

Examiners' Comments on the 2017 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates this year was 48. Of those 48, 31 passed Head II, resulting in a pass rate of 65% (slightly lower than last year's pass rate of 69%).

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 procedure.

Question 1

7. Question 1 concerned indecent assault, choice of court, discount for a guilty plea, screened witness testimony, and prosecution appeals against sentence. It had three parts on which marks were awarded.
8. This question, considered by the examiners to be an easy one, was very poorly answered. A most serious omission was the widespread failure to mention/apply correctly the sentencing discount guidelines set down in *HKSAR v Ngo Van Nam* and *HKSAR v Abdou Maikido Abdoulkarim* [2016] 5 HKLRD 1. Many candidates also failed to recognise that the tariff for indecent assault would likely place the case in the jurisdiction of the Magistrates' Court. Accordingly, they did not discuss the prosecution's right to seek review of the sentence under section 104 or appeal, by way of case stated, under section 105 of the Magistrates Ordinance, Cap 227. Where the possibility of an appeal to the Court of First Instance was discussed, many candidates confused the means of appeal by way of case stated under section 105, which is open to both the prosecution and defence, with the right of appeal under section 113, which is open to the defence only, under the Magistrates' Ordinance, Cap. 227. A large number of candidates also overlooked review of sentence in the Court of Appeal, under section 81A of the Criminal Procedure Ordinance, Cap 221.
9. A startling number of candidates did not recognise that the offence was an excepted one under Schedule 3 to the Criminal Procedure Ordinance, Cap 221. Many candidates also confused the means of giving evidence by a vulnerable witness, by way of live television link, under Part IIIA of the Criminal Procedure Ordinance, Cap. 221, with the use of screens in giving evidence in sexual offence cases in magistrates' courts under Practice Direction 9.10.

Question 2

10. Question 2 concerned drug trafficking, bail, choice of court, the merits of a defendant assisting the Police, and the principles of representing multiple defendants. The question had four parts.
11. Part 1 concerned the factors that a magistrate would take into account when considering whether to grant or refuse bail where the offence was a serious drug trafficking offence. In general terms this part was adequately answered, and the relevant provisions of Cap 221 were mentioned. The fact that the defendant was looking after his disabled mother was sometimes missed.
12. In Part 2, some candidates did not read beyond the fact that the offence carried a possible sentence of life imprisonment. Tariff was often not mentioned as the prime basis for the prosecution determining venue. In some cases, candidates failed to identify that it was for the prosecution to choose venue.

13. In Part 3, the benefit, particularly in regard to mitigating sentence of giving assistance, was not always identified. Some candidates seemed to think it was for the police to decide whether to accept the defendant as a prosecution witness, although the initial approach might be to the police.
14. In Part 4, most candidates identified the possible conflict in representing both defendants.
15. 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

16. Question 3 was a single task worth 25 marks – the drafting of a Defence or Defence and Counterclaim. Issues raised included set-off, counterclaim, the defence of tender, and the formal aspects of drafting a pleading. This question was well answered, as reflected in the high pass rate.

Question 4

17. Question 4 was split into 3 parts: part 1 – on the limits of discoverability – worth 6 marks; part 2 – on pre-action disclosure and the Norwich Pharmacal jurisdiction – worth 12 marks; and part 3 – on joinder and service out – worth 7 marks. Overall the standard of answer was reasonable, although a surprisingly small group identified the Norwich Pharmacal jurisdiction.

Question 5

18. Question 5 was split into 4 parts: part 1(a) – on subpoenas *ad testificandum* – worth 4 marks; part 1(b) – on adducing hearsay evidence under Section 47A Evidence Ordinance – worth 4 marks; part 1(c) – about *Khanna* applications – worth 4 marks; and part 2 – on accidental disclosure of privileged materials – worth 13 marks. Overall the standard of answer was poor. Few candidates had a working familiarity with the practicalities of assembling evidence for trial. Very few were aware of the availability of a *Khanna* application, which may be forgivable, but almost no one was aware of the possibility of adducing hearsay evidence under Section 47A of the Evidence Ordinance, which is a serious lacuna.
19. The markers are aware from previous years that some candidates appear to be copying from pre-prepared answers, as evidenced by the fact that similar wording was seen in different candidates' scripts. This appears to indicate that the pre-prepared answers were not prepared by the candidates individually, but provided by external suppliers.

20. 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.

March 2018

.3849515