



VICTORIAN BAR

Candidate Number:

## ENTRANCE EXAM

### VICTORIAN BAR READERS' COURSE

**3 NOVEMBER 2016**

**EXAM DURATION:**        **3 hours** writing time  
                                  **30 minutes** perusal time (prior to commencement of exam)

#### INSTRUCTIONS TO CANDIDATES:

- 1) During the exam, you must not be in possession of anything other than writing implements, this exam script and the hard copies of the Reading Guide and examinable excerpts of legislation that have been provided. You are not permitted to have in your possession any other paper, notes, books, electronic devices, mobile phones, pencil cases or any other items that have not been specifically authorised by the Chief Examiner and/or Invigilators of the exam. Any item on your person, on your chair, or on your desk are deemed to be in your possession.
- 2) Your Candidate Number (but not your name) appears at the top of this page. Your Candidate Number represents your unique identifier for the purposes of this exam. You have previously been advised in writing of the Candidate Number which has been assigned to you. Please ensure that the Candidate Number above matches the Candidate Number which has been assigned to you. You **must not write your name** on any page in this exam script.
- 3) This exam tests your knowledge and understanding of rules of **Civil Procedure, Criminal Procedure, Evidence and Legal Ethics**. The exam consists of two parts – Part A and Part B. You **must answer all questions (and sub-questions) in both Parts of the exam**. The total number of marks allocated to questions in the exam is 100, so that the maximum score attainable by any candidate is 100. A total mark of 75 or more is required to pass the exam.
- 4) **Part A** contains 20 questions (Questions 1 to 20) and is worth a total of 50 marks. Part A commences with a preliminary statement of facts giving rise to a hypothetical **criminal proceeding**. Questions 1 to 20 then follow. In answering Part A, you should assume that all

questions are referable to the preliminary statement of facts. Each question posed in Part A informs you of the following: (i) whether you are being tested on rule(s) of criminal procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part A is: Criminal Procedure (19 marks), Evidence (21 marks) and Legal Ethics (10 marks).

- 5) **Part B** contains 16 questions (Questions 21 to 36) and is worth a total of 50 marks. Part B commences with a preliminary statement of facts giving rise to a hypothetical **civil proceeding**. Questions 21 to 36 then follow. In answering Part B, you should assume that all questions are referable to the preliminary statement of facts. Each question posed in Part B informs you of the following: (i) whether you are being tested on rule(s) of civil procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part B is: Civil Procedure (21 marks), Evidence (16 marks) and Legal Ethics (13 marks).
- 6) Although each question is designated as either ‘Criminal Procedure’, ‘Civil Procedure’, ‘Evidence’ or ‘Ethics’, you may refer to legal rules and principles outside the designated subject area if you consider these to be relevant in answering the question. With some questions, it may be necessary to do so in order to completely answer the question.
- 7) You must write your answers in the writing space provided after each question. The reverse side of each page in this exam script contains further writing space if required. Further additional blank writing pages have been provided at the end of this exam script.
- 8) In the case of multi-choice questions, you must simply circle the answer(s) you consider to be correct. Some multi-choice questions are worth 1 mark where **only one answer** may be circled, and other multi-choice questions are worth 2 marks where **two answers** may be circled. If you circle more than one answer for a 1-mark multi-choice question, or more than two answers for a 2-mark multi-choice question, a score of **zero marks will be recorded** for that question. If you wish to change your answer(s) to a multi-choice question, you will not be penalised for doing so provided that the change is effected in such a manner that clearly indicates your intended final answer(s).
- 9) Your attention is also drawn to the following:
  - i) If an application of state law is necessary in answering any question, you should assume that the law of Victoria applies.

- ii) In answering questions, you are not required to cite section numbers or case names unless the question specifically directs you to do so. You may restate principles of law or rules in your own words. A significant degree of latitude is given to you paraphrasing rules and principles.
  - iii) The standard of expression, spelling, punctuation, grammar, conciseness and legibility of your writing will be taken into account in the assessment of your answers.
- 10) It is suggested that you allocate time spent on each question proportionate to the number of marks allocated. The table below is provided to assist you in planning time (calculated on the basis of 180 minutes total writing time).

**TABLE – SUGGESTED TIME SPENT ANSWERING  
QUESTION BASED ON MARKS ALLOCATED**

<b>Marks</b>	<b>Time (approx.)</b>
1 mark	no more than 2 minutes
2 marks	3½ minutes
3 marks	5½ minutes
4 marks	7 minutes
5 marks	9 minutes
10 marks	18 minutes

- 11) You are **not permitted to remove this exam script** from the examination room.

**PART A (Questions 1 to 20) – Candidates are required to answer ALL questions in Part A.**

**Assume the following prosecution summary of alleged facts relates to all questions in Part A.**

The Accused is Scarlett PORTER. She is 50 years old (born 01/03/1966) and resides at 18B Silverleaf Grove in Surrey Hills, Melbourne, Victoria. From 21 January 2012 to 1 October 2015, the Accused was employed by the Victorian state government as Deputy Secretary (Schooling) in the Department of Education and Training ('the Department').

The Victim is Jacob HERNE and has been employed by the Department as Deputy Secretary (Higher Education) since March 2013. The Victim has been married for 20 years. He and his wife have three teenage children all of whom still live at home. On 17 December 2014, after the Department's staff Christmas party, the Victim and his personal assistant, Rinalda GRAVES, had a consensual sexual encounter in the basement level carpark of the Department's office building located at 85 Lonsdale Street, Melbourne at approximately 11.00pm. The Victim and Ms Graves did not later disclose the fact of their sexual encounter to anybody else and had agreed to maintain secrecy about it. The Victim and Ms Graves were not aware that, at the time of the sexual encounter, the Accused had observed the two of them together from a discrete distance as she was making her way to her car that was parked in the basement carpark.

On 1 June 2015 the Secretary of the Department, Raewyn HUI convened a meeting of the senior executive personnel, which included both the Accused and the Victim and other Deputy Secretaries of the Department, in the main boardroom of the Department's offices located on Level 15, 85 Lonsdale Street, Melbourne. At this meeting Ms Hui announced that the Department was to undergo a restructure, and that as part of this restructure a number of the Department's divisions would merge. Ms Hui said that this would result in a number of employees being made redundant, including 3 out of the 9 current Deputy Secretaries. After the meeting, Ms Hui met with each Deputy Secretary privately. When she met with the Accused, she informed her that the restructure would result in the 'Schooling' division merging with the 'Higher Education' division and that both the Accused and the Victim would be invited to apply for the position of Deputy Secretary in the newly merged division. Both the Accused and the Victim were advised separately that only one of them would be appointed to the position, to be determined on merit, and that the unsuccessful candidate would receive a generous retrenchment package. Ms Hui told the Accused and the Victim that if either of them

volunteered to accept the retrenchment package, then the other person would be appointed Deputy Secretary without a decision between the two candidates having to be made.

On 16 June 2015 at approximately 2.15pm, the Victim returned to his office on Level 15 after his lunch break and noticed an envelope on his desk chair addressed to “JACOB” in large type-face. The Victim opened the envelope in which he found a folded A4-sized piece of paper with type-written words:

*“Does your wife and family know what you did after the last staff Christmas party? You are a disgrace to the department.*

*A concerned employee”*

The Victim inferred that the author of the type-written note was referring to the sexual encounter with Ms Graves of 17 December 2014. The Victim felt shocked and intimidated by the note. The Victim called Ms Graves into his office, whose work station is situated immediately outside the Victim’s office door. The Victim showed Ms Graves the note and asked her if she knew anything about it. Ms Graves was also shocked and felt intimidated by the note. She told the Victim that she did not know about the note and did not see who had left it on the Victim’s chair as she had only just returned from lunch. Ms Graves told the Victim that she had not told anybody about their sexual encounter of 17 December 2014 as they had agreed.

On 17 June 2015 at approximately 11.30am, the Victim received an email from [aconcernedemployee@hotmail.com](mailto:aconcernedemployee@hotmail.com). The email contained the following text:

*“Every time I see you strutting around the office like you own the place I feel sick to the stomach. You are filth and morally bankrupt. If you don’t leave soon, I’ll be letting your wife and family know of your disgusting relationship with Rinalda. I know where you live.”*

The Victim was shocked and in fear of the author of the note informing his family of the sexual encounter of 17 December 2014.

At 3.30pm on the same day, as a result of being in fear of the author of the note informing his family about the sexual encounter with Ms Graves, the Victim went into the office of Ms Hui and formally tendered his resignation. The Victim advised Ms Hui that he would accept the proposed retrenchment package that had been offered a few weeks earlier. Upon further inquiry by Ms Hui, the Victim disclosed the reason for his resignation as being due to the anonymous note and email he had received.

Ms Hui refused to accept the Victim's resignation and suggested that the Victim make a formal complaint to police, which the Victim did.

Upon investigation, Victoria police discovered the further following information:

- The Department's Information Technology ('IT') records indicate the following in relation to the type-written note on A4-paper left on the Victim's office chair on 16 June 2015:
  - o The note was printed at 1.32 pm on a printer connected to the Department's IT network located on Level 15. This printer is located approximately 10 metres from the Accused's office and is the printer that the Accused ordinarily used when sending print requests from her computer terminal in her office.
  - o The print request was sent from the Accused's computer terminal located in her office at 1.32 pm when the Accused was logged-on.
- The envelope and the A4-paper contained in it were tested for traces of DNA. The Accused's DNA was found on the envelope seal. The Accused's DNA was not found anywhere on the note itself.
- The Hotmail account [aconcernedemployee@hotmail.com](mailto:aconcernedemployee@hotmail.com) was created at the Accused's computer terminal on 16 June 2015 between 1.40 pm and 1.50 pm.
- There is no independent witness who is able to say that they saw the Accused in her office, at the printer, or on Level 15 between the hours of 1.00 pm and 3.00 pm on 16 June 2015.
- The email sent to the Victim at 11.30am on 17 June 2015 was sent via a mobile phone device set up with a pre-pay Telstra account under the name "Con Emplee" with a fake residential address. The email was transmitted via the mobile phone device somewhere within the Melbourne central business district.

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The Accused has been charged with blackmail under section 87 of the *Crimes Act 1958*, which provides:

**87 Blackmail**

- (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—

- (a) that he has reasonable grounds for making the demand; and

- (b) that the use of the menaces is proper means of reinforcing the demand.
- (2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.
- (3) A person guilty of blackmail is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).

For the prosecution to prove a charge of blackmail, it must establish:

1. that the accused made a demand;
2. that the demand was unwarranted;
3. that the demand was made with menaces;
4. that the demand was made with –
  - a. a view to gain for the accused or another; or
  - b. with intent to cause loss to another.

**Note:** The word “*menaces*” is not defined in the *Crimes Act 1958* but may be taken to include threats to publish allegations of misconduct (not necessarily criminal misconduct) which could, objectively, intimidate or influence the victim into acceding to the accused’s demand.

The Accused was arrested and interviewed on 1 October 2015 before being charged and released on bail. She was served personally with a copy of the charge-sheet and summons (**reproduced overleaf**). The Prosecution is putting its case on the basis that the Accused was solely responsible for creating and leaving the type-written note on the Victim’s office chair on 16 June 2015, and sending the email to the Victim on 17 June 2015 (i.e. the Accused is alleged to be “a concerned employee” referred to in the written communications). The offending “demand” made by the Accused is alleged to be constituted by the contents of the email of 17 June 2015 which was designed to intimidate the Victim into resigning from his position at the Department so that the Accused could secure the position of Deputy Secretary in the newly merged division of the Department.

**FORM 3**

Magistrates' Court Criminal Procedure Rules 2009

**Charge-Sheet and  
Summons**

(Copy for the Accused)

To the Accused	Scarlett PORTER 18b Silverleaf Grove Surrey Hills VIC 3127	<input type="checkbox"/> Male <input checked="" type="checkbox"/> Female	Date of Birth 01/03/1966
	You have been charged with an offence. Read these pages to see what you must do.	Registration No.	State
		Licence No.	State

**DETAILS OF THE CHARGE AGAINST YOU**

What is the charge? (Description of offence)	1 <b>[TO BE COMPLETED – SEE QUESTION 1].</b>		
Under what law?	<input checked="" type="checkbox"/> State <input checked="" type="checkbox"/> Act <input type="checkbox"/> Other-specify <input type="checkbox"/> C <sup>'</sup> wealth <input type="checkbox"/> Reg.	Act or Regulation No. 6231/58	Section or Clause (Full Ref.) 87
Are there more charges?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes – See Continuation of Charges attached		
Request for Committal Proceedings	<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes		
Type of offence	<input type="checkbox"/> Summary Offence (You should go to Court) <input checked="" type="checkbox"/> Indictable offence (You must go to Court)		
Who filed the charge-sheet(s)? (informant)	Steven Hunter	Email: smhunter@police.vic.gov.au	
Agency and Address	St Kilda Road Police Station 412 St Kilda Road Melbourne 3004	Phone: (03) 9876 5432 Fax: (03) 1234 5678 Ref: ABC9732/21	
Signature of Informant	<i>Steven M Hunter</i>	Date 1 October 2015	

Charge filed at	Melbourne (Venue)	on	1 October 2015 (Date)
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**WHERE WILL THE CASE BE HEARD**

Where you must go	The Magistrates' Court of Victoria at Melbourne			
Address	233 William Street, Melbourne VIC 3000		Phone: (03) 9628 7777	
When	Time 10.00am	Day 29 <sup>TH</sup>	Month January	Year 2016

**DETAILS ABOUT THIS SUMMONS**

Issued at	St Kilda Road Police Station 412 St Kilda Road Melbourne 3004	Date: 1 October 2015
Issued by (Signature)	<i>Steven M Hunter</i>	<input type="checkbox"/> Registrar <input type="checkbox"/> Magistrate <input type="checkbox"/> Public Official <input checked="" type="checkbox"/> Member of Police Force <input type="checkbox"/> Prescribed Person







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**QUESTION 4**

**Ethics:**

As a matter of general principle, which **ONE** of the following is **not** a manner in which a barrister is expected to act?

*Your answer:*  
(circle **ONE**)

- a) Acting bravely.
- b) Acting competently.
- c) Acting diligently.
- d) Acting fairly.
- e) Acting vigorously.
- f) Acting honestly.

**[1 mark]**

**QUESTION 5**

**Ethics:**

Which **ONE** of the following statements most accurately reflects the general requirement that a barrister must be a 'sole' practitioner?

*Your answer:*  
(circle **ONE**)

- a) A barrister must only ever work on a case alone.
- b) A barrister cannot employ or enter into a partnership with other practitioners, nor operate through a company.
- c) A barrister cannot engage in any other business activity other than the work of a barrister.
- d) A barrister can only ever act for one client at a time.
- e) A barrister must generate personal income solely from work as a barrister.
- f) A barrister must, upon becoming a barrister, not become a solicitor at any point in the future.

**[1 mark]**





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**For the purposes of answering further questions in Part A, assume the following additional facts:**

The Accused has been committed to stand trial in the County Court and has been provided with a copy of the depositions and exhibits by the Prosecution. The Prosecution's brief of evidence includes:

- Written statements made by Mr Herne (the alleged Victim), Ms Graves (Mr Herne's personal assistant) and Ms Hui (Secretary of the Department).
- Copies of the envelope addressed to "JACOB" and received by Mr Herne on 16 June 2015 (**Exhibit 1**), the A4-sized type-written note found inside the envelope from "A *concerned employee*" (**Exhibit 2**), and the email sent from [aconcernedemployee@hotmail.com](mailto:aconcernedemployee@hotmail.com) to Mr Herne on 17 June 2015 (**Exhibit 3**).
- The Department's IT records showing the relevant connections between Exhibit 2 and the Accused's computer terminal, and the establishment of the hotmail account from the Accused's computer terminal.
- Written statement of Dr Monica Smith, a forensic scientist who examined Exhibit 1 and Exhibit 2 for traces of DNA.
- Copies of the criminal records of all Prosecution witnesses and the Accused.

The Accused has instructed her Defence Counsel that she will be pleading 'not guilty'. She has also instructed as follows:

- She was not responsible for sending the communications to the Victim and had no involvement in sending them. She only became aware of the communications and the police investigation approximately one week before she was arrested and charged, at which point she realised that she was a primary suspect.
- On 16 June 2015, between 1.00pm and 3.00pm she was not in her office building. She had an appointment with her psychiatrist, Dr Nova KNIGHT, from 1.15pm to 2.30pm on the other side of the city, which she attended. She does not wish to reveal the fact that she is being treated for a mental health condition to the police, to her employer or to anyone else.

- She admits that she was aware of ‘office gossip’ about the Victim having an extra-marital affair with Ms Graves, but she denies the Prosecution allegation that she had witnessed the sexual encounter between the pair in December 2014.
- She admits that she has never had a good working relationship with the Victim and was intending to compete with him for the position of Deputy Secretary in the upcoming restructure of the Department.

**QUESTION 8**

**Ethics:** Explain how Defence Counsel should deal with the Accused’s instructions that she does not want to give evidence about, nor call as a witness, Dr Knight who can testify as to the Accused’s whereabouts at the critically relevant time on 16 June 2015. In particular, explain: (i) what advice should be given by Defence Counsel to the Accused about this evidence; (ii) what Defence Counsel should do if the Accused refuses to accept this advice; and (iii) what Defence Counsel should tell the Prosecution about this issue. **[3 marks]**

**Answer:** \_\_\_\_\_

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2. On 1 June 2015 I attended a meeting called by the Secretary in the main boardroom on Level 15. The meeting was attended by all Deputy Secretaries of the various divisions of the Department, including Scarlett Porter. At the meeting the Secretary announced that there was going to be a restructure, including the merger of several divisions. The Secretary told us that she had, just the day before, had a meeting with the Minister who had instructed her to engage in this restructuring process to save costs. After the meeting, the Secretary met with me privately in her office. She told me that my division and Scarlett's would be merging and that only one of us would be able to serve as Deputy Secretary. She said that we would both have to apply for the position but that one of us would get it, based on merit. The other would be offered a retrenchment package. My intention at that point was to apply for the position.
3. On 16 June 2015 I returned to my office at about 2.15 pm. There was an envelope on my desk chair simply addressed to "JACOB" (**Exhibit 1**). I opened the envelope and inside was a single piece of paper which stated "*Does your wife and family know what you did after the last staff Christmas party? You are a disgrace to the department.*" The note was signed "A concerned employee" (**Exhibit 2**).
4. I felt shocked and intimidated by the note as I thought it was referring to the sexual encounter I had with Rinalda. I called Rinalda into my office and showed her the note. I asked if she knew anything about it. She said she didn't. She reassured me that she had told nobody about our Christmas party encounter.
5. Later that day, Rinalda came into my office and mentioned that she had some vague recollection about Scarlett mentioning to her, about a month after the Christmas party, that Scarlett was aware of the '*naughty things*' that Rinalda had got up to at the Christmas party.
6. The next day, on 17 June 2015, I received an email from [aconcernedemployee@hotmail.com](mailto:aconcernedemployee@hotmail.com). The email stated: "*Every time I see you strutting around the office like you own the place I feel sick to the stomach. You are filth and morally bankrupt. If you don't leave soon, I'll be letting your wife and family know of your disgusting relationship with Rinalda. I know where you live.*" (**Exhibit 3**)
7. I felt sick in the stomach after reading the email. After thinking on it for a few hours, I went to see the Secretary and tendered my resignation to avoid my family finding out about the Christmas party encounter. She asked me why I was resigning, and I eventually told her about the note and email. She then refused to accept my resignation and convinced me to make a complaint to police, which I did.

Defence Counsel is thinking about objecting to the admissibility of various parts of Mr Herne's evidence, as well as to the admissibility of Exhibits 1 to 3, on the basis that they are all '*riddled with hearsay, including both first-hand and second-hand hearsay*'.

## **QUESTION 10**

**Evidence:** Explain the difference between 'first-hand' and 'second-hand' hearsay. In the course of giving your answer you should identify within Mr Herne's statement: (i) an example of *first-hand* hearsay, and explain why it is arguably evidence of that kind; and (ii) an example of *second-hand* hearsay, and explain why it is arguably evidence of that kind. **[4 marks]**











**For the purposes of answering further questions in Part A, assume the following additional facts:**

The written statement of Ms Graves is largely consistent with that of Mr Herne, save for the following passage regarding her ‘run-in’ with the Accused in the staff kitchen, reproduced below:

**Rinalda GRAVES** states:

...

6. At the end of January after the holiday break, I ran into Scarlett in the level 15 kitchen. She made some bizarre remark about me being a ‘naughty girl’ and I asked her what she meant. She said that she had seen me and Jacob in the staff car park after the Christmas party. My heart sank as I hadn’t realised that anybody had seen us. I quickly made up some excuse about needing to go to the ladies bathroom and left the kitchen. I was really upset about what she’d said.

7. ...

**QUESTION 14**

**Evidence:** Explain the evidentiary significance of paragraph 6 of Ms Graves’ statement. Is this evidence admissible? [2 marks]

**Answer:** \_\_\_\_\_

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**For the purposes of answering further questions in Part A, assume the following additional facts:**

The Accused has instructed Defence Counsel as follows:

- She admits running into Ms Graves in the level 15 staff kitchen at about the same time that Ms Graves has suggested in her statement.
- She admits saying words to the effect of “*I’ve heard you’ve been a naughty girl*”. However, she denies ever stating that she had seen Ms Graves and Mr Herne having their sexual encounter in the car park (because she was never there when it happened).
- The Accused cannot remember when and from whom she had heard ‘office gossip’ concerning the sexual encounter between Mr Herne and Ms Graves after the Christmas party. However, she is adamant that it was common knowledge amongst many staff on level 15.

**QUESTION 15**

**Evidence:** Explain how the rule in *Browne v Dunn* might be applied in relation to Ms Graves’ evidence, including an explanation as to:

- (i) who would have to comply with the rule;
- (ii) at what point in the proceeding the rule would have to be complied with;
- (iii) whether the rule is obligatory or discretionary;
- (iv) how exactly the rule would be applied on the given facts; and
- (v) the possible consequences (if any) of non-compliance with the rule. **[3 marks]**

**Answer:** \_\_\_\_\_  
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7. I compared the DNA in Samples #1 and #4 with the DNA in the sample of hair taken from the Accused, Scarlett Porter, and conclude that the DNA is identical with 99.999% confidence. I therefore conclude that the **DNA in Samples #1 and #4 is that of the Accused.**
8. I compared the DNA in Samples #2 and #3 with the DNA in the sample of saliva taken from the Victim, Jacob Herne, and conclude that the DNA is identical with 99.999% confidence. I therefore conclude that **the DNA in Samples #2 and #3 is that of the Victim.**
9. I compared the DNA in Sample #5 with the DNA in the sample of saliva taken from Rinalda Graves and conclude that the DNA is identical with 99.999% confidence. I therefore conclude that the **DNA in Sample #5 is that of the Rinalda Graves.**
10. I had no DNA samples of comparison for the purposes of identifying the particular individuals whose DNA was found in Samples #6 and #7. I can only conclude that the **DNA in Samples #6 and #7, respectively, each belongs to a unique individual other than the Accused, the Victim or Rinalda Graves.**

The Prosecution contends that the presence of the Accused’s DNA on Exhibit 1 supports the charge. However, the Defence contends that the presence of other human DNA on Exhibit 1 raises the possibility that somebody other than the Accused was responsible for placing the envelope on Mr Herne’s office chair. Defence Counsel rely particularly on the inability of Dr Smith to identify the owners of the DNA found in Samples #6 and #7 (*Note: Defence Counsel accepts that the presence of Mr Herne’s DNA and Ms Graves’ DNA on Exhibit 1 is explicable on the basis that they both handled the envelope when it was found*).

### QUESTION 16

**Evidence:** The trial judge has ruled that the evidence of Dr Smith is prima facie admissible “*because it reaches the relatively low relevance threshold provided by sections 55 and 56 of the Evidence Act.*” Explain the judge’s likely reasoning here. [2 marks]

**Answer:** \_\_\_\_\_  
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**QUESTION 17**

**Evidence:**

Assuming the evidence of Dr Smith is *relevant*, which **ONE** of the following propositions of legal analysis is the trial judge most likely to adopt next if this evidence is ultimately ruled to be *admissible* under the *Evidence Act 2008*?

Your answer:  
(circle **ONE**)

- a) The evidence is prima facie *inadmissible* under s 12 but rendered *admissible* by the operation of s 13.
- b) The evidence is prima facie *inadmissible* under s 59 but rendered *admissible* by the operation of s 60.
- c) The evidence is prima facie *inadmissible* under s 59 but rendered *admissible* by the operation of s 66.
- d) The evidence is prima facie *inadmissible* under s 59 but rendered *admissible* by the operation of s 66A.
- e) The evidence is prima facie *inadmissible* under s 76 but rendered *admissible* by the operation of s 79.
- f) The evidence is prima facie *inadmissible* under s 97(1) but rendered *admissible* by the operation of s 97(2).

**[1 mark]**

**QUESTION 18**

**Evidence:** Defence Counsel seeks to exclude Dr Smith's evidence by invoking ss 135 and 137 of the *Evidence Act 2008*. Discuss the merit in the arguments likely to be made by both Defence Counsel and the Prosecution, with particular reference to essential points of principle established by the High Court of Australia in *IMM v The Queen* [2016] HCA 14 [**3 marks**].

**Answer:** \_\_\_\_\_

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**For the purposes of answering further questions in Part A, assume the following additional facts:**

The trial judge rejects Defence Counsel's application to exclude Dr Smith's evidence under s 135 or s 137 of the *Evidence Act 2008*.

The "sample of hair" referred to in paragraph 7 of Dr Smith's statement was obtained by Ms Hui in the week leading up to the Accused's arrest. Police had asked Ms Hui to undertake a search of the Accused's office (without the Accused knowing) for a personal item of the Accused that might contain traces of the Accused's DNA. Ms Hui found an old hair brush belonging to the Accused in a filing cabinet drawer that was filled with a lot of the Accused's personal items. Ms Hui put the hairbrush in an envelope and provided it to police.

The following exchange takes place between the trial judge and Defence Counsel:

**Defence Counsel:** If your Honour is minded to reject my submission in relation to sections 135 and 137, then I would seek to have the evidence of Dr Smith excluded on the grounds that it is fundamentally unfair and wrong to allow the prosecution to use this evidence.

**Judge:** What do you mean?

**Defence Counsel:** I mean this evidence was obtained surreptitiously, without my client's knowledge, and without her permission.

**Judge:** So what? What particular rules or principles do you say have been infringed here? You've failed to convince me on the application of sections 135 and 137, so I don't see that you have a chance of arguing anything else. Do you have anything else to say?



**For the purposes of answering further questions in Part A, assume the following additional facts:**

At the conclusion of the Prosecution’s case, the trial judge adjourns the proceeding until the following day. On her way back to chambers, the Prosecutor stops at a café to buy coffee. There is a woman in front of her talking on her phone at the cash register. The Prosecutor immediately recognises her as Ms Graves, who she had called as a Prosecution witness and examined earlier in the week. The Prosecutor was of the view at the time that she was an excellent and reliable witness and Defence Counsel did very little by way of discrediting her. However, the Prosecutor then overhears Ms Graves say on the phone: *‘...I think the jury’s buying it. Scarlett’s going down. The bitch deserves it. You should see the fear in her eyes. Hahaha! ... No, I don’t care one bit that she didn’t do it. Everyone hates her. It’s called karma.’* The Prosecutor is now extremely concerned, but not entirely sure as to what to make of what she has just overheard heard Ms Graves say.

**QUESTION 20**

**Ethics:** What should the Prosecutor do? Explain. [2 marks]

**Answer:** \_\_\_\_\_

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***END OF PART A***



**PART B (Questions 21 to 36) – Candidates are required to answer ALL questions in Part B.**

**Refer to the facts in Part A and assume the following further facts relate to all questions in Part B.**

Scarlett PORTER was acquitted of the blackmail charge after it emerged that it was very possible that Ms Porter was actually ‘set-up’ (i.e. ‘framed’) by somebody within the Department. The jury took less than 15 minutes to complete its deliberations before returning a ‘not guilty’ verdict. The trial judge even took the unusual step of apologising to Ms Porter in open court for all *‘the stress and humiliation that this trial must have caused you in circumstances of your probable innocence.’* An internal review by the ethical standards division of Victoria Police has also raised questions as to whether Ms Porter was appropriately charged.

Ms Porter’s livelihood, reputation and emotional well-being have been severely damaged as a consequence of the criminal prosecution against her. On the day that she was charged with the blackmail offence, 1 October 2015, she was also summarily dismissed by Ms Hui (by text message from Ms Hui’s personal assistant) without even an opportunity to defend herself. Since her acquittal several months ago, she has not received an apology from the Department nor has she been offered her old job back.

An independent review has also been conducted by the Victorian Auditor-General in relation to the Department’s involvement in the prosecution of Ms Porter. The Auditor-General’s “Summary of Conclusions” included the following:

1. I have concluded that it was unlawful for Ms Porter to have been summarily dismissed from her role as Deputy Secretary on 1 October 2015. The Secretary should have afforded Ms Porter an opportunity to be heard before making the decision to dismiss her. Furthermore, in the circumstances of Ms Porter’s ‘not guilty’ plea, the inherent weaknesses of the prosecution’s case, and the importance of the doctrine of the presumption of innocence, the Secretary should have refrained from making a decision in relation to Ms Porter’s continued employment until the final outcome of the prosecution was reasonably clear.
2. I have also found that the Secretary’s act of entering Ms Porter’s office, searching her drawers containing personal items, and taking Ms Porter’s hairbrush and providing it to police were unlawful acts. Those acts were also contrary to existing Departmental privacy policy that specifically provided for staff being permitted to store a reasonable number of personal items in the Department’s offices without interference by the Department.
3. The Secretary’s readiness and willingness to hold Ms Porter responsible for the ‘blackmail’ is very troubling. On one view, at the time the Secretary took this view, the evidence could have easily been interpreted as

pointing to Ms Graves as the culprit. But the Secretary seemed to be intent on holding Ms Porter responsible. Curiously, I note that in Ms Hui's 20 years as Secretary of the Department she has summarily dismissed 4 Deputy Secretaries under her management, all of whom were women, and in circumstances where the merits of each summary dismissal was highly questionable. I note that she has had never had occasion to dismiss a male Deputy Secretary.

Ms Porter (**Plaintiff**) has decided to bring proceedings for compensatory, aggravated and exemplary damages totalling in excess of \$3m against Ms Graves, Ms Hui, and the lead informant responsible for charging Ms Porter (Detective Sergeant Raymond CRANE). Ms Porter is essentially alleging two causes of action:

- the tort of 'malicious prosecution', as against Ms Graves (**First Defendant**), Ms Hui (**Second Defendant**) and D/S Crane (**Third Defendant**) as joint tortfeasors; and
- the tort of 'misfeasance in public office' as against Ms Hui.

In relation to the claim of malicious prosecution, Ms Porter has alleged (and must prove):

- The three Defendants were instrumental in bringing and maintaining the criminal prosecution for blackmail against her.
- The criminal proceedings terminated in Ms Porter's favour (this will be conceded by the Defendants).
- The Defendants were malicious in being instrumental in bringing or maintaining the prosecution (**Note:** 'malice' is a broad concept than can capture tortfeasors who are motivated by an improper purpose, an illegitimate or oblique motive, or with reckless indifference to the harm that may be incurred by a plaintiff).
- The Defendants did not honestly believe and/or did not have a sufficient basis for holding an honest belief that the prosecution was initiated or maintained with reasonable or probable cause.
- Ms Porter suffered damage as a result.

In relation to the claim of misfeasance in a public office, Ms Porter has alleged (and must prove):

- Ms Hui acted unlawfully or without a valid exercise of power in:
  - o summarily dismissing Ms Porter on 1 October 2015; or
  - o conducting a search of Ms Porter's office for Ms Porter's personal items, and taking her hairbrush.
- Ms Hui acted 'with malice' in carrying out the unlawful or invalid acts (**Note:** 'malice' for the purposes of this tort is a broad concept that is interpreted in a similar way to the equivalent element in the tort of malicious prosecution).

- Ms Hui is a public officer (this will be conceded by Ms Hui).
- Ms Hui acted in purported discharge of her duties (this will be conceded by Ms Hui).
- Ms Porter suffered damage as a result.

Apart from the concessions referenced in round-brackets above, the Defendants will be denying Ms Porter's claims.

### QUESTION 21

<p><b>Civil Procedure:</b></p> <p><i>Your answer:</i> <i>(circle TWO)</i></p> <p><b>[2 marks]</b></p>	<p>Which of the following <b>TWO</b> propositions are most likely to be correct in this case?</p> <ul style="list-style-type: none"> <li>a) The proceeding will be commenced by originating motion.</li> <li>b) The proceeding will be commenced by <i>ex parte</i> application.</li> <li>c) The proceeding will be commenced by writ.</li> <li>d) The proceeding will be commenced in the Magistrates' Court of Victoria.</li> <li>e) The proceeding will be commenced in the County Court of Victoria.</li> <li>f) The proceeding will be commenced in the Supreme Court of Victoria.</li> </ul>
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### QUESTION 22

<p><b>Ethics:</b></p> <p><i>Your answer:</i> <i>(circle ONE)</i></p> <p><b>[1 mark]</b></p>	<p>Who is bound by the overarching obligations in civil proceedings, as set out in the <i>Civil Procedure Act 2010</i>?</p> <ul style="list-style-type: none"> <li>a) A party to the proceeding.</li> <li>b) Counsel acting for a party.</li> <li>c) Litigation Funder.</li> <li>d) Expert Witness.</li> <li>e) All of the above.</li> <li>f) None of the above.</li> </ul>
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**QUESTION 23**

**Ethics:** What is a ‘proper basis certification’? Explain how this requirement would apply to the Plaintiff’s legal representatives in this proceeding and what the potential consequences could be (if any) if they fail to comply with that requirement. **[3 marks]**

**Answer:** \_\_\_\_\_

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**For the purposes of answering further questions in Part B, assume the following additional facts:**

In her Statement of Claim, the Plaintiff has pleaded the following in relation to the claim of malicious prosecution against the First, Second and Third Defendants.

23. Each of the Defendants was malicious in being instrumental, instigating and maintaining the criminal prosecution against the Defendant.

Apart from the allegations pleaded in paragraph 23, nothing further is pleaded about the element of ‘malice’ in relation to this cause of action.

The Plaintiff has also pleaded the following in relation to her misfeasance in a public office claim against the Second Defendant:

38. And furthermore, the Second Defendant’s malice is established by the fact that has had a habit of summarily dismissing female Deputy Secretaries.

**QUESTION 24**

**Civil Procedure:** What criticisms may be made of paragraphs 23 and 38 of the Plaintiff’s statement of claim? After being served with the Statement of Claim, explain what, if any, reasonable demands could the Defendants solicitors make of the Plaintiff, and the possible consequences for the Plaintiff if she fails to comply with these demands. **[4 marks]**

**Answer:** \_\_\_\_\_

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**QUESTION 25**

**Ethics:** In what circumstances can counsel represent two parties in a proceeding? Having regard to the information available, is it possible that two parties in this proceeding could be represented by the same counsel? **[3 marks]**

**Answer:** \_\_\_\_\_

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**For the purposes of answering further questions in Part B, assume the following additional facts:**

Discovery has been ordered. In the course of reviewing the Second Defendant's list of documents, the Plaintiff's solicitors noticed one particular document listed:

Doc #	Description	Date	Privileged?	Privilege claim (if any)
120	Letter from Victorian Government Solicitor to Second Defendant.	25/09/15	Yes	Legal Professional Privilege

The letter contains legal advice to Ms Hui regarding what actions she could take against Ms Porter in the circumstances of Ms Porter being a primary suspect in the police investigation into blackmail. Because of the privilege claim, the Second Defendant's solicitors are refusing to allow the Plaintiff's solicitors to inspect the letter.

**QUESTION 29**

**Evidence:** Explain whether the Second Defendant's claim of privilege in relation to document #120 is justified and, in the event that the Plaintiff wishes to challenge the privilege claim, how that challenge can be made (*Note:* you should assume the letter contains advice that cautions Ms Hui against terminating Ms Porter's employment before the outcome of the criminal prosecution has been determined). [5 marks]

**Answer:** \_\_\_\_\_

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**QUESTION 30**

**Civil Procedure:** As part of the Plaintiff's preparations for trial, her legal representatives will need to carefully review all documents relating to her criminal prosecution. The bulk of these documents are contained in files in the possession of Victoria Police and the Office of Public Prosecutions. The Third Defendant (D/S Crane) has stated, through his solicitors, that he is unable to discover these documents because he is not in possession or control of them. What steps should the Plaintiff take to secure copies of these documents? **[2 marks]**

**Answer:** \_\_\_\_\_

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**For the purposes of answering further questions in Part B, assume the following additional facts:**

The Plaintiff obtained the relevant prosecution records from Victoria Police and the Office of Public Prosecutions. The Plaintiff's solicitors discover in those records the following:

- A criminal history report of Ms Graves from Queensland which discloses that Ms Graves was, in 2010, convicted of perjury and making a false statement to police. This criminal history report was not provided to Ms Porter's Defence Counsel in the criminal proceeding.
- A file note from a solicitor employed at the Office of Public Prosecutions, which included the following: *"T/A with D/S Crane. He mentioned a prosecution witness has a criminal history in QLD for dishonesty offences and asked whether it should be provided to defence. I said no, it's probably not relevant and would only serve as a tangential exercise in cross-examination for defence."*

The Plaintiff's solicitors believe that, based on this evidence, there grounds for holding the Office of Public Prosecutions also responsible for malicious prosecution.

An issue has also arisen between the Second and Third Defendants, and the State of Victoria. Initially the Victorian Government was willing to fund the defence of these two defendants but now it is refusing. Both Second and Third Defendants have grounds to believe that, by the terms of their employment, the State of Victoria must indemnify them in relation to any proceedings brought against them of the sort that have been brought by the Plaintiff in this case.

### **QUESTION 31**

**Civil Procedure:** Explain any further procedural steps which the Plaintiff and/or the Second and Third Defendants should now consider taking to maximise their interests in the outcome of the litigation. [3 marks]

**Answer:** \_\_\_\_\_

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**For the purposes of answering further questions in Part B, assume the following additional facts:**

The Plaintiff’s solicitors have tracked down the four female Deputy Secretaries, referred to in the Auditor-General’s report, who were summarily dismissed by Ms Hui. If called by the Plaintiff, their evidence would be as follows:

- Enid WHITE states: *“I was Deputy Secretary from January 2010 to February 2011. Ms Hui took a disliking to me shortly after I started, even though we got along in the interview. She criticised virtually everything I did without really providing any reasons. In early February, she summoned me into her office and said that I was dismissed and to pack my belongings and leave immediately. I asked her why and she said that I had been consistently late into work for the last week. I tried to explain to her that I had just returned from maternity leave and that managing motherhood was difficult. She was not sympathetic.”*
- Selena BRYCE states: *“The Secretary dismissed me after 3 years of solid work in 2009. My appointment to the position was actually up, but I expected to have it renewed for another 3 years. She simply said my services were no longer required without any reason being given at all.”*
- Marilyn BAKER states: *“I had been in the position of Deputy Secretary for 2 weeks in March 2004. Ms Hui came into my office and simply said ‘This isn’t going to work. You need to leave.’ I’ll never forget those words. Later that day her PA came and told me that my employment was terminated and for me to pack my belongings and leave immediately. To this day I have no idea why my employment was terminated.*
- Yasmine THAMES states: *“I was Deputy Secretary in Schooling for about 5 years – from 2004 to 2009. I’d had a good working relationship with Ms Hui for many years. Early in 2009, however, we both attended a meeting with the Minister. I recall Ms Hui making a suggestion to the Minister about some minor expenditure matter. I then interjected and suggested some alternative. I got the*

*feeling later that Ms Hui felt that I'd made her look foolish. She was never the same with me again and cut me out of a lot of Departmental decision-making that I had regularly been involved with. In October 2009, she came into my office and said that my current tenure as Deputy Secretary was about to expire and that it wouldn't be renewed. She didn't need to explain why. Our relationship had obviously deteriorated."*

**QUESTION 33**

**Evidence:** With reference to *Velkoski v The Queen* [2014] VSCA 121, explain whether the Plaintiff may adduce the evidence of four former Deputy Secretaries in support of her case, under ss 97 and/or 98 of the *Evidence Act 2008*. **[5 marks]**

**Answer:** \_\_\_\_\_

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**QUESTION 34**

**Evidence:** Consider the exchange between the trial judge and Counsel above, and answer the trial judge's question. [2 marks]

**Answer:** \_\_\_\_\_

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**QUESTION 35**

**Civil Procedure:** Could this matter be heard before a jury? Explain. [2 marks]

**Answer:** \_\_\_\_\_

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**For the purposes of answering further questions in Part B, assume the following additional facts:**

The matter is set down to be tried before judge and jury.

Ms Graves gives evidence and is cross-examined by Plaintiff's Counsel. In the course of cross-examination, the following exchange takes place:

**Counsel for Plaintiff:** Do you understand what it means to tell the truth?

**Ms Graves:** Of course.

**Counsel for Plaintiff:** Do you know what perjury is?

**Ms Graves:** Yes.

**Counsel for Plaintiff:** Of course you do, don't you? You've been convicted for perjury before haven't you?

**Ms Graves:** I beg your pardon.

**Counsel for the Plaintiff:** Does Queensland 2010 ring a bell?

**Ms Graves:** No.

**Counsel for the Plaintiff:** Liar!

**Ms Graves:** Please I really don't know what you're talking about.

**Counsel for the Plaintiff:** And there you go again!

### **QUESTION 36**

**Ethics:** Discuss the ethical implications of this line of questioning and consider the objections that Counsel for the First Defendant could make in relation to it. Assuming there is an evidential basis for raising the 'Queensland' issue, how might Counsel for the Plaintiff have handled it better in cross-examination? [3 marks]

**Answer:** \_\_\_\_\_  
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