan areas since the 1990s.<sup>40</sup> Perhaps this is a trend which PNG will emulate in future. In addition, parliamentary seats in the UK have very high enrolments compared to local electoral districts or wards. Petitions are more likely to arise when the winning margin is small. However, the median constituency at Westminster has around 70,000 electors – fewer than the turnout in many electorates in PNG. Thus, it should be noted that the size of enrolments cannot explain the additional petitions that PNG acquires.

Secondly, despite its original intended use as a mechanism to tackle corruption in parliamentary elections, electoral petitions are contemporarily most often used to redress administrative errors in local elections.<sup>41</sup> This is substantiated by Morris and Wilks-Heeg's data, which notes that the primary grounds of recent successful petitions related either to allegations that ballot papers were incorrectly included or excluded from the final count, or that a counting or computational error was made in the declared result. Over 80% of these petitions were successful.<sup>42</sup> Clearly, there has been a shift of focus in the primary effective use of the petition mechanism.<sup>43</sup> This trend has prompted questions of whether the Victorian-era petition mechanism remains fit for purpose in the UK, and whether a streamlined process for cases involving administrative errors would be more resource efficient – especially when the outcome is usually a supervised recount.<sup>44</sup>

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<sup>38</sup> Morris and Wilks-Heeg (n 21) 42.

<sup>39</sup> Ibid 45.

<sup>40</sup> Ibid 39.

<sup>41</sup> Ibid 42.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid 45.

<sup>44</sup> Ibid.

### C. Cases of interest

The 2019 Peterborough by-election petition was filed by the Brexit Party after losing the by-election to the Labour Party.<sup>45</sup> The petition alleged that the Labour Party candidate had committed electoral fraud and illegal practices related to campaign spending and vote-rigging. Although the Election Court found that numerous serious offences relating to the handling of postal votes had been committed by the Labour party, the petition was dismissed as no evidence suggested it had affected the outcome of the election.

In 2017, the losing candidate of North Antrim in Northern Ireland, Jim Allister, challenged the eligibility of Ian Paisley Jr. Allister as the winning candidate as he had failed to declare a luxury holiday paid for by the Sri Lankan government, which violated electoral laws.<sup>46</sup> This was dismissed as the failure to declare was not material to the election, and was not done to intentionally or recklessly mislead voters.

The 2015 General Election petition concerned the constituency of Oldham East and Saddleworth. The petition, filed by the UK Independence Party (UKIP), alleged that the successful Labour Party candidate, Debbie Abrahams, had engaged in illegal practices related to campaign spending and voter fraud. While the Election Court found there had been some irregularities in the campaign, the petition was dismissed as the evidence did not meet the high standard of proof necessary to void the election result.<sup>47</sup>

Morris and Wilks-Heeg's paper outlines multiple noteworthy historical cases of interest. In 1955 and 1961 there were three petitions that established the ineligibility of a successful candidate elected to the House of Commons, and resulted in the second-placed candidate being returned.<sup>48</sup> There have been parliamentary elections successfully contested by the election courts on the grounds of malpractice or maladministration, such as those in Winchester in 1997 and Oldham East and Saddleworth in 2010, which are both outlined in Morris and Wilks-Heeg's paper.

Of the 48 successful petitions from 1977 to 2017 that arose from administrative errors, 28 specifically challenged re-counting and computational errors.<sup>49</sup> The following cases highlight this:

- In 2006, a double-counting error arose whereby 981 extra votes were accidentally allocated to the representative for the Kingstanding ward of Birmingham City Council.<sup>50</sup>

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<sup>45</sup> UK Parliament, *Peterborough MP Fiona Onasanya removed in first successful Recall Petition* (Web Page, 1 May 2019) <<https://www.parliament.uk/business/news/2019/may/peterborough-mp-fiona-onasanya-removed-in-first-successful-recall-petition/>>.

<sup>46</sup> 'DUP MP Paisley faces suspension over Sri Lankan holidays,' *BBC* (19 July 2018) <<https://www.bbc.com/news/uk-northern-ireland-44869627>>.

<sup>47</sup> Morris and Wilks-Heeg (n 21) 36.

<sup>48</sup> Cornelius O'Leary, 'The Wedgwood Benn Case and the Doctrine of Wilful Perversity,' (1965) 13(1) *Political Studies*, cited in Morris and Wilks-Heeg (n 21) 36.

<sup>49</sup> Morris and Wilks-Heeg (n 21) 42.

<sup>50</sup> *Ibid.*

- In 2011, two candidates who shared a surname, husband and wife Bob and Hazel Charlesworth, were mixed up by the returning officer and the wrong winner was declared.<sup>51</sup>
- In the 2012 Denbighshire County Council elections, 240 votes for P. Penlington, the Labour candidate, were mistakenly credited to A. Pennington, the Conservative candidate, resulting in the latter being mistakenly declared to have been elected, at the expense of the former.<sup>52</sup>

This reinforces Morris and Wilks-Heeg's broader assertion that "election petitions have been used as the only available means to correct relatively straight-forward errors."<sup>53</sup>

## AUSTRALIA

### A. Similarities and differences between the Australian and PNG systems

Because of the history of shared and overlapping legislation many similarities between Australia and PNG processes remain. In fact, "to compare the PNG statutory law on election disputes to the Australian is to compare almost identical twins."<sup>54</sup>

#### 1. Petition requirements and jurisdiction

Part XXII of the *Commonwealth Electoral Act* 1918 governs national elections, and section 354 imbues the High Court with jurisdiction to hear election petitions as the Federal Court of Disputed Returns. Challenges regarding the validity of state elections are heard by the Supreme Court of that state as the state's Court of Disputed Returns.<sup>55</sup>

In accordance with the UK and PNG, Australian case law dictates that electoral petitions "are not vehicles to challenge impurities in the process if those problems did not affect the result."<sup>56</sup> Petitions must be based on one or more of the grounds specified in the electoral legislation. The particular arguments of a petition may relate to election processes such as campaigning, polling or counting, but it can only be successful if the alleged errors are likely to have affected the election outcome on the balance of probabilities.<sup>57</sup>

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<sup>51</sup> Morris and Wilks-Heeg (n 21) 43.

<sup>52</sup> Ibid.

<sup>53</sup> Morris and Wilks-Heeg (n 21) 42.

<sup>54</sup> Orr (n 11) 8.

<sup>55</sup> It is interesting to note the historical debate around whether determining disputed returns is consistent with the constitutional role of the High Court in exercising judicial power. For further reading see Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, (Report No 92, July 2001) 121-124; Kristen Walker, 'Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?' (1997) 20(2) *UNSW Law Journal*.

<sup>56</sup> Orr (n 17) 2.

<sup>57</sup> *Kean v Kerby* (1920) 27 CLR 449 at 458, cited in Graeme Orr, 'Judging elections: The Role of courts in electoral Practice,' in *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 1st ed, 2010) 214.

## 2. Submission process

The requisites of a petition in Australia are outlined in section 355 of the *Commonwealth Electoral Act 1918*.

As is the case in PNG, a federal election petition in Australia must be filed within 40 days of the formal declaration of the election result.<sup>58</sup> This varies for some state elections.<sup>59</sup> In contrast to the UK, Australia and PNG share the logistical challenges of accounting for election results in a geographically bigger country with isolated electorates. Results take 1-2 weeks to be declared in Australia, dually because of the Senate – elections for which involve a very complex count and long ballot papers – and because, unlike the UK and PNG, postal votes in Australia can be received up to 13 days after polling day.<sup>60</sup>

Australia requires a quarter of what PNG does as security for costs: approximately \$500 AUD as opposed to 5000 PGK.<sup>61</sup> Orr notes that Australia's fees have likely remained unchanged over time because of a lack of reform attention, whereas PNG has increased its costs in an attempt to deter unworthy election disputes.<sup>62</sup>

It is worth noting the tension between the advantages of higher filing fees in deterring unmeritorious claims and the imperative of ensuring accessibility in disputing election results. Striking this balance is essential to maintain the petition's role in fostering accountability within electoral processes. This is perhaps of greater concern in PNG where political parties have fewer resources and the nature of more localised politics gives bystanders a greater role in challenging election outcomes.

## 3. Hearing and appeal process

In Australia, the hearing of an election petition is usually conducted by a single judge.<sup>63</sup> Difficult questions of law (e.g. determining the meaning of disqualification rules) may be referred to a fuller bench of the High Court of Australia. As previously mentioned, in PNG the National Court (which may vary in size depending on the Provincial Registries) will preside over the decision.

The general goal of petitions in both Australia and PNG is to redress an incorrect or unjust election. If a petition has been successful, a re-election of the seat will typically occur. Exceptions may apply where, for example, a losing candidate is declared elected through the Court changing the count of a few key, disputed ballots, or where only two candidates were nominated and the winner was not qualified.

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<sup>58</sup> *Commonwealth Electoral Act 1918 (Cth) (CE Act) s 355(e)*.

<sup>59</sup> Orr (n 57) 214.

<sup>60</sup> Orr (n 22).

<sup>61</sup> Orr (n 17) 8.

<sup>62</sup> *Ibid.*

<sup>63</sup> *CE Act* (n 58) s 354(6).

Like the UK, there is no avenue for review of judicial decisions made on election petitions in Australia. Acting as the Court of Disputed Returns, the High Court is the first and final forum to hear election petitions.

## **B. Contextual differences between Australia and PNG**

### **1. Number of petitions**

As in the UK, Australia generates fewer electoral petitions than PNG. Of the 190 election outcomes of each national election, between 0 and 2 petitions are heard by the Court of Disputed Returns.<sup>64</sup> The notoriously stringent Australian petition system ameliorates the potential for abuse of petitions, and few petitions are successful.<sup>65</sup> Australian barrister Stephen Gageler SC highlights three pillars of the Australian procedural requirements: “the inability to challenge a whole election in a single petition, the short time limitation for filing a petition and the need to plead facts sufficient to invalidate the result.”<sup>66</sup> Thus, like the UK, Australia’s lack of petitions cannot simply be seen as evidence of fair elections and a lack of errors to ground a petition: “whatever mistakes or malfeasance may occur are rarely provable to a degree capable of showing the electoral outcome was likely to have been affected.”<sup>67</sup> Although PNG has similar requirements, its higher frequency of petitions emphasises that the prevalence of petitions is not caused by the legislative framework, but the numerous contextual nuances that the Australian system is simply not affected by.

### **2. Trust in and comfort with existing election system**

In regards to election administration, PNG’s less developed infrastructure and resources may lead to more errors and irregularities in the conduct of elections, resulting in more disputes and petitions. In comparison, “the UK and Australia have bigger parliaments than PNG (hence more outcomes to potentially contest), and political parties and movements in both those countries are not short of resources to afford to litigate.”<sup>68</sup> The volatility of the wider political culture differs between the countries – PNG has historically seen frequent changes in government and election-related violence which could contribute to a higher level of political contestation and disputes over election results, whereas Australia’s major parties have an interest in their own reputation which provides stability and predictability.

Australia has an instant-runoff voting system which requires voters to rank all candidates by preference, which is more comprehensive and definitive than PNG’s preferential voting system which requires voters to rank a limited number of candidates by preference.

Australian voters must be enrolled, and are compelled by mandatory voting and its associated fines. Conversely, PNG voters must enrol but are not fined for failing to vote.

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<sup>64</sup> Orr (n 22).

<sup>65</sup> Orr (n 57) 214.

<sup>66</sup> Ibid 214.

<sup>67</sup> Ibid 209.

<sup>68</sup> Orr (n 17) 14.



Perhaps in theory the voluntary voting in PNG should make for less disgruntled voters, but in reality, PNG's elections are much more heavily contested in terms of the numbers of candidates per electorate, which may make interpretation of ballots and allocations of votes more disputed.

The Australian system is more demanding than PNG because of its dual House and Senate ballots, compulsory voting, and the requirement for House ballots to be given full preferences in order to be valid. Although the complicated nature of the Australian system gives rise to greater risk of administrative error, voter trust in the process is more established than in PNG. This can be attributed to the older and more stable nature of Australia's democracy and its well-resourced, independent electoral commission.

Australia and the UK tends to not be concerned with 'free' elections and 'retail' or face-to-face campaign breaches (e.g. intimidation, bribery, and breach of the secret ballot). Instead, concern for 'fair' elections focuses on 'wholesale' campaign problems, such as online misinformation and the influence of large donations to parties, and the resulting imbalance of resources for. These wholesale concerns are neither easy for the law to combat, nor a source of election petitions.<sup>69</sup>

As a less wealthy and newer democracy, PNG still faces some of the 'free' election concerns, while also facing the 'fair' election problems of greatest concern to industrialised nations.

### C. Cases of interest

Election petition cases in Australia are relatively rare in both federal and state jurisdictions. The following highlights recent petitions brought against federal and state election results.

#### 1. Federal jurisdiction

Joint 2019 federal election petitions involved the seats of Chisholm and Kooyong in Victoria.<sup>70</sup> An elector and a losing candidate petitioned to challenge the eligibility of the successful candidates on the grounds that election campaign signs used on polling day were intended to appear as though they were official Australian Electoral Commission signs. The signs, in traditional and simplified Chinese characters, translated to saying the "CORRECT VOTING METHOD" was to vote "1" for the Liberal candidate. Whilst the signs breached the law, both petitions were rejected by the Court of Disputed Returns on the grounds of insufficient evidence to suggest the signs had changed the result of the election.

Further, the 2016 federal election petition in the Division of Herbert challenged the election of Cathy O'Toole to the Australian House of Representatives.<sup>71</sup> The petition alleged that

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<sup>69</sup> Orr (n 22).

<sup>70</sup> Sumeyya Ilanbey, 'Josh Frydenberg and Gladys Liu's election win cleared,' *The Sydney Morning Herald* (24 December 2019) <<https://www.smh.com.au/politics/federal/josh-frydenberg-and-gladys-liu-s-election-win-cleared-by-federal-court-20191224-p53mq4.html>>.

<sup>71</sup> Stephanie Anderson, 'Election 2016: Ewen Jones concedes defeat in seat of Herbert but leaves door open to legal action,' *Australian Broadcasting Corporation* (1 August 2016) <<https://www.abc.net.au/news/2016-08-01/election-2016->



O'Toole had been elected as a result of votes improperly cast and counted. The Court of Disputed Returns found that petitioners had not presented sufficient evidence to support their claims, and the case was dismissed.

In 2017 petitions were filed against seven parliamentarians alleging they were ineligible for election due to dual citizenships that they were unaware of, under section 44 (i) of the Australian *Constitution*. The High Court unanimously held that a dual citizen, irrespective of whether they knew about their citizenship status, will be disqualified from Parliament. Four Senators and one member of the House of Representatives were incapable of being elected.<sup>72</sup> Similar petitions (some not disputed) were successful across 2017-18 in relation to a host of other MPs.

## 2. State jurisdiction

The 2015 Queensland state election petition in the seat of Ferny Grove challenged the election of Mark Furner to the Queensland Legislative Assembly.<sup>73</sup> The petition alleged that Furner was ineligible for election due to a prior bankruptcy. This was dismissed by the Court of Disputed Returns as the bankruptcy had been discharged. The Australian law regarding qualifications for election (to sit in Parliament) has become a focus of litigation in the past few years.

The 2018 Western Australia state election petition in the seat of Darling Range challenged the election of Barry Urban to the Western Australian Legislative Assembly.<sup>74</sup> The petition alleged that Urban had made false claims about his education and military service. The court found that Urban's nomination was invalid, which resulted in a by-election which was won by the Liberal Party candidate, Alyssa Hayden.

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ewen-jones-concedes-defeat-in-seat-of-herbert/7677244>.

<sup>72</sup> Human Rights Law Centre, *Australian High Court finds 5 parliamentarians incapable of being elected on the basis of foreign citizenships* (Web Page, 7 November 2017) <<https://www.hrlc.org.au/human-rights-case-summaries/2017/11/24/australian-high-court-finds-5-parliamentarians-incapable-of-being-elected-on-the-basis-of-foreign-citizenships>>.

<sup>73</sup> Matt Eaton, 'Queensland election 2015: Ferny Grove result to stand as LNP gives up on legal challenge,' *Australian Broadcasting Corporation* (16 February 2015) <<https://www.abc.net.au/news/2015-02-16/queensland-election-2015-lnp-rejects-ferny-grove-court-challenge/6120836>>.

<sup>74</sup> Antony Green, 'Darling Range by-election 2018,' *Australian Broadcasting Corporation*, <<https://www.abc.net.au/news/elections/darling-range-by-election-2018>>.

### III. Review of the Samoan Model

Despite its adoption of the Westminster model, Samoa's legislative framework differs from the PNG system in several regards. This report will give a brief overview of the Samoan election petition process, and identifies the nation's most prominent election petition trends.

#### A. Petition process in Samoa

The *Samoa Electoral Act 2019* sets out several key offences which may ground an election petition. Under part 13 of the Act, these offences are divided into 'corrupt practice', including personation, bribery, treating and undue influence, and 'illegal practice' which includes the procurement of voting by unqualified voters and illegal activities during the period of election like gifting.<sup>75</sup> The Office of the Ombudsman, the Public Service Commission, and other law enforcement agencies are empowered to pursue any allegations of corruption under these offences.<sup>76</sup> Petitions under these offences are brought before the Supreme Court. Should the Court find that the candidate committed one of these offences under the Act, the candidate's seat is then declared vacant and is the subject of a by-election.<sup>77</sup> Simpler claims such as a dispute over the counting of votes can be taken to the District Court under section 85 of the Act. There are restrictions on election petitions under section 108; namely, that challenges can only be made at the Supreme Court by candidates who stood for election, and that the unsuccessful candidate must have received more than 50% of the winning candidate's total votes.<sup>78</sup>

#### B. Most common trends in election petitions

Three key issues can be identified as the most common catalysts of electoral litigation in Samoa: gifting, the interpretation of the gender quota, and the influence of custom.

##### 1. Bribery

Bribery<sup>79</sup>, treating<sup>80</sup> and giving<sup>81</sup> have become the common bases for electoral litigation as they clash with the reciprocal nature of Samoa's traditional values. The Samoan saying *tali le fa'aaloalo i le fa'aaloalo* - 'respect is paid with respect' - forms the basis of the customary practice when a guest is hosted by a village, and in return thanks the hosts through gifts of money, food or other.<sup>82</sup> As candidates often travel around their political

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<sup>75</sup> *Electoral Act 2019* (Samoa) s 94-100.

<sup>76</sup> Freedom House, 'Samoa Country Report,' *Freedom in the World 2022* (Web Page, 2022) <<https://freedomhouse.org/country/samoa/freedom-world/2022>>.

<sup>77</sup> Beatrice Tabangcora, 'An Analysis of the 2021 Electoral Decisions of the Samoan Courts,' (2021) 26 *Comparative Law Journal of the Pacific* 120.

<sup>78</sup> Asofou So'o, 'Samoa' in Dieter Nohlen (ed), *Asia and the Pacific: A Data Handbook: South East Asia, East Asia, and the South Pacific* (Oxford University Press, 2001) 784; *Electoral Act 2019* (Samoa) s 108.

<sup>79</sup> *Electoral Act 2019* (Samoa) s 96.

<sup>80</sup> *Ibid* s 97.

<sup>81</sup> *Ibid* s 100.

<sup>82</sup> Tabangcora (n 77) 120.

constituency to campaign, the line between giving items as part of this customary practice and giving in order to gain political favour is blurred.<sup>83</sup>

This issue was the topic of judicial consideration in electoral litigation following the 2021 elections which has provided clarification as to whether an instance of giving is an electoral offence. In these instances, the Court took into account the timing, purpose, and proportionality of the exchange and held that giving money was appropriate in exchange for being hosted by a village, receiving a traditional *ava* ceremony, or in response to a request for financial assistance.<sup>84</sup> The key distinction that the Court drew in these decisions was whether corrupt intentions could be inferred from the circumstances. For example, in *Ah Him v Seiuli*<sup>85</sup>, \$10,000 in exchange for a “morning tea” provided by the village was considered disproportionate and therefore to have corrupt intentions.<sup>86</sup> However, it should be noted that this distinction has been criticised by some commentators who argue that gifts of any kind can influence political favour, regardless of intent.<sup>87</sup>

## 2. The Gender Quota

Samoa’s government has attempted to overcome barriers to women participating in government through a constitutional amendment which requires that 10% of the Legislative Assembly members be women.<sup>88</sup> In instances where less women are elected, seats are added to the legislature to meet the 10% requirement.

The gender quota was recently a notable instance of electoral litigation in Samoa. In the 2021 election the longstanding HRPP party and the opposition FAST party both won 25 seats, with the remaining seat won by an independent who ultimately supported FAST.<sup>89</sup> To fulfil the gender quota requirement the Office of the Electoral Commissioner announced an extra seat was to be added to Parliament for the HRPP party so that they met the required 10%.<sup>90</sup> The application of article 44A in this manner was challenged by FAST in the Supreme Court where a series of decisions were issued to clarify the interpretation of this provision.<sup>91</sup> It was held that article 44(1) of the *Constitution* required at least six members of the Legislative Assembly be women. It was further held that the power under article 44A to add additional female members to the Assembly could only be activated after

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<sup>83</sup> Ibid.

<sup>84</sup> *Salele v Sua* [2021] WSSC 29; *Tafili v Peti* [2021] WSSC 30; *Moala v Sio* [2021] WSSC 40; *Mua v Malolo* [2021] WSSC 35.

<sup>85</sup> [2021] WSSC 27.

<sup>86</sup> Tabangcora (n 77) 122.

<sup>87</sup> Tabangcora (n 77) 122.

<sup>88</sup> *Constitution of the Independent State of Samoa* Art 44A; Tabangcora (n 77) 109.

<sup>89</sup> Kate Wiseman, ‘Samoa 2021 Election: Supreme Court of Samoa helps bring an end to political instability,’ *Bankside Chambers of Law* (Web Page, 21 April 2022) <https://www.bankside.co.nz/post/supreme-court-of-samoa-helps-bring-an-end-to-political-instability>.

<sup>90</sup> Anna Dziedzic, ‘The Making and Unmaking of a Constitutional Crisis in Samoa,’ *Verfassungsblog on Matters Constitutional* (Web Page, 2 June 2021) <<https://verfassungsblog.de/the-making-and-unmaking-of-a-constitutional-crisis-in-samoa/>>

<sup>91</sup> Kate Wiseman, ‘Samoa 2021 Election: Supreme Court of Samoa helps bring an end to political instability,’ *Bankside Chambers of Law* (Web Page, 21 April 2022) <<https://www.bankside.co.nz/post/supreme-court-of-samoa-helps-bring-an-end-to-political-instability>>

all electoral petitions had been resolved and any resulting by-elections held.<sup>92</sup> While these decisions provide greater clarity in law, the political uncertainty following the 2021 election as a result of two politicians claiming to have been elected Prime Minister demonstrates that the quota may be a contentious point for future electoral litigation.

### 3. The influence of custom

The influence of custom is not a direct topic of electoral litigation, however it may prevent litigation from occurring fairly. Traditional customary practices remain central to Samoan society and government. Although there are few legal barriers preventing citizens from engaging in electoral litigation, social barriers are present. For example, village councils often endorse a particular matai to stand for election in their political constituency. While citizens can file a petition to challenge the validity of a candidacy, doing so may result in the council issuing customary punishments like fines or banishments.<sup>93</sup> Furthermore, reforms in 2020 bar village council decisions from being referred to the Supreme Court for review and so individuals may be left with no legal recourse if they engage in electoral litigation against the wishes of their village council.<sup>94</sup>

This customary pressure can in some instances also extend to the judiciary. A core principle of Samoan custom is that it is “disrespectful to question, challenge or criticise chiefs and by extension, the Government”.<sup>95</sup> This can restrict the court’s ability to hold illegal government practices to account.<sup>96</sup> For this reason, custom may influence the ability of citizens to engage in electoral litigation.

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<sup>92</sup> Tabangcora (n 77) 115.

<sup>93</sup> Freedom House (n 76).

<sup>94</sup> Ibid.

<sup>95</sup> Tabangcora (n 77) 118.

<sup>96</sup> See *FAST Party & Ors v Attorney-General & Ors* [2021] WSSC 25 where the court’s critique of the Head of State for acting outside of the scope of his power was moderated owing to cultural influence.

### **C. SUMMARY OF COMPARISON**

This report has undertaken a review of four nations, each rooted in the Westminster system but procedurally and culturally distinct. Although there are some key differences between the legislative frameworks of Samoa and PNG, a review of the procedural and cultural context of the Samoan system provides a valuable comparative Pacific perspective. The legislative frameworks for election petitions between PNG, the UK and Australia are markedly similar. Despite this, the UK and Australia see significantly fewer challenges to election outcomes than PNG. The high volume of election petitions filed in PNG must then – at least in part – be attributed to causes beyond the legislative framework. This article will consider such causes in the following categories: the young age of PNG’s democracy, lack of a uniform cultural identity, distrust in the electoral process, and PNG’s constitutional framework.

## IV. Key Factors Driving Papua New Guinea's High Election Petition Rate

### A. The young age of PNG's democracy

Orr considers the young age of PNG's democracy, having achieved independence only 48 years ago in 1975, as a contributing factor to its high electoral petition rate. A less established democracy means less time for an embedded party system and a norm against disputing election results to develop as it has in comparable systems like the UK and Australia.<sup>97</sup>

Rather than subscribing to an ideology espoused by a particular political party, voters in PNG often choose their representatives on the basis of local politics, personal interest and personal gain.<sup>98</sup> The expectation for candidates to act as 'local champions' leads to voters preferencing candidates that they are related to, those recommended by influential community members, and candidates of good reputation who have previously assisted them.<sup>99</sup> Consequently, no party has formed a majority since PNG's independence.<sup>100</sup> In more established democracies with stable and overarching party systems, the number of candidates per electorate is much lower. Whilst larger parties in the UK and Australia have the resources to litigate, they tend not to. They are repeat players who both tend to trust the system and who have other means at their disposal to raise concerns about electoral maladministration or malpractice by rivals.

The personalised and localised nature of PNG's politics creates more intense stakes for both candidates and voters than in older democratic systems where candidates are preferenced based on their party membership, rather than their individual characteristics. This personal involvement, along with the political instability generated by the absence of a party majority in parliament, are key factors in the high levels of electoral litigation.

### B. Localism and the lack of a uniform cultural identity

The prevalence of personal and local politics in PNG can partly be attributed to the nation's lack of a uniform cultural identity. Data from the most recent census report available reveals a significant population spread, with the highest percentage of people in a single province being 9.3% in Morobe.<sup>101</sup> More than 800 *tokples* are spoken across the nation, several of which are mutually unintelligible.<sup>102</sup> This, compounded by the independence movement in Bougainville and pushes for autonomous governance in the island

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<sup>97</sup> Orr (n 11).

<sup>98</sup> Michael Kabuni et al, 'Elections and politics,' in *Papua New Guinea: Government, Economy and Society* eds Stephen Howes and Lekshmi N. Pillai (ANU Press 2022).

<sup>99</sup> Ibid.

<sup>100</sup> Kabuni (n 98).

<sup>101</sup> National Statistical Office, *Papua New Guinea 2011 National Report* (Report, 2015).

<sup>102</sup> Ibid.

provinces,<sup>103</sup> shows a fragmented nation comprised of distinct cultural and linguistic groups who are more prone to focussing on local politics than other, more homogenous nations. This can also be a strength, if politics are negotiated at the ground level and involve trusted non-partisan independents representing their area. This ‘fits’ the grain of traditional societies, where liberal ideas of democracy rooted in an ‘individual right to vote’ make less sense than the interconnectedness of tribal relationships, trust in chiefly rule and guidance, and community consensus.

However, that model of representation makes it hard for a truly ‘national’ politics or stable parties to emerge. It also risks ‘clientelism’, the process whereby communities or sub-groups treat elections as times to bargain for resources without considering wider policies or broader interests. These are deep structural and cultural factors that conflict with ideas of liberal legalism and bureaucratic governance.

### C. Distrust in the election process

Another consequence of the heterogeneity of PNG is that the conduct of elections, and the election petitions subsequently received, differ significantly across the provinces.<sup>104</sup> Despite this variation, voters throughout PNG consistently allege and report electoral violence, bribery, ballot tampering and corruption. ‘Free elections’ in PNG – meaning the bedrock and aggregative ideal that each elector can vote their conscience and that each legitimate ballot is counted accurately - are thus imperfectly achieved. This largely mirrors both the UK and Australia in the late 19<sup>th</sup> century when they were young democracies.

During the 2017 election, the Australian National University (ANU) election observation team reported that 65% of the 3,770 citizens surveyed considered the election to be worse than the two prior elections in 2012 and 2007 in terms of security and electoral malfeasance.<sup>105</sup> Noting that one quarter of people surveyed did not vote in the 2017 election, 35% of those who did vote reported being unable to vote freely and without intimidation.<sup>106</sup> The sources of intimidation varied across the four regions. However, in all four regions – most predominantly the Highlands – respondents reported intimidation by polling officials, security personnel, candidates and their supporters.<sup>107</sup> It is also noteworthy that many people surveyed identified a spouse or family member as the source of intimidation.

Alongside intimidation, observer teams noted irregularities in the voting and vote-counting processes. Personation, underage voting, multiple voting and proxy voting was reported in all electorates, with greater frequency in the Highlands and major urban centres.<sup>108</sup> A lack of a genuine secret ballot was also observed, caused by the particular arrangement of

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<sup>103</sup> Stephen Howes, Lawrence Sause and Lhawang Ugyel, ‘Decentralisation: A political analysis,’ in *Papua New Guinea: Government, Economy and Society* eds Stephen Howes and Lekshmi N. Pillai (ANU Press 2022).

<sup>104</sup> Haley and Zubrinich (n 13) 40.

<sup>105</sup> *Ibid* 61.

<sup>106</sup> *Ibid* 65.

<sup>107</sup> *Ibid* 63.

<sup>108</sup> *Ibid* 66.



polling compartments which allowed scrutineers to view the vote-making, and high levels of 'assisted voting' which several observers often perceived as forced.<sup>109</sup> Additionally, the counting of votes was reported to be rushed and lacking procedural compliance and numerous ballot boxes were damaged, hijacked or destroyed.<sup>110</sup>

Reports emerging from the most recent 2022 election confirm that these issues are ongoing. Observers have critiqued the government's failure to implement the ANU election observation team's proposed recommendations from 2017, particularly the failure to ensure the timely release of funds for voter registration to allow the Electoral Commission to update its electoral rolls.<sup>111</sup> An update of the electoral roll for the 2022 election commenced only 5 months prior to the scheduled election period,<sup>112</sup> leaving as many as 50% of eligible voters off the rolls.<sup>113</sup>

Paul Barker, director of the Institute of National Affairs, believes that the scale and extent of fraud is worsening with each election. Citing widespread reports of vote-selling during the 2022 election, Barker attributes the prevalence of vote-selling to PNG's economic poverty and to political corruption which has left voters seeing "little prospect of any long-term improvement, so they resort to the short-term gains that come from selling their votes."<sup>114</sup> He further warns that the act of tampering with ballot boxes and papers, once largely confined to the Highlands, has now gained frequency in the northern mainland.<sup>115</sup>

Alongside continuing malfeasance in the voting and vote-counting processes, 55 "election-related deaths" were recorded during the 2022 election period, revealing a continuing trend of violence and intimidation.<sup>116</sup> Although this was a decrease from the number of election-related deaths recorded in 2017 (approximately 200), observers have attributed this to the stronger security presence of the Australian Defence Force, rather than improvements in election administration.<sup>117</sup> Violence prevented the completion of vote counting in several provinces, which, alongside the disappearance of up to 50 ballot boxes, caused the election for Lagaip province in Enga to be declared failed.<sup>118</sup>

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<sup>109</sup> Ibid 72-73.

<sup>110</sup> Ibid 73.

<sup>111</sup> Henry Ivarature and Michael Kabuni, 'Why PNG's 2022 election is facing controversy,' *Australian National University Crawford School of Public Policy* (Web Page, 21 June 2022) <<https://crawford.anu.edu.au/news-events/news/20375/why-pngs-2022-election-facing-controversy>>.

<sup>112</sup> Ibid.

<sup>113</sup> 'Commonwealth observers advise "urgent review" as many voters left out of Papua New Guinea Polling,' *The Commonwealth* (News Article, 25 July 2022). <<https://thecommonwealth.org/news/commonwealth-observers-advise-urgent-review-many-voters-left-out-papua-new>>.

<sup>114</sup> 'Papua New Guinea conducts its worst election ever,' *The Economist* (Web Page, 11 August 2022), <<https://www.economist-com.ezproxy.library.uq.edu.au/asia/2022/08/11/papua-new-guinea-conducts-its-worst-election-ever>>.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ron May, 'PNG elections show there is still a long way to go to stamp out violence and ensure proper representation,' *The Conversation* (Web Page, 16 August 2022) <<https://theconversation.com/png-elections-show-there-is-still-a-long-way-to-go-to-stamp-out-violence-and-ensure-proper-representation-188715>>.

<sup>118</sup> Miriam Zarriga, '50 missing PNG ballot boxes spark "failed" election warning in Enga,' *Asia Pacific Report* (News Article, 17 July 2022) <<https://asiapacificreport.nz/2022/07/17/50-missing-png-ballot-boxes-spark-failed-election-in-enga-warning/>>; Development Policy Centre, 'PNG MP Database' *DevPolicy Blog* (Blog Post) <<https://devpolicy.org/pngmps/>>.



Experiences of intimidation and exclusion from the election process are particularly acute for women. Haley and Zubrinich report that in the 2017 election the proportion of women who reported voting freely was lower than men in every region. This was especially prominent in the Highlands and National Capital District where a mere one in five and two in five women respectively reported being able to vote freely, with the remainder reporting experiencing intimidation when doing so.<sup>119</sup> Nationally, 29% of women surveyed reported not voting at all compared to 22% of men.<sup>120</sup>

Women's participation in politics itself is generally limited. In the 2022 election, a mere 2 women were elected to the 118-seat parliament, although it should be acknowledged that this is an improvement from 2017 when no women were elected.<sup>121</sup> In its 2008 submission to the UN Committee on the Elimination of Discrimination against Women (CEDAW), the PNG government identified the notion of 'big man leadership' as key to the lack of women in leadership and public life.<sup>122</sup>

Under 'big man leadership', the concept of leadership draws on the traditional models of the 'Warrior, Feast Giver and Priest' that have endured through PNG's independence and the adoption of the Westminster system. This cultural norm is strongly associated with masculinity, strength, power and wealth, and has been incorporated into the role of elected parliamentarians who are consequently overwhelmingly male.<sup>123</sup> This gender-skew may also affect bureaucracies like electoral management bodies, and mean that the skills and more conciliatory organisational style that women can bring may be under-utilised.

The high rates of violence, intimidation and coercion experienced by voters during election periods and the highly gendered nature of PNG's political participation are symptomatic of generally poor governance experienced in PNG.<sup>124</sup> Such poor governance, alongside rampant bribery, ballot tampering and political corruption has created widespread distrust in the election process, and towards politics more generally.<sup>125</sup> This distrust contributes to the dominance of personal politics as voters support people well known to them or their community members with the belief that they can trust them to aid their own interests.<sup>126</sup> Such is a twofold effect where distrust in the election process and the persisting norm against an entrenched party system it feeds into creates a jurisdiction ripe for disputing electoral returns.

Election petitions in PNG may therefore be perceived – rightly or wrongly – as the most prominent forum to raise concerns about electoral conduct or administration. As noted above, the Australian and UK systems benefit from increased public trust in electoral

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<sup>119</sup> Haley and Zubrinich (n 13) 82.

<sup>120</sup> Ibid.

<sup>121</sup> ANU-UPNG partnership, 'PNG MP Database,' *Devpolicy* (Web Page, 9 June 2022) <<https://devpolicy.org/pngmps/>>.

<sup>122</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: combined initial, 2nd and 3rd periodic report of States parties : Papua New Guinea* (Report, CEDAW/C/PNG/3, 22 May 2009).

<sup>123</sup> Ibid.

<sup>124</sup> Kabuni (n 97).

<sup>125</sup> Haley and Zubrinich (n 13).

<sup>126</sup> Kabuni (n 97).

administration and in political parties to not use crude measures to breach electoral law. In these wealthier societies, electoral administration is well resourced and highly institutionally professionalised. Election contests are mediated through broadcast advertising and social media campaigning: so, the ‘battleground’ is abstracted from ‘retail’ (i.e., face-to-face or physical campaigning), into ‘wholesale’ and ‘professionalised’ campaigning relying on political consultants. ‘Fair’ elections in these countries are less concerned with breaches of election campaign rules or maladministration than about raising sizeable donations and indirect corporate influence on government.

Instead of election petitions being a continuation of election contests through a legal channel, the focus of complaint or accountability in Australia is through a non-judicial mechanism. After each national election a national parliamentary Joint Standing Committee on Electoral Matters conducts a wide-ranging consultation and inquiry into the conduct of the election. This becomes a cheaper and more productive, even positive, forum to raise concerns and advocate for positive changes to the law or electoral commission practice. Similar committees exist in most states of Australia also.

Whilst this parliamentary oversight can have downsides – most obviously partisan debates in the inquiry and recommendations for electoral reform – such committees can bring a wider, more public, and practical eye to the question of electoral administration and justice, rather than relying primarily on case-by-case election litigation.

#### **D. Constitutional Framework**

Some scholars consider that public distrust in government and its organs is manifested in PNG’s Constitution which itself contributes to the high rate of electoral petitions. The *Constitution* of PNG binds its governmental organs with an unusual number of safeguards in recognition of the potential for the political process to degenerate into abuses of authority.<sup>127</sup> Although these inclusions were designed to promote trust in political processes, the amount of verbiage they entail gives potential litigators a wealth of material with which to litigate.<sup>128</sup>

This framework can be contrasted with other Westminster systems which have a skeletal constitutional framework that rests its trust instead in responsible and parliamentary government.<sup>129</sup> The strength of political constitutionalism in these jurisdictions has created the norm that even the highest courts should not transgress on the “right and privileges of the Assembly itself” to shape the law. This may act as a deterrent to election petitions<sup>130</sup> and cause concerns about electoral practices to be channelled through independent electoral authorities via complaints (especially during the election) or via a parliamentary committee afterwards. This is in contrast to PNG where citizens place significant faith in the judiciary to uphold not just the rule of law, but also to develop the normative

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<sup>127</sup> Yash Gai, ‘Establishing a Liberal Political Order Through a Constitution: The Papua New Guinea Experience,’ (2017) 28(2) *Development and Change*.

<sup>128</sup> John Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism* (LBC, 1978) 46.

<sup>129</sup> Orr (n 11).

<sup>130</sup> *Ibid*.

constitutional law about, for example, electoral rights. This may be positive given PNG's often fragmented or 'clientelist' (rewarding those with good connections to government) political system where the notion of a 'national' public interest is less clear given the great cultural and developmental diversity across the country. However, this trend may cast an exorbitant burden on the judiciary – both in workload, and citizen expectation – after each national election.

## V. Conclusion

The number of election petitions filed in PNG and other Westminster systems differs drastically, despite the nations sharing a similar legislative structure in the management of contested electoral returns. This article attributes PNG's high election petition rate to factors falling outside of the legislative framework. The cultural diversity of PNG has encouraged the practice of personal and community-based politics which has remained a steadfast fixture since the nation's independence in 1975. Widespread distrust in the political process has fuelled the preference for personal politics, and the higher stakes – and consequential incentive to litigate – that it results in. Petitioning, and litigation in general in PNG, may be seen as a continuation of the electoral contest by other means. This same distrust has borne a rich and lengthy Constitution containing a multitude of safeguards against governmental bodies, and a relatively high level of constitutional litigation. To the extent that this allows conflict to be channelled through a judicial process and the rule of law, rather than festering or leading to greater schisms, this is not a bad thing in itself.

Taken as a whole, these cultural and political factors may encourage a high, even unreasonable, expectation in the ability of the courts to process a multitude of petitions and achieve electoral justice via petitions. Approaches to reduce the volume of election petitions received should target these factors or at least be formulated with these factors in mind. The Australian model of a standing parliamentary committee to inquire into the conduct of each general election may in theory be of use to PNG. However, it also assumes that MPs both take such a role seriously as a chance for systemic reform or improvement, and not just to advance their immediate personal or factional cause.



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