THE MELBOURNE AGE

SUNDAY, 6 DECEMBER 1992

THE SACKING OF JUSTICE

The sackin

SUNDAY AGE 6 DEC 1992

The Victorian Government's decision to sack judges ultimately affects all of us, argues Michael Kirby.

CHARLES Dickens begins his novel 'The Tale of Two Cities' with the assertion that the revolutionary days described were the "best of times" and the "worst of times". These words could be used this week in relation to the respect for judicial independence in Australia.

In the past seven days, judicial independence has suffered a serious blow in Victoria. Ten judges have been effectively "sacked". This has happened despite:

- Long established conventions previously followed when judicial courts were abolished;
- Principles for the independence of the judiciary accepted by the international community;
- Provisions of the act of the Victorian Parliament, under which the judges in question were appointed, that they would hold office "during good behavior" and be removed only on an address of both houses of Parliament;
- The promise by the Victorian Premier, Mr Jeff Kennett, in July 1991, when he was in Opposition, that "there is no suggestion from the Coalition of any judges being removed";
- A letter by the Attorney-General, Mrs Jan Wade, then the Opposition spokeswoman on legal matters, denying that her party had a "hit list" of office-holders, including judges, and a similar assurance to Parliament when the bill abolishing the Compensation Tribunal was under consideration; and,
- Protests from judges, lawyers and other citizens throughout the country.

In many countries judges are cowed by the civil and military dictators and autocrats who govern. In some countries, judges are elected and hold office for a limited time. In other places, judges are no more than trained public officials.

But in Australia we are the beneficiaries of the constitutional struggles of England to secure an independent tenured judiciary. Judicial independence rests upon the security of judicial appointments. If judges hold office at the whim of the executive government — or are liable to lose office on a change of government or change of fashion — they will be politicised. They will be tempted from their duties as judges to avoid the disfavor of those who enjoy political

In the highly charged circumstances of Australian politics, this would completely change the relationship between the judiciary and the powerful interests whom judges sometimes have to deal with: including big government, big business and big media.

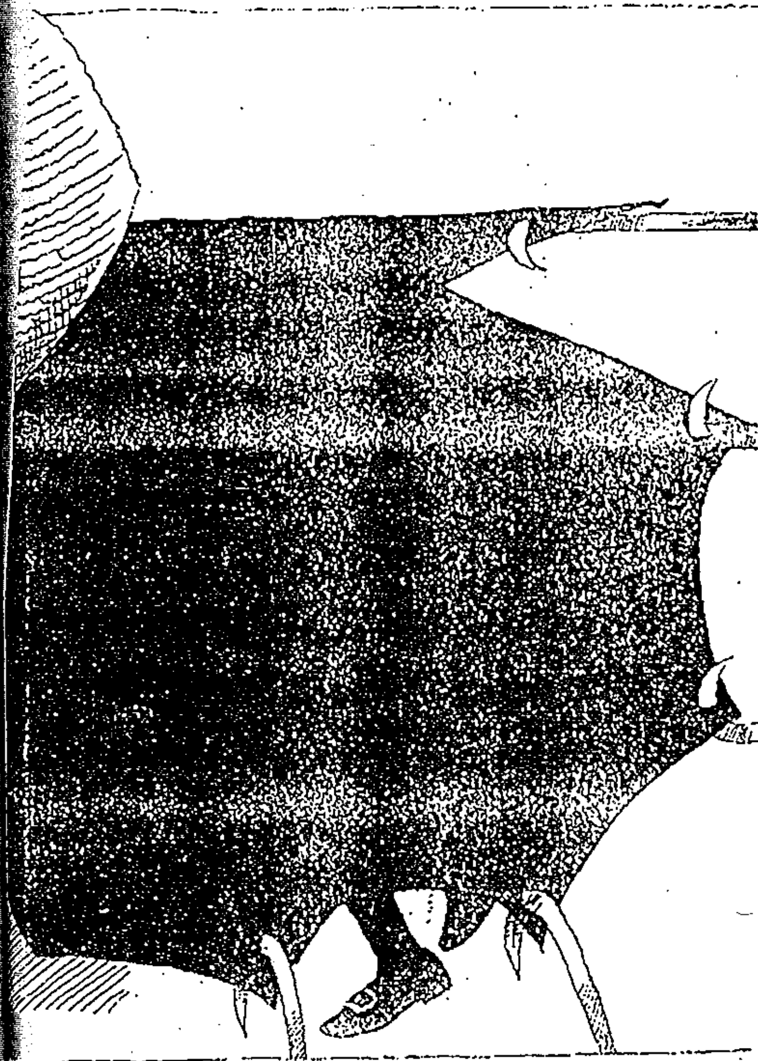
Fortunately, the Federal Constitution, which can only be changed with the approval of the people at referendum, protects the tenure of justices of the High Court and other federal courts. But there is no equivalent constitutional protection for state judges, except arguablythe state Supreme Courts.

Conventions are being thrown overboard. The previous institution of judicial independence is being sacrificed to political expedience. We will

At risk is the vigilance and courage of the judges who are the ultimate protectors of basic rights and liberties in Australia. What is at stake is not just the personal interests of 10 Victorian compensation judges. It is the avoidance, nationally, of a very bad precedent. Unless reversed, this precedent will remain to haunt us. It will tempt politicians in the future to a similar erosion of judicial independence in Australia.

The statement issued by the Attorney-General justifying the effective dismissal of the Victorian compensation judges is completely unsatisfactory. It rings with assertions of a commitment to "the maintenance of the value of judicial independence". But what it seeks to justify is an act which seriously undermines

g of justice



No one disputes that courts may be reconstituted or that the Victorian Compensation Court could be abolished. But when this happens, the principle is clear. It is stated in the 'Universal Declaration of the Independence of Justice' accepted by the United Nations:

"2.39. *In the event that a court is abolished, judges serving on that court shall not be affected, except for their transfer to another court of the same status.*"

It is no excuse that there is no exactly equivalent court or tribunal to which the appointed judges can go. Convention and international principle require that the judges either be appointed to the County Court or to a court or tribunal of equivalent status. Only one of the judges was accorded that right.

Much of the Attorney-General's justification for the course the Government has taken rests upon the right to reorganise compensation litigation. But as that is not contested, the justification rings sadly hollow.

It is said that lots of people are suffering and that the judges must be lumped in with "any highly qualified individual who unexpectedly loses a public office". By this argument judges are henceforth to be treated as no different from other public servants. Well, that was how it was in England before the Act of Settlement 300 years ago. It has to be said plainly that judges, including compensation judges, are not ordinary public servants. This is not a matter of empty pride. Judges have to do strong, courageous and sometimes unpopular things to powerful people. If this precedent stands in Victoria, state judicial officers throughout Australia will know henceforth that, in reality, they hold their offices at the risk that politicians can easily get rid of them, or some of them, by the simple expedient of abolishing the court they sit in. The inferences will be more readily drawn because of two recent precedents:

- The failure of the former New South Wales Government to reappoint five of the magistrates of the old Court of Petty Sessions when it was replaced by the Local Court of New South Wales in 1982;
- The refusal of the Federal Government to reappoint Justice James Staples to the Australian Industrial Relations Commission when it replaced the Arbitration Commission in 1988.

Fortunately, in NSW there was a different story this week. The Independents, who hold the balance of power in the state Parliament, earlier extracted from the Government an undertaking to entrench judicial independence in the law of that state.

THE NSW Parliament passed two bills, which now await the royal assent to pass into law, that insert in the constitution a protection for judicial officers of NSW against removal from office except for "proved misbehavior or incapacity" found by both houses of state Parliament in the same session. And there is included an entirely new provision on "abolition of judicial office". It states: "*s56(2). A person who held an abolished judicial office is entitled (without loss of remuneration) to be appointed to and to hold another judicial office in the same court or in a court of equivalent or higher status, unless already the holder of such an office.*"

It is not too late to hope that the Victorian Government will have second thoughts about this serious assault on judicial independence. It is little wonder that judges of courts around Australia are alarmed by what has happened.

It is to be hoped that the Government of Victoria will return to basic constitutional principles, and that the Parliament of Victoria will take its own initiatives to entrench judicial security in the way the Parliament of NSW has done this week. Let this serious wrong be righted. And put beyond repetition.

Justice Michael Kirby is president of the New South Wales Court of Appeal and chairman of the executive committee of the International Commission of Jurists.