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Law Oration 2013

Victorian Attorney-General
The Honourable Robert Clark MP

‘Tradition and reform in the law’

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About the Law Oration

The Law Oration is a free public event that explores important legal issues that affect the lives of all Victorians.

It is jointly presented by Victoria Law Foundation and Melbourne Law School and provides an opportunity for Victorians to gain an insight into interesting and important legal topics and issues. Speakers have included jurists, academics, diplomats and politicians.

The Law Oration 2013

Attorney-General, The Honourable Robert Clark MP, offered a fascinating insight into law reform at the Law Oration 2013 on 3 October 2013.

The Attorney-General shared his views on tradition and reform in the law, different possible approaches to law reform, current law reform projects and opportunities in Victoria.

To find out more about the oration, or to read or listen to past orations, visit www.victorialawfoundation.org.au/oration.

Law Oration 2013

By Robert Clark MP, Attorney-General

'Tradition and reform in the law'

I am honoured to have been invited to deliver this year's Law Oration under the auspices of Melbourne University Law School and the Victoria Law Foundation, two fine institutions each dedicated to greater knowledge and understanding of the law. As an alumnus of the law school, it is a particular pleasure to return this evening.

My topic is tradition and reform in the law. Both tradition and reform are generally regarded as noble qualities, but they can also be at odds. What is the role of each, and how can they best be reconciled?

The case for tradition and reform

It is easy to make the case for both tradition and reform.

Tradition upholds the wisdom of centuries, the institutions that have brought us freedom, democracy and the protection of the individual against tyranny or overbearing bureaucracy. Tradition supports social stability and safeguards the legitimacy of our institutions. Tradition keeps each of us in check and helps gives us confidence that others will keep themselves in check. Tradition not only teaches us *how* things should be done, but through noble stories of courage and sacrifice teaches us *why* things are done as they are, and the dire consequences that can follow if they are not. Tradition favours the tried and true over the untried and untested.

Reform, on the other hand, offers hope, progress and improvement. Reform can end follies, injustices, and out-dated practices. Reform can harness the fruits of new knowledge, new technology and new experience. Reform can bring the law into line with contemporary needs and wants. Reform can extricate the law from dead-ends or misguided precedents. Reform can make the law more accessible and affordable. Reform can give the community greater ownership of and commitment to the law through better understanding of its relevance and fairness.

When we look back over the history of our law and our courts, we can see examples of successes and failures in both tradition and reform.

Successes and failures of tradition

The successes of tradition underpin much of what we take for granted today – the liberty of the subject, freedom of speech, habeas corpus, trial by jury. The then Chief Justice of New South Wales, Hon James Spigelman, listed many of the traditional and valuable presumptions of the common law in his McPherson Lecture of 2008, including, for example, that Parliament does not intend, by legislative enactment to:

- retrospectively change rights and obligations;
- infringe personal liberty;
- interfere with freedom of movement or freedom of speech;

- alter criminal law practices based upon the principle of a fair trial;
- restrict access to the courts; or
- deny procedural fairness to persons affected by the exercise of public power.[i]

In listing these presumptions, it is important to recognise that they are not only *presumptions* of statutory interpretation. More importantly, they are *norms* that are valued in themselves. In other words, they are presumptions not just because courts and lawyers seek to preserve common law rights, but because neither the community nor Members of Parliament would want lightly or unknowingly to detract from those rights.

However, as well as these successes of tradition in the law, we need to recognise that there have also been manifest failures. The common law for centuries was unduly focussed on the technicalities of forms of action, and equity on the minutiae of procedure. Probably for these reasons, lawyers and courts have often not enjoyed good reputations in the broader community.

Shakespeare's line in Henry VI, Part 2 "The first thing we do, let's kill all the lawyers." is well known, and Hamlet's musings about the skull of a lawyer are even more derisory.

Hon Philip Cummins, chair of our co-host this evening, Victoria Law Foundation, has aptly cited Charles Dickens' opening paragraphs from *Bleak House* describing Lincoln's Inn Hall in London on a cold and foggy November afternoon in 1853.[ii] I quote in part:

> *On such an afternoon, some score of members of the High Court of Chancery bar ought to be – as here they are – mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of equity with serious faces, as players might.*
>
> *… This is the Court of Chancery.*

Even after the monumental reforms of the Judicature Acts, Gilbert & Sullivan still have the Lord Chancellor in *Iolanthe* telling of his "new and original plan" as a young lawyer that he would read his briefs beforehand, not accept payment for work not done and not to deceive jurors or judges.

Successes and failures of reform

Reform also has had both its successes and its failures.

Despite Gilbert & Sullivan, we do owe a lasting debt of gratitude to the reformers of the 19th century who brought us the Judicature Acts, rationalising the superior courts and allowing the same courts to dispense both common law and equity, and who also gave us clear and elegant codifications of the law such as the Goods Act, with its simple and far reaching statements of principles such as fitness for purpose and merchantable quality.

In more recent years, we have had the Theft Act, justifiably cited by Justice Weinberg as a shining example of clear and simple codification of previously tortuous and convoluted law.[iii]

We should also pay tribute to the campaigners for plain English drafting, which has become such well accepted practice in Victoria that we tend to take it for granted, only to be forcefully reminded of the magnitude of its achievements when we happen to read the legislation, or the court rules, of jurisdictions that have not adopted plain English.

On the other hand, not all reform turns out to be good. The failures of history tend to be consigned to obscurity, but we can be glad we have seen the back of measures such as Sedition Acts, the licensing of newspapers and the Court of Star Chamber.[iv]

In more recent times, Justice Weinberg has identified the law of defensive homicide and changes to sexual offence laws as examples in Victoria of where well intentioned reforms have failed to achieve their objectives and opened up other problems, and are themselves now in need of change.[v]

We also have seen in recent decades bookshelves in jurisdictions around the world groaning with reports of Law Reform Commissions that have not been implemented. Some would say this shows the folly of governments and legislatures in failing to heed or act on the wise advice of law reform commissioners. Others would say it shows the folly of law reform commissioners in proposing changes to the law that are unacceptable in principle or impracticable in implementation. However, on either explanation, there has been a serious failure of the law reform process.

Reform can enhance tradition

It is important to make the point that reform is not necessarily in conflict with tradition. Indeed, our forebears in medieval times had a completely different notion of reform to modern times. In their eyes, reform consisted of the restoration of ancient liberties after recent degradations and abuses, and anything new in the substantive law was suspect.

Even when reforms do consist of innovations in the law, as we would usually expect these days, Edmund Burke and others have made the point that reforms do not necessarily overturn or undermine tradition.[vi] To quote Benjamin Disraeli:

> *Change is constant; and the great question is, not whether you still resist change which is inevitable, but whether that change shall be carried out in deference to the manners, the customs, the laws and the traditions of a people, or…in deference to abstract principles and arbitrary and general doctrines.* [vii]

One should take with caution claims about the inevitability of any particular change, as the failed prophecies of inevitable change by Karl Marx and many others demonstrate, but Disraeli's point about the crucial differences between possible approaches to change is a sound one.

How should issues of reform be approached?

So where are we left, if both tradition and reform can bring both successes and failures? How can we tell when tradition should be upheld, and when it should be

departed from? How can we tell when reform will be beneficial, and when it will fail? Are we able to say anything more than that we need to decide on a case by case basis?

My contention is that there *is* more we can say about how we can and should approach issues of changing or not changing law or legal practice. We can say more about attitudes and approaches to change, and we can say more about the institutions and processes that are more likely to deliver good outcomes.

Understanding

What is crucial to successful law reform is that any decisions about change need to start with understanding. Reform requires a sound knowledge, not only of the current state of law and practice, but why that state exists. What has led to law and practice being what it currently is? What have been the vices and problems that have led to particular elements of the current law? What were the gains made by past reforms that have shaped the current law?

Understanding is also needed of what changes in the external environment may have created a need for reform, be those changes social, technological or economic. The phenomenon of sexting, for example, would seem due to both social and technological changes, and the resulting inadequacies in the law have led to the government commissioning the Parliamentary Law Reform Committee to investigate, with a range of recommendations by the Committee currently being considered by government.

Respect

Alongside understanding of the status quo, good law reform usually requires respect. There may or may not be opportunities for improvement, but what we currently have is usually there for what is, or at least was, a good reason.

Those who act in accordance with current law and practice are usually doing so in the sincere belief that they are doing good work in a good way. If change is to be made, it is desirable if at all possible to bring current practitioners along with the change, either accepting its need or at least understanding and respecting its content and reasons.

In other words, the “angry young man” approach to law reform is seldom the right approach, and perhaps even worse is what might be characterised as the “high horse” approach.

Some present may have watched the BBC political comedy *The Thick of It* and recall the words of the aspiring political leader, Dan: "I like getting on my high horse. I look good on it. Like a knight."[viii] That approach is not likely to succeed with law reform. Anger and self-righteousness tend to be the enemies of understanding and of dispassionate and constructive consideration, and sweeping reform introduced in self-righteousness is likely to do more harm than good.

Evidence and analysis

Following understanding and respect in the reform process come evidence, analysis and mental experiment. By what processes does the current law achieve or fail to achieve its objectives? What effects would various possible changes have?

Careful law reform looks, of course, to evidence in other jurisdictions. How comparable are those jurisdictions? How have they tackled the issue? How has it worked there, and how might it work here?

Systematic, competent and honest research is essential for good law reform, and legal and social science research is today much assisted by the ability to access enormous databases and to use computerised research.

However, there can be a consequent temptation to regard evidence as the be-all and end-all of law reform, or to argue that so-called "evidence based" reform is by virtue of that fact alone legitimate, objective and unquestionable.

There are several flaws in that approach. The first is that errors can be made in the collection and presentation of evidence. The second is that people can draw conclusions from evidence that are not in fact supported by that evidence. The third is that an agreed and validated body of evidence often can legitimately be analysed in different ways by different people. The fourth flaw is that positive findings do not automatically translate into normative outcomes. "Is" does not automatically produce "ought".

To illustrate the point with one contemporary example, it does not seem immediately persuasive to argue for changes to sentencing approaches in Victoria based on recent changes in the US, when the average rate of incarceration in the US is between five and seven times the rate of incarceration in Victoria.

Detail

Next in making reforms usually comes attention to detail. Occasionally changes are simple – repeal a failed provision, insert a provision that corrects an obvious error. Unfortunately, simple changes seem to be a small minority.

Thomas Edison is often quoted as saying that invention is one per cent inspiration and 99 per cent perspiration, and the same goes for the successful implementation of the detailed collateral and subsidiary issues involved in most legislative reform. Even when the policy detail has been decided upon, that detail still needs to be formulated in statutory amendments that accurately express what is sought, and with all the consequential amendments and necessary cross-references.

I might add that, perhaps counter-intuitively, attention to detail is often as important to a short piece of legislative reform as to a long piece of reform. Winston Churchill is quoted as having said "I'm going to make a long speech because I've not had the time to prepare a short one." Similar may be said about legislative reform. The most successful statutory codifications, with their sparse clarity and elegance, require careful thought and deliberation over every word and phrase.

Implementation

Lastly in the processes of effective law reform come persuasion and implementation. One can have an outstanding case for a reform proposal, or indeed for keeping the status quo, but if one cannot persuade others to give effect to that case, one will be unsuccessful. Furthermore, if reform is to work well, those who will need to

implement it need to understand what it consists of, and almost as importantly, understand why the change is being made, and hopefully be persuaded of its merits.

Institutional roles in law and reform

Having discussed law reform *processes*, I now turn to the roles of various *institutions and individuals* in changing or not changing the law.

Views as what the law should be can come from many different directions –from law reform commissions, from legal professional bodies, from stakeholder groups, from academic writers, from media organisations, from governments, from Parliamentary committees, and from individual citizens.

However, ultimately there are two recognised sources of definitive statements of the law – Acts of Parliament and rulings by the courts.

The role of courts and judges

There are some who say that courts ought to take the lead on law reform, and declare changes to the law when Parliament, as they would put it, "fails to act", or indeed regardless of what Parliament might think or not think.

In my view, that would be a profoundly dangerous approach. As then Chief Justice of the High Court, Hon. Murray Gleeson, put it in 2007:

> *There are some who say that … the best judges are those who break free of the myth of impartiality and exercise judicial power in order to promote social ends.*
>
> *If this were ever to become a general opinion of the way judges behave, then there could be no public confidence. … If the idea of judicial impartiality is consigned to the intellectual scrap heap, judicial authority will soon follow it*...[ix]

Furthermore, as Chief Justice Gleeson put it in his sixth Boyer lecture:

> *The method of the common law is based upon experience, reflected in precedents. From precedent, principle is derived and the application of principle creates further precedent. The development of principle sometimes involves departure from earlier precedent, but the technique always requires an understanding of the policy of the law. It does not turn upon the personal choices or preferences of individual judges. Legal reasoning that commands respect does so upon the basis of adherence to legal principle.*[x]

It follows that judges should not be expected or required to bring personal choices or values to decision-making.

Where society has common values, it is consistent with judicial method for judges to be asked to apply those common values, because those values are a known and expected underpinning to the explicit provisions of the law.

However, that is much harder for judges to do so these days, when community values are more likely to be contested. A clear area where difficulties may arise in this regard is in the application of rights laws, which I have discussed on another occasion recently.[xi]

Similarly with sentencing law. Parliament has traditionally set maximum penalties for offences, leaving it to courts to judge the gravity of each individual case of offending in comparison to the maximum sentence. However, for many offences the typical sentence imposed has over time become only a small fraction of the maximum, to the point where some sentences handed down by courts have become a matter of considerable public controversy and disquiet.

In these circumstances, it is the responsibility of Parliament on behalf of the community to specify more clearly what is expected in terms of sentencing, rather than leaving judges exposed to criticism for what are ultimately policy decisions.

That is one of the reasons why the Government has been preparing and bringing to Parliament legislation that will in our view not only make sentencing in Victoria stronger and more effective, but also give clearer guidance as to legislative expectations and reduce an unfair burden on the courts. Legislation either enacted or in preparation is abolishing suspended sentences, introducing statutory minimum sentences for assaults of gross violence, and establishing baseline sentences that will indicate the median sentence that Parliament expects to apply to various offences.

These reforms retain judicial discretion where appropriate, but in my view strike a better balance in what Hon James Spigelman has described as the "tension between the principle of individualised justice and the principle of consistency".[xii]

That is not to say that judges have not played a key role in making laws better. Judges do so through providing expert suggestions and advice on possible legislation, not in a policy sense, but in terms of making practical improvements to how courts and the law operate. They also contribute to possible improvements in the law through indicating in judgements matters that they consider may require Parliament's attention.

Courts and procedural reforms

As well as contributing in this way to changes to the law, courts can, and generally should, the prime driver of procedural and operational reform, with governments and Parliaments backing the courts through legislation where needed and supported.

This is a key reason why the Victorian Government is working with the courts to transfer responsibility for court administration from executive government to the courts themselves.

It is a surprise to many that, while judges are independent of executive government, the administrative staff who support the courts are public servants who ultimately answer to the Secretary of the Department of Justice, and thus to executive government.

This derives from long standing practice. Courts are an arm of government under the Crown, and thus the Crown needs to provide the means for courts to undertake their functions.

However, while the Crown needs to provide the administrative support for the courts, it is bad in principle and bad in practice for that support to be provided via a government department.

It is bad in principle, because it opens the potential for executive government to interfere in the operations of the courts, and bad in practice because it has meant that much of the operational functioning of the courts has been outside of the courts' control. Court administrations have, for example, been heavily dependent for facilities construction, IT and personnel services on other parts of the Department of Justice, parts which also have responsibilities for supporting diverse other functions of the Department.

The courts, both in Victoria and in other jurisdictions, have for a number of years been seeking to be vested with control of their own administrations. This occurs at a Commonwealth level, with administration generally vested in individual courts, and in South Australia, where a Courts Administration Authority provides administrative support for the Supreme, District and Magistrates' courts.

The Victorian Government has committed to reforms using the South Australian model as the starting point, and those reforms are now well advanced. Already, many of the functions supporting the courts have been consolidated into a separate division within the Department of Justice – the Courts and Tribunals Service - with an advisory board chaired by the Chief Justice and consisting of the head of each court and VCAT. Legislation is in preparation to establish a separate entity, to be known as Court Services Victoria, to be governed by the heads of jurisdiction.

Under this model, the courts will remain part of the Crown, but Court Services Victoria will be headed by a chief executive officer answerable to the heads of jurisdiction rather than to the Secretary of the Department of Justice. Parliament will continue to determine through the budgetary process the allocation of public resources to each court, and Court Services Victoria will provide administrative staff and facilities to each court in accordance with the resourcing level determined by the Parliament.

The role of Parliament and governments

It follows that if the roles of courts are judges in law reform are as I have described, then it must fall to Parliament to make or not to make broader changes to the law.

Parliaments and governments from time to time are criticised in this regard by some who consider themselves the real champions of law reform. Parliaments and governments are accused of being weak, cowardly, neglectful or incompetent. In short, it is said, they are not fit to have charge of law reform, and hence the task should be taken from them and given to others more worthy.

Needless to say, I profoundly disagree with such a proposition. Like lawyers and courts, Parliaments and governments have not necessarily enjoyed good press over the years. Like lawyers and courts, they have had both successes and failures. However, if you give up on Parliament as the supreme deliberative and decision-making body of the community, you give up on democracy. If there are failings in

Parliament, you need to tackle those failings head on, not look to circumvent Parliament.

Furthermore, I venture to say that some of the agitation about Parliament and law reform is not truly about shortcomings of the Parliamentary process, but about the fact that Parliament disagrees with various law reformers regarding the desirability or importance of the changes to the law that those reformers seek.

A crucial role of Parliaments and governments is to decide and set priorities between competing community needs and wants. This is most obvious in relation to financial matters – deciding on taxing and spending levels, deciding on spending priorities. It is also so in relation to legislative and other Parliamentary priorities. Legislating is not a free good. You will have gathered from what I have said earlier that drawing up legislation, particularly reforming legislation, takes a considerable amount of time and effort, and thus also of resources. Public servants, Ministers, Parliamentary Counsel, Cabinets, and Parliaments do not have unlimited time and resources. Priorities need to be set. Legislation to reform the law of constructive trusts, for example, may need to be weighed for priority against laws to restructure public transport, or laws to improve product safety or education.

Furthermore, governments or Parliaments may simply disagree with law reform proposals put forward by advocates of reform, or decide early on that the potential upsides of what may be adopted from a learned report does not justify the effort required to separate the wheat from the chaff. Inaction by government in those circumstances is not a sign of neglect; it is a sign of government doing its job.

In any event, to anyone who claims that Governments and Parliaments are not interested in law reform, I simply say – look at the reforms currently underway in Victoria.

Improving law reform processes

Nonetheless, we should continue to seek ways in which to get worthwhile law reform proposals into Parliament and onto the statute books more efficiently and effectively than has happened in the past.

To give just one example, I am encouraging and facilitating wherever possible the drafting of actual proposed amendments to the law as part of the development of law reform proposals, be it by the Law Reform Commission or by expert advisory groups. Similarly, I am seeking wherever possible to have draft changes to the law incorporated into consultation papers on possible law reforms that are issued for public comment.

In my view, there are three substantial advantages in this approach. The first is the time that is saved. When a worthy and weighty law reform commission report hits the Parliamentary table, it triggers a massive amount of work to be done within the public service, not to mention by the responsible Minister. The first part of that work is in assessing and deciding on which reforms to seek to implement. However, by far the largest part of the work is in deciding how to translate accepted recommendations into drafting instructions and hence into actual legislation.

Receiving a law reform commission's proposals in drafted legislative form will dramatically shorten that process.

Secondly, providing government and Parliament with drafted legislative proposals will greatly improve the clarity of communication of what is proposed. At the end of the day, law reform requires legislation, so why should law reformers not be enabled to convey exactly what they wish to propose?

Thirdly, preparing drafted legislative proposals can be of assistance to the writing of law reform reports as well, because the task of translating policy objectives into drafted law can often throw up issues about policy proposals that would not otherwise become apparent.

Of course, drafting of legislative provisions as part of law reform proposals is not a cost-free option. Nonetheless, if used judiciously, I believe the gains from this approach can far outweigh the costs.

Already, this approach has been followed with the recent Weinberg report on the second stage of jury directions reforms, and for consultation papers currently being finalised in relation to possible reforms to defensive homicide and sexual offence laws. A similar benefit is being achieved through asking advisory groups on various criminal and civil procedure reforms to oversee and review the drafting of Bills before those Bills are brought to Parliament.

Roles of other bodies

Law reform can also be improved through recognising the contributions that are or can be made by many bodies other than the courts and Parliament, both where contributions are solicited by governments and where individuals or institutions see a need for reform and put forward a case.

When governments solicit advice, they should be prepared to do so from the sources best placed to give advice on the matter in question. The current Victorian government has greatly benefited from expert advice from a wide range of sources both within and outside the Victorian public sector.

We have given important references to the Victorian Law Reform Commission on topics including succession laws, the Crimes (Mental Impairment) Act and jury empanelment. The Commission's report on succession laws will be tabled in Parliament shortly, and I expect it will make a valuable contribution to reform of the law in this area. The work previously done by the VLRC on guardianship reform is also being drawn on extensively in current considerations of possible changes to the law in this area.

We have also sought expert advice from a range of other bodies within the public sector, including from the Sentencing Advisory Council on our gross violence and baseline sentencing reforms, from the Victorian Competition and Efficiency Commission in relation to possible reforms to the Wrongs Act[xiii], from the Parliamentary Family and Community Development Committee in relation to the handling of child sexual abuse allegations by non-government organisations, from the Parliamentary Scrutiny of Acts and Regulations Committee in relation to the

Charter of Human Rights and Responsibilities Act and from the Parliamentary Law Reform Committee in relation to donor conceived children, sexting, and persons with intellectual disabilities in the justice system.

I should also place on record the important role that members of law schools can play in contributing to law reform. Among them in recent times have been Mr Jason Bosland of this Law School, who has provided important insights that have contributed to the Open Courts Bill currently before Parliament, Dr Kate Fitz-Gibbon of Deakin Law School who has done valuable work in relation to defensive homicide reform, and several faculty members of Bond University who have undertaken detailed research on social media and the law.

Legal and other professionals also, of course, make significant contributions to law reform, for example to projects such as jury directions and civil procedure reforms. Arguments for change made by the profession were also decisive in seeing Victoria's acting judges regime replaced with reserve judges appointed only from amongst former tenured judges, and in bringing about the scrapping of mandatory pre-litigation requirements in civil procedure law.

The contributions to law reform of people who are not professionals or experts are also vital. I mention in particular the tireless work of crime victim representatives, who have been instrumental over many years in bringing about reforms such as the Victim's Charter, strengthening of the Victims of Crime helpline service and SupportLink, and greater awareness of police, prosecutors and courts about the roles and rights of victims. The recently established Victims of Crime Consultative Committee, which brings together victims, judicial officers, police, parole representatives and others, is providing a valuable opportunity for the exchange of ideas and the identification of opportunities for further reform.

How should tradition be sustained?

I have spoken at length about how best to address issues of change and reform. I should also say a few words about how best to sustain traditions.

In any time and place it is necessary and important to uphold traditions that support the proper role of the courts and reinforce the fact that courts as institutions are greater than the people who comprise them at any one time.

To uphold such traditions, knowledge of history is vital. You can't fully know where you are unless you know where you have come from. Recently, I had occasion to talk about where courts were in the Westminster tradition some 900 years ago, and how courts have changed to where they are today.[xiv] It is important for each of us involved in the law to understand both *how* and *why* courts changed from being sub-committees of the king's council of advisers 900 years ago to being the independent institutions of justice they are today.

As well as this macro history, there is micro history. There are the stories of great successes and failures in advocacy, of heroism and villainy, of wisdom and folly. These comprise the lore that is passed on through occasions such admission ceremonies, judicial welcomes and farewells and bar council dinners. These occasions provide both the role models and the dire warnings for up-and-coming

practitioners, and thus help form the values, standards and patterns of conduct that are transmitted from generation to generation.

These traditions are taught and reinforced not only on these special occasions, but also through daily reminders such as robing, insignia and the small formalities of sitting procedures and forms of address, as well as through the convivial discussions over a glass or a meal at the end of a long week.

Tradition and reform in Victoria

Where does all this leave us in relation to tradition and reform in the law in Victoria today?

What are the traditions in the law that we are or should be sustaining? What are the reforms that have been or are being made, and what further reforms are on the way?

Sustaining the tradition of impartiality

The core tradition that is vital for us to sustain, as it has been for centuries, is that of courts as impartial founts of justice. If courts are not the umpire, the referee, the arbiter to whom people can turn for authoritative, reliable and fair adjudication of disputes and upholding of the law, then courts have lost their reason for existence.

Reinforcing this tradition of impartiality are further traditions regarding the qualities that impartial judges should embody, qualities such as independence, detachment, legitimacy and integrity.

I respectfully venture to say that, through their commitment to these traditions and qualities, we in Victoria have generally been very well served by our courts and by our judges. It is thus crucial that we continue to uphold these traditions and transmit both understanding of and commitment to them to future generations.

Current priorities and reforms in Victoria

Let me now look at reform. The reforms to law and practice currently underway in Victoria form three broad streams:

The first is strengthening the operation of the law in protecting the community. The second is continuing to improve how legal proceedings can be resolved in a just, timely and effective manner, and how to avoid a need for legal proceedings in the first place. The third is tackling specific gaps or deficiencies where the substantive law is not operating as well as it could.

Some of these reforms are initiatives of the courts, others are initiatives of the Government, many are being undertaken in collaboration and there are, of course, convergences between the three streams.

Reforms to help better protect the community include reforms relating to sentencing, parole and bail, and aspects of criminal procedure including jury directions, committals, compensation orders, victim impact consideration, double jeopardy and sexual offence procedures, as well as changes to the substantive law such as on criminal bikie and similar gangs, anti-fortification laws, anti-bullying laws, sexting, defensive homicide and sexual offences.

The second stream I cited, that of avoiding and better resolving legal proceedings, is one of the most vexed and long-standing challenges faced by courts, lawyers and the law.

On the criminal side, the speedy and certain imposition of sanctions on offenders is vital for deterring re-offending, as well as the content of the sanction itself. Thus delay and uncertainty in the criminal law detract from the effectiveness of sentencing as well as being unfair and stressful for victims, witnesses and innocent accuseds. Furthermore, when offenders need sanctions involving programs and services, the implementation of the sanctions needs to integrate with those programs or services.

For protective proceedings, such as child protection applications and intervention orders, the law needs not only to be effective in itself, but well integrated with services and supports that may be available for those who have suffered or are at risk, and indeed with programs that may be available for perpetrators.

For civil disputes, the first best position is that disputes do not arise because both parties to an encounter know what the law requires, and know that sure, swift and unpleasant consequences will follow if they do not meet the law's requirements, with the result that parties comply with their obligations without need to resort to legal proceedings, or even to threats or arguments. As far as I know, that ideal has not yet been achieved at any point in human history, but our objective should always be to get as close to that ideal as possible.

In each of these types of proceeding, benefits for individual citizens and for the community can come from reforms ranging from first principles re-assessments through to detailed and careful examination of and improvement in individual steps and processes. Examples of the use of first principles reassessments include in reforms currently being undertaken in child protection, fines, infringements and civil judgement recovery, and court control of court administration.

Numerous other reforms that have been made or are underway involve tackling specific steps and processes. These include, in addition to procedural reforms I have previously mentioned, reforms relating to expert evidence, costs orders, discovery, arbitration and mediation, intervention orders, part time judges, judicial complaints, suppression orders, vexatious litigants, and uniform legal profession regulation.

As well, each and every individual jurisdiction has been undertaking examinations of its operations, looking for ways of doing things better. I mention just a few examples.

The Coroner's Court has recently made extensive reforms to many aspects of its functions, from reception of deceased persons, to support for coroners, to the handling of paperwork. The early signs are that these reforms are providing substantial benefits.

The Children's Court is achieving excellent results with its new model conferencing for child protection matters, and its recently opened Melbourne conferencing centre is proving highly successful.

VCAT has undertaken its *Transforming VCAT* reforms and is now looking at a range of further legislative, procedural and operational reforms.

The Magistrates' Court has introduced changes to contest mentions that have proved very successful in earlier resolution of criminal proceedings, and has also been involved in discussions of possible intervention order reforms.

The County Court has introduced a pilot of next day post-committal mentions, which offers the prospect of taking months off the time needed for indictable offences to come to trial, and of resolving far more matters ahead of a full trial. The early reports of that pilot are highly encouraging indeed.

The Supreme Court has achieved enormous success through the Venne reforms to criminal appeals, dramatically cutting backlogs and the times taken to determine appeals, and is examining possible similar reforms to civil appeals. The Court is also introducing a range of reforms to its commercial division, as well as continuing to develop its RedCrest efiling and document management system.

Last but certainly not least of the law reform streams I referred to earlier is that of improvements to the substantive law. Reforms to the substantive law currently underway include not only the reforms to criminal law that I have previously listed, but also reforms in important areas of civil law touching the lives of many citizens, such as succession law, fencing law, powers of attorney and guardianship.

Conclusion

I hope that I have demonstrated this evening that both tradition and reform have important places in the law, and that good reform strengthens rather than weakens good traditions.

We should thus be vigilant to maintain, uphold and protect the traditions that have enabled the legal system to make the invaluable contributions it has made over the centuries, and continues to make, to freedom and the protection of rights.

At the same time, we should continue to seek, develop and implement reforms that will enable the legal system to serve the community even better.

[i] "The Common Law Bill of Rights" *First Lecture in the 2008 McPherson Lectures* (10 March 2008), p. 23 http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman100308.pdf/$file/spigelman100308.pdf

[ii] "Scrutiny of the Courts" Address at the Victoria Law Foundation Legal Reporting Awards 2012, 27 March 2012, referencing Charles Dickens, Bleak House (1853), http://mp3.news.com.au/hwt/Philip_Cummins_speech.pdf

[iii] See for example, Hon. M. Weinberg, *The Criminal Law: A Mildly Vituperative Critique* (Peter Brett Memorial Lecture, 10 August 2011). p. 29 at https://assets.justice.vic.gov.au/scv/resources/31e7ab4f-348b-4f02-8fb3-045c6074525b/peter%2bbrett%2bmemorial%2blecture.pdf[iv] See, re the abolition of the Court of Star Chamber, *An Act for Regulating the Privie Councell and for taking away the Court commonly called the Star Chamber*. http://www.british-history.ac.uk/report.aspx?compid=47221 (accessed 22 September 2013). Although the Court was for many years regarded as an effective court able to give justice where the ordinary courts were failing to do so, its powers became increasingly abused, resulting in its abolition by the Act cited, which is often referred to as the Habeas Corpus Act of 1640.

[v] Hon. M. Weinberg, op.cit. pp. 9-18.

[vi] See, eg, Jesse Norman, *Edmund Burke, Philosopher, Politician and Prophet* (William Collins, London, 2013), chapter 6[vii] Benjamin Disraeli, speech at Edinburgh, 29 October 1867

viii *The Thick of It* Series Four, Episode 7

[ix] *Public Confidence in the Courts*, speech delivered to the National Judicial College of Australia (2007) at p.1 http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_9feb07.pdf

[x] http://www.abc.net.au/radionational/programs/boyerlectures/lecture-6-the-judiciary/3483326[xi] "The Courts, Parliament and the Executive", *Deakin Law Oration* 2013, 11 September 2013. http://www.robertclark.net/news/the-courts-parliament-and-the-executive/

[xii] *Consistency and Sentencing*, Keynote Address to the Sentencing 2008 Conference, National Judicial College of Australia, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman080208.pdf/$file/spigelman080208.pdf

[xiii] See http://www.vcec.vic.gov.au/CA256EAF001C7B21/pages/vcec-inquiries-current-inquiry-into-aspects-of-the-wrongs-act-1958#.Ukemz9R-_4Y

[xiv] *Deakin Law Oration* 2013 op.cit.