AN AUSTRALIAN NATIONAL SCHOOL OF LAW.

This is a supplement to Dean Griswold's article in this *Review*.[1] I find myself agreeing heartily with nearly all his observations on Australian legal education and law practice. So far as the implied comparisons with the United States of America may tend to give too rosy a view of the situation in the latter country, a valuable corrective is supplied by Dean McGechan of Victoria University College, New Zealand, in the 1953 American *Journal of Legal Education*;[2] note particularly his comments on the relative value of apprenticeship in law offices as compared with the work in filling stations, drug stores, etc., which forms a considerable though unacknowledged part of the curriculum of many "full time" American Law students.

There is, however, one subject on which I would like to put a point of view differing at least in emphasis from that of Dean Griswold, namely the desirability and feasibility of an Australian "national" school of law. I feel an obligation to do this, because it is obvious that some facetious observations of mine have been taken too literally by the Dean; hence his statement: "There is a National University at Canberra, with a law professor. But it is curiously proud of the fact that it wants few, if any students . . . ". Mr. Griswold obtained this impression in 1951, when the National University was struggling with inflation, shortages of labour and materials, and a very natural resistance from an accommodation-starved environment to get its building programme under way, and academic staff had just begun to arrive. Since the Australian National University is necessarily almost entirely residential, its capacity for handling students is directly related to the availability of accommodation and to the costs of building and running a hall of residence; the situation in this respect has for years been even worse in Canberra than in the State capitals, so it is hardly surprising that in 1951 there was no desire to encourage any rapid influx of students. Having myself just spent 15 years in the teaching of large undergraduate classes, with a lecturing week varying from about 21 hours (when I was also tutoring at a college) down to about 12 hours

[1] See pp. 197-214, *supra*.

[2] *A New Zealander's Comments on American Legal Education*, at 286. Mr. Griswold lists some earlier articles; others more recent are E. C. S. Wade, *Legal Education: The Changing Scene*, (1951) 1 J. Soc. Pub. Teach. Law n.s. 415, and C. J. Hamson, *The Teaching of Law: Reflections prompted by the UNESCO Enquiry 1950-52*, (1952) 2 J. Soc. Pub. Teach. Law n.s. 19.

(plus many hours interviewing students as sub-Dean), it is hardly surprising that I should have regarded the then absence of students, and their probably small numbers for some time to come, with equanimity. I expressed the spirit of the time in the following quatrain, written on the occasion of the institution of a regular seminar for members of staff on the research problems we expected to face:

"When they ask whom we teach at this place
Don't prate about research, my brother;
Throw the question right back in their face—
The Professors here lecture each other."

There is a general impression abroad that the Australian National University has had unlimited financial resources. The impression is quite false; actually, the University has been as badly caught by the inflation as any other educational institution. A large part of the money spent upon it has gone into the expensive forms of buildings and fixed equipment which are required for the prosecution of research in nuclear physics, geophysics, and medical laboratory science. It was a tribute to the courage and foresight of those who founded the University that they managed to create any place at all for the social sciences, since even in the optimistic days of 1946, when the initial plans were being developed, it was obvious that the expense of the research in the natural sciences was going to be very heavy. Probably it is an exaggeration to say that the late John Curtin[3] wanted a new brand of penicillin, and the late Ben Chifley[4] an atom bomb, but the statement does give an indication of the emphasis which existed in the minds of many of those whose goodwill was essential to bringing the University into existence. It required pushing from the natural scientists concerned, as well as from the many men from our State university social science faculties who were consulted in the early days, to ensure that the nucleus of a complete university was provided, and in the blueprint so fashioned it was inevitable that the proportionate funds for social science research was smaller. Moreover, there was a sound pragmatic justification for giving the social sciences less money, since the State universities already provide excellent training, including post-graduate research, in most (though not all) of the social science subjects contemplated for the Canberra school, whereas in the natural sciences the intention was as far as possible to concentrate on things for which there was no close parallel in any existing Australian university.

[3] Prime Minister of the Commonwealth, 1941-45.
[4] Prime Minister of the Commonwealth, 1945-49.

In such a situation, a lawyer at the Australian National University had to be prepared to see his particular discipline occupy a modest role. The object of the twin Schools of Social Sciences and Pacific Studies is to carry on basic research in the social sciences, regarding the latter as comprising in some sense a coherent body of doctrines, or at least as a series of studies which ought to be brought into as close relationship with each other as possible. This is obviously quite foreign to the purpose of a law school organised as such, no matter how broad and liberal the education provided by the law school may be. There are respectable grounds for treating law as a possible focus of studies in the social sciences, but the method of study would need to be much more sociological than legal; the commoner, and probably the more useful, approach to a synthesis of the social sciences is to take general sociology and anthropology, or economics, politics, and history, pursued in close association with each other, as the main disciplines. In a setting like this, law studies must play an important part, especially when the field material is necessarily taken from the Australian environment and that environment is a federal democracy with a highly legalised system of government and economic relations. But as lawyers in State universities are well aware, the interest of the sociologist and the historian in law differs in major respects from the interest even of the "sociological lawyer", leave alone the student training or the practice of law.

For these reasons, it would be quite impracticable to fit a professional school for the training of lawyers, even at a very high level, into the general scheme of the Australian National University as hitherto contemplated and within the sort of budget and staff provisions which have hitherto been evolved. At the present time I am the only law teacher on the staff. Future plans contemplate the appointment of a second permanent teacher (a Fellow or Reader to be appointed, I hope, in 1954) and a three-year Research Fellow (I hope the first will be appointed in 1955). Such a staff can quite admirably cope with the numerous legal problems which arise incidentally in the research work of the larger departments of the School, and also pursue some major pieces of research within the law itself. But it is obvious that such a staff could not provide adequate teaching at a high level for any considerable body of graduate students wishing to specialise on purely legal topics. It will doubtless reassure Dean Griswold to know that for two years past, I have been pretty closely involved in the training of a dozen research students, though doubtless he will be sorry to learn that not one of them would be regarded by the Harvard Graduate School as a law student.

I think that once the history and finances of the present situation at the Australian National University are understood, there will be little quarrel with the view that at the present stage of its development, its law department should not regard itself as the nucleus of a graduate school of legal studies offering to large numbers of students a degree comparable with the S.J.D. at Harvard or the Ph.D. in law at London and Cambridge.

However, what is at present does not have to last for ever, and the next question is whether and when we should seek to build in Australia a national school of law in the sense intended by Dean Griswold. I believe that in his article Mr. Griswold has set out pretty well all the circumstances which suggest that no such school is necessary at present and none such is likely to become a pressing need for a long time to come; but he has not drawn that inference. Firstly, Australian unenacted law (and this means in practice the general techniques and principles applied in the analysis and application of enacted law as well) has a uniformity which it can hardly lose, because of the position of the High Court of Australia (and to a lesser extent the Privy Council) as the single superior court of law. One might say that for a great many purposes of legal administration Australia is not a federal country. Differences between States are almost entirely in the field of statutory law; these differences can be considerable and irritating enough for practitioners, but they tend to be precisely in the matters of detail, varying not only from State to State but from year to year, which are of minor importance for legal instruction. Secondly, there is little distinctive State constitutional and administrative law in Australia; we might get more of it in the future, and probably the law schools should already be paying more attention to the field of local government law in which differences between States are now considerable, but it is unlikely that local government law will ever bulk so large as it does in the highly devolutionary society of the United States of America. Thirdly, whatever happens to the attempt of Mr. R. G. Menzies[5] and Sir Arthur Fadden[6] to return income taxation to the States, it is likely that the general principles of income tax law will continue to possess substantial uniformity over the whole Commonwealth, and since the Commonwealth has a monopoly of customs and excise (and probably, under the latter, of sales tax) there is very little in the field of taxation which can become distinctive for par-

[5] Prime Minister of the Commonwealth, 1949—.

[6] Treasurer of the Commonwealth, 1949—.

ticular States. Fourthly, with only six States, the noting up of a list of State differences is a comparatively easy job.

Hence, the six Australian State university law schools have no option but to be in most senses national schools of law. Doubtless their curricula can be improved so as to increase the "national" content; for example, by introducing specific references to statutory variation between State laws, and to differences of court procedure and administrative practice. But a great deal of this is in fact already done, and probably the heartening success of journals such as the *Annual Law Review* will inevitably make students more conscious of the law of other States so far as it is different.

Of course, this only means that our existing schools are and will remain "national" in their curriculum. It is unfortunately likely to remain the case that they will not become national in the sense of bringing together students (though they do to some extent staff) from all over the continent. Personally I am not sorry that no State University has established the sort of national ascendancy which three or four universities (private and State) have established in the United States, an ascendancy which I think more than any consideration of teaching "national law" has resulted in the great American schools attracting students from all States.

If there is to be some desirable intermingling of Australian students from different States, I think it can only be at the post-graduate stage, and I hope that such a development will occur. I suggest that it can be achieved in the following ways. Firstly, in spite of what I have said before as to the predominant character of research studies at the Australian National University, that institution is now glad to welcome graduate students in law who wish to pursue research in constitutional, administrative, or industrial law or in the application of sociological and philosophical critiques to law, and the range of purely legal work that can be adequately supervised will expand with the projected new appointments mentioned above. I hope that at least in the second decade of the Australian National University's existence, its law department will become in a more specific sense a graduate law school, but this in turn depends to some extent on the growth of the Canberra community as a whole, since a really live graduate law school of any size needs in my opinion the stimulus of a fairly large legal profession and body of courts reasonably accessible to it.

But secondly, I would strongly urge that the Australian National University should not for a considerable period be regarded as the

only or even the main place at which such developments should occur. What we should rather aim for in the field of more or less exclusively *legal* studies, as distinct from synthesised research in the social sciences, is a distribution of necessary post-graduate training between the several State universities and the Australian National University. It is of course already the case that each State university provides for higher degrees in law. It is well known that very few students have in the past pursued such degrees, because of the economic problems associated with pursuing them and because good students are almost by definition promptly swallowed up in legal practice. What I am suggesting is a development of the existing situation towards some degree of specialisation in the six State universities on aspects of post-graduate research appropriate to the geographical or social situation of those universities, or to the special talents of their teachers. To give a concrete example, if a good research student enquired whether he could pursue a piece of work on criminology at the Australian National University, I would tell him that it was not impossible, but that I would much rather see him doing it with Dr. Norval Morris at Melbourne or Mr. Peter Brett at Western Australia. It is possible that the decisive consideration would be the possibility of his getting a graduate research scholarship at the Australian National University, there being at present no corresponding scholarships available at Melbourne or Western Australia. I would very much like to see such a student being able to exercise his choice solely by reference to the existence of the proper facilities; this would necessitate the existence of appropriate research scholarships at the other centres. Other examples at once suggest themselves.

There are at present three grave limiting factors on such possibilities. Firstly there is the absence of adequate scholarship provision for graduate students; without such aid it is very unlikely that first-quality students can afford to pass up the opportunity of getting straight into practice when their primary degree is completed. Secondly, there is the probability which has existed since 1943 and may still exist that any first-quality student getting straight into practice is likely to achieve within a short space of time an income and a professional position which he might not achieve at all if he takes the risk of spending two or three years pursuing a higher degree. Thirdly, there is the tendency of both government and business to take such graduates in law as they need either at the earliest possible stage after their primary training, or else at a very much later stage of practical experience; although, as far as govern-

ments are concerned, the number of openings for university graduates of any kind is still in any one year extremely small.

My general conclusion is that we already possess in Australia six national schools of law which are national in a more positive sense than any American school is, in so far as they teach neither a purely local law nor an idealised picture of divergent local laws, but the system of law which is in fact applied over most of the continent. But the possibilities of our soon acquiring a national school of law in any other sense are not at present good, and there is some ground for thinking that, as a matter of priority, the building up of the existing schools is more important.

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