

## **Examiners' Comments on the 2010 Examination**

### **Head II: Civil & Criminal Procedure**

#### The Overall Performance of Candidates

1. The quality of answers to the recent years' Examination was maintained in 2010, there remains a tendency for candidates not to address the specific issues contained in the questions with the practicality expected from the Day One Lawyer.
2. There was yet again a tendency amongst the candidates to avoid the question related to pleadings and hence, the need for there to be a greater focus on such questions in the future continues, particularly mindful of the Civil Justice Reforms.

#### The Standard and Format of the Examination

3. The 2010 Examination, as in previous years, was open book.
4. The 2010 Examination was premised on the standard to be expected from the Day One Lawyer. The Day One Lawyer is one who has completed both the academic and vocational stages necessary for professional qualification. In Hong Kong that means the LL.B (or a non-law degree and the CPE), the PCLL and the two year training contract. Day One Lawyers should have a sound base of substantive knowledge and have acquired the ability to apply that knowledge to straightforward situations. In reality those taking the examination will be more than Day One Lawyers because of experience obtained in their home jurisdictions. Even so the Panel was careful to focus on the "Day One" standard and to keep away from what might be classed as "advanced procedure" or "superior ability". A Day One Lawyer intending to practise in Hong Kong should, however, have the ability to demonstrate an appreciation of the structure, powers and responsibilities of Hong Kong's Courts and have a basic knowledge of what is required in advising and representing clients in litigious matters.
5. If it is to have any value in ensuring that those seeking to practise in Hong Kong are of a suitable standard, the examination must test both substantive knowledge and the ability to apply that knowledge. As with any professional qualifying examination, the Panel was concerned to set questions which would test substantive knowledge and the ability to apply that knowledge in a constructive, practical and common sense manner.

#### General Criticisms

6. There were five questions in the paper, candidates were required to answer any four of those questions. The time allowed was 3 hours and 30 minutes. The first

30 minutes is intended to allow candidates an opportunity to read and digest the questions in the paper and to plan their answers before starting to write. However, candidates can start to write their answers as soon as they wish.

7. As in previous years, the majority of candidates brought into the examination room a significant amount of materials, but it was yet again noted that such practice proved to be somewhat counter-productive. There is insufficient time in the examination to search such materials for the required answers. Preparation is required in order to be fully conversant with the content of such materials in order to be able to refer to the same in an efficient manner that results in a precise answer to the actual question. In several answers, the candidates went down the road of including materials which were wholly irrelevant to the questions asked or were peripheral to the issues and accordingly, marks were not granted.
8. As has been raised in respect of previous years, Candidates would be recommended to spend part of their preparation in focusing upon examination technique. Answers should be carefully prepared such that the issues raised in the questions are identified and precise, direct answers relevant to those issues are produced.
9. Candidates scored disappointingly in the Head II paper, with a pass rate of 53%. The criminal questions were generally done poorly. The answers to the civil questions were generally slightly better.

#### Performance on individual Questions

10. Questions 1 and 2 addressed issues of criminal procedures.
11. Question 1 was split into 3 parts with 9 marks available for parts 1(1), and 8 marks available for each of parts 1(2) and 1(3). Question 1 was very poorly answered. While many candidates identified the breach of legal professional privilege, few noticed there was any problem with coaching the witness. Further, very few suggested applying for a stay of proceedings.
12. Question 2 was split into 3 parts with 12 marks available for part 2(1), 5 marks available for part 2(2), and 8 marks available for part 2(3). In Question 2, few candidates realised that the defendant has been identified by the victim at the scene. In the next part of the question, many mistakenly argued that section 65C admissions could easily be retracted on appeal. Finally, candidates should be reminded to read the question given carefully. Too many failed to identify the test for allowing an appeal in the Court of Appeal, which should have offered easy marks under the third part of the question.
13. Questions 3, 4, and 5 addressed issues of civil procedure and should not have unduly tested the abilities of an averagely competent Day One Lawyer. The relevant procedure was tested in a manner that sought reference to the rules or

other materials in support of the answers and a sensible, practical approach to the issues.

14. Question 3 was split into 5 parts with 4 marks for part 3(1), 6 marks for part 3(2), 3 marks for part 3(3), 2 marks for part 3(4) and 10 marks for part 3(5). The question was designed to ensure candidates had knowledge of certain aspects of the court rules. Most candidates addressed the issues fairly well in respect of this question, identifying the correct procedural issues and related time limits. However, yet again some candidates elected to write at length without focussing the answer on the relevant issues as identified by the question, which indicated a lack of awareness as to what was being sought by the question.
15. Question 4 was split into 2 parts with 15 marks for part 4(1) and 10 marks for part 4(2). The first part of this question concerned drafting in that candidates were required to draft a Defence and Counterclaim if appropriate. The second part required candidates to draft advice in the form of a letter addressing specified queries named in the question. A majority of candidates did not attempt this question. The question needed careful analysis, but if proper preparation had been undertaken enough marks to score well and pass the question should have been easily obtainable.
16. Question 5 was split into 5 parts with the 25 marks being allocated in the following manner: 6 marks for the first part, 5 marks for the second part, 5 marks for the third part, 4 marks for the fourth part and 5 marks for the fifth part. The question tested knowledge of confidentiality, privilege and discovery / disclosure. The issues were not overly complex and many of the candidates identified and addressed the pertinent points.

### Conclusion

17. As has been found in previous years, there was a general consistency in that the candidates who addressed the criminal questions well also addressed the civil questions well, which evidenced such candidates' proper and careful preparation for the 2010 Examination. Mindful that generally those who performed badly on the criminal questions also performed badly on the civil questions, this would seem to confirm the findings of previous years that a lack of preparation for the examination will be identified. Candidates would therefore, be well advised to prepare thoroughly for the examination and to focus upon careful planning and prioritising the content of their answers, which answers should address the precise questions set in a logical and practical manner demonstrating the candidates' knowledge.

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