Communication No. 3274/2018

Submitted on behalf of Mr Albert Fletcher Buffett

Under the Optional Protocol to the

International Covenant on Civil and Political Rights

Australian Government Submission

on Admissibility and Merits

to the United Nations Human Rights Committee

INTRODUCTION

1. By letter dated 10 December 2018, the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) conveyed to the Australian Permanent Mission to the United Nations Office in Geneva the text of Communication No. 3274/2018 (the Communication) concerning Australia. The communication was submitted to the Human Rights Committee (the Committee) under the *Optional Protocol to the International Covenant on Civil and Political Rights*[1] (the Optional Protocol) on behalf of Mr Albert Fletcher Buffett (the author) through the author's representative, Mr Geoffrey Robertson AO QC.

2. In accordance with Rule 97, paragraph 2 of the Committee's Rules of Procedure, the Committee's Special Rapporteur for New Communications and Interim Measures requested that the Australian Government submit to the Committee information and observations in respect of both the admissibility and the merits of the allegations which are the subject of the communication no later than 10 June 2019. The Australian Government requested, and was subsequently granted, an extension on account of the Australian Federal election until 31 July 2019.

3. The Australian Government appreciates the additional time provided by the Committee. Australia takes its obligations under the *International Covenant on Civil and Political Rights* (the Covenant)[2] seriously and has endeavoured to give its full consideration to all of the author's allegations and to respond comprehensively and in good faith.

[1] *Optional Protocol to the International Covenant on Civil and Political Rights* [1991] ATS 39 (entered into force generally 23 March 1976 and for Australia on 25 December 1991).
[2] *International Covenant on Civil and Political Rights* [1980] ATS 23 (entered into force generally 23 March 1976 and for Australia on 13 November 1980).

SUMMARY OF ALLEGATIONS AND AUSTRALIAN GOVERNMENT RESPONSE

Allegations

4. The author alleges that, by passing the *Norfolk Island Amendment Act 2015* (Cth), Australia legislated to deny him his rights to self-determination (Article 1); to take part in the conduct of public affairs through freely chosen representatives (Article 25); and to deny him (and the other members of the minority to which he claims to belong) his right to his own culture and language (Article 27) and to permit discrimination against him on grounds of language, political opinion and birth (Article 26).

Australian Government Response

5. Having given careful consideration to the allegations in the communication, the Australian Government respectfully submits that each of the author's allegations under Articles 1, 2, 26 and 27 are inadmissible on either or both of the following grounds:

    a. the author has not sufficiently substantiated his claims pursuant to Rule 99(b) of the Committee's Rules of Procedure, and/or

    b. the author's claims are incompatible with the provisions of the Covenant under Rule 99(d) of the Committee's Rules of Procedure.

    These claims should be dismissed without consideration of the merits.

6. In addition, the Australian Government respectfully submits that Article 1 of the Covenant is not an individual right that can be the subject of a communication to the Committee and that this claim is inadmissible *ratione materiae* as it is outside the scope of the Committee's mandate.

7. Accordingly, the Australian Government has not addressed the author's arguments with respect to the alleged violation of Article 1 of the Covenant.

8. Should the Committee find any of the author's allegations are admissible, the Australian Government submits that all of the author's claims are without merit.

OUTLINE OF FACTS

Background

9. Given the wide-ranging commentary in the communication from Mr Buffett, the Australian Government believes that the following short synopsis[3] of the history of the Australian Territory of Norfolk Island, its status under the Australian Constitution and successive arrangements for its governance will assist the Committee's consideration of that communication. In so doing, it will also be important to point out the errors of fact and assertion contained in the communication.

10. Norfolk Island is an external territory of Australia situated in the Southern Pacific Ocean 1412 km east of the eastern coast of the Australian mainland. It has an overall land area of just over 37 km². The 2016 Australian Bureau of Statistics Census refers to Norfolk Island as having a population of 1748 people with 20% identifying as having Pitcairn ancestry[4] (see paragraph 12 below).

11. While there is evidence of Polynesian inhabitation of Norfolk Island in the 13th to 15th centuries,[5] it was uninhabited when Captain James Cook took possession of the island on behalf of the British Crown in 1774. It was first occupied as a penal settlement by the British in 1788 some six weeks after the settlement of Sydney on the eastern Australian mainland. This first penal settlement was abandoned in 1814 but was followed by a second penal settlement from 1825 until 1855. During those periods Norfolk Island was under the successive control of the Governors of the British colonies of New South Wales (NSW) and Van Diemen's Land (now Tasmania).

12. In 1855 the majority of the community of Pitcairn Island which is located in the eastern Pacific (the Pitcairners) agreed to accept an invitation from the British Crown to move some 4,830 km west to Norfolk Island. The entire Pitcairn population of 193 people did so, arriving in the by then uninhabited Norfolk Island on 8 June 1856. The forbears of the Pitcairners were the HMAS Bounty mutineers and Tahitians who landed on Pitcairn Island in January 1790.\

13. Norfolk Island was made a separate and distinct British settlement on 24 June 1856. The Governor of NSW was also appointed the Governor of Norfolk Island with the power to make laws for the peace, order and good government of the island. The Governor developed those laws

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[3] A full authoritative account of the history and governance of Norfolk island is to be found in the majority judgment of the Australian High Court in *Bennett v. Commonwealth* (2007) 231 CLR 91.

[4] https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SSC90004?opendocument. For an explanation of the results of the 2016 Census with respect to persons of Pitcairn descent see: https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2900.0main+features101422016.

[5] Anderson and White, 'Prehistoric Settlement on Norfolk Island and its Oceanic Context', *Records of the Australian Museum, Supplement 27 (2001)*, pp 135-141.

in consultation with the residents of Norfolk Island. Subsequently Norfolk Island was made a dependency of NSW.

14. Australia became a federation with its own Constitution[6] on 1 January 1901. Section 122 of the Constitution gave the Commonwealth Parliament plenary powers over territories as well as providing for the representation of those territories in the Commonwealth Parliament. On 1 July 1914, being the date of entry into force of the *Norfolk Island Act* 1913, the Territory of Norfolk Island was 'placed… under the authority of and accepted by the Commonwealth of Australia' pursuant to s. 122 of the Constitution.[7] Constitutionally, Norfolk Island, in common with the six other external territories of Australia, is part of the Commonwealth of Australia.[8] Norfolk Island's legal status as part of Australia was confirmed by the High Court of Australia in *Berwick v. RR Gray, Deputy Commissioner of Taxation*[9].

15. Pursuant to the *Norfolk Island Act 1913* the executive government of the island was vested in an Administrator who was subject to the direction of the relevant Minister in the Commonwealth Government. The fundamentals of these arrangements, involving as they did Commonwealth Government legislative and executive power over the island and an elected or partially elected local Council acting in an advisory capacity, remained in place until the enactment of the *Norfolk Island Act 1979* (Cth).

16. The *Norfolk Island Act 1979* provided for an Administrator of the Territory, an elected nine member Legislative Assembly and an Executive Council consisting of Assembly members with ministerial responsibilities and presided over by the Administrator. The Legislative Assembly had the power to make laws on a wide range of matters normally covered by the State and local governments on mainland Australia together with the matters of customs, immigration and social security which would normally be the province of Federal Government. Any law passed by the Assembly could only enter into force on the assent of the Administrator. Also, the Commonwealth Governor-General had the power to override or disallow a local law.

17. Those arrangements remained in place until 2015 - 2016 when a package of Federal legislation relating to Norfolk Island, including substantial amendments to the *Norfolk Island Act 1979*, came into effect. This legislation took the form of the *Norfolk Island Amendment Act 2015*.[10] This legislation established both transitional and final arrangements. The package as finalised and now in place involves reformed governance arrangements on Norfolk Island as well as the

[6] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.
[7] *Bennett v Commonwealth* (2007) 231 CLR 91, 98.
[8] *Spratt v Hermes* (1965) 114 CLR 226, 247 and 270.
[9] (1976) 133 CLR 603, 606 and 609.
[10] *Norfolk Island Legislation Amendment Act 2015* (Act No. 59, 2015) as amended by the *Territories Legislation Amendment Act 2016* (Act No. 33, 2016).

extension of a range of legislation applying to the rest of Australia to Norfolk Island, including on matters of social security, health and taxation. That legislation and the reforms it entails were the subject of comprehensive prior consultation with the Norfolk Island community, which revealed, amongst other matters, that there were those in the community who supported the changes and those who did not.[11]

18. The reasons for the changes were outlined in the Explanatory Memorandum that accompanied the tabling of the *Norfolk Island Legislation Amendment Bill 2015* in the Federal Parliament[12] in the following terms:

> There are two principal objectives of this package of Bills. The first is amendment of the *Norfolk Island Act 1979* to reform governance arrangements of Norfolk Island. This is in response to the "Same Country: Different World" report of the Joint Standing Committee on the National Capital and External Territories [of the Federal Parliament], which recommended substantial changes to the governance arrangements for Norfolk Island.
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> The second principal objective of this package of Bills is the extension of many mainland social security, immigration, and health arrangements to Norfolk Island, as well as changes to the tax system. This will implement the election commitment the Australian Government made in September 2013 and is consistent with the general principle that as Norfolk Island is part of Australia, those Australians who live there should have the same obligations and receive the same access to benefits as other Australians.
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> The current governance arrangements have been unable to deliver an adequate level of services to the community or an effective safety net for those most vulnerable in this small isolated community. The wide range of functions for which the Norfolk Island Government has been responsible, which includes national, state and local government services, coupled with the relatively narrow revenue base available for funding those services has meant large and growing revenue shortfalls for the Norfolk Island Government. As a result standards of service, particularly in the areas of social welfare and health care are well below those enjoyed by other Australians. It is beyond the resources of the small Norfolk Island community to support its current governance arrangements.
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> Similarly, the complexity involved in many of the services means the Norfolk Island Government has struggled to deliver an adequate level of services to the community or maintain an effective and up to date body of state-level legislation.

19. That Explanatory Memorandum also attached a *Statement of Compatibility with Human Rights* which was prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act*

[11] It was the introduction of these arrangements that gave rise to the author's Communication.
[12] Explanatory Memorandum, Norfolk Island Legislation Amendment Bill 2015 (Cth), available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5440.

2011 (Cth). The Statement concluded that the package of legislation was compatible with the human rights set out in a number of international instruments, including the Covenant.

20. The current governance, legislative and fiscal arrangements applying on Norfolk Island as a result of this package are as follows:

- The previous locally elected body, the Norfolk Island Legislative Assembly, has been replaced by the Norfolk Island Regional Council comprising five Councillors who are elected for a four year term. The Regional Council is responsible for all local council-type functions on Norfolk Island such as land rates and planning and also delivers some state-type functions under an agreement with the Australian Government Department of Infrastructure, Transport, Cities and Regional Development.

- As with all Australian citizens, Australian citizens resident on Norfolk Island are now required to enrol and vote in Federal elections. Australian legislation provides for the representation of Norfolk Island electors in the electorate of Bean in the Australian Capital Territory.[13]

- In addition to Commonwealth laws, a combination of laws made by the former Legislative Assembly of Norfolk Island and laws of the Australian State of NSW apply in Norfolk Island. However, it is important to note that the body of applied NSW State law (20 laws in total)[14] has been applied through the force of an Act of the Commonwealth Parliament as Commonwealth law. It may be altered by the Commonwealth Parliament at any time and also it may be adapted to circumstances specific to Norfolk Island by legislative instrument made by the Governor-General under the *Norfolk Island Act 1979*[15]. These governance arrangements are similar to those applying to the other populated island external territories of Australia, being the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands where the laws of Western Australia apply, with the exception that the pre-existing Norfolk Island judicial arrangements continue.

- The Norfolk Island community is consulted on proposed changes to the laws applying to Norfolk Island. By way of example, consultations have been held on proposed legislative changes to criminal laws to improve protections for vulnerable people, improvement to the

[13] Electors on Norfolk Island are represented by three members in the Federal Parliament, one in the House of Representatives and two in the Senate. This is the same as other external territories with small populations - for example, the Territories of Christmas Island and the Cocos (Keeling) Islands in the Indian Ocean which are represented via association with the federal electorate of Lingiari in the Northern Territory.
[14] These 20 laws relate mainly to industrial relations to support the delivery of education and health services.
[15] *Norfolk Island Act* 1979, s 18A (3).

administration of land valuations, planning and development approvals and the registration of births, deaths and marriages.

- Prior to the new arrangements, Norfolk Island was the only place in Australia where residents did not participate in the taxation system and where resident Australian citizens could not access the Australian social security and health systems. Extending national social security and health systems and, by extension, the national taxation and superannuation systems, has addressed prior issues of inequity and welfare and ensures that Australian citizens on Norfolk Island are treated equally with those citizens living in the other Australian States and Territories.
    - Australia's universal health care scheme Medicare now applies to Norfolk Island as does the Pharmaceutical Benefits Scheme. Health and aged care services on Norfolk Island are delivered through the Norfolk Island Health and Residential Aged Care Service. The services provided include primary health care, community health care and aged care services. In cases of medical emergency that cannot be treated on Norfolk Island, medical evacuation to the most appropriate treatment facility is arranged.
    - Australia's comprehensive social security arrangements now apply to Norfolk Island including payment of aged pensions, unemployment benefits, disability support pensions and youth allowances. This ensures Norfolk Island residents have access to social security on the same terms as other Australians.
    - Norfolk Island residents and companies have now been brought fully into Australia's income tax system. Comprehensive taxation exemptions that previously applied to Norfolk Island sourced income and the foreign sourced income of residents no longer apply.

These changes involve a significant financial investment by the Australian Government[16] and were essential to ensure equality and fairness.

Errors of fact and assertion in the author's communication

21. The Communication contains numerous errors of fact and assertion that require correction or clarification to better enable the Committee to consider both the admissibility and merits of the Communication. The Australian Government sets out the principal errors below but, in so doing, it does not accept the correctness of the Communication as a whole, or of much of the detail which it contains. Australia does not propose to address the emotive language contained in parts of the Communication.

[16] The total estimated Australian Government funding for the three years to 30 June 2019 is Aus$173.1 million.

Absence of indigenous identity

22. The Communication asserts that the author 'is an indigenous inhabitant of Norfolk Island'.[17] It also refers to 'indigenous inhabitants' more generally, an 'indigenous minority', 'indigenous islanders', 'indigenous identity' and 'Norfolk's indigenous people'[18] thus claiming that persons of Pitcairn descent are an indigenous peoples.

23. As is apparent from the history of Norfolk Island set out above, there are no indigenous peoples of Norfolk Island or indigenous population on Norfolk Island. Nor does the Communication provide any justification or support for the assertion that there is. Indeed, an independent statutory body, the Human Rights and Equal Opportunity Commission confirmed that Pitcairn descendants 'cannot be described as indigenous people' and 'are indigenous neither to Norfolk Island nor Pitcairn Island.'[19] The Australian Government has never accepted that residents of Pitcairn descent are 'indigenous' and despite the assertion in the Communication that Norfolk Island was represented on a UN Committee dealing with indigenous health[20] the Australian Government is unaware of any international recognition of that alleged status.[21] The Australian Government is aware that individuals from Norfolk Island of Pitcairn descent have attended international indigenous organisations and meetings of their own volition, but such attendance at their own instigation does not constitute recognition of an indigenous status. Their efforts to gain recognition of persons of Pitcairn descent as indigenous have been rebuffed.

Norfolk Island is part of Australia and the Australian legal system

24. The author asserts that there are no remedies available for Norfolk Islanders in constitutional or public law against the Government of Australia because Norfolk Island 'is neither part of Australia nor a state in the Federal system.'[22]

25. As noted above, Norfolk Island is clearly part of Australia. Indeed, this is expressly stated to be so in paragraph 8 of the author's Communication. As such, leaving aside the question of prospects of success, the same legal remedies are available to persons living on Norfolk Island as

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[17] Communication, Part III, para 1.

[18] Communication, Part III, paras 1, 3, 5 and 7; Part IV, paras 2, 8 and 17.

[19] HREOC Report: *Territorial Limits; Norfolk Island's Immigration Act and human rights* at p 34.

[20] Communication, Part IV, para 8.

[21] One accepted listing of the criteria that must be fulfilled to be an indigenous community is that contained in the 1986 Report of Mr Martinez Cobo in his capacity as the Special Rapporteur on the Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/1987 and Add.5:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them.

[22] Communication, Part III paras 2 and 8.

are available elsewhere in Australia. While it is true that the Commonwealth's power under s.122 of the Constitution is a 'plenary' power, it is not correct to say that it is 'unlimited' or that 'Australian courts cannot review or strike down any provision of the *Norfolk Island Amendment Act 2015*'.[23] The Commonwealth's power under s.122 is subject to both express and implied limitations under the Australian Constitution and any law made under s.122 could be the subject of a successful challenge if it does not respect those limitations.

There is not, and never has been an international obligation on Australia to 'decolonise' Norfolk Island

26. The author asserts that Australia accepted its international law duty to decolonise Norfolk Island in 1979[24] and that it 're-colonised Norfolk Island by passing the *Norfolk Island Amendment Act* [*2015*]' and that this contravenes the right of self-determination. [25]

27. The Australian Government has never been under an international obligation to de-colonise Norfolk Island and does not accept that its past actions can in any sense be characterised as an act of decolonisation. While the *Norfolk Island Act 1979* did accord Norfolk Island a degree of limited self-government, as noted in the previous preamble to that Act (which is quoted in paragraph 5 of the Communication) that limited self-government as accorded was 'as a Territory under the authority of the Commonwealth'. In short, the Norfolk Island is an integral part of Australia and not subject to any duty of decolonisation. Nor is there any right of self-determination applicable to Norfolk Island or its inhabitants, either under the UN Charter or under international human rights treaties.

The author does have a vote in the sole legislature applying laws to Norfolk Island

28. The author makes a series of erroneous assertions regarding the legislature responsible for applying the laws on Norfolk Island and the right to vote in that legislature. The author asserts that important matters such as crime, health, education and social security 'will henceforth be dealt with only by the Parliament on the State of New South Wales'; that 'he has no right to vote in NSW elections, so political decisions and laws pertaining to his welfare are made by politicians he has no power to elect'; that 'we can only vote in Federal elections, in an electorate in Canberra... which returns a Federal MP who cannot raise issues relating to crime, health, education etc in Federal Parliament, which has no power over those matters. Such powers are reserved to the States...'.[26]

[23] Communication, Part III para 8.
[24] Communication, Part III para 4.
[25] Communication, Part III para 6 and Part IV paras 1 and 5.
[26] Communication, Part III para 5. See also Part IV paras 1 and 6.

29. The sole legislature with power to apply laws to Norfolk Island is now the Commonwealth Parliament in which the author does have a right to vote and, indeed, an obligation to vote. As noted above, the Commonwealth has applied NSW law to Norfolk Island as Commonwealth law. That body of Commonwealth law is adapted to the circumstances of Norfolk Island by the Commonwealth Parliament as well as ordinances made by the Commonwealth Governor-General. Any person residing on Norfolk Island can make representations on the laws applying to Norfolk Island to their Federal members, the Commonwealth Minister with executive responsibility for Norfolk Island, the Administrator of Norfolk Island or the relevant Commonwealth Department.

30. It is irrelevant that the author has no right to vote in the NSW Parliament as that legislature has no power to make laws of direct application to Norfolk Island. Moreover it is incorrect to say that the matters of crime, health, education, and social security are purely within the province of the State legislatures and not the Federal Parliament. Responsibility for many of those matters is shared between the Federal and State levels and indeed the matter of social security is primarily one for the Federal legislature.[27] In relation to Norfolk Island, the Federal Parliament is the sole legislature with the responsibility for those matters. As such, the author can raise those matters with his Federal Members of Parliament who would be the logical recipient of such representations in terms of carrying them forward.

Australia has not at any time relinquished its sovereignty over Norfolk Island

31. The author asserts that the *Norfolk Island Amendment Act 2015* amounts to a 're-acquisition of full sovereignty over Norfolk Island.'[28] Australia has not at any time relinquished its sovereignty over Norfolk Island and hence it has not, at any stage, 're-acquired' that sovereignty. Australia has maintained its full sovereignty over Norfolk Island since the date it accepted Norfolk Island as a Territory of Australia under the Australian Constitution in 1913.

Persons of Pitcairn descent are but one, albeit important segment of the population of Norfolk Island.

32. The Communication in parts conflates the interests of the population of Norfolk Island as a whole with interests of that part of the population which is of Pitcairn descent.[29]

33. Although views may differ on the size of the element of the Norfolk Island population which is of Pitcairn descent, on no view does that element form a majority of that population. The breaches of Articles 1, 25 and 26 of the Covenant asserted by the author relate to his capacity as

[27] Three of the current members of the Federal Cabinet hold the portfolios of the Minister for Health, the Minister for Education and the Minister for Families and Social Services. Three of the Federal Government Departments are the Department of Health, the Department of Education and the Department of Social Services.
[28] Communication, Part III para 9. See also Part III para 7.
[29] See, for example, Communication, Part III paras 1 and 4 and Part IV paras 2, 3, 4 and 10.

a member of a larger Norfolk Island community as a whole and not the fact that he is of Pitcairn descent. Therefore his Pitcairn descent should not be taken into account by the Committee in considering those alleged breaches.

34. Moreover, the 'historical rights' asserted by the author relying upon a quoted research paper of Helen Irving such as the 'right to self government; the right to live as British subjects and in accordance with British law; ... [and] the right to live free from taxes (especially externally-imposed)'[30] have no legal basis. The assertions made in the paper of Professor Mühlhäusler are equally unsustainable. Not only does Professor Muhlhausler conflate Pitcairner values with those of the population of Norfolk Island as a whole, he raises matters which are completely irrelevant such as the fact that 'man-eating mammals and poisonous reptiles common to Australia are entirely absent from Norfolk.'[31]

Assertions concerning the removal of artefacts, censorship of the radio station, closing of the maternity wing and playing of the national anthem are incorrect.

35. The author makes a series of assertions concerning these matters which are incorrect.

36. First, he alleges that 'democratic memorabilia' and 'historical records and artefacts' were seized and removed from the Island.[32] It is the understanding of the Australian Government that in August 2015 the former Administration of Norfolk Island moved assets out of the Military Barracks building which housed the former Legislative Assembly and that Norfolk Island Museum staff were involved in recording and assessing the items for historical significance with a view to such items being donated to the Museum Trust. There is no record of any of the items being 'seized and removed from the island'.[33]

37. Secondly, the author alleges that Radio Norfolk was subjected to government censorship.[34] It is the understanding of the Australian Government that the former Administration of Norfolk Island took action against some broadcasters at Radio Norfolk for breaches of a code of conduct that required broadcasters to remain apolitical.

38. Thirdly, the author alleges that the Australian Government closed down the maternity wing of the hospital.[35] The Australian Government did not close down the maternity wing of the hospital. Norfolk Island birthing services ceased in 2012 with the departure of the former general practitioner/obstetrician. The former Administration of Norfolk Island tried to recruit a new

[30] Communication, Part IV para 3.
[31] Communication, Part IV para 4.
[32] Communication, Part IV para 7.
[33] Ibid.
[34] Ibid.
[35] Ibid.

general practitioner/obstetrician but was unsuccessful.[36] As with other rural and remote areas in Australia, expectant mothers travel to major metropolitan areas that can provide maternity services to mothers and babies. To assist with travel to the mainland, the Australian Government funds the Norfolk Island Patients' Travel Accommodation and Assistance Scheme (NIPTAAS) which pays for flights and subsidised accommodation for expectant mothers travelling to the mainland.

39. Fourthly, he alleges that war memorial commemorative events on Norfolk Island have been instructed to play the Australian national anthem instead of 'God save the Queen'.[37] While it is true that the Administrator of Norfolk Island encouraged the local Returned Services League (RSL) to play the Australian national anthem out of respect for all Australian military veterans, in the end the decision to play that anthem was one of the RSL alone.

Participation in international organisations and sporting events.

40. The author asserts that Australia has taken away from his (and other Norfolk Islanders) long-standing enjoyment 'of their identity at international and regional political and cultural organisations and potentially at sporting events.'[38] The Australian Government takes the view that it represents Australia at multilateral and bilateral meetings, including meetings under the auspices of the UN. The view that national governments represent their countries in such matters is universal. Prior to 2016, there were many occasions when persons purporting to represent Norfolk Island without prior warning, sought to participate in multilateral and regional meetings of countries against the wishes of the Australian Government. The Australian Government has communicated its views on such purported representation over many years and well before the changes to the governance of Norfolk Island in 2016. As to the particular matter of the Commonwealth Parliamentary Association which is comprised of members of legislatures from throughout the Commonwealth of Nations, Norfolk Island representation did come to an end when the Norfolk Island Legislative Assembly was abolished. The Australian Government has not interfered with or brought to an end Norfolk Island's separate representation in the Commonwealth Games and regional sporting events, noting that sub-national regions of certain other countries also participate in those events.

[36] See media release dated 6 February 2015 of Robin Adams, Minister for Cultural Heritage and Community Services in the then Government of Norfolk Island, outlining their extensive recruitment efforts which did not elicit one response.
[37] Ibid.
[38] Communication, Part IV para 8. See also Part III para 5.

AUSTRALIAN GOVERNMENT SUBMISSIONS ON ADMISSIBLITY AND MERITS

International procedures and domestic remedies

41. The Australian Government is not aware of any other international procedure examining the matters raised by the author. Also, the Australian Government does not seek to argue that the communication should be found inadmissible on the basis that the author has not exhausted domestic remedies.

Allegations concerning the right of self-determination

Admissibility

42. The Australian Government respectfully submits that Article 1 of the Covenant is not an individual right that can be the subject of a communication to the Committee. In this regard, the Committee has itself recognised that it does not have competence under the Optional Protocol to consider claims from an individual alleging a violation of the right to self-determination contained in Article 1 of the Covenant.[39]

43. Accordingly, the Australian Government submits that this claim is inadmissible *ratione materiae* as it is outside the scope of the Committee's mandate and should be dismissed by reason of Article 3 of the Optional Protocol and Rule 99(d) of the Committee's Rules of Procedure.

Merits

44. Given matters concerning an alleged breach of Article 1 are outside the competence of the Committee in its consideration of communications, the Australian Government will not address the merits of the author's complaint concerning an alleged breach of that article.

Allegations concerning a failure to provide effective remedies

45. This section addresses the author's allegations concerning a failure by the Australian Government to provide an effective remedy under Article 2(3) of the Covenant. Before addressing the admissibility and merits aspects of that claim it is important to note that the author has assimilated the requirement under Article 5(2)(b) of the Optional Protocol that an individual submitting a communication must first exhaust domestic remedies with the obligations of a State under Article 2(3) of the Covenant to provide an effective remedy to an established violation of the Covenant. In this respect the Australian Government draws the Committees attention to Part III paragraphs 2 and 7 and Part of IV paragraph 14. While it is true that an alleged absence

[39] *H.E.A.K v Denmark*, Communication No. 2343/2014, UN doc CCPR/C/114/D/2343/2014 (23 July 2015), para 7.3, recalling *Gillot v France*, Communication No. 932/2000, UN doc CCPR/C/75/D/932/2000 (15 July 2002), para 13.4.

of remedies to be exhausted could be a pointer to the absence of an effective remedy to an established breach of an obligation, the two requirements must be considered separately.

46. Article 2(3) of the Covenant provides:

> 3. Each State Party to the present Covenant undertakes:
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> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Admissibility

47. Article 3 of the Optional Protocol and rule 99(d) of the Rules of Procedure provides that communications which are 'incompatible with the provisions of the Covenant' are inadmissible. The Committee has previously expressed the view that claims are inadmissible *ratione materiae* 'when they do not come under the scope of the Articles of the Covenant'.[40]

48. As noted above at paragraph 46, the author seems to have confused the obligation in Article 2(3) to provide an effective remedy with a domestic remedy (in the sense of being able to take the matter to a court or tribunal) which must be exhausted by the author prior to lodging a communication. The purpose of Article 2(3) is to require State parties to provide an effective remedy for any person whose rights have been violated under the Covenant.

49. The drafting of Article 2(3)(a) – '*to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy*' – suggests that the Covenant is directed at ensuring a right to remedy for the violation of rights under the Covenant. Nowak states that a 'literal reading of the application of Article 2(3)(a) presupposes a prior holding by the Committee that a substantive right of the Covenant was violated.'[41]

50. Thus, Article 2(3) does not of itself confer any substantive rights except where the Committee finds that there is a violation of another right.[42] In the absence of such a finding, the Australian

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[40] *Report of the Human Rights Committee* (Vol I), 94th Session, 95th Session, 96th Session (2009), UN Doc A/64/40, page 99, para 123.

[41] Professor Manfred Nowak, *UN Covenant on Civil and Political rights: CCPR* Commentary (2nd revised edition, 2005), 67.

[42] This is consistent with the practice of the Committee in the event that it finds a State to be in breach of the Covenant. The Committee notes the obligation of the State party to provide an effective remedy under Article 2(3)(a) and gives that State party a period of time, usually 180 days, to provide information to the

Government submits that the Committee should rule the author's allegations that he has been deprived of a right to an effective remedy inadmissible *ratione materiae*.

51. Further, or in the alternative, the Australian Government submits that the author's claim that he has been deprived of a right to remedy under Article 2 has not been sufficiently substantiated and should be ruled inadmissible pursuant to Rule 99(b) of the Committee's Rules of Procedure.

52. If the author is to argue that there has been a violation of his rights under Article 2(3) of the Covenant, he must first provide sufficient evidence to substantiate his allegations that there has been a breach of his substantive rights under Articles 25, 26 or 27 of the Covenant - which the Australian Government does not concede - and then demonstrate that Australia has failed to provide him with an effective remedy in response to such violations.

53. As these submissions outline, Australia is of the view that the author's claims in relation to Articles 26 and 27 are inadmissible as the claims are incompatible with the Covenant or have not been sufficiently substantiated, or alternatively, and with respect to Article 25, are without merit.

54. Consequently, the author's claims that he has been deprived of a right to an effective remedy should be considered inadmissible under either or both Rules 99(b) and 99(d) of the Committee's Rules of Procedure.

Allegations concerning discrimination

55. This section addresses the author's allegation that the Australian Government is in breach of Articles 2(1) and 26 of the Covenant by discriminating against the author on the basis of a distinction of being resident on Norfolk Island. He alleges that unlike Australian citizens resident elsewhere in Australia he is unable to vote for a government at the State level or a legislative assembly that undertakes most of the tasks of a government at the state level.[43] More particularly the author alleges that:

> A consequence of the *Norfolk Island Amendment Act* is that, although Australians resident in Australia are able to vote for State governments to make laws relating to crime, education and health etc. those Australians (and others) living on Norfolk are not - a distinction based on their national origin.[44]

Committee about the measures taken - see General Comment 33: (The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights), 94th session, UN Doc (28 October 2008), para 14.

[43] Communication, Part IV, paras 14 and 16.

[44] Ibid, para 14.

And that:

> Mr Buffett is an Australian, and Australians living in Norfolk are, by the 2015 Act, denied the right to vote for local government and for a legislative assembly that undertook most of the tasks of a state government. This discriminates against them, in their enjoyment of their Article 25 right.[45]

56. Article 2(1) of the Covenant states that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

57. Article 26 of the Covenant provides that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Admissibility – Articles 2(1) and 26

58. The Australian Government notes that Article 26 is a stand-alone right to equality before the law as well as equal protection of the law and it prohibits discrimination under the law and guarantees protection against discrimination on any grounds.[46] This contrasts with Article 2(1) of the Covenant, which relates to the enjoyment of Covenant rights on an equal basis without distinction.

59. In his submissions, the author seeks to use Article 26 as an auxiliary argument in relation to his claims about violations of Article 25. The Australian Government submits that this characterisation of Article 26 of the Covenant is misconceived and that accordingly, the author's claims under this article are outside the scope of the Covenant and should be dismissed *ratione materiae*, pursuant to Rule 99(d) of the Committee's Rules of Procedure.

60. The accessory character of Article 2 means that a breach of Article 2(1) will only be made out where the Committee finds that there is a violation of another Covenant right.[47] The Australian Government refers to its submissions on Articles 25, 26 and 27 and submits that in the absence of substantive violations of these articles, the author's discrimination claims under Article 2(1)

[45] Ibid, para 16.
[46] Human Rights Committee, *General Comment No. 18,* 37th session, UN Doc HRI/GEN/1/Rev.7 (10 November 1989), para 1.
[47] Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 34-5.

should be dismissed *ratione materiae*, pursuant to Rule 99(d) of the Committee's Rules of Procedure.

61. Further, or in the alternative, the Australian Government respectfully submits that the author's allegations with respect to discrimination have not been sufficiently substantiated to the degree required by Article 2 of the Optional Protocol and Rule 99(b) of the Rules of Procedure.

62. The Australian Government notes that the Committee has taken the view that a 'claim' is not merely an allegation, but 'an allegation supported by substantiating material'.[48] The Australian Government respectfully submits that an author must submit evidence of a 'specific, substantial, not insubstantial nature and of pertinent character'[49] so as to make out a *prima facie* case.

63. The Australian Government submits that the author has provided no cogent evidence in his submissions to substantiate his allegations concerning discrimination under either Article 2(1) or Article 26 and, in particular, those concerning his rights as reflected in Article 25. As these submissions will further outline below, the governance arrangements on Norfolk Island (in which the author has a right to participate) are substantively equal to those applying in the rest of Australia and fundamentally the same as those applying in the other populated island external territories of Australia.

64. Accordingly, the Australian Government respectfully requests that the Committee find the author's allegations of discrimination inadmissible under Rule 99(b) of the Committee's Rules of Procedure.

Merits - Articles 2(1) and 26

65. In the event the Committee decides that the author's claims under Article 2(1) (in conjunction with Article 25) and 26 of the Covenant concerning non-discrimination are admissible, the Australian Government submits that they do not have merit. The Australian Government respectively submits that as the factors to be assessed in considering the merits of the two distinct claims are the same, the analysis below is equally applicable to both claims.

[48] *Report of the Human Rights Committee* (Vol I), 94th Session, 95th Session, 96th Session (2009), UN Doc A/64/40, p 98, para 118.

[49] Statements by the HRC indicate that the complainant must 'submit sufficient evidence substantiating the allegation for purposes of admissibility': A/64/40, para 118; A/63/40, para 108; A/62/40, para 119; A/61/40, para 115. While these statements do not refer to evidence constituting a *prima facie* case, Australia assumes that, in effect, this is what is required.

66. The Committee in its *General comment No. 18: Non-discrimination*[50] stated:

> ... The Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction exclusion restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercised by all persons, on an equal footing, of all the rights and freedoms... The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance… '[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.[51]

67. The relevant 'rights' asserted by the author are those reflected in Article 25 of the Covenant, being the rights to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections by universal and equal suffrage and access to the public service. The Australian Government contends that the author is accorded all of these rights without discrimination. These rights do not require the adoption of a particular governance model such as that suggested by the author – that being a parliament at the State level or a legislative assembly which are empowered to enact particular types of laws. Nor do they encompass 'a right to self-government'[52] or a right to vote at elections for the Parliament of NSW[53] which has no power to enact laws of direct application to Norfolk Island given that Norfolk Island does not form part of the State of NSW.

68. For the most part, Australian citizens living in the rest of Australia vote for, and are able to participate in three levels of government, Federal, State or Territory and local. One exception is the Australian Capital Territory (ACT – population of just over 400,000) where the functions of local Government are carried out at the level of the ACT Legislative Assembly. Prior to the governance changes introduced in 2016, Norfolk Island was in a similar position to the ACT with Australian citizens on Norfolk Island (population of 1748) having a right to vote for and participate in the Federal Parliament as well as the Legislative Assembly of Norfolk Island. The new governance arrangements introduced in 2015 - 2016 involved abolition of the Legislative Assembly and its replacement with the Norfolk Island Regional Council comprising five Councillors who are elected for a four year term.[54] This model is fundamentally the same as that

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[50] Human Rights Committee, *General Comment No. 18*, 37th session, UN Doc HRI/GEN/1/Rev.7 (10 November 1989).
[51] Ibid, paras 7, 8 and 13.
[52] Communication, Part IV para 14.
[53] Ibid, para15.
[54] These governance arrangements are set out in paragraph 20 above.

applying in the two other populated external island territories of Australia, being the Territories of Christmas Island (population of 1843) and the Cocos Keeling Islands (population of 544).

69. It has long been recognised under international law that non-discrimination protects substantive equality, not mere formal equality.[55] Moreover, equality and non-discrimination should not be understood simplistically as requiring identical treatment of all persons in all circumstances. Indeed, identical treatment could itself result in discrimination.[56] The Australian Government submits that the governance arrangements applicable to Norfolk Island in which the author has a right to participate are substantively equal to those applying in the rest of Australia and fundamentally the same as those applying in the other populated island external territories of Australia. Indeed, their introduction has removed prior discrimination and ensured that the author and other Australia citizens residing on Norfolk Island have the same rights, obligations and benefits (including social security and health care) as those received by other Australian citizens. Under the previous arrangements the Norfolk Island Legislative Assembly and Government proved incapable of providing that equivalent level of rights and benefits.

70. If the Committee were to find that there is a differential treatment of the rights accorded by Article 25 as between Australian citizens residing on Norfolk Island, and those residing in the rest of Australia, the Australian Government contends that that differential treatment is legitimate and does not constitute discrimination. The principles concerning legitimate differential treatment and their application to the circumstances of the author are set out immediately below.

71. It may be legitimate, or even required, to treat different persons differently in certain circumstances, to ensure equality. The European Court of Human Rights (ECtHR) set out what is arguably the first clear articulation of the standard of legitimate differential treatment in the *Belgium Linguistics* decision.[57]

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[55] See for example, *Settlers of German Origin in Poland (Advisory Opinion)* [1923] PCIJ (ser B) No 6, p 24; *South West Africa Cases (Ethiopia v South Africa) (Liberia v South Africa) (second phase) [1966] ICJ Rep 6*, 293 (Dissenting Opinion of Judge Tanaka); *Case relating to certain aspects of the laws on the use of language in education in Belgium v Belgium* (1968) ECHR (ser A) no 6, 34.

[56] WA McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Yearbook of International Law* 177.

[57] In that case, the Court stated with regard to Article 14 of the *European Convention on Human Rights* on equality and non-discrimination (broadly equivalent to Article 2 of the Covenant): 'Article 14 does not forbid every difference in treatment…[T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment…must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised' in *Case relating to certain aspects of the laws on the use of language in education in Belgium v Belgium* (1968) 1 Eur HR Rep 252, p 34.

72. Although legitimate differential treatment is not explicitly referred to in international human rights treaties, the Australian Government notes that the principle has been endorsed in the General Comments, Concluding Observations and views of many UN treaty bodies and submits that it is thus well established at international human rights law. For example, as noted above, the Committee makes clear in General Comment No 18 that certain types of differential treatment do not constitute discrimination.[58] This approach has been consistently applied by the Committee in the consideration of complaints before it.[59]

73. It is the submission of the Australian Government that the test for legitimate differential treatment requires that the treatment is:

    - aimed at achieving a purpose which is legitimate
    - based on reasonable and objective criteria, and
    - proportionate to the aim to be achieved.[60]

74. If the Committee were to find that the author's rights as reflected in Article 25 rights are subject to differential treatment, it is appropriate to apply that test to determine whether that treatment is legitimate and thus not discriminatory.

Legitimate purpose

75. The purpose of moving from the previous governance model on Norfolk Island to the current model is to ensure that Australians who live on Norfolk Island receive the same access to rights and benefits and have the same obligations as all other Australians. The previous model of limited self-government, involving as it did substantial responsibilities resting with the Norfolk Island Legislative Assembly and the former Administration of Norfolk Island, proved incapable of providing those rights and benefits.

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[58] '[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant' - General Comment No. 18, para 13.

[59] 'The Committee recalls its constant jurisprudence that not every distinction constitutes discrimination, in violation of Article 26, but that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant' in *Love v Australia*, Communication no. 932/2000, UN Doc CCPR/C/77/D/983/2001 (25 March 2003), para 8.2.

[60] See General Comment No. 18, para 13; CERD Committee, *General Recommendation No. 14*, 42nd session, UN Doc A/48/18 (22 March 1993), para 2; CESCR, *General Comment No. 20*, 42nd session, UN Doc E/C.12/GC/20 (2 July 2009), para 13.

76. The Hon Mr Luke Simpkins MP, Chair of the Joint Standing Committee of the Australian Parliament on the National Capital and External Territories noted that fact in his foreword to the Report of the Committee dated October 2014, entitled: *Same country; different world – The future of Norfolk Island*:

> The Committee's terms of reference were to focus on the prospects for economic development in the wake of a marked decline in tourist visitors, a serious budget deficit, and ongoing financial management concerns. There is an ever increasing reliance on the Commonwealth Government for financial and other assistance, just to keep basic services going for Norfolk Islanders. A consistent theme throughout the inquiry, from witnesses and experts, was that economic development is simply not possible without the establishment of new governance arrangements.
>
> The Norfolk Island Act 1979 (Cth) established self-government. Over the years, a number of reviews and reports have assessed the effectiveness of self-government and questioned whether it has best served the interests of Norfolk Island residents. Some 35 years on, it is clear that this model has failed and on many levels.
>
> The Joint Standing Committee on the National Capital and External Territories has a long standing history and interest in the welfare of Norfolk Island and Norfolk Islanders, as Australian residents. Norfolk Islanders should have the same rights and responsibilities as all Australian residents. The priority therefore must be what is in the best interests of the people, and not a defence at all costs of governance arrangements that have not been able to provide a social or economic existence that equates to the rest of the nation.[61]

77. The Hon Jamie Briggs MP, the then Federal Assistant Minister for Infrastructure and Regional Development, speaking in March 2014 emphasised the gravity of the financial situation and that the problems were becoming more critical as deficits increased and essential infrastructure on the Island further deteriorated. He noted that there had been no significant infrastructure investment since the 1970s and that the roads were deteriorating, broadband services were poor and the island's electricity network was extremely fragile and at risk of collapse.[62]

78. The Joint Standing Committee in its 2014 *Same country; different world* Report noted:

> The Committee appreciates the complexity, nuances and to-some extent enormity of the task ahead for the Commonwealth Government to transition Norfolk Island from a self-governing territory to a modern local government type authority. One that is fiscally responsible and accountable to its elected representatives, and delivers services of a suitable standard. However, the alternative of continuing to

[61] Joint Standing Committee on the National Capital and External Territories, *Same country: different world – the future of Norfolk Island* (2014) pp. vii-viii, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Capital_and_External_Territories/Norfolk_Island/Report,

[62] House of Representatives Official Hansard, Canberra, 27 March 2014, p. 3356.

> prop up the NIG [Norfolk Island Government] budget and NIA [Norfolk Island Administration] or 'business as usual' approach is not an option that ultimately serves Norfolk Island residents well.[63]

79. Thus the Australian Government submits that any differentiation in the enjoyment of the author's Article 25 rights from those enjoyed by Australian citizens on the mainland brought about by the changes in governance introduced in 2016 was for a legitimate purpose.

Reasonable and objective criteria

80. The criteria applied in reaching that differentiation are outlined in the quote from the Explanatory Memorandum to the 2015 Parliamentary Package of Bills, referred to in paragraph 18 above. Those criteria are closely aligned to the purpose as just elaborated and include:

- the general principle that as Norfolk Island is part of Australia, those Australians who live there should have the same obligations and receive the same access to benefits as other Australians;
- the provision of social security and health arrangements to Norfolk Island, equivalent to those available on the mainland;
- ensuring an adequate level of services to the community and maintaining an effective and up-to-date body of State-level legislation.

81. These criteria are reasonable and objective. They were publicised well before the governance changes were made and were also the subject of consultation open to all inhabitants of Norfolk Island including the author.[64] For the reasons outlined above it is obvious that these criteria were not being met by the previous Norfolk Island Legislative Assembly, which had responsibility for most of the matters the subject of the objectives.

Proportionate to the aim to be achieved

82. In assessing proportionality, the poor history of governance under the previous system of limited self-government involving the Norfolk Island Legislative Assembly and former Administration is of central relevance. As a result of this history, the Commonwealth Government concluded that a

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[63] Joint Standing Committee on the National Capital and External Territories, *Same country: different world* p. 41.

[64] Community consultation was undertaken by the Joint Standing Committee on the National Capital and External Territories during the preparation of its Report, *Same Country: Different World – the future of Norfolk Island*. Following the Report's release in October 2014, the former Administrator undertook further community consultation on the recommendations in the Report. The consultations revealed diverse views on the proposed changes to the governance arrangements – while some in the community opposed the proposed changes, others supported the reforms or took no specific position on governance arrangements. A detailed summary of the findings is available at https://www.regional.gov.au/territories/publications/Attachment-D-Outcomes-of-NI-Community-Consultation-Report-by-Administrator/index.aspx.

system of limited self-government could not deliver in key areas of importance including revenue raising, health, social security and the provision of services. It therefore introduced a new system of governance proportionate with the aim to be achieved (including an elected Norfolk Island Regional Council), that is delivering on those matters albeit with the loss of voting rights for a local legislative assembly. However, the author does have the right to vote for, and be elected to the Regional Council. He also has the right to vote for, and be elected to the Commonwealth Parliament, the legislative body with the responsibility for applying laws to Norfolk Island. This package of measures is both proportionate and necessary to the aim to be achieved.

Conclusion

83. The Australian Government therefore submits that any differential between the application of Article 25 rights to the author and their application to Australian citizens resident on the mainland is legitimate and thus does not amount to discrimination.

Allegations concerning voting rights and equal suffrage

84. This section addresses the author's allegation that the Australian Government is in breach of Article 25 of the Covenant because he has 'no right to vote at elections for the Parliament which passes and imposes its laws on Norfolk, viz the Parliament of NSW' and, as such, the author '… is denied his right to take part in the conduct of public affairs through freely chosen representatives, as he cannot choose a representative to the New South Wales Parliament where laws affecting him are made.'[65] He also alleges that his Member of Parliament in the Federal Parliament 'is in any event constrained' because the Federal Parliament 'cannot deal with issues such as crime education and health.'[66]

85. Article 25 of the Covenant provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

[65] Communication, Part IV para 15.
[66] Ibid.

Admissibility

86. The Australian Government does not seek to contest the admissibility of the author's claim with respect to Article 25 of the Covenant. However, the Australian Government submits that the author's claims are without merit.

Merits

87. The element of Article 25 dealing with 'the distinctions mentioned in Article 2' has been addressed above in dealing with the authors allegations concerning discrimination and will not be repeated here.

88. As noted in paragraphs 31 and 68 above, the Parliament of NSW does not have the constitutional power to make laws of direct application to Norfolk Island and nor does it purport to do so. It follows that the author's claim that Article 25 requires that he have the right to vote in that Parliament is without foundation.

89. The sole legislature with power to apply laws to Norfolk Island is now the Commonwealth Parliament in relation to which the author, consistently with Article 25, does have rights both to vote and to stand for election.

90. While the Commonwealth has applied NSW law to Norfolk Island, that law is applied as Commonwealth law. That body of Commonwealth law is adapted to the circumstances of Norfolk Island by the Commonwealth Parliament as well as ordinances made by the Commonwealth Governor-General. Any person residing on Norfolk Island, including the author, is able to make representations on the laws applying to Norfolk Island to their Federal member, the Commonwealth Minister with executive responsibility for Norfolk Island, the Administrator of Norfolk Island or the relevant Commonwealth Department.

91. Again as noted above, the author's assertion that matters of crime, health, education, and social security are purely within the province of the State legislatures and not the Federal Parliament are incorrect. Responsibility for many of those matters is shared between the Federal and State levels and indeed the matter of social security is primarily one for the Federal legislature. In relation to Norfolk Island, the Federal Parliament is the sole legislature with the responsibility for those matters. As such, the author can raise those matters with his Federal MP who would be the logical recipient of such representations in terms of carrying them forward.

92. Therefore the Australian Government submits that the author has not established that Australia is in breach of Article 25 in its application to the author. The author does have each of the rights as defined in Article 25, that is: to take part in the conduct of public affairs, directly or through

freely chosen representatives; to vote and to be elected at genuine periodic elections; and to have access to the public service.

Allegations concerning the culture right of minorities to enjoy their own culture

93. This section addresses the author's allegation that the Australian Government has breached the rights of a minority of persons of Pitcairn descent to enjoy their own culture and to use their own language under Article 27 of the Covenant. This is asserted to relate to an alleged 'seizure of historical artefacts', an alleged 'commandeering of the radio station', closure of the hospital maternity wing and the imposition of land rates.[67]

94. Article 27 of the Covenant provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

95. As a preliminary matter, the Australian Government accepts for the purposes of the Committee's consideration of the author's Communication that the author is a member of a minority, that being persons of Pitcairn descent resident on Norfolk Island. In saying this Australia wants to make two matters abundantly clear. First, as noted above, the Australian Government does not accept the author's assertion that persons of Pitcairn descent, including the author, are indigenous to Norfolk Island. Secondly, the Norfolk Island population as a whole is not a minority for the purposes of Article 27 as it is not ethnically, religiously, linguistically or culturally distinct.

Admissibility

96. The Australian Government respectfully submits that the author's allegations with respect to Article 27 are inadmissible as the author has not sufficiently substantiated his claims to the degree required by Article 2 of the Optional Protocol and rule 99(b) of the Rules of Procedure.

97. As discussed above at paragraphs 36 to 40, assertions concerning the removal of artefacts, censorship of the radio station, closing of the maternity wing and playing of the national anthem are incorrect and the author has provided no evidence to substantiate the claim that the Australian Government took such actions. The author's claim concerning the imposition of land rates without an impact assessment of equity or capacity to pay also is incorrect. As noted in paragraph 106 below, land rates have been phased in over time and hardship arrangements for those having difficulty making payments are available. There is no evidence to suggest that the payment of rates affects the author's right to enjoy his culture.

[67] Communication, Part IV, para 17.

98. Accordingly, the Australian Government respectfully submits that the author's claims under this article should be ruled inadmissible pursuant to Rule 99(b) of the Committee's Rules of Procedure.

99. Further, the Australian Government notes that the author's allegations concerning the closure of the maternity wing of the hospital and the imposition of land rates do not have any rational connection to the preservation of cultural rights. Accordingly, the Australian Government submits that these aspects of the author's claims under Article 27 are inadmissible *ratione materiae* as they are not within the scope of the article and should be ruled inadmissible pursuant to Rule 99(d) of the Committee's Rules of Procedure.

Merits

100. In the event that the Committee finds that the author's claims under Article 27 are admissible, Australia submits that those claims are without merit and should be dismissed by the Committee.

101. The Australian Government has not breached Article 27 of the Covenant in its application to the author as a member of the Pitcairn minority and will deal with each of the alleged breaches in turn. In this respect, it is notable that author's assertions underpinning the alleged breaches are either incorrect and/or omit key facts. Furthermore, as noted at paragraph 100 above, at least two of the alleged breaches - those concerning the closure of the maternity wing and the imposition of land rates - do not have any rational connection to the preservation of cultural rights.

Historical artefacts

102. First, the author alleges that the Commonwealth, through the Administrator, seized artefacts, emblems and parliamentary records, including matters of cultural significance, and sent them off the island where they can no longer be exhibited.[68] As noted above, that assertion is incorrect. It is the understanding of the Australian Government that in August 2015 the former Administration of Norfolk Island moved assets out of the Military Barracks building which housed the former Legislative Assembly and that Norfolk Island Museum staff were involved in recording and assessing the items for historical significance with a view to such items being donated to the Museum Trust. There is no record of any of the items being 'seized and removed from the island'.

The local radio station

103. Secondly, the author alleges that the Commonwealth commandeered the local radio station and altered community access to it.[69] The author also implies that persons are prevented from using

[68] Ibid.
[69] Ibid.

the Norf'k language on the station. These assertions are incorrect. As noted above, it is the understanding of the Australian Government that the Administration of Norfolk Island took action against some broadcasters at Radio Norfolk for breaches of a code of conduct that required broadcasters to remain apolitical. Furthermore the Australian Government is not aware of any restrictions on the use of the Norf'k language on Radio Norfolk. The *Norfolk Island Language (Norf'k) Act 2004* recognises the right of the people of Norfolk Island to speak and write Norf'k freely without interference or prejudice from government. 70

Maternity services

104. Thirdly, the author alleges that the Commonwealth closed the Norfolk Island hospital maternity wing forcing residents to have their children born in Australia which he describes as 'an insidious and deliberate measure forcing the children of indigenous islanders to become homogenous with mainlanders.'[71] The facts concerning the closure and the reasons for it are set out in paragraph 39 above. They have no connection to the rights of the Pitcairn minority.

105. Norfolk Island birthing services ceased in 2012 with the departure of the former general practitioner/obstetrician. The former Administration of Norfolk Island which had responsibility for the hospital tried to recruit a new general practitioner/obstetrician but was unsuccessful. Expectant mothers now travel to major metropolitan areas that can provide maternity services to mothers and babies. The Australian Government funds their flights and subsidises their accommodation.

Rates on land

106. Fourthly, the author alleges that rates have been imposed on land without an impact assessment or assessment of equity or capacity to pay[72] and that this affects his right to enjoy the culture of the Pitcairner minority. The Commonwealth submits that it could not possibly do so. By way of comment, land rates are an important source of revenue funding the services of the Norfolk Island Regional Council as is the case for other local governments in Australia. They have been phased in over time and hardship arrangements for those having difficulty making their payments are available.

107. For these reasons, the Australian Government submits that the author has not established his claim under Article 27 and that it should be dismissed.

[70] https://www.legislation.gov.au/Details/C2015Q00190
[71] Communication, Part IV, para 17.
[72] Ibid.

CONCLUSION

108. Having given careful consideration to the allegations made by the author, the Australian Government submits that each of the claims under Articles 1, 2, 26 and 27 are inadmissible and should be dismissed without consideration of its merit.

109. Should the Committee be of the view that any of the allegations are admissible, the Australian Government submits that each of the claims should be dismissed for lack of merit.