JOTTINGS ON THE BAR

John Reeves QC, President of the NT Bar Association

A (belated) Happy New Year

May I begin this first column for the year by wishing you all a happy and prosperous year in 2002. That despite the fact that we are now well into the second month of the year.

Next, on behalf of all the members of the NT Bar Association, I wish to congratulate our two new silks — Jon Tippet QC and Jack Karczewski QC — on their appointments as Queen's Counsel.

As most of you will know, their appointments were based on recommendations made by the Chief Justice to the Attorney General following an extensive consultation process within the courts and the legal profession.

That process is intended to ensure that only those counsel with the requisite qualities of learning, ability and leadership are appointed QCs. In the words of Gleeson CJ:

> Appointment as Senior Counsel has never been recognised in any Australian jurisdiction as something to which a barrister is entitled simply by reason of having survived in practice for a sufficient length of time. It is a formal recognition of the professional standing of those whose learning; skill and ability have come to be regarded by their peers, and by the relevant appointing authority, as warranting such a distinction. (4 February 2002, High Court Ceremonial Sitting on the occasion of announcement of appointments of Queen's Counsel and Senior Counsel)

Unfortunately, in recent years, the appointment of QCs in the NT has been surrounded by a deal of controversy. No QCs were appointed in the NT between Riley QC (as he then was) in1989 and 1997.

For most of this period, appointments were not made because of the fallout from the decision of the Perron government not to follow the recommendation of Asche CJ that it should appoint John Waters as a QC.

After lengthy negotiations, the present protocol for the appointment of QCs was adopted in 1996 by agreement between the then Attorney General, Mr Stone; and Chief Justice Martin, with the involvement of the President of the Bar Association and the President of the Law Society.

The protocol seeks to ensure that the Chief Justice consults with a wide range of persons within the court system and the legal profession before making his recommendation to the Attorney General.

The protocol does not expressly provide that the government must follow the CJ's recommendation. That flows from a convention to that effect, unless there are exceptional circumstances justifying the CJ's recommendation not being followed.

Exceptional circumstances might include, for example, an intervening criminal charge. Exceptional circumstances would NOT include purely political considerations.

Four appointments were made pursuant to the protocol in 1997 – Wild QC, McDonald QC, Reeves QC and Waters QC. The appointment of Shane Stone QC in 1997 was not made pursuant to the protocol i.e. on the recommendation of the CJ, so the controversy surrounding that appointment did not adversely reflect on the protocol.

Thereafter everything seemed to be back to normal until late 2000 when the Burke government refused to follow the recommendation of the CJ and appoint Jon Tippet as a QC. At the same time, the Burke government did adopt the CJ's recommendation to appoint Steve Southwood as a Queen's Counsel.

During 2001 Mr Burke refused on a number of occasions to give any reason for his government's decision and specifically refused to state whether it was based on some genuine exceptional circumstance.

That refusal left open the obvious conclusion: that the decision was based on political considerations. It also lead to the abandonment of the protocol for most of 2001.

After the election of the Martin government, the NT Bar Association was impressed with the speed with which the present Attorney General, Dr Toyne, moved to re-establish the protocol.

Most importantly, the new A-G agreed, on behalf of the new government, that it would be bound by the convention I have mentioned above.

So, the appointments of Jon Tippet and Jack Karczewski mark a return to normalcy – to a system that ensures that the appointments of QCs are based on peer assessments of the merits, standing and leadership qualities of the appointees and not on some petty political considerations.

I have no doubt that that process has served us well with the appointments of Jon Tippet QC and Jack Karczewski QC.

While I am on the topic of new QCs, I should mention the ceremonial sitting which the High Court conducts on the first sitting day each year to hear the announcement of the appointments of new QCs and SCs.

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The sitting proceeds with the President of each Bar Association in turn presenting to the Court those barristers who were appointed QCs or SCs in their jurisdiction in the previous year.

This year Jack Karczewski QC was present. Unfortunately Jon Tippet QC could not attend because of court commitments.

Among the new silks taking their bows were some familiar names — barristers who have practised in the Territory in the past, including : Vance Hughston SC, David Parsons SC, Tim Robertson SC and David Collins SC.

As the sitting proceeded, it was interesting to note that the NT and South Australia are now the only remaining jurisdictions that use the title Queen's Counsel. In all the other jurisdictions the title is Senior Counsel.

With moves afoot to consider a change in the title in the Territory, South Australia may be the only jurisdiction left with the old title.

In his address, Chief Justice Gleeson commenced by pointing out that the ceremonial sitting came about with the development of a national bar in Australia.

The Chief Justice also made a number of remarks about the significance of the role of counsel in the adversarial system.

In the pressure of day-to-day practice we sometimes lose sight of these matters, so they bear repeating here. The following is an extract from Gleeson CJ's address:

> References to the adversary system by which the common law jurisdictions administer justice usually place emphasis on the contest, and often pay little attention to another key aspect of the process. The contest between the parties and their lawyers helps to secure the impartiality and independence of the judges who decide the outcome. The parties and their lawyers choose the issues to be decided in a case, the evidence that will be called, and the arguments that will be advanced.
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> In consequence, the judge is able to act, and to be seen to act, as an impartial and independent adjudicator.
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> In a criminal trial, the guilt or innocence of an accused person will be decided by a judge, or a jury instructed by a judge, who has taken no part in the decision to prosecute the accused, or in the framing of the charge, or in the selection of witnesses. In a civil trial, the judge similarly remains neutral.
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> In an appeal, it is the parties and their lawyers who define the grounds of appeal and present the material on which the appeal is decided.
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> The adversarial system, and the public and official neutrality of the decision makers, are closely related.
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> Such a system depends on the skill and integrity of the professional representatives of the parties. The capacity of courts to do justice depends on the capacity of lawyers to assist the court.
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> The acceptance of an obligation to assist the court, an obligation that may override even a duty to the client, is the fundamental condition on which barristers are given a right of audience.
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> It is the foundation of the adversarial system of justice. The services of barristers are provided to courts as well as to clients; a matter that is sometimes left out of account in considering how those services are best arranged.

NEWS BRIEF

Legal issues will be highlighted in a major workplace safety conference to be held in Melbourne in April.

A highlight of the legal sesssions will be *The Great Debate - Should Industrial Relations and OHS Be Linked?* chaired by Sir Daryl Dawson QC.