

Examiners' Comments on the 2016 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates this year was 48. Of those 48, 33 passed Head II, resulting in a pass rate of 69% (slightly lower than last year's pass rate of 72%).

The Standard and Format of the Examination

2. The Examination, as in previous years, was open book.
3. The Examination is 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. They should not be a danger to the client.
4. 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. The examination deliberately mimics the situation of a solicitor asked to advise a client about a problem, and calls for directional practical answers, sometimes against an unfamiliar factual background.

General Comments

5. There were five questions in the paper, and 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.

Performance on individual Questions

6. Questions 1 and 2 addressed issues of criminal procedures.

Question 1

7. Question 1 had four parts on which marks were awarded. All parts were well answered by most candidates, with parts 2 and 4 particularly well done. For the first part, some students did not recognise that the complainant had identified the defendant at the scene of the crime and argued she first identified him in the dock. For part 3, most students discussed general disclosure duties competently but less went on to consider how to deal with an appeal against a failure to disclose evidence which had been judged irrelevant and destroyed. In such a case, authorities suggest the appellant would need to show the footage of the area was relevant and that lack of access to it had created such prejudice as to deny him a fair trial.

Question 2

8. Question 2 had four parts. This question was less well done than the first. The first part required candidates to identify the court of trial or rape. While most knew the case would be tried in the Court of First Instance, many thought there was an option to try it in a lower court, disregarding the controls on jurisdiction set by the second schedule to the Magistrates Ordinance. Most students identified the need to assert alibi in part 2 but some misidentified the statutory provisions applicable. Students were also not clear on the use of sections 79C and 79B of the Criminal Procedure Ordinance for vulnerable witnesses. Many overlooked the possible use of CCTV link for the complainant's cross examination. The fourth part of the question required

students to identify the Secretary for Justice's right of review under section 81A Criminal Procedure Ordinance. Common errors were failure to apply the 21 day time limit or recognise the need for leave.

9. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases we were looking for common sense application of the law, rather than just a recitation of black letter rules.

Question 3

10. Question 3 was split into 3 parts: part 1 – on next friends – worth 8 marks; part 2 – on service outside the jurisdiction – worth 10 marks; and part 3 – to draft submissions on costs – worth 7 marks. This question was well answered, as reflected in the high pass rate, but subject to the comments below.

Question 4

11. Question 4 was split into 3 parts: part 1 – on expired writs and time-barred claims – worth 10 marks; part 2 – to draft an affidavit in support of an application to renew an expired writ – worth 10 marks; and part 3 – on time and judgment in default of acknowledgement – worth 5 marks. A strikingly low number of candidates chose to answer this question – only 16 out of 48, compared with 44 and 41 for questions 3 and 5 respectively. Overall the standard of answer was poor.

Question 5

12. Question 5 was split into 3 parts: part 1 – on interlocutory injunctions – worth 15 marks; part 2 – on security for costs – worth 5 marks; and part 3 – about settlement – worth 5 marks. Overall the standard of answer was again poor.
13. The marker for question 3 (the only one of the civil questions which achieved an acceptable pass rate) has reported that many candidates appeared to be copying from pre-prepared answers, as evidenced by the fact that similar wording was used by many candidates and the same mistakes were repeated

by many candidates. This pattern appears to indicate that the pre-prepared answers were not prepared by the candidates individually, but provided by external suppliers, and moreover that there were mistakes in those answers.

14. The availability of commercially reproduced answers for some topics but not others may explain the low number of candidates who attempted question 4, and the poor pass rate for questions 4 and 5.
15. The use of commercially reproduced answers in this way, whilst not improper under the current rules, might be thought to subvert the purpose of the examination. In particular it undermines the examiners' attempt to reposition the Head II paper as a test of the ability to apply legal knowledge in order to give practical advice to a client, and away from mere recitation of the White Book (or any other text). Consideration is invited as to whether there is a case for limiting the permitted "open books" in this head to textbooks on the approved reading list. The alternative would seem to be an effort by the examiners to choose more *recherché* topics for which commercially reproduced answers are unlikely to have been prepared.

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