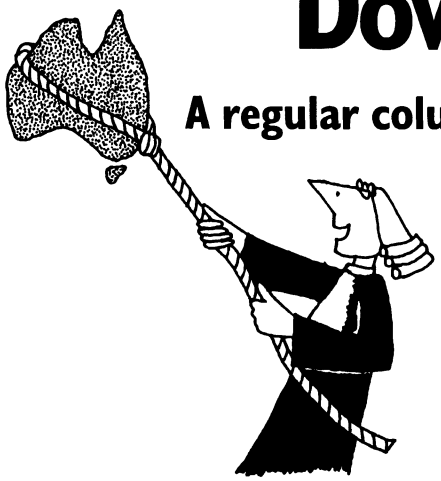
DownUnderAllOver

A regular column of developments around the country



Federal Developments

Referendum Bills passed by Federal Parliament

On 12 August 1999 the Commonwealth Parliament passed the proposed alterations to the Constitution which will be voted on by the Australian people, in two separate questions, on 6 November 1999.

The two proposed laws are the *Constitutional Alteration (Establishment of Republic) 1999* and the *Constitutional Alteration (Preamble) 1999*.

The Republic Bill

This Bill largely implements the recommendations of the Constitutional Convention (ConCon) held in February 1998. It provides for an Australian citizen, the President, to replace the Queen and Governor-General, as head of state. The President must be qualified to be a member of the House of Representatives but must not be a member of a Commonwealth, State or Territory Parliament or a political party. The President would serve for a term of five years but is eligible to serve more than one term.

The Bill provides that the President shall have the same powers as the current Governor-General and that, with the exception of the reserve powers, the President must act on the advice of the Prime Minister or other Ministers. It provides that the President must exercise the reserve powers in accordance with the existing constitutional conventions relating to those powers. However the Bill expressly provides for the continual evolution of these conventions. The Bill also ensures that the Commonwealth and the President will keep the existing prerogative powers.

The appointment of the President would be as follows:

- after consideration of a report of the Presidential Nominations Committee (this Committee would be established by the *Presidential Nominations Committee Bill 1999* and will consist of 32 members, including community representatives and Federal, State and Territory Parliamentarians), an Australian citizen will be nominated by the Prime Minister at a joint sitting of Federal Parliament; and
- if that nomination is seconded by the Leader of the Opposition; and
- if that nomination is affirmed by a two-thirds majority of Parliament,
- that citizen will be appointed President.

The Bill provides that the Prime Minister can dismiss the President by 'signed instrument'. However, unless an election has been called, the Prime Minister must seek the approval of the House of Representatives for the removal of the President within 30 days of the dismissal. This provides that if the Presidency becomes vacant, the longest-serving State Governor shall be an Acting President until a new President is appointed.

Finally, the Republic Bill provides that the States will not sever their links with the British Crown until they make their own constitutional arrangements.

The Preamble Bill

This Bill will insert a new preamble into the body of the Constitution. The existing preamble, which is not part of the Constitution itself but contained within the enabling clauses of the *Commonwealth of Australia Constitution Act 1900 (UK)*, would remain intact.

The proposed preamble includes references to 'hope in God', Australia's 'federal system of government', as well as 'freedom, tolerance, individual dignity and the rule of law'. It also refers to 'our responsibility to protect our unique natural environment', the 'nation-building contribution' of immigrants, and the 'sacrifices of all who defended our country and our liberty in time of war'. Probably the most controversial aspect of the proposed preamble is its reference to Aborigines and Torres Strait Islanders and 'their deep kinship with their lands'.

The Preamble Bill will also insert a new section 125A into the Constitution. This section will provide that the preamble 'has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth'.

In accordance with section 128 of the Constitution, the two proposed laws must be approved by a majority of voters overall and a majority of voters in at least four States to successfully alter the Constitution. Since 1901, only 8 of the 42 proposals put to the people to alter the Constitution have been successfully carried. • **AK**

Genocide not part of the Common Law

Judgment in *Nulyarimma v Thompson* [1999] FCA 1192 was handed down on 1 September 1999. The judgment was made regarding two cases, *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACT 9 (*Thompson*) and *Buzzacott v Hill* (s23 of 1999) (*Buzzacott*).

Thompson involved an appeal against the decision of the Registrar of the ACT Magistrates Court not to issue warrants for the arrest of John Howard, Tim Fischer, Brian Harradine and Pauline Hanson alleging that they had committed genocide with respect to the formulation of the 'Ten Point Plan' for native title.

Buzzacott involved an application by the Commonwealth to strike out a cause of action alleging genocide by Robert Hill, Alexander Downer and the Commonwealth for not applying to the UNESCO World Heritage Committee to include the lands of the Arabunna People on the World Heritage List.

The Full Federal Court (Wilcox, Whitlam and Merkel JJ) unanimously dismissed the appeal against the decision of the Registrar not to issue warrants in *Thompson* and also dismissed the proceedings in *Buzzacott*. In so doing Wilcox and

Whitlam JJ held that the crime of genocide is not recognised by Australian law. Merkel J held that genocide is an offence under the common law of Australia, but that other issues precluded a finding for the applicants.

From a wider perspective the majority decision reflected the decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (*Teoh*), that international law is not incorporated into domestic law in the absence of an act of the Parliament. Additionally, it is noteworthy how the recent decision in *R v Bow Street Magistrate (Ex parte Pinochet)* (1999) 2 WLR 827 (*Pinochet*) ripples through the judgments.

Wilcox J

Wilcox J noted the difficulty in establishing the relevant intention to commit genocide, namely an intention by decision makers to 'destroy, in whole or in part, a national, ethical, racial or religious group'. In this regard he noted that 'some of the Australian destruction clearly fell into this category'. Wilcox J included in these acts 'the rounding up of the remaining Tasmanian Aboriginals in the 1930s, and their removal to Flinders Island' as well as 'shooting parties and poisoning campaigns to "clear" local holdings of their indigenous populations' on the Australian mainland.

However, Wilcox J said even if the relevant intent to commit genocide could be established, the cases could not succeed in the absence of legislation incorporating the crime of genocide into domestic Australian law.

Wilcox J also noted that in *Pinochet* the House of Lords had ruled that Senator Pinochet could only be extradited on those charges arising from conduct that occurred after the United Kingdom implemented the Torture Convention into domestic law. That is, the majority did not consider the international prohibition on torture was part of the common law of the United Kingdom and that accordingly Pinochet could be tried for crimes occurring before this time.

Whitlam J

Whitlam J focused on the question of whether the crime of genocide forms part of the law of Australia. He noted that courts are no longer able to create new criminal offences and cited *Knuller v DPP* [1973] AC 435 in this regard. Whitlam J also cited section 1.1 of the Commonwealth Criminal Code as abolishing common law offences under Commonwealth law. Section 1.1 provides:

> The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act.

Whitlam J also doubted that any common law offences survived as part of the law of the ACT by virtue of s.6 of the *Seat of Government Acceptance Act 1909* (Cth).

Merkel J

Merkel J took the view that the relationship between international law and domestic law in Australia can best be characterised by the adoption approach. Under this approach '[a] rule of customary international law is to be adopted and received unless it is determined to be inconsistent with, and therefore "conflicts" with, domestic law' (para 132.4). Merkel J distinguished this approach from the incorporation approach in that under the adoption approach international law is not automatically incorporated into the common law (even in the absence of conflicting legislation) but also needs to be consistent with general domestic legal policies and principles in order to be adopted.

Merkel J also took the view that universal crimes involve a vesting of extra-territorial jurisdiction in domestic courts without the requirement that these crimes be incorporated through an act of the Parliament.

With regard to *Thompson*, Merkel J found that the actions did not fall within the terms of the Genocide Convention and that the requisite intention has not been demonstrated. Merkel J also noted that the implied constitutional freedom of political communication could be invoked with regard to arguments about the 'Ten Point Plan' and that in any event, 'the role of members of an Australian parliament in supporting and voting for a valid law could not possibly constitute criminal conduct' (para 198).

With regard to *Buzzacott*, Merkel J took the view that the 'complex policy considerations' involved in deciding to nominate an area for listing for World Heritage status would make the matter non-justiciable in the courts.

In conclusion, the decision of the majority seems consistent with the views of the majority in both *Teoh* and *Pinochet* which supported the requirement that for international law to become part of domestic law it must be enacted by the Parliament. • **SB**

ACT

Eastman's case: the High Court finds the territories can use acting judges

David Harold Eastman was convicted by a jury in the ACT Supreme Court in 1995 of the murder of Assistant Police Commissioner Colin Winchester. The trial judge, Kenneth Carruthers, had been appointed by the ACT Executive as an acting judge for a period of seven months.

Eastman used the fact that Carruthers AJ was an acting judge to try to quash his conviction and imprisonment. His argument in the High Court was based on s.72 of the Constitution, which deals with the tenure and remuneration of the Justices of the High Court and of 'other courts created by the Parliament'. It requires a Justice to be appointed by the Governor-General for a term expiring when the Justice reaches the age of 70. Eastman argued that Carruthers AJ's appointment fulfilled neither of these conditions and so Carruthers AJ had no authority to preside over the trial or to enter a conviction.

For Eastman to succeed, the High Court had to overrule two long-standing decisions: *Spratt v Hermes* and *Capital TV v Falconer*. These cases had held, respectively, that s.122 of the Constitution (the territories power) authorised the creation of a court whose judges did not have to be appointed pursuant to s.72, and that the ACT Supreme Court was neither a federal court, nor a court exercising federal jurisdiction under s.73 of the Constitution. The authority of these decisions had, however, been questioned in recent cases.

The majority rejected Eastman's challenge, with only Kirby J dissenting. Gleeson CJ, McHugh and Callinan JJ reaffirmed the authority of *Spratt* and *Capital TV* in regard to s.72 and s.122. They remarked the result was sensible, and paid due regard to practical considerations arising from the varied nature of the territories.

Gaudron J addressed the relationship between territory courts and Chapter III of the Constitution in more detail. She rejected the idea that a territory court created under s.122 was a federal court

on the basis that a federal court in s.71 of the Constitution was one upon which the Commonwealth Parliament could confer jurisdiction to be exercised throughout the Commonwealth. Territory courts were not federal courts because their jurisdiction was necessarily confined to matters involving the applications of laws that operated in a territory. Furthermore, Gaudron J accepted the authority of *Spratt* and *Capital TV* that s.72 of the Constitution only applied to federal courts created under s.71. That was sufficient to dismiss Eastman's application. In *obiter*, however, she indicated that territory courts exercised federal jurisdiction, and that there was a right of appeal from such courts to the High Court under s.73 of the Constitution.

Gummow and Hayne JJ took a similar view to Gaudron J. They suggested that territory courts created under s.122 were not federal courts but were courts exercising federal jurisdiction, and they would have limited s.72 of the Constitution to federal courts. However, they expressly decided the case on another ground; namely, that the ACT Supreme Court was not a court 'created by the Parliament'. For them, a court created by the Parliament was a court constituted and sustained, at the time of a judge's appointment or removal, by the legislative power of the Commonwealth. When Carruthers AJ was appointed, the ACT Supreme Court was not constituted or sustained by a law of the Commonwealth, but by enactments of the ACT Legislative Assembly. On that basis, s.72 of the Constitution did not apply.

Eastman's case avoided practical difficulties that would have resulted from holding that s.72 applied in the territories. Such a holding would not only have invalidated the practice of appointing acting judges (something long permitted in the Northern Territory) but may also have threatened the conferral of non-judicial functions on territory courts. Unfortunately, the case did not go far in clarifying the murky relationship between Chapter III of the Constitution and the territories power. The resolution of that issue must await another day.

Gim Del Villar

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Northern Territory

Bob's Bill

The local papers have reacted with predictable howls of parochial outrage to the introduction of the Greens' anti-mandatory sentencing legislation in the Senate. The *Centralian Advocate* proudly proclaimed 'Hands off: It's our Territory. Bill Brown is barking up the wrong tree.' Meanwhile, an ABS survey has been published showing that the NT has the highest rate of property offending in the country, a strong indication that mandatory sentencing's original purpose — to deter crime — has failed. Does this deter the government? Not at all. Now they're saying

(a) the ABS survey is inaccurate;
(b) crime rates are actually going down;
(c) no, we won't release the data to prove it (or pass FoI legislation)
(d) we need to wait five years to see the underlying trends;
(e) we never said mandatory sentencing would reduce the crime rate in the first place (which they did, actually); and
(f) we're a mature and responsible government who don't deserve to be treated like a bunch of hicks. No wonder they want Bill (or is it Bob?) to butt out. Watch out for the smoking barrels when the Senate Inquiry rides into town.

For more details of the recent amendments, see our article in this issue. • **RG**

Timorous on Timor?

Transport planes rumble and drone. Darwin is awash with media, military and aid personnel as it enjoys the spotlight of world attention for the first time since Cyclone Tracey in 1974.

After the early riptide of rhetoric on the human rights atrocities — violation is too pallid a term; after all 'overstaying parking' is a traffic violation — the first worrying signals creep in that action against the militiamen and their military cohorts may never happen. The UNHRC has voted in favour of an International Inquiry into abuses but solidarity was fractured by the breakaway votes of some in Asia who have excused the excesses of the Indonesian military in the past. The miscreants are largely safely back in the home of the 'motherland' which is hardly likely to release them or cooperate in investigations.

Previous experience does not lead to optimism. Karadzic and Mladic, arguably the decade's two leading human rights renegades, could easily have been apprehended and tried but smile and sit in smug safety in Paale.

Human rights are self-defining. They represent the entitlement of every person to dignity. Sadly, all too often the assertion by delinquent states of their sovereignty rights has been allowed to dominate the political agenda. Until murky, squalid *realpolitik* is rejected and replaced with oft-trumpeted but rarely implemented ethical foreign policy, we may expect timorousness on Timor. Let us hope that for once cynicism is unjustified.

Rubble, rubble, toil and trouble

Japanese bombs missed it. Cyclone Tracey whooshed past it. But it could not escape the wrecker's ball. The Darwin Hotel, the city's most valuable and prestigious heritage symbol recently vanished overnight, demolished in the pursuit of the golden grail of development.

According to its owners, the locally prominent Paspalis Group of Companies, it suffered from concrete cancer and was put out of its misery. But the perception of many is that this is too simplistic and the public received too little information on its condition. They ask:

- could its 'disease' have been cured at a reasonable cost?
- had the owners already had plans approved for the site's redevelopment as a luxury conference centre?
- why was there no proper public inquiry into the matter?

The affair again calls into question the laughable planning process — or lack of it — in the NT. Darwin City Council has pressed for some time for a more open consultative procedure. They are not alone. At present the notification, investigative and consultative regime is anything but open, comprehensive or inclusive.

Agitation may lead to a more democratic planning system. Until then the silent majority will continue to feel that a few pollies and their pals in the commercial world acting in cahoots resolve planning matters. • **KB**

NSW

NSW

The Glory of the Game Ltd

20,000 Sydneysiders marching on the Town Hall, Andrew Denton and Ray Martin rallying the masses, unions offering support and CFMEU workers walking off the Fox Studios site in protest, and lawyers told to be in court seeking injunctions.

What human rights are at stake in this imbroglio? Well none really, but on 15 October 1999 the NRL decided to eradicate 'the mighty Rabbitohs' (aka South Sydney Leagues Club) from the year 2000 competition. (A day that will live in bunnyfamy perhaps?)

Sydneysiders who follow rugby league got another object lesson, if one was needed, in how sport and its players and fans are commodities. As the *SMH* of 11 October 1999 reported: 'It's still not uncommon to see $7 million worth of players running around in front of 5,000 people.' (That is $1400 per fan, better up the admission prices).

Such an issue is hardly new and those trying to challenge the decision will find the law of little comfort.

Observers will recall that following the decision *in News Ltd v Australian Rugby Football league Ltd* (1996) ATPR 41-521 two parallel sets of players in different coloured teams were created to play each other in two competitions.

After a year the two sets of teams in the ARL and the Super League amalgamated to form the NRL. There were too many teams so 'hard' decisions had to be made about cutting the number of teams for the competition in 2000. Clubs were encouraged to amalgamate and several now have. The 'mighty Bears' (Norths) joined with the 'mighty Sea Eagles' (Manly) but Souths rejected any inter species breeding.

It was the fate of Souths that brought out the passion. In a full page piece in the *Sun-Herald* on 3 October, 1999, Ray Martin (yes that one) penned a full page story titled 'Why my beloved Rabbitohs can't die'. Rupert Murdoch certainly copped it from Ray for what he was doing to rugby league and Souths.

The point that seems to be missed is that rugby league operates in a particular market — in the *Super League* case, the market was identified as entertainment, not sport and not rugby league. In a failure to recognise what has been happening for more than 20 years Ray observed:

> Rugby league is my passion. And it's our game. The biggest shareholders in the business of rugby league are the fans. That's you, not News Ltd.

News Ltd owns 50% of the shares in the NRL, according to the *SMH* of 16 October 1999.

And further:

> Every great sport needs its tradition and its culture. You can't just dump 92 years of Sydney's sporting history because you've lost money on a business venture or because a club refused to jump into bed with you, for old-fashioned moral reasons. That's not what the glory of the game is about.

Who is he trying to kid? Sports teams are corporations run in conjunction with other corporations. Any student of company law will tell you what status the 'fans' and 'glory' have in determining the interests of companies.

Way back in 1984 the decision was made to limit the then Sydney Winfield Cup competition to 12 teams and Wests (the Magpies) were to be excluded. Wests sought succour from the law, received it from the first judge but lost it in the Court of Appeal and the High Court. In the course of its decision in *Wayde v New South Wales Rugby League Ltd* (1985) 61 ALR 225 a line was run that a 13-team competition could be operated and a viable club should not be excluded. Mason ACJ, Wilson, Deane and Dawson JJ responded by saying:

> The answer to this contention is that no amount of sympathy for Wests can obscure the fact that the League was expressly constituted to promote the best interests of the sport and empowered to determine which clubs should be entitled to participate in competitions conducted by it. It was upon this basis that the clubs, including Wests, chose to incorporate.

I suspect little has changed now. Teams that choose to swim in the corporate shark pool should find out the feeding rules. If, subsequent to the decision, Souths is 'saved', it will be for marketing reasons and not sentimental ones.

What is happening in rugby league is the natural result the corporatisation of sport. The same thing was happening in Rugby Union in 1995 with an irreversible decision to change the face of rugby from amateurism to professionalism. Peter Fitzsimons' book *The Rugby War* (Harper Sports, 1996) tells the story. The current World Cup line up should tell us all which code is likely to expand and appeal in the future. Cricket of course had been given its corporate makeover and divided into its colour gangs more than 20 years before.

In 10 years from now Souths will be forgotten (who now remembers Newtown or South Melbourne) and in 20 years I'll be surprised if Rugby League is even played. • **PW**

South Australia

Home invasions, skating and community pressure

The SA Attorney-General has bowed to pressure from some quarters and has released three draft Bills for community consultation which if passed will create specific offences related to home invasions.

The *Criminal Law Consolidation (Robbery and Burglary) Amendment Bill* creates a new offence of aggravated burglary or robbery with a maximum penalty of 25 years. The *Criminal Law (Sentencing) (Sentencing Principles) Amendment Bill* will require courts to consider a sentence of imprisonment in the case of home invasions. The *Criminal Law Consolidation (Serious Criminal Trespass) Amendment Bill* replaces the offence of burglary with serious criminal trespass and aggravated criminal trespass in a residence. This offence would carry a maximum sentence of life imprisonment.

The Attorney, Mr Griffin, had resisted calls for such offences and increased penalties for some time, but 'community pressure' had been building for some time. Aided and abetted by the Labor Opposition this pressure has now resulted in a situation where the Attorney now denies he has been 'rolled' according to the *Advertiser* newspaper.

Wiser minds would question the effectiveness of increased penalties for such offences as a deterrent. One Democrat member of the State Upper House has spoken against the proposals on this basis. Of course, this is simply more US style criminal justice which will more than likely simply add to the long term prison population with little impact on the crime rate.

On a different note ... the Adelaide City Council has done a back flip (and a triple wheelie ???) on an inner city skateboard park. While at first questioning the security of the proposed site and reneging on a commitment to the park, the Council reversed its opposition after skateboarders placed pressure on the Council by making their dissatisfaction known.

Community pressure it seems is still alive in Adelaide. It just depends on which community you belong to ... • **BS**

Victoria

The election ... results?

The outcome of the Victorian State Election has only been determined one month after the original polling day. All of the 88 Lower House seats, and half of the 44 Upper House seats were originally contested on September 16. But a supplementary election for the seat of Frankston East was necessary following the unfortunate death of Independent candidate Peter McLellan. The immediate results from the Lower House seats suggested a large swing against the Liberal/National coalition government in favour of the Labor Party, with the greatest shift coming from rural Victorians. The results of several seats could not be found without the counting of postal votes, revealing a close split of voter preferences between the two major parties — the seat of Geelong was won by an ALP member by only 16 votes!

After the Frankston East election, won by the ALP, the number of Lower House seats held by each party is as follows: Liberal — 36 (46); National — 7 (9); ALP — 42 (30); Independents — 3 (3). (The figures in parentheses represent the number of seats held in the former Parliament). Neither the Labor nor the Liberal/National coalition can form a majority government in their own right however, and both have been in the process of negotiating with the three Independent members from the Gippsland East, Gippsland West and Mildura districts.

The Independent members' minimum requirements to support either of two major parties in forming a minority government were focused on democratic processes and representation. They required that electoral procedure must be reformed in the traditionally conservative Upper House, and shortening the term of office there from eight to four years. They also called for legislation to restore the position of Auditor-General, a review of freedom of information restrictions, and for a judicial inquiry into the ambulance contracts affair.

It was announced on 18 October (at time of going to print) that the Independents will give support to the ALP, lead by Steve Bracks. It is expected that the ALP will be officially pronounced minority government on the 19th by State Governor, Sir James Gobbo. It has been indicated that the current care-taker Premier, Jeff Kennett may resign ... • **MR**

Western Australia

Anyone for QC?

With the November republic referendum looming and the potential redundancy of the title of Queen's Counsel, one might be forgiven for thinking that the debate over QC appointments in this State would drift silently away. As reported in August *DownUnderAllOver*, WA Attorney-General Peter Foss QC, has outlined reforms which will see the politicisation of the QC appointment process. Now the Bar Association, has indicated that its members would effectively boycott the process by foregoing nomination for appointment if the new plan were passed. With all the deserving senior barristers out of the running who could possibly be left to nominate? Sorry — did somebody say my name ...? • **TH**

Same sex, Same laws

Few (any?) speeches to Commonwealth parliament have included the words, 'I am gay'. In his first speech to the senate, WA Democrat Senator Brian Greig said, 'since the age of 12, I have known I am gay. This has profoundly influenced my life and given me personal insight into intolerance, prejudice and the hatred that I might not otherwise have experienced.' Senator Greig went on to make clear that his sexuality and experiences would be directly relevant to his parliamentary agenda. 'Equally, it has made me determined to stand against [prejudice] and to fight against all unjust laws by confronting law and opinion makers with the reality of their intolerance'. Two priorities were identified for attention in WA: (1) the discriminatory age of consent rule (16 for heterosexuals and 21 for gay men); (2) the omission of sexuality as a ground for discrimination in the State anti-discrimination legislation. • **MF**

WA's Alcatraz

In a recent decision of the WA Court of Criminal Appeal in *Bekink v R* [1999] WASCA 160, Ipp J detailed what he termed the 'lock down' that has been applied by prison authorities since a 'riot' in Casuarina prison on Christmas eve 1998. The Ipp J judgment describes a regime that applies to one half of the prison population, including prisoners who are not alleged to have been involved in the 'riot', that involves being confined to a cell of 3.5 metres square for 21 hours and 45 minutes each day. In the remaining 2 hours 15 minutes the prisoner has access, together with 26 other prisoners, to an indoor corridor of 20-30 metres length. Notwithstanding the broad powers of management enjoyed by prison authorities under the *Prisons Act 1984*, Ipp J expresses serious reservations about the lawfulness of the lock-down regime.

The *Bekink* case stands for the proposition, by majority, that the prospect of enduring the lock-down was not relevant to the exercise of sentencing discretion. The judgment does not appear to preclude a defendant adverting to the established principle that a potential breach of an obligation of the International Covenant on Civil Political Rights is a relevant factor to sentencing: *R v Hollingshed* (1993) 112 FLR 109. The lock-down regime described by Ipp J may well give rise to a breach of Article 7 of the ICCPR concerning 'cruel, inhuman or degrading treatment or punishment'. • **MF**

DownUnderAllOver was compiled by Alt.LJ Committee members Stephen Bouwhuis (ACT), Ken Brown (NT), Martin Flynn (WA), Adam Kirk (ACT), Russell Goldflam (NT) Tatum Hands (WA), Michael Ryall (Vic), Brian Simpson (SA), Peter Wilmshurst (NSW) together with invited writers listed under their contribution above.