Department of Justice

ADDRESS

BY

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BEFORE

THE LAW COUNCIL OF AUSTRALIA
IN CONJUNCTION WITH THE LAW INSTITUTE OF VICTORIA
AND THE VICTORIAN BAR

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I am pleased to appear before you. I would like to take this opportunity to discuss the role of the legal profession and improving the delivery of justice. Both of these topics transcend national boundaries in their importance. Thus, I hope that some of the problems that we face and the solutions that we have proposed will be of value to you in considering similar concerns.

January, a year ago, I assumed my current position as Attorney General of the United States. I was interested recently to read the following comment made at that time by the editors of the Australian Law Journal about my appointment and my relationship with President Carter:

> *... it has never been considered inappropriate that he (the Attorney General) should have had a prior friendly association with the President nominating him.*

I would like to lend my full support to this statement, although I have the clear impression that several members of the United States Senate, the body that confirms Cabinet appointments by the President, might not agree.

Actually, I do have a close working relationship with the President, as must any Attorney General. The Department of Justice, which I head, is a major agency of the government. The Department is charged with a diverse range of duties. Our 55,000 employees, among other things, represent the government in the federal courts on both civil and criminal

matters, investigate violations of the laws, operate the federal corrections system, and administer a substantial program of financial and research assistance to our states and localities.

In addition to managing the Department of Justice, one of my primary responsibilities is to advise the President on legal matters. Despite his recently expressed reservations about the legal profession in the United States, I have no indication that the President would subscribe to William Shakespeare's infamous admonition about the necessary demise of all lawyers.

Rather than condemning the legal profession, the President was issuing a challenge, exhorting all lawyers to assist in improving the delivery of justice to the citizens of our country. Similarly, Chief Justice Warren Burger of the Supreme Court recently has lamented what he considers to be an unacceptably low level of competence of the trial lawyers in our country. The Chief Justice and the President were not attacking lawyers. They were pointing our shortcomings in a profession that strives for excellence, and exhorting it to do better.

As I have mentioned, this concern that the legal profession must do "better" is not restricted to the United States. Throughout the reports of the proceedings of the Nineteenth Australian Legal Convention held last year at this time there were concerns voiced that parallel those raised by President Carter.

I believe that we must begin to conceive and implement reforms that can be counted as a direct benefit of this ferment over the role and contribution of the legal profession.

In the common law tradition that our countries share, the lawyer -- the solicitor, the barrister -- serves, in a sense, as a trustee for the functioning of the justice system. One of the special responsibilities of lawyers in the United States, imposed by Canon Eight of the Code of Professional Responsibility, is to "assist in improving the legal system." I am sure that you would subscribe to this same definition of professional responsibility.

One of the most important ways this responsibility can be met is through improving the administration of justice.

In the United States, the Attorney General is an official of the executive branch. Yet, as an attorney, and as an officer of the courts by virtue of my profession, I am obligated to aid in any way that I can efforts to improve the administration of justice. So, too, is the United States Department of Justice.

As you know, there is more than one system of justice in the United States. The federal system is nation-wide and deals with a significant array of laws created by Congress.

The state and local systems that also exist are much larger than the federal system.

One state -- California -- has more prosecutors than the Justice Department has in its 95 offices of United States Attorney throughout the nation. One city -- New York -- has many more policemen than we have special agents in the largest federal enforcement agency, the FBI. The courts of my home state of Georgia hear more cases than in all of the federal district courts combined.

At the same time, the federal justice system is extremely important. It covers the entire country. And states and localities often look to it for leadership and incentive in many important areas of the law. We are working very hard to provide that leadership.

To return to President Carter's speech, although press coverage focused on the criticisms of the legal profession, the President also laid down four specific challenges that must be met. Those challenges were, first, to make criminal justice fairer and more certain; second, to strive to make the legal system totally impartial; third, to increase the access of all persons to justice; and fourth, to reduce our nation's reliance on the adversary system and to speed up that litigation which remains.

I would like to share with you a few of the projects we are pursuing to meet these challenges.

Our major effort to make criminal justice fairer and more certain is contained in legislation currently being considered by the Congress to recodify and reform the federal

criminal code. As they currently exist, our federal criminal laws are a disparate collection of offenses and penalties that have evolved through the years. Many of the current statutes are outmoded. Many others are unenforceable, either because of inadequate drafting in the first instance or because of court interpretations construing provisions in a fashion unintended by the draftsmen. Even the statutes that are useful are in many respects overlapping and inconsistent. Yet, in other areas there are serious gaps in the coverage of the federal laws.

The proposed revision of the criminal code, which has already been passed by the Senate, and is being considered by the House of Representatives, responds directly to these problems. Its single most important contribution is in setting forth in a comprehensive, orderly, and simple manner all of the principal statutes and rules concerning federal crimes and the federal criminal justice process. By enacting this legislation, the United States Congress will have made a substantial step toward meeting the first of the President's challenges.

The President's second challenge was a call for impartiality in our legal system. As the President noted, one important area in which impartiality must prevail is in the selection of federal judges and prosecutors. In the United States, the President nominates persons to fill federal

judgeships as well as persons to become United States Attorneys, the field litigating arm of the federal government. These appointments must be confirmed by the United States Senate.

Shortly after he took office, the President established nominating commissions to assist in filling vacancies in the circuit courts of appeal, our intermediate appellate courts. The nominating commissions, which exist for each of the eleven judicial circuits, or regions, recommend qualified candidates for appointment by the President.

Such commissions add to the quality and impartiality of justice in two ways. First, the commission system opens up the selection process and makes it possible for anyone to be considered for nomination regardless of his or her lack of political connections. Second, the review of all candidates by a panel of independent citizens ensures that a requisite level of competence will be exhibited by all of the persons from whom the President eventually chooses his nominee.

In the past, the requirement of the Senate confirmation operated in practice by giving the Senators from states in which new federal judges were to be located an effective power of individual approval of the persons selected to be the nominee of the President. The nominating commissions for the circuit courts of appeal have caused a beneficial change in this process. We have also encouraged individual

Senators to use nominating commissions to aid in selecting nominees for judgeships in the district courts, which are our federal trial courts. As a result, nominating commissions have been used in filling more than 60 percent of the district court vacancies during the past eighteen months. Indications are that several additional Senators will use some form of nominating commission when a substantial number of new district judgeships are created by legislation now pending before the Congress.

I believe that the use of nominating commissions is an important step toward ensuring impartiality in our legal system. A year ago, in his first State of the Australian Judicature address, Sir Garfield Barwick proposed a commission system for advising in the appointment of candidates for judicial office. I am sure that his proposal has attracted great interest, and I hope that our experience will be of use to you in considering it.

Our concern with promoting impartiality through the appointment process has extended to the selection of the United States Attorneys. There are now a number of states in which nominating commissions are used to assist in recommending U. S. Attorney candidates. We have appointed only men and women who were willing to try cases actively and who have pledged to run their offices in a nonpolitical fashion. Further, there has been no presumption that U. S.

Attorneys serving from the previous Administration should automatically be removed from service. As a final step we have also insisted on professional and impartial treatment of the lawyers who work in the Offices of the United States Attorneys. In short, we are institutionalizing professionalism and impartiality in the position of federal prosecutor.

The President's third challenge was to increase access to justice. I have made this goal one of my highest priorities since arriving at the Department of Justice.

In this area, the Congress currently is considering three legislative proposals that will do much to meet the President's challenge.

The first of these proposals, which I hope will be passed by both Houses of the Congress soon, will expand the authority of the United States magistrates. In our system the magistrates serve as officers of the court, aiding our life-tenured trial judges in the district courts by hearing preliminary motions in cases, ruling on applications for warrants, and presiding at arraignments of criminal defendants.

We have closely studied the work of the magistrates, and we have come to the conclusion that they can be given increased authority to dispose of a broader range of matters, thus helping to alleviate the workloads of the federal district judges. As a result, the legislation now being

considered by the Congress would, for the first time, expressly allow magistrates to decide civil cases if the court and parties agreed. Magistrates could also hear all petty offenses, and could try all misdemeanors, provided the court consented and the defendant agreed. In both civil and criminal cases heard by magistrates the parties could avail themselves of specified routes of appeal of the magistrate's decision.

The second proposal is a bill providing for mandatory but nonbinding arbitration of selected civil cases in the federal courts. While this bill is being considered by the Congress, the Department of Justice is working with the federal judiciary on pilot arbitration projects in three federal district courts. These pilot projects, operated under the authority of each court to prescribe "local rules" for its own operations, are designed to test the approach embodied in the legislation. Selected civil suits are referred for arbitration to lawyers who are paid a nominal fee, but who really act from a sense of public service. This innovation in the federal courts is based upon the successful experiences of several states with similar programs for arbitration. Lawyers serve, in effect, as adjunct judges and their offices are adjunct courthouses.

A third bill would substantially reform the diversity of citizenship jurisdiction of the federal courts. In our

system, as in yours, the federal courts have jurisdiction to hear suits between citizens of different states. As a complicating factor, the Supreme Court of the United States decided forty years ago that applicable state law would be the law of decision in these cases. Thus, approximately one-fourth of the civil cases now heard by the federal district courts concern matters of state law, based upon a jurisdictional statute that was first enacted in 1789, largely to protect against potential discrimination against out-of-state litigants.

This historical justification for diversity jurisdiction no longer is a compelling reason for maintaining these cases in the federal courts. The bill we have proposed would remove from federal diversity jurisdiction cases filed in the plaintiff's home state, as these litigants have the least to fear from any discrimination, real or imagined, on account of their residence. The House of Representatives already has passed an even more far-ranging bill that eliminates all diversity jurisdiction, and the Senate is considering both approaches. An impressive array of judges -- both federal and state -- academics, and legal practitioners support these reforms, which will work substantial improvements.

The President's fourth challenge was to reduce the need for the adversary system and make that system itself more efficient. The President noted that the excesses of the

adversary system can entail societal costs, in the form of delayed or unequal justice, in addition to being prohibitively expensive.

The Department of Justice has taken several steps to reduce the excesses of the adversary system. We have supported a bill to empower the Attorney General to institute or intervene in civil litigation in which persons in mental hospitals or other institutions allegedly have been deprived of constitutional rights. We have successfully insisted that there be included in the legislation a strong pre-suit negotiation requirement that we hope will lead to a successful conciliation in most of these disputes.

We are also seeking to reduce the abuses of pretrial discovery in the federal courts. In our system, lawyers can use interrogatories and depositions, as well as similar techniques, to "discover" certain facts and legal theories that the other side plans to use in its case. While the concept of discovery before trial has great value, its general abuse has led one federal judge to comment that "the average litigant is over-discovered, over-interrogatoried, and over-deposed. As a result, he is over-charged, over-exposed, and over-wrought." And I may add sometimes abused by misuse of the discovery process. For example, we are faced with a serious problem when discovery is being used to get names of law enforcement informers -- an effort which would be dismissed out of hand if brought as a substantive action.

Fortunately this problem is being recognized by a wide range of persons, including the organized bar. Steps are being taken now to correct many of the problems that have been found. For example, one particularly significant reform will narrow the scope of permissible discovery.

Another promising reform will be much-needed changes in class actions, which are civil suits brought by a class of litigants with an identity of interest. We will soon send to the Congress a comprehensive piece of remedial legislation that will carefully define the circumstances and procedures under which class actions can be brought. Our proposals also will provide the federal judiciary with the procedural tools that are necessary to handle cases affecting thousands of persons, and which may often involve millions of dollars in claims for relief. Your Law Reform Commission is beginning to study the possible introduction of class actions in Australia, and I will be glad to provide you with information on our research and proposed reforms in this area.

Procedures in the courts of appeal are also being studied to devise means of expediting appeals in civil cases. While our work in this area is just beginning, one possible approach may be to impose time limits in civil suits. This approach has been used in our class action reform proposal, and it is being considered for use in complex cases, such as large antitrust suits.

Our attention has focused not only on traditional means of resolving disputes, such as through the courts, but on promising steps to reduce reliance on the adversarial model of dispute resolution. One of these has been the development and implementation of what we call Neighborhood Justice Centers.

These Centers, which are now in operation on a pilot basis in three large cities, are designed as low cost alternatives to the courts for resolving everyday disputes fairly and expeditiously. Community residents are specially trained to serve as mediators and arbitrators for minor disputes arising within the community.

While the Centers have been open for little more than three months, a steadily increasing volume of disputants has availed themselves of the services offered. With this influx has come a wide variety of disputes, ranging from mediation and settlement of a dispute between a tenant and his landlord, to the involved resolution of a long-standing dispute between neighboring families, involving members of three generations. We hope that if the experience with these pilot Centers proves successful, the states and localities will be inspired to implement similar programs on their own.

The experience with the Neighborhood Justice Centers also is particularly relevant to my opening theme of the role of the legal profession and improving the delivery of justice.

The idea for the Centers emerged from a seminal meeting held two years ago by the leaders of the bar to examine the wide-ranging need for improvements in the administration of justice. Since that time the bar has been instrumental in aiding us in the development of the concept of these Centers, as well as in implementing the program. Thus, in this important area the bar is beginning to recognize and meet the President's challenges.

I have mentioned too that these challenges are not constrained by national boundaries.

The first report of your Law Reform Commission contained the following quotation from Mr. G. H. Reid, later your fourth Prime Minister, made in 1891:

> *(W)hether law reform is a good thing for lawyers or not, it is bound to come, and the public were entitled to it long ago. There must be sweeping changes in our methods of administering justice.*

We must all respond to the challenge posed by commitment to the ultimate goal of the fullest measure of justice for all.

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