

**Communication under the Optional Protocol to the International Covenant on Civil and
Political Rights (ICCPR)**

*To: Petitions Section, Office of the High Commissioner for Human Rights, United Nations
Office at Geneva, 1211 Geneva 10, Switzerland*

Filed on the 8th March 2018

ALBERT BUFFETT V AUSTRALIA

Please indicate which of the above procedures you are invoking: **Optional Protocol to the International Covenant on Civil and Political Rights**

I. Information on the complainant:

Name: Buffett

First name(s): Albert Fletcher

Nationality: Australian

Date and place of birth: 2nd August 1940, Norfolk Island

Address for correspondence on this complaint:

c/- Geoffrey Robertson AO QC (Legal representative)

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II. State concerned/Articles violated

Name of the State that is either a party to the Optional Protocol (in the case of a complaint to the Human Rights Committee) or has made the relevant declaration (in the case of complaints to the Committee against Torture or the Committee on the Elimination of Racial Discrimination): Australia

Articles of the Covenant alleged to have been violated: Articles 1, 2, 25, 26 & 27

III. Exhaustion of domestic remedies/Application to other international procedures

1. The complainant, Albert Fletcher Buffett, is an indigenous inhabitant of Norfolk Island, an external territory of Australia, which was self-governing in large measure between 1979 and 2016, when the government of Australia legislated to deny its inhabitants their 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 indigenous minority to which he belongs their right to their own culture and language (Article 27) and to permit discrimination against them on grounds of language, political opinion and birth (Article 26). Mr Buffett brings this petition in his own right. The President of the Norfolk Council of Elders (representing the Island's indigenous inhabitants – 47% of the island's population) which fully supports him, and suffers from the breaches of which he complains, as (in relation to complaints under Article 1 and Article 25) do all islanders.

2. Because of Norfolk Island's anomalous position – neither a part of Australia nor a state in the Federal system – there are no remedies for its people (a population of 1,700) in constitutional or public law against the government of Australia or its appointed administrator, for actions of the kind here complained of. The explanation for this anomaly is relevant both to compliance with the “exhaustion of domestic remedies” rule and to the complaint about a breach of Article 2. It is necessary to outline briefly both the history of the island and the decisions of Australia's High Court – more detailed information will be provided in due course if Australia claims that there are effective remedies.
3. Norfolk is a volcanic island in the Pacific Ocean. It was uninhabited when first settled by the British in 1788 as a brutal convict prison (relics of which are now part of a world heritage site). In Tahiti in 1789 there was a world-famous mutiny on HMS Bounty against its captain, Bligh. The mutineers together with Tahitian women sailed off to Pitcairn Island, where they had families and established a settlement which by 1856 had become unsustainable. For this reason the British government took them all (194 men, women and children) to Norfolk, declaring that it should be a “distinct and separate settlement” from Australia, although it would have a governor based in an Australian state (in due course, in New South Wales). From the 194 British/Polynesian people from Pitcairn, the present indigenous inhabitants of Norfolk, including Mr Buffett, have sprung.
4. Australia as a nation came into being in 1901 but its constitution made no mention of Norfolk, which remained under UK rule until handed over to Australia 1913 as an “external territory”. Under direct Australian rule its community was given no rights against the tyrannical power of the administrator appointed by the Australian government, except to ask that government, based in Canberra 2,000 kilometres away, to overturn his decisions. Australia did not accept its international law duty to decolonise until 1979, when the *Norfolk Island Act* established a democratically elected Parliament with power to make laws for the good government of the island in respect of crime, health, education, customs, immigration and other local matters, whilst the Federal Government retained power over defence, aviation, shipping etc. In other words, the Norfolk Island Parliament had power to make laws over matters which most concerned islanders and their cultural identity. The separation of powers between the island legislature and the Australia Federal Government was similar to that between the six Australian State Governments and the Federal Government. As will be described hereafter, over 36 years of self-government the people of Norfolk, nearly half of them indigenous, protected through their elected representatives their special and separate culture, history and language.
5. In 2015 Australia re-colonised Norfolk Island by passing the *Norfolk Island Amendment Act*, which abolished its Parliament and its rights to separate identity at political associations and cultural organisations. It could no longer be represented on UN Committees, or at meetings of the Commonwealth Parliamentary Association or at

other international gatherings of democratic countries. Its autonomy was extinguished, without any regard for its indigenous minority (or indeed for the majority of its people, who voted in a referendum against the Australian takeover).

6. The breach of Article 25 is perhaps most clearly shown by the Act's abolition of any right of involvement in the control of crime, health, education, social security etc. through direct elections. Those matters are henceforth to be dealt with only by the Parliament of the State of New South Wales (NSW). But the complainant, and the people of Norfolk were disenfranchised – they have no right to vote in NSW elections, so political decisions and laws pertaining to their welfare are made by politicians they have no power to elect. They can only vote in Federal elections, in an electorate in Canberra, some 2,000 miles away and inland, 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 – here, the State of NSW – where islanders are unable to vote.
7. There are no effective remedies under Australian law for the complainant or his indigenous people, or the other residents of Norfolk Island.
 - a. They are unable to enforce rights protected by the ICCPR because this treaty has not been incorporated into Australian law. It is well settled that ICCPR provisions are not enforceable by individuals against the Australia government.¹
 - b. There is no effective remedy for the human rights abuses brought about by the *Norfolk Island Amendment Act (2015)*, because the Australian constitution and Australian law has no Bill or Charter of Rights by which a court can review legislation for conformity with human rights standards.
 - c. The Commonwealth of Australia has a constitution, s.122 of which empowers its Parliament to make laws “*for the government of... any territory placed by the Queen under the authority of and accepted by the Commonwealth or otherwise acquired by the Commonwealth.*” As Norfolk Island was placed by the Queen under the authority of the Commonwealth in 1913, there can be no constitutional challenge to the validity of the *Norfolk Island Amendment Act (2015)*.
 - d. Were any action brought to challenge the re-acquisition, by an act of the Australian Parliament, of full sovereignty over Norfolk Island, that challenge would be to an “act of state” which the Australian courts would regard as non-justiciable, i.e. to be dismissed without a hearing.
8. The legal position, that Norfolk is part of Australia and may be regulated as an external territory by any law passed by the Commonwealth of Australian Parliament, has been established beyond doubt by a series of High Court cases, and it is unlikely to be

¹ See *Minogue v HREOC* (1999 FCA 85): “It is because the ICCPR does not give rise to rights or obligations enforceable under Australian law that it cannot give rise to a ‘matter’ which constitutes a judicial controversy.”

questioned by the Australian government. The Court has held that the power is “*plenary in quality and unlimited and unqualified in point of subject matter.*”² The power over Norfolk being plenary and unlimited, Australian courts cannot review or strike down any provision of the *Norfolk Island Amendment Act (2015)*. Parliament can legislate as it wishes for Norfolk Island, without legal restraint, under the “broad plenary power” bestowed by s.122 of the Constitution.³ This was emphasised by the High Court in 2007 when an attempt was made to challenge an amendment to the *Norfolk Island Act* which disenfranchised non-citizens of Australia by preventing them from voting in elections for the Norfolk Island legislative assembly. Although this was plainly a law which abrogated the right to vote of some Norfolk residents, the High Court ruled that they, as residents of an external territory, could not challenge it, because “*The entire legal situation of the territory may be determined by the authority of Parliament.*”⁴

9. The plenary power given to the Australian Parliament under s.122 of its constitution, as interpreted by the High Court, would render impossible any challenge to the *Norfolk Island Amendment Act (2015)*. It is more than likely that Australian courts would refuse even to hear such a challenge, on the principle that the re-acquisition of full sovereignty over Norfolk was an “act of state” which cannot be interfered with by the courts. The 2015 law which abolished Norfolk Island’s Parliament (the legislative assembly) and abrogated the right of its Australian residents to vote for representatives to make the laws that most affect them (which are now made by the NSW Parliament, for which they have no vote) are unchallengeable in any court, as are the actions of the newly-empowered Administrator of the territory.
10. It follows that the complainant has no domestic remedy to exhaust, because there are none. Any attempt to challenge the *Norfolk Island Amendment Act (2015)* or the actions of the Administrator under it, would be doomed to failure.
11. Shut out from access to the courts, the complainant and others from the Norfolk community have sought extra-judicial remedies but to no avail. A complaint was made to the Australian Human Rights Commission about the breach of Article 25 by denying the right to vote, but this committee (which in any event has no power to enforce any remedy) decided it did not have the resources to undertake an inquiry. In 2016 a complaint was made to the Commonwealth Ombudsman, about various actions of the Administrator which had breached Articles 26 & 27 of the ICCPR. The Ombudsman decided not to investigate, because no practical outcome could be achieved.
12. The above information is provided in order to satisfy Article 41(c), by demonstrating that no domestic remedies are available to invoke, let alone exhaust. Should the Committee require further details, or copies of the cited case law, this can be provided.

² *Teori Tan v Commonwealth* (1969) HCA 62

³ *Berwick v Gray* (1976) 133 CLR 603

⁴ *Bennett v Commonwealth* (22007) 234 ALR 204

It may be doubted whether the respondent will question the proposition that it has plenary power over Norfolk Island and its islanders: this is the legal position it has always accepted in relation to Australia's external territories.

Have you submitted the same matter for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Court of Human Rights, or the African Commission on Human and Peoples' Rights)?: No

IV. Facts of the complaint

Introduction

1. Paragraphs 1 to 6 section III are repeated. Norfolk Island has in effect been “re-colonised” by Australia, after 36 years of democratic governance relating to matters of immediate concern to the community. They are now, in relation to these vital matters, subject to laws passed by a state parliament (NSW) comprising representatives they have no right to elect. Their only right to vote is for a federal Member of Parliament in the electorate of Canberra (2,000 kilometres away) and their representative can only engage on federal issues (defence, foreign relations etc.) and not on such basic issues as crime, health, education and welfare which are subject to NSW law.
2. The necessity for residents of Norfolk, and especially indigenous residents like Mr Buffett, to have representation on those issues and to maintain their culture and traditions goes back to their origins in the settlement at Pitcairn Island, after the mutiny on “*The Bounty*” in 1789. Utterly isolated from the rest of the world for 66 years, this mix of English and Polynesian descent developed a community ethos which was distinct – indeed unique – and it was transported to isolated Norfolk, where it survived and developed to the point where it was successful and sustainable enough for its people to be granted a large degree of self-government in 1979.
3. Over 36 years of self-government, Norfolk developed as a “distinct and separate settlement”, with communal norms quite different to those in mainland Australia. Its guiding principle of ‘communal self-help’ has been implemented by levies (particularly on the tourist industry), customs and stamp duties and the use of land in common. It has, distinctively, no taxation, although it has not developed as a tax haven because of stringent residence requirements and because residents are in any event subject to tax in countries (mainly Australia) where any of their earnings arise. The Island had no political parties (all members of parliament were elected as independents). Three quarters of the islanders speak a local language, which is taught in schools. It has its own special festival and religious days, its own flag and emblem, and its athletes compete as Norfolk Islanders in the Commonwealth and Pacific Games. “God Save the Queen” was (until 2016) its national anthem. As one recent academic study concludes;

“The historical rights claimed to derive from Pitcairn Island include: the right to self-government; the right to live as British subjects and in accordance with British law; the right of families to own subsistence land; and the right to graze cattle on commons. There are cultural obligations: to provide labour for public works, including communal grave digging and free burials. The right to live free from taxes (especially externally-imposed) is said to derive from the original Pitcairn ethos of self-help, simplicity of lifestyle and financial autonomy.

In an assessment of the Island’s common heritage, a Norfolk-commissioned report identified other cultural practices and traditions:

“The harmonic rather than polyphonic style of church music, the availability of voter initiated intervention in the legislature, the barter economy, the rejected of development for its own sake and the relaxed, relatively low technology lifestyle of the Island are each example that reflect the Island’s past and distinguish it from mainland [Australian] norms that together contribute to the distinctive identity of Norfolk Island” (See Helen Irving, Sydney University legal studies Research Paper 13/83, November 2013)

4. The question of Norfolk’s cultural and ethnic distinction from Australia is clearly answered by the independent expert Professor Mühlhäusler, whose report is at Annex A. He concludes that Norfolk Islanders are genetically distinct and different from mainland Australians with regard to all parameters that define ethnicity: homeland, shared ancestry, cultural narrative and cultural core values, and that they subscribe to an Anglo-Polynesian rather than Australian identity. Their culture exhibits numerous differences with Australia in musical styles, traditional ecology and spirituality, and their language – “Norf’k”, is not related directly to English. So far as geographical separation is concerned, the natural environment of Norfolk is unique and distinct, containing flora and fauna not found elsewhere in the world and with unique genetic diversity. The man-eating mammals and poisonous reptiles common to Australia are entirely absent from Norfolk.
5. Australia has re-colonised Norfolk Island by virtue of the *Norfolk Island Amendment Act (2015)*, which avowedly seeks to assimilate the island with Australia. It begins by repealing the preamble of the *Norfolk Island Act (1979)*, which asserts that the Island should be “*a distinct and separate settlement*” and states in terms

“And whereas the Parliament considers it to be desirable and to be the wish of the people of Norfolk Island that Norfolk Island achieve, over a period of time, internal self-government as a Territory under the authority of the Commonwealth and, to that end, to provide, among other things, for the establishment of representative Legislative Assembly and of other separate political and administrative institutions on Norfolk Island.”

6. Now, internal self-government has been abolished and the Island is reduced to the status of a colony. Its citizens have no say in the laws by which they are being governed (the laws of New South Wales, where they cannot vote) and will only be able to vote in respect of federal laws (and only if Australian citizens) in the electorate of the Australian Capital Territory (i.e. Canberra) some 2,000 kilometres away. Australia's regressive action contravenes the right to self-determination, the rights of minorities and the right to take part in public affairs and elections.
7. The Norfolk Island Legislative Assembly was abolished on 17th June 2015, the day that democracy came to an end by Australian diktat. The historic house of Parliament was locked up and has not been used since: all democratic memorabilia, together with flags and photographs and historical records and artefacts (including some from the 1856 Pitcairn settlers and earlier, from the *Bounty* mutiny) were seized and removed from the island and from the people who venerate them. In an action all too typical of colonial powers, the island's radio station was immediately subjected to government censorship: its director was removed, all contributions from opponents of Australia's action were disallowed, and satirists were sacked on the grounds that criticism of Australia was "political" and could not be broadcast. All community announcements are now subject to approval by the Administrator (the Australian government official appointed to run the Island in place of the Legislative Assembly), who during the abolition of self-government refuses to allow mention of any meetings by the complainant and his indigenous association (the Norfolk Island Council of Elders) and other groups opposed to Australian rule. The government has commandeered the radio station and closed the maternity wing of the hospital – an insidious step to deter births on the island and force women to give birth in Australia. Already, war memorial commemorative events have been instructed to play the doggerel Australian anthem, "*Advance Australia Fair*", in preference to "*God Save the Queen*" or the indigenous anthem. These examples of colonialist behaviour can be multiplied.
8. A particularly cruel result of the re-colonisation has been to take away from Norfolk Islanders the long-standing enjoyment of their identity at international and regional political and cultural organisations and potentially at sporting events. Norfolk Island has been represented on a number of UN committees (e.g. on indigenous health). Their place is taken by Australian Government appointees. They can no longer have members of parliament eligible, as previously, to attend meetings of the Commonwealth Parliamentary Association and other international gatherings of democratic countries. (Norfolk has been a member of the CPA since 1980 and its Speaker was actually a member of the CPA executive at the time – June 2015 – when the Assembly was abolished). It is particularly humiliating and degrading that Norfolk Island athletes and sportspeople may no longer be entitled to compete at international and regional events under their own flag and identity. The Norfolk sportspeople who have competed at the Commonwealth Games and in Regional athletics, bowls, archery etc. will now have to compete as Australian, if they manage to get into an Australian team. Norfolk has played an important role in the Oceania Athletics Association – here too, its identity

will be lost. All these examples reflect on the unthinking behaviour of Australia, which has destroyed Norfolk democracy, culture and pride heedless of the ways in which this will undermine the dignity and self-respect of its people *as a people* on the regional and international stage.

9. Of particular concern to Norfolk Islanders is that the Australian government, after taking back control in 2016, removed all restrictions on Australians from entering Norfolk, whether they have records for serious criminality or are on bail or have communicable illnesses or are on the sex offenders register. There is no Parliament on the island to regulate their conditions of entry. There is no Parliament to enact laws relating to planning or environmental management. The Australian government has lifted all previous restrictions on bringing foods, fruit and vegetables and plant materials onto the island, thus permitting mainland pests and diseases to enter Norfolk's primary production sector, damaging crops and trade in a way which the representative parliament had not permitted.

Article 1: The Right to Self-Determination

10. This is an individual and collective right to "*freely determine... political status and (to freely pursue economic, social and cultural development.*" The *Norfolk Island Amendment Act (2015)* deliberately destroys the limited form of self-rule developed since 1979, and extinguishes any prospect of future progress in that direction.
11. Norfolk Islanders – comprising both those like the complainant with Pitcairn ancestry and those who have migrated and settled at later dates and joined in the Pitcairn tradition, comprise "a social entity possessing a clear identity and its own characteristics" with a strong "relationship to territory". They satisfy the factors which give rise to possession of self-determination, namely:
 - a. A history of independence or self-rule in an identifiable territory,
 - b. A distinct culture,
 - c. A will and capability to regain self-governance.⁵
12. A substantial majority of Islanders want independence from Australia, or at least to be accorded the autonomy and the measure of self-rule they have enjoyed between 1979 and 2016. There can be no doubt of the distinctiveness of their culture. The 2015 Act has deprived them of any independent future, abolished their Parliament and put their liberties entirely at the mercy of an Administrator, effectively a dictator appointed by the Australian Government.
13. Article 1(3) is relevant, to the extent that it requires states with "*non-self-governing territories*" to promote and respect the right. This clearly imposes a duty on countries like Australia with external territories – a duty which it shouldered in 1979 but reneged

⁵ See H Gros Espiell, "*The Right to Self-Determination*" UN Doc E/CN4/Sub2/405/Rev.1 page 41

upon in 2015, reducing Norfolk from a largely self-governing territory to an entirely non-self-governing territory.

Article 2: No Effective Remedy

14. The reasons why islanders have no effective remedy against the act of the Australian Government which abolished their right to self-government and against acts of the Australian Administrator which undermine their culture and discriminate between them and the Australian public, are set out at III above. The obligation in Article 2(1) is not only to provide an effective remedy but to ensure rights without distinction such as race, national or social origin, birth etc. 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, health etc. those Australians (and others) living on Norfolk are not – a distinction based on their national origin.

Article 25: The Right to Vote

15. As explained above, islanders have no right to vote at elections for the parliament which passes and imposes its laws on Norfolk, viz the Parliament of NSW. The Act gives them a vote only recorded in the Australian Capital Territory, whose MP is unconcerned about Norfolk (2,000 kilometres away) and is in any event constrained because she is in *Federal* Parliament, which cannot deal with issues such as crime, education and health. It follows that the complainant 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 NSW Parliament where laws affecting him are made.

Article 26: Rule Against Discrimination

16. 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 state government. This discriminates against them, in their enjoyment of their Article 25 right.

Article 27: Right of Minorities to Enjoy their Own Culture

17. The complainant is President of the Norfolk Island Council of Elders, representing the indigenous islanders who make up 47% of the island's population. Article 27 protects the rights of minorities to enjoy their own culture and to use their own language. Those rights have been breached by the Administrator appointed by the Australian Government pursuant to the Act, by actions including:

- a. The seizure of historical artefacts, emblems and parliamentary records, dating back to the *Bounty* and to the 1856 transportations, and sending those items of great cultural significance off the island. They can no longer be publicly exhibited and venerated on Norfolk,
- b. By commandeering the local radio station, which featured programmes in indigenous language, and altering community access to it.
- c. By closing the hospital maternity unit, thereby preventing residents from having their children born (according to their tradition) on the island. They are forcing

them to have them born in Australia – an insidious and deliberate measure forcing the children of indigenous islanders to become homogenous with mainlanders.

- d. By imposing rates on land without an impact assessment or assessment of equity or capacity to pay.

Annexures:

1. Norfolk Island Act (1979)
2. Norfolk Island Amendment Act (2015)
3. Professor Peter Mühlhäusler - Expert Report on the Distinctiveness of Norfolk Islander Ethnicity, Culture and the Norfolk Language
4. Letter Appointing Geoffrey Robertson QC as Legal Representative

Author's signature:

A handwritten signature in cursive script, appearing to read 'Geoffrey Robertson', written in black ink.

V. Checklist of supporting documentation (copies, not originals, to be enclosed with your complaint):

Written authorization to act (if you are bringing the complaint on behalf of another person and are not otherwise justifying the absence of specific authorization): *See Annex 4*

Decisions of domestic courts and authorities on your claim (a copy of the relevant national legislation is also helpful): *See Annexures 1 & 2*

Any documentation or other corroborating evidence you possess that substantiates your description in Part IV of the facts of your claim and/or your argument that the facts described amount to a violation of your rights: *See Annex 3*

If you do not enclose this information and it needs to be sought specifically from you, or if accompanying documentation is not provided in the working languages of the Secretariat, the consideration of your complaint may be delayed.