OPINION

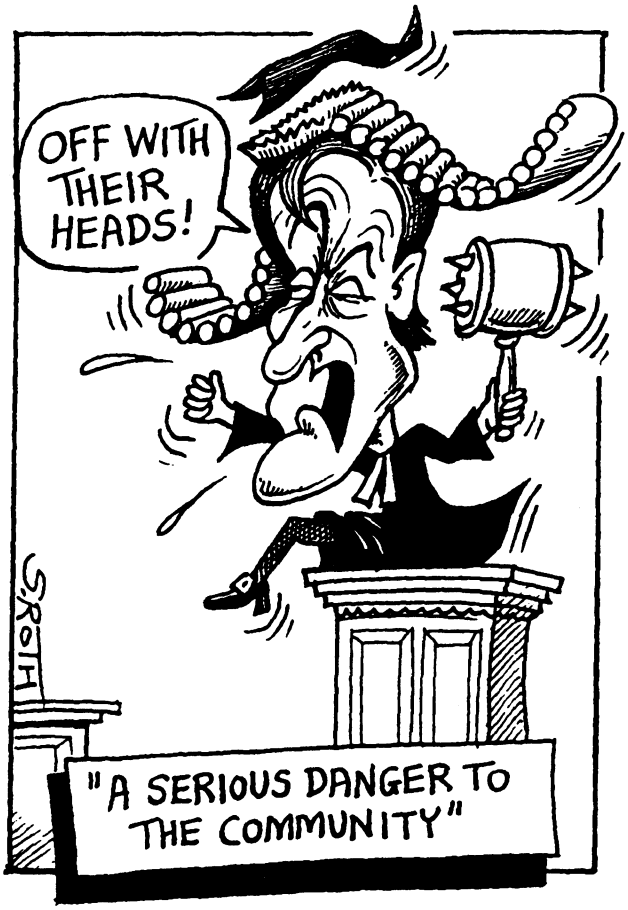
Law and order developments in Victoria

Amidst an extraordinary and determined lack of consultation, the Victorian Government is rushing through Parliament dramatic changes to law and order legislation. Police are being given powers that until now have only lived in their fantasies. They will be able to detain people and demand their names and addresses; they will be able to insist on the provision of fingerprints from people about whom they only have suspicions and they will be able to obtain a whole new range of forensic specimens from suspects. In the criminal trial domain, the defence is being forced into revealing the nature of its defence before the prosecution even opens its case. The availability of legal aid is being further reduced and judges will be able to order that unrepresented defendants in major cases be funded by the Legal Aid Commission from what little remains in its kitty.

A sentencing revolution

Fundamental alteration to sentencing legislation has provoked the loudest calls of anguish. The major changes brought about by the *Sentencing (Amendment) Act* 1993 include significant increases in sentences for all sex offences and violent offences (at least a third), the potential for indefinite detention for repeat violent and sex offenders and for protection of the community to be the predominant purpose of sentencing for sex offences.

The Bill created an almost unparalleled unity among legal bodies with the Law Institute, the Federation of Community Legal Centres, the Criminal Bar Association, the Council for Civil Liberties, the Criminal Justice Coalition and the Australian and New Zealand Association of Psychiatry, Psychology and Law all denouncing the legislation as ill-conceived, unlikely to achieve its stated aims and in breach of Australia's international obligations. A collective of women lawyers from Monash University, followed by the Convenor of Feminist Lawyers, called for reconsideration of the legislation and denied that the Attorney-General, Jan Wade, was acting 'in the best interests of women'. Later, the federal Human Rights Commissioner, echoed by the Commonwealth Attorney-General and the Law Council of Australia, called on the Victorian Attorney-General to amend the Bill because it infringed Australia's human rights obligations. Even the Government-controlled Scrutiny of Acts and Regulations Committee in a report released minutes before the sentencing legislation was to be debated argued for fundamental changes to its approach.



Indefinite detention

The most abhorrent aspect of the legislation is its potential to hold large numbers of prisoners (more than 1100 according to Professor Freiberg of Melbourne University) in gaol on the basis that they represent 'a serious danger to the community'. The criteria for assessing them as such include their character, past history, age, health or mental condition. Indefinite detention in the *penal system*, therefore, can take place because of the danger represented by a person who is mentally or physically ill!

Mrs Wade maintains that the legislation is based on comparable provisions in Queensland. This is not accurate because the Queensland provisions, objectionable though they are, apply to only a handful of offences, whereas the Victorian provisions apply to in excess of 60 offences, some of which carry penalties of only three years' gaol.

Reviews of the indefinite detention are to take place after the actual sentence of imprisonment has expired and then at three-yearly intervals, in stark contrast to the frequency with which reviews occur in other places where preventive detention is permitted. One of the sinister sides to the Government's law and order strategy is that there are no plans to improve rehabilitative services in prisons so at the end of each three-year period it is most unlikely that any new facts or circumstances will have arisen. If anything, gaol will have worked its course and the prisoner's circumstances may well have deteriorated. The result? There will be no reason why people previously detained should not further be detained – indefinitely.

The new (ill-considered) ideology

The sentencing changes are founded on the now discredited notions that dangerousness can be predicted with accuracy by mental health professionals and that the imposition of harsher sentences will reduce the incidence of crimes of violence. All this is supposedly being done to protect the community. Ironically, though, as the *Age* editorial of 10 May 1993 pointed out, the

Attorney's pandering to the uninformed populist lobby for harsher sentences and protection of victims may well completely backfire.

First, those few violent offenders who do consider the consequences of their actions may well feel tempted to take even more violent steps to avoid apprehension if they face sentences potentially longer than those for murder. Second, few will plead guilty. This will dramatically increase the cost of administering justice in cases which in the past would have involved pleas of guilty. Third, in these cases it will force victims whom the Act arguably seeks to protect to go through the traumas of being witnesses and testifying against their assailants.

Fourth, the Act will not deter the individuals concerned; nor is it likely to deter others from such offences. Reams of criminological findings attest to this. Fifth, its punishment will in good part be visited by embittering the recipients of such dispositions who will recognise that they are to be imprisoned not so much for what they have done but for what they might do. The inevitable consequence will be serious management problems in prisons because of the anger and despair that will be felt by those sentenced indefinitely – all of this in a State whose rates of crime are no worse than in other Australian jurisdictions. Sixth, the new detention provisions will massively increase the size of the gaol population with all of the cost ramifications that that will entail. Hopefully, the idea of reintroducing 'hulks', now called 'floatels', which is being mooted in England to alleviate gaol overcrowding, will not appeal to the Kennett Government as much as their current dalliance with private prisons!

In making the protection of the community the principal purpose for which a sentence is imposed, the Act is at odds with the long-standing and carefully developed common law rationales for sentencing. The relevant principles of proportionality and parsimony sound technical but in fact they are based on simple commonsense. The first holds that people should be sentenced in accordance with the seriousness of what they have done; the second that they should receive as minimal a penalty as is necessary to achieve the purpose served by the sentence, be that punishment, deterrence, rehabilitation etc. The proposition that offenders should be detained because of the danger they might pose runs counter to fundamental principles of fairness and humanity. Unfortunately, it appears that such notions are being by-passed in the drive for retribution against lawlessness mendaciously represented by the Kennett Government to be overwhelming the State of Victoria.

The task ahead

Monitoring of the impact of the Kennett Government's changes will be crucial for all jurisdictions with governments tempted to emulate the Victorian initiatives. In due course, it will be a careful analysis of the continuing incidence of violent crime, unsolved by the harsh sentencing regimen of Attorney-General Wade, together with the soaring costs of escalating rates of imprisonment, that will lead to the repeal of Victoria's new sentencing legislation.

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Nicholas Brunton is a Melbourne lawyer. Ian Freckelton is a Melbourne barrister. Glenda Waghorn is a Melbourne lawyer.

Correction

In the last issue (Vol 18, No. 2), we wrongly described a contributor, David Fraser, as teaching law at Macquarie University. He in fact teaches law at the University of Sydney.