

# THE COUNCIL THE QUARTERLY

## Issue 2: WINTER 2016

### In this edition:

- Opening of the Legal Year
- QC Competition
- Legal Services Bill and Code of Conduct
- Gibraltar Innovation
- Case Report - *Bonnici and Celecia v The Queen*
- Public Register of Trusts and Beneficial Ownership
- AML Guidance Notes for Law Firms
- Supreme Court Registry Announcement
- Bar Council on Twitter

## Opening of the Legal Year

The Opening of the Legal Year 2016 took place this year on Friday 14th October. The ceremonies commenced with the traditional Red Mass, followed by the speeches of the Bar Council's Chairman, the Attorney General and the Chief Justice as the head of the Judiciary.

The Chairman of the Bar Council made clear that the Council's aspiration to see a comprehensive new law on the regulation of legal services remained on track and had dominated the work of the Council over the last 12 months. Work on the draft Code of Conduct is also very advanced. The Chairman also made reference to the urgent need to amend the eligibility threshold to legal assistance which currently stands at £5,000. This was echoed by the Chief Justice in his own remarks.

The Attorney General emphasised the possible effects of Brexit at length. The Attorney General also made significant comments on the legal challenges being made by the Gaming Association in the European Court of Justice and the Advocate General's Opinion scheduled for December. Finally, the importance of the Court of Arbitration for Sport ("CAS") Ruling on the Gibraltar Football Association's application to FIFA was also stressed. This, the Attorney General said, was a very significant ruling made for Gibraltar.



Photo courtesy of J Bugeja, The Chronicle

The respective speeches of the Chairman and the Attorney General are available to view on the new Bar Council website, [www.barcouncil.gi](http://www.barcouncil.gi).

## QC Competition

On 17th October 2016 it was announced that Guy Stagnetto and Daniel Feetham were appointed to the rank of Queen's Counsel. The appointments were made by the Governor, Lieutenant General Edward Davis.

The rank of QC in Gibraltar is available to a limited number of senior practitioners who have a minimum of 15 years' experience since Call or Admission to the Bar.

Mr Stagnetto expressed his satisfaction and gratitude with the news "It is undoubtedly the proudest day of my professional career since I was called to the Bar 24 years ago"

Mr Feetham made similar comments to social media: "Honoured and privileged to have been appointed as one of Her Majesty's Counsel for Gibraltar" he wrote.



Daniel Feetham



Guy Stagnetto

Photos courtesy of J Bugeja, The Chronicle

## Legal Services Bill and Code of Conduct

The Bar Council has made significant progress on modernizing the regulatory system for legal services in Gibraltar, a goal that has been prioritised by Mr Keith Azopardi QC as Chairman of the Council.

In July, the Government and Bar Council published a Consultation Paper for the Legal Services Bill that will bring an overhaul of the regulation of legal services in Gibraltar. The consultation process closed on on the 21st September. Representations will now be considered in further discussions with the Chief Justice and Minister for Justice to take the bill to a more final state to allow for its presentation in Parliament.

The need to overhaul regulation has been growing in parallel to the pace of growth of the profession in Gibraltar. Whereas there were just 18 members of the legal profession in 1961, today our group of peers stands at over 250 members with over 30 law firms, compared to just 30 practitioners in 1980. The new regulation expects to bring more than 350 people within its scope comprising all individuals who are providing legal services in or from Gibraltar.

## Gibraltar Innovation

Aside from, and in addition to, the factually important content of the other articles in this newsletter, we also want to use this as a platform to encourage thought, discussion and proposals at a professional level in respect of economic issues relevant to the legal profession.

There is no doubt that as a jurisdiction we are on the brink of shifts as a result of political or economic changes.

There are some interesting developments in the areas of technology and investments in tech which has reacted to the Brexit decision, the American election and concerns over inflation in markets in the far east. This has resulted in the technology industry and investors looking inwards and considering how sustainable high growth in technology investment really is. Further, we are now starting to see some of the larger players in the technology industry focusing on markets in developing regions such as Africa. Crypto-currency and other forms of mobile banking are having a huge impact in developing regions where the majority of inhabitants do not have access to traditional banks but do have mobile phones with access to the internet.

There is definitely a new breed of mobile only and mobile first banks out there and in an age where everybody is increasingly reliant on their mobile devices, now may be the right time for these banks to succeed. The digital revolution has enabled new business models to facilitate the services that banks provide today and although traditional banks remain in charge, they must pay attention or they risk getting left behind.

To bring this back to a local level – we would encourage any of our colleagues to consider the global focus of technology investments and innovation. With regard to the financial services industry, it is very encouraging to see that the Financial Services Commission of Gibraltar has now established the "innovate and create" team to help encourage innovation by supporting local businesses looking to develop and introduce innovative ideas that may fall within the realm of financial services. As legal professionals we can look to try and understand where these markets and investments will focus on in the next 5-10 years so as to position our practices and Gibraltar's legal and regulatory framework for that. For example, given the very heavy regulatory burden on the divulgence of personal information by consumers and regulated institutions, as well as the connection of almost all technology to the internet, cybersecurity is set to be one of the biggest issues for businesses and national security in the coming years.

Additionally, in light of the shifts towards investment and adoption of technologies by all industries, we may, as legal professionals, need to assess whether our legal practices need to shift technologically and adopt changes to meet client expectations.



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## Case Report: Bonnici and Celecia v The Queen

The autumn session of the Gibraltar Court of Appeal saw the determination of the two conjoined appeals of Edward Celecia and David Bonnici.

Both cases involved horrific crimes of the like we thankfully do not often see in this Jurisdiction. As such, they raised uncommon legal issues which were finally resolved in a unanimous Judgment issued by the Court.

Messrs Celecia and Bonnici were both charged and convicted of inter alia attempted murder, the latter having committed the offence whilst on bail for stabbing a doctor in the Accident and Emergency Department of St Bernard's Hospital.

The trial Judges in both cases imposed life sentences and, as part of that sentencing exercise, made a "recommendation" to the Minister for Justice as to the minimum period of time which had to be served before the defendants became eligible for parole.

The practice of making a "recommendation" had, prior to these appeals, already been successfully challenged by Mr Bonnici earlier on in the year via a constitutional motion with the result that both defendants' cases were remitted to the trial Judges for the fixing of the minimum period or "tariff" (see *Bonnici v HMAG Misc No 20 of 2015* unreported). Both trial Judges then took the approach adopted in England and Wales of fixing the tariff at one half of the notional determinate sentence they would have imposed had the term of imprisonment not been for life.

It was that approach as to the fixing of the tariff which fell to be determined by the Court of Appeal.

Counsel for the appellants submitted that Gibraltar Law, in particular the provisions of the Prison Act which provide for eligibility for parole after one third of the sentence, meant that the tariff had to be one third of the notional determinate sentence rather than one half.

The Court of Appeal agreed with Counsel for the appellants and stated that the tariff must be one third of the notional determinate sentence rather than one half.

In addressing the rationale for such an approach they said as follows at paragraph 35 - 37:

"35. Generally, a discretionary life sentence is only passed when the court is dealing with an offender who is likely to remain a serious danger to the public for an indeterminate period, often by reason of mental illness. The notional determinate sentence indicates the sentence he would have received but for the unforeseeability of the period of danger and the minimum period relates to the point at which, but for the continuing risk factor, he would have been eligible to be considered for parole. The underlying assumption is that consideration for parole should come on to the agenda at or about the time when it would do so for an offender serving a determinate sentence, but of course, the actuality of parole will not arise until the body entrusted with the subsequent assessment of risk is satisfied that an offender serving a life sentence no longer constitutes a serious danger to the public. As the English authorities demonstrate, there is a rational link between the judicial task of fixing the minimum period and the statutory role of the Parole Board in risk assessment. The offender should serve the tariff period called for by his offence but further incarceration is only justified if he remains a serious risk.

36. In these circumstances, we do not consider that, in a jurisdiction where even a very long determinate sentence carries a right to consideration for parole at the one third stage, it is justified to maintain a minimum period norm of one half of the notional determinate sentence in cases of life imprisonment. That would be to subvert the rationale for the minimum.

37. The seriousness of the offence, leaving aside the question of the unforeseeability of future danger, is already factored into the notional determinate sentence.

The only justification for keeping the life prisoner in custody for longer than his determinate sentence comparator is the element of continuing risk. For these reasons we conclude that in Gibraltar the minimum period should normally be one third rather than one half of the notional determinate period (with adjustment for time spent in custody on remand)".

In addition to the point of law, the appellants successfully challenged the length of the notional determinate sentence from which the tariff was derived.

In the case of Celecia, the notional determinate sentence was reduced from 20 years to 17 years with the tariff fixed at one third or 5 years and 8 months.

In respect of Mr Bonicci, the notional determinate sentence was reduced from a total of 24 years and 8 months to 23 years, his tariff consequently being fixed at 7 years and 8 months.

In its conclusion, the Court reminded the public of the limited impact of its decision by saying:

"Finally, we add this in respect of both cases. When members of the public read or hear of minimum periods, they sometimes believe and fear that prisoners will automatically or probably be released at that stage. That is not the case. Neither of these men will be released until the point after their respective minimum periods at which the Parole Board feels able, on up to date information, to recommend to the Minister that the offender no longer constitutes a serious danger to the public. It is not for us to determine when, if ever, that will be. There is no material before us to suggest that it will be in the near future"



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## Public Register of Trusts and Beneficial Ownership

Senior judges in France ruled last month that a public register of trusts, introduced in 2013 to fight tax evasion, infringed the fundamental right to privacy and was therefore unconstitutional. The French court criticised the publication of the register on grounds that it allowed the public to see how a person intends to dispose of their estate. This was considered contrary to privacy and disproportionate to the original aim of the register.

Here is a link from STEP which summarises the case in some detail: <http://www.step.org/news/french-constitutional-court-rules-public-register-trusts>

Incidentally, two weeks later, the French data protection watchdog (the Centre National Numerique) asked the government to suspend the implementation of a database that could hold the biometric details of 60 million people.

In their approach to the collection of taxes, it is arguable that governments of late have been ignoring the right to privacy that is enshrined in the European Convention of Human Rights. The UK for example has implemented a fully public register on the beneficial ownership of companies that is very similar to the French trust register. While the holding of shares in companies differs slightly from trusts in the sense that trusts are more commonly used as bespoke vehicles through which to hold and dispose of assets, it is not too far a leap to argue that making

the UK register public could lead to similar arguments as those faced by the French Trust register. One must note that the decision from France's Constitutional Court (Conseil Constitutionnel Décision no.2016-591 QPC du 21 octobre 2016 3/3) is based on their own statutory rights to privacy (which dates back to 1789 and pre dates the EU privacy directive), but the Human Rights Act applies European Convention principles in England on which the French decision was based.

It must be said, however, that the French decision is a little vague as to whether the register itself is unconstitutional or simply its publication. For the time being the obligation to register trusts still applies even though the register cannot now be accessed by the general public. Therefore, although this decision has not gone as far as some would have liked, it could spark a riposte, inviting challenges against automatic, disproportionate and indiscriminate information gathering. It is certainly an interesting space and we would do well to keep an eye on it.



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## AML Guidance Notes for Law Firms

The Government are in discussions with Council on AML Guidance Notes which will be made by the Attorney General under the Proceeds of Crime Act. These Notes will provide Guidance to Law Firms in respect of supervision, monitoring and enforcement arrangements of AML requirements. The Council strongly recommends that practitioners keep an eye out for the introduction of these that is expected in early 2017.

## Supreme Court Registry out-of-hours urgent contact

Following representations made by the Bar Council, a contact email address [urgentcontact@gcs.gov.gi](mailto:urgentcontact@gcs.gov.gi) has been set up for practitioners to contact the Registry in cases where either (i) an urgent application needs to be made to a judge out of hours; or (ii) the Admiralty Marshal needs to be contacted for the purposes of an urgent ship arrest. Practitioners must ensure that a contact telephone number is included in the email they send.

It is important to note that this email address will **only** be accessed when the Supreme Court Registry is closed.

## Online Media

### New Website & Twitter Account

The Gibraltar Bar Council is pleased to announce the launch of the long anticipated new Bar Council Website, [www.barcouncil.gi](http://www.barcouncil.gi) and this very newsletter, the Council Quarterly.

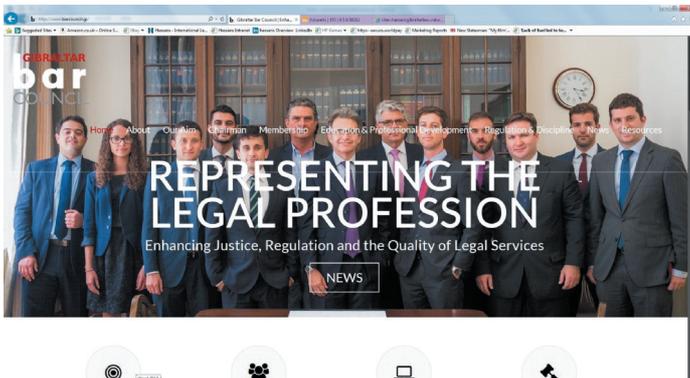
The new website brings a presence on the internet which had been lacking for a number of years.

The website provides information to any individual wishing to know more of the work of the council in Gibraltar.

The website will be updated regularly with relevant news and resources pertinent to Gibraltar's legal profession and membership. Similarly, the Council Quarterly will provide a quarterly update on similar issues.

For further information, suggestions or proposals for content please email [info@barcouncil.gi](mailto:info@barcouncil.gi).

The Bar Council is also on [twitter@GibLawCouncil](https://twitter.com/GibLawCouncil). Follow us to receive regular updates on our work.



### Christmas Social

Following on from the success of events organised last December and July, we are delighted to announce that the Bar Council will be hosting a Christmas social event at My Wines on 20th December 2016 as from 20:30. The event gives us all an opportunity to mingle with others from the profession, as well as with law students, in a relaxed and casual atmosphere.

In the spirit of encouraging as many as possible to come together, the Bar council will be subsidising this event so the cost will once again only be £5 per head for students (this includes those undertaking the Gibraltar Law Course) and £15 per head for lawyers. An assortment of wines and tapas will be on offer, including a selection of kosher food and wines.

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If you are interested in contributing an article, please contact us at [barcouncil@gibtelecom.net](mailto:barcouncil@gibtelecom.net). Suggestions for posts are always encouraged.

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