VICTORIAN BAR

Candidate Number:

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

3 NOVEMBER 2016

(Annotated with sample answers)

This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 3 November 2016, with annotations included as a means of feedback. For each question requiring a written response (i.e. all questions bar the multi-choice questions), a sample of actual answers given by candidates in the examination immediately follows the question. For multi-choice questions, the correct answers are highlighted and underlined.

Attention is drawn to the following **important points concerning this document**:

- Each sample answer has been reproduced in type-written form verbatim, as it appeared in the candidate's actual examination script. Any errors and omissions contained in the candidate's original answer are therefore included. No attempt has been made in this document to correct such errors and omissions. Accordingly, **each sample answer is not to be regarded as perfect and necessarily exhaustive of all relevant issues disclosed by the particular question**.
- In assessing each sample answer, an examiner has applied a combination of quantitative and qualitative criteria and taken into account any errors and omissions in the answer. The candidate has been awarded either the maximum or *near*-maximum possible marks attainable for that question. For example, in the case of a question worth 2 marks the sample answer scored 2 marks, and in the case of a question worth 4 marks the sample answer may have scored 3½ or 4 marks.
- It is possible that other candidates' answers (not included in this document) obtained a similarly high mark for the same question but for different reasons. Accordingly, each sample answer represents only one way in which it was possible to score highly for a particular question.

Jason Harkess
Chief Examiner
9 December 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

Marks	**Time (approx.)**
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. 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:
    - 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.
    - 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 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	☐Male ☑ 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 ***[TO BE COMPLETED – SEE QUESTION 1].***		
Under what law?	☑State ☑ Act ☐ Other-specify ☐C'wealth ☐ Reg.	Act or Regulation No. 6231/58	Section or Clause (Full Ref.) 87
Are there more charges?	☑No ☐ Yes – See Continuation of Charges attached		
Request for Committal Proceedings	☐No ☑ Yes		
Type of offence	☐ Summary Offence (You should go to Court)	☑ 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	**Steven M Hunter**	Date 1 October 2015	

Charge filed at		on	
	Melbourne (Venue)		1 October 2015 (Date)

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 29TH	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)	**Steven M Hunter**	☐ Registrar ☐ Magistrate ☐ Public Official ☑ Member of Police Force ☐ Prescribed Person

QUESTION 1

Criminal Procedure: Refer to the charge-sheet and summons on the previous page. Complete the charge-sheet by drafting the charge. Provide your answer in the writing space below. **[2 marks]**

Answer 1: The accused did on 16 June 2015 and 17 June 2015 at Melbourne commit blackmail, with a view to gain for herself with intent to cause loss to another, by making any unwarranted demand with menaces against Mr Jacob Herne.

Answer 2: The Defendant, at Melbourne on 17/6/15, did with a view as gain for herself or with intent to cause loss to another, make an unwarranted demand of Jacob Herne with menaces.

QUESTION 2

Criminal Procedure: In this case, the police decided to release the Accused on bail after she was charged. If the police had decided ***not*** to release her, what steps would the Accused need to take to secure her release pending the determination of the charge? You should identify and explain in your answer: (i) the relevant decision-maker who may order her release; (ii) the applicable legal principles that would govern the decision-making process; and (iii) the kinds of factual matters that would most likely be taken into account by the decision-maker. **[3 marks]**

Answer 1: Because the police have refused to bail A, A would have to apply to a court for bail. Here A can apply to a Magistrate for bail as she is not charged with treason or murder, or being committed for murder (s.13 Bail Act). S.4 of the Bail Act governs the decision-making process whether the accused should be granted bail. Here the accused does not have to show exceptional circumstances (because not murder or treason) or show cause (because not already on bail or other factors in s.4(4) of Bail Act). Court has to consider factors in s.4(3) of Bail Act. Here decision maker would likely take into account the nature and seriousness of charge (serious because indictable 15 yr max penalty) the character and antecedents of accused (no evidence of priors here) strength of the evidence (circumstantial case) A would likely be granted bail.

Answer 2: (2.5/3) (i) Upon police refusal of bail, Porter would need to face a bail justice (if out of court hours) or a magistrate within a reasonable time of her remand.

(ii) Due to the nature of the charge (blackmail), Porter has a prima facie entitlement to bail unless the court is satisfied she presents an unacceptable risk of: reoffending/interfering with witnesses/endangering community or failing to answer bail. Here, it is likely to be granted. It doesn't appear that she has prior convictions (and unlikely given her profession). Therefore, it would be difficult for PC to assert risk of re-offending. The court can impose conditions to reduce risk. Here, appropriate conditions may be not to contact witnesses and attend the victim's workplace.

QUESTION 3

Ethics: Assume you are Counsel and that you have been approached by the Accused to act for her in relation to this matter. In what circumstances are you able to act for the Accused directly (i.e. without an instructing solicitor)? Explain whether you would be able to do so in this case. **[3 marks]**

Answer: Counsel is not required to accept a direct access brief – this is an express exception to the cab-rank rule. If counsel intends to accept a direct access brief, they must (a) inform the client of rules 11 and 13 of the Uniform Conduct Rules (what work a barrister can and cannot do) (b) provide the client with a fair description of their advocacy experience and availability (c) inform the client that they may need to retain an instructing solicitor at short notice (d) inform the accused of any other disadvantage which many, as a real possibility, be suffered by the client by reason of the failure to retain an instructing solicitor. A barrister should obtain a written acknowledgement of the above from the client before accepting a direct access brief.

A barrister must not accept a direct access brief if they believe on reasonable grounds that the failure to retain an instructing solicitor may, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's best interests.

In practice, the direct access brief is inappropriate in most occasions – save for relatively simple summary offences. Here, having regard to the request for committal, the complexity of the evidence, the sentencing options, number of witnesses, etc., I would not accept a direct access brief.

If a barrister does accept a direct access brief, they must comply with the costs disclosure obligations as a 'first law practice'.

Answer 2: Prima facie counsel are obliged to accept all briefs offered to them within their expertise/practise etc. However, a barrister is not required to accept a brief directly from a client. To accept a brief directly, I would need to inform the client in writing of the effect of rule 11 (what is barristers work) and rule 13 (what a barrister is prohibited from doing), that circumstances may require the client to obtain a solicitor at short notice, any disadvantage that the client may suffer as a result of not having a solicitor, and a fair description of my advocacy experience. I must receive from the client a signed, written acknowledgment that they have been informed of those matters.

In this case I would refuse to act directly because it is not appropriate or in the client's best interest as it is an indictable offence – so will likely be heard in the CC or SC, involves a range of complex evidence (DNA, hearsay/emails, circumstantial evidence, etc.) and a complex offence with many elements which need to be considered.

QUESTION 4

Ethics: *Your answer:* ***(circle ONE)*** **[1 mark]**	As a matter of general principle, which **ONE** of the following is **not** a manner in which a barrister is expected to act? a) Acting bravely. b) Acting competently. c) Acting diligently. d) Acting fairly. e) Acting vigorously. f) Acting honestly.

QUESTION 5

Ethics: *Your answer:* ***(circle ONE)*** **[1 mark]**	Which **ONE** of the following statements most accurately reflects the general requirement that a barrister must be a 'sole' practitioner? 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.

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

The matter has been set down for a committal hearing and is to proceed by way of hand-up brief only (no witnesses will be called).

QUESTION 6

Criminal Procedure: What is a 'committal hearing' and in which Court does it take place? Explain the essential determination the Court must make in a committal hearing and the likely outcome for the Accused in this case. **[3 marks]**

Answer 1: A committal hearing is an administrative hearing held before a magistrate. The primary purpose of the hearing is to determine whether there is sufficient evidence of sufficient weight to order that the accused stand trial before a judge and jury. It is held in the Magistrates' Court and can be oral or on the papers (eg hand-up committal). Here the prosecution's case consists mainly of circumstantial evidence and some of it is tenuous to link the accused. However other evidence such as the computer used to create the Hotmail address is stronger evidence. Here although not a strong prosecution case, there is sufficient evidence for a prima facie case and matters of weight of evidence that should be determined by a jury. The A would likely be committed to stand trial.

Answer 2: The committal hearing will take place in the Magistrates' Court. It is a preliminary hearing, administrative in nature, at which the Mag will hear or consider the evidence and case put by the prosecution and determine if there is sufficient evidence to lawfully convict the accused. If there is, the accused will be committed to stand trial. If not, the case will be dismissed. Much of the evidence sought to be relied on by the prosecution is circumstantial. That is not to say the accused cannot be committed on the basis of circumstantial evidence. It is a question of weight, and whether the inference sought to be drawn is rationally open. The fact that the print request was sent from her computer and the accused would obtain a benefit if the victim resigned by reason of the threats is likely to meet the requisite threshold.

QUESTION 7

Criminal Procedure: Refer to Part 3.1 of the *Criminal Procedure Act 2009* ('the Act') and answer the following questions:

(i) What are the main practical benefits for the criminal defendant who successfully applies to have an indictable offence heard and determined in accordance with Part 3.1 of the Act? **[2 marks]**

Answer 1: The main benefits of having an indictable offence determined summarily is that it is heard in MC, with no jury, and has capped jurisdiction. The MC can only sentence to term of imprisonment of two years and 5 years for multiple offences. If goes to trial in CC, Porter faces a max term of imprisonment of 15 years. Other benefits include faster (no committal proceeding) and therefore cheaper.

Answer 2: The main practical benefits for a defendant who successfully applies to have matter heard summarily include (1) matter heard faster (2) open lower allowable sentence (here 2 years if heard summarily versus 15 years if heard indictment); (3) can have de novo appeal in County Court.

(ii) Assume that blackmail is an indictable offence that is not listed in Schedule 2 of the Act. Is it possible for the Accused to make such an application in this case? Why/why not? **[1 mark]**

Answer 1: Cannot be heard and determined summarily as is a level 4 offence with 15 year max gaol (s.28).

Answer 2: Here the accused is not eligible to apply for summary determination: the charged offence of blackmail carries a 15 year maximum term (level 4 imprisonment), whereas generally only indictable offences carrying level 5 or level 6 penalties are eligible for summary hearing.

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 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 1: Counsel should advise A this evidence could amount to Alibi evidence. In order to rely on alibi evidence, notice must be given within 14 days of the committal. Failure to give such notice may result in A being unable to rely on this evidence at a later time. Counsel should advise A that this evidence may go to establishing her innocence and as such, would form an important part of the defence case.

Defence counsel must promote and fearlessly protect their client's interests. Counsel must seek to help their client understand the issues and then, ensuring the client understands the available alternatives, enable them to make decisions about how the case might run (r.36 and r.37). Alibi evidence is a clear advantage for the client and counsel must advise about this (s.38).

If she still refuses, Counsel should continue to act and promote A's interests without the Alibi. Counsel need not disclose this to the P and should not as it was advised in confidence.

Answer 2: (i) Counsel has an obligation to ensure the client has sufficient knowledge to give instructions about the case. Dr Knight's appointment would amount to alibi evidence. Counsel must advise A of the time limits for giving notice of alibi evidence and the implications for A's case if she fails to give such notice, namely she will not be able to rely on the alibi evidence if she later changes her mind. Counsel can do this in strong terms. Counsel should advise A that this is strong exculpatory evidence.

(ii) If A refuses to accept this advice, Counsel must follow A's instructions. Counsel must not mislead the Court and so the case must not be run in a way that asserts anything contrary to A's instructions.

(iii) Counsel is not obliged to tell Pros about this information. Indeed, Counsel's duty of confidentiality to A means they must not disclose it to the prosecutor.

QUESTION 9

Criminal Procedure: Compose **FOUR (4)** different questions of substance that a County Court Judge might ask Prosecution or Defence Counsel about this proceeding at a Directions Hearing. **[2 marks]**

Answer 1:

1. Do the parties have any pre-trial issues that they intend to raise or any orders that they intend to seek?

2. What is the estimate of the length of trial?

3. How many witnesses do the parties intend to call?

4. Are there any requirements of facilities required by witnesses or interpreters (eg if evidence is to be via video link)?

Answer 2: 1. Estimate of the length of time for the trial 181(2)(e).

2. Number of witnesses that might be called other than the accused and whether they need any mode to communicate (eg videolink).

3. Whether the accused will continue to be represented legally (funding) throughout trial.

4. Whether there are any pre-trial issues requiring interim action, eg if a charge should be removed from indictment.

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

Parts of Mr Herne's written statement are reproduced in the box below.

Jacob HERNE states:…

1. On 17 December 2014, after the Department's staff Christmas party which finished at about 11.00 pm, my personal assistant, Rinalda Graves, and I took the lift down to the basement level car park in our office building. The car park was virtually empty except for 5 or 6 parked cars. I did not see anybody else around. Rinalda and I found a secluded spot behind a thick concrete pillar. We then engaged in sexual intercourse which lasted about 30 minutes. We then got dressed and I gave Rinalda a lift home and dropped her off. I then drove home. We agreed not to tell anyone about our encounter that night.

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. 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]**

Answer 1: First hand hearsay is evidence of a previous representation given by a person who saw, heard or otherwise perceived the representation being made by a person who had personal knowledge of the asserted fact. The statement by Hui that the Departments were merging and only one person would get the job is firsthand hearsay. Hui has actual knowledge of that asserted fact and made a representation to Herne about it. His evidence of her statement is first hand.

Second hand hearsay is one more step removed. I.e. A observes/perceives an event. A tells B what happened. B then tells C what A said. C's evidence is second hand hearsay. Grave's comment that Porter had told her she was aware of the "naughty things" is second hand hearsay. Porter has actual knowledge, she then made a representation to Graves, who then told Herne about it.

Answer 2: Hearsay is a representation made containing the asserted fact which the W did not immediately perceive, but 'heard' from another. 1st hand HS is where W heard it from person that had personal knowledge/perception of asserted fact. 2nd hand HS is where a W heard it from a person who heard it from someone else. Eg. 'Rinalda heard some vague recollection' is first hand, because he witnessed Rinalda recalling. Secretary's report on meeting of Minister is 2nd hand because H heard it from Sec who heard it from Minister.

QUESTION 11

Evidence: In relation to Exhibit 1 (the envelope), Exhibit 2 (the A4-sized type-written note found inside the envelope) and Exhibit 3 (the email), the Prosecution is likely to respond to Defence Counsel's hearsay objections by arguing the following:

(i) *"The evidence is not hearsay, and therefore admissible."*

(ii) *"Alternatively, if the evidence is hearsay, exceptions clearly apply."*

What do you expect Prosecuting Counsel to submit and why? Is there any merit in these arguments? Explain. **[4 marks]**

Answer 1: The envelope is hearsay evidence because the representation that it said 'Jacob' on it would be used to prove the truth of the fact that the envelope was addressed to him. However the envelope could be admissible for a non-hearsay purpose that is that Jacob did in fact receive an envelope. If it is admitted for the non-hearsay purpose, then it can be used for the hearsay purpose (s.60 EA). Here likely that the envelope would be admitted because it's relevant (s.55 EA) because is in fact in issue whether Herne received it and it is proof of him receiving it, therefore it falls under s.60 non-hearsay exception.

Exhibit 2 is not hearsay because it would not be used to prove the truth of the representation, it would not be used to prove that he did have a sexual encounter. Whether he had encounter does not prove that he may have felt threatened by its contents. The note is relevant and the representation within it would be used to prove that there was a threat/menace being made with the note. It would likely be ruled admissible.

Exhibit 3, the email is partially hearsay. The rep re the victim 'strutting around' would not be used to prove the truth of that statement. But arguably the threat that writer of email will tell wife would be used to prove the truth of that statement. However it is admissible because it can be used for non-hearsay purpose because it is proof that Herne did receive a threat, which is a fact in issue. Likely to be admissible on this basis because of s.60 EA then can be used for hearsay purpose too. The metadata of email (sender, recipient, time etc) is admissible because of s.71 EA re electronic communication.

Answer 2: Exhibit 1 – is not hearsay evidence because it is not sought to be adduced for a hearsay purpose, nor is it evidence of a previous representation. It is sought to be adduced to prove that the victim received a letter. It is therefore not caught by the rule.

Exhibit 2 – the letter contains a previous representation but is not tendered to support the existence of the asserted facts (i.e. you are a disgrace). It is also therefore not caught by the hearsay rule.

Exhibit 3 – there are two parts of the email which need to be considered. (i) - the electronic data attached to the email (e.g. time, date, identity of sender). This is evidence of a previous representation and is admissible under s71 as an exception to the hearsay rule and may be relied on by the prosecution to prove these matters. (ii) – the content of the email contains a clear threat. It is a previous representation made by a person. It is sought to be adduced to prove that person made the threat. It is not adduced to prove the truth of the contents of the threat and demand that they leave. Again this is not a hearsay purpose. The prosecution's objections each have strong merit, with respect to those particular exhibits and the evidence is likely to be ruled admissible.

QUESTION 12

Criminal Procedure: Defence Counsel is contemplating the best strategy, in terms of timing, as to when to make his 'hearsay' objections to Mr Herne's evidence known to the Prosecution. She is contemplating three possibilities:

(i) objecting well before the commencement of trial (to be fair to the Prosecution);

(ii) objecting just after Mr Herne has been sworn in to give evidence (to catch the Prosecution off-guard); or

(iii) objecting on the first day of trial, before jury empanelment (a 'half-way house' between (i) and (ii) above).

Which of the above options is open for Defence Counsel to select and, if more than one option is open, which is preferable? Explain. **[3 marks]**

Answer 1: Any of the above options would be open for counsel to select, however the preferable option is (i). This is because the objections would be substantial and likely take some time to determine and it is more convenient to do this before the trial using pre-trial procedures. Further counsel is obliged to disclose pre-trial issues unders.200 of the CPA. Because counsel is aware of this now, before trial, it would be looked upon unfavourably if notice were not given in accordance with s.200. If any other objections, as yet unknown, arise during the evidence in trial, then counsel can still object then. Further, better to have pre-trial hearing because if evidence ruled inadmissible, will weaken crown's case and they may decide to withdraw the charge, nolle it or offer resolution to a lower charge. Tactical advantage therefore in having it decided pre-trial. Also gives counsel two chances at XXN of Herne.

Answer 2: Defence is technically able to make an application as to the admissibility of the evidence at any time before the trial (that is before the Accused is arraigned) (s199). Defence counsel is also obliged to respond to the summary of the prosecution's opening and notice of pre-trial admissions that P has served (s182-183). Defence is obliged to identify what evidence is in issue/basis (s183(3)). If the defence does not take issue at the required time, obliged to inform the Court/the party in advance of the trial. Defence also has ethical obligation to narrow issues in a timely way (s58). In the event that defence fails to take those steps, this could lead to adverse comment from the trial judge for non-compliance, and may preclude/inhibit leave to appeal prospects if the trial judge rules against defences counsel for failing to take issue earlier (affects certification prospects s295(2)(c)).

QUESTION 13

Criminal Procedure: Assume that the trial judge rules that Mr Herne's evidence in its entirety is inadmissible, and Exhibits 1, 2 and 3 are also inadmissible, because he accepts Defence Counsel's submission that they are all *'riddled with hearsay'*. Explain how the Prosecution might seek to challenge the trial judge's ruling in relation to this evidence and whether such a challenge is likely to be successful. **[3 marks]**

Answer 1: P would seek to challenge the TJs ruling pursuant to s295 of CPA. The TJ must certify that if the interlocutory decision concerns the admissibility of evidence, the evidence of ruled inadmissible would substantially weaken or eliminate the P case. If the TJ refuses to make this certification, the P may apply to the C of A to review this decision and the C of A may consider the same factors as the TJ was obliged to consider. The C of A will grant leave to appeal only if satisfied that it is in the interests of justice to do so, considering any disruption or delay to the trial, whether the determination may render trial unnecessary, substantially reduce the time required, resolve an issue of law, evidence of procedure or reduce likelihood of successful appeal against conviction and any other issue the court considers relevant. In that case the challenge is likely to be successful as the evidence has significant probative value and inadmissibility would remove the backbone of the prosecution case (luna).

Answer 2: The prosecution may make an interlocutory appeal to the Court of Appeal. In order for the prosecution to appeal, the trial judge must certify under s295(3) that the ruling will substantially weaken or eliminate the prosecution's case. A refusal to certify can also be reviewed/appealed under s296 within 2 or 10 days (depending on whether trial has commenced). Second, the prosecution will require leave of the Court of Appeal to appeal. In determining whether leave should be granted, Court of Appeal must be satisfied that the reasons for the appeal clearly outweigh the disruption to the trial.

An appeal against an interlocutory decision is conducted on House v R principles. The prosecution must point to a specific error in the trial judge's ruling (taking into account irrelevant considerations, not taking into account relevant considerations, plainly unjust etc.).

Here, the appeal is likely to be successful. Although the House v R threshold is a high bar to reach, the documents are arguably not hearsay, and form the backbone of the prosecution case – that is, they are self-evidently capable of significant probative value.

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 1: This evidence is an admission by the accused that she had seen the victim and Graves in the car park. The 'naughty girl' comments may also be an admission of knowledge of the events the subject of the blackmail. Although it is hearsay, it may be admitted as an admission under s.81 because hearsay doesn't apply to admissions. Here it is first hand evidence of the admission for the reasons in question 10 and 11 the evidence is admissible.

Answer 2: The evidence of Graves re the conversation is hearsay and it is also relevant. It is relevant because it goes to a fact in issue, namely did A know about the sexual encounter in the car park, because if A did it made it more likely A could have written note and email. It could also be deemed an admission because it is a statement that is adverse to A's interest because it shows she has knowledge of car park encounter which could mean she wrote note and email. If it is an admission then it will be deemed admissible (s.81 EA: admission exception to hearsay). Can also be admitted under s.60 because it can be used for non-hearsay purpose that A and Graves had a conversation re encounter. If admissible for non-hearsay then can be used for hearsay purpose (s.60 EA).

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 1: All counsel must comply with the rule in *Brown v Dunn*. It requires them to put to the witness before the close of XXN any factual scenarios which they will ask the court to accept as true that contradicts the account given by the witness, so that the witness might comment on it. It is an obligatory rule. In this case, Defence counsel would have to put to Ms Graves ("G") that D never said to her that she had seen G and Jacob together in the staff car park after the Christmas Party, and that G is either mistaken about this, or being dishonest about it. DC should also put to G that there was "office gossip" about her affair with Herne also. If DC fails to comply, the Court could recall G under s46 EA so that the necessary matters can be put to her for comment. If this does not occur, trial judge may make a comment to the jury about how they have been deprived of the puttage and an opportunity to assess G as a witness as a result.

Answer 2: (i) Defence Counsel must comply with B v D in relation to Ms Graves evidence. (ii) This must occur at the time Graves is giving evidence, when Defence Counsel X-examines her, unless leave is later obtained to recall. (iii) The rule must be complied with. The only discretion remains with the Judge as to how to deal with the evidence adduced via breach of the rule. (iv) On these facts, Defence Counsel must put to Graves that the Accused did not say that she saw Graves and Herne having sex. (v) the possible consequences of failing to comply is that Defence Counsel may be excluded from adducing evidence from the Accused that she did not say those words. Alternatively, Graves may be recalled or the evidence may be given little or no weight.

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

Mr Herne's evidence and Exhibits 1 to 3 are held to be admissible, as is the evidence of Ms Graves.

Parts of written statement of Dr Smith (the forensic scientist) are reproduced below:

Monica SMITH states:

…

5. In accordance with established laboratory protocols, I examined Exhibit 1 (envelope with word "JACOB" type-written on front) for traces of DNA. I discovered seven (7) samples of biological matter on Exhibit 1 and analysed each of them separately (and labelled Samples #1 to #7, respectively).
6. Upon analysing each of the seven (7) samples, I made the following findings:

- There is a 99.999% probability that the DNA in **Samples #1** and **#4** belong to the same unique particular individual (and that Samples #2, #3, #5, #6, and #7 belong to unique individuals other than this person).
- There is a 99.999% probability that the DNA in **Samples #2** and **#3** belong to a unique particular individual (and that Samples #1, #4, #5, #6 and #7 belong to unique individuals other than this person).
- There is a 99.999% probability that the DNA in **Sample #5** belongs to a unique particular individual (and that Samples #1 to #4, and #6 to #7 belong to unique individuals other than this person).
- There is a 99.999% probability that the DNA in **Sample #6** belongs to a unique particular individual (and that Samples #1 to #5, and #7 belong to unique individuals other than this person).
- There is a 99.999% probability that the DNA in **Sample #7** belongs to a unique particular individual (and that Samples #1 to #6 belong to unique individuals other than this person).

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 1: S55 states that evidence is relevant if, were it accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. It is open on the evidence to find that the presence of accused's DNA increases the chance she committed the crime. The fact that other conclusions are open on the evidence does not rob the evidence of its relevance. The question is whether it could, not whether it will, or likely will.

Answer 2: Under s55, evidence is relevant if, were it accepted, it could rationally affect the assessment of existence of a fact in issue. Relevance does not look at extent of effect (IMM). Therefore, here an issue is whether accused made threats against V including a letter in envelope - the DNA evidence could affect assessment of that issue. The reliability and credibility of evidence no assessed at point of relevance.

QUESTION 17

Evidence: *Your answer:* ***(circle ONE)*** **[1 mark]**	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*? 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).

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 1: The decision of IMM v R effected a change in the way courts in Victoria assess the probative value of evidence under the Evidence Act (for example, in relation to s97, 98, 135 and 137). The majority judgment in IMM made it plain that a trial judge, when assess the probative value of evidence, is to assume both the reliability and credibility of the evidence. This marked a change from Dupas where the trial judge was permitted the reliability of evidence when deciding its probative value. In effect, IMM stated that the trial judge is to assume that the tribunal of fact will accept the evidence at its highest. Questions of the credibility (i.e. truthfulness) and reliability (e.g. memory, accuracy, perception) are not relevant factors in the determination of whether evidence is probative. However, the facts asserted in the evidence are not necessarily taken to be reliable or credible – the court may have regard to the circumstance surrounding the asserted fact to determine whether that evidence is weak or simply unconvincing.

Here, defence counsel might seek to rely upon s137 of the Evidence Act. In making a determination, the trial judge is to assume that Dr Smith is giving his evidence reliably and credibly. This does not mean that the trial judge is prohibited from looking behind the facts asserted by Dr Smith. Here, Dr Smith's evidence is probative. It concludes a 99.999% probability that the accused touched the envelope. This is plainly probative. However, the evidence might be considered

prejudicial, due to the danger that the jury will improperly use the evidence in some unfair way – here by attaching too much weight to the evidence.

Further, defence counsel may seek to exclude the evidence under s135 on the basis that the evidence is misleading or confusing – without further explanation it does not paint the true picture to the jury and might ultimately mislead or confuse. However, the test for exclusion under this discretion is high – the probative value of the evidence must be *substantially* outweighed by the danger that the evidence will be misleading or confusing. Unlikely to have occurred here.

Answer 2: DC is correct to seek exclusions under these provisions. This provides exclusion of relevant evidence on the grounds of unfair prejudice. Here, both provisions require an assessment of the probative value of the evidence. Per IMM, in assessing probative value, take it to be accepted. That is, both credible and reliable. Here therefore, an analysis of the probative value requires acceptance of the evidence 'Samples 1 and 4 belong to Scarlett Porter'. The evidence therefore has probative value of linking SP to the notes. The concepts of unfair prejudice/unfairly prejudicial both require consideration of whether there is a risk that the jury will either place too much weight on the evidence/use it impermissibly or react to it with emotions or moral outrage. Here, the prejudicial effect is likely to be argued by DC that there is a danger that the jury will place too much weight on the DNA evidence. DC's particular arguments likely to be as follows.

- Probative value is outweighed by jury being misled or confused by evidence. (i.e. there are many ways DNA can come to be on note) (s135 argument)
- Reasonably low probative value: because there are other, unknown people's DNA on the envelope the paper comes from D's workplace and she could have innocently touched it. This is compared to the danger that the jury will place too much weight on the evidence; i.e. view as being the 'smoking gun'. DC can ask for exclusion under s137 because this is a criminal matter and is adduced by P.

Here, I think that ultimately evidence would be inadmissible under s137.

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?

QUESTION 19

Evidence: Assist Defence Counsel by identifying any further ground(s) upon which the Accused could seek to exclude the evidence of Dr Smith, paying particular attention to arguments that may be made in relation to how the Accused's hair sample was obtained. **[2 marks]**

Answer 1: DC could argue that s138 is engaged and that the evidence has been obtained improperly or unlawfully. The gravity of the impropriety will determine the admissibility of the evidence. The court will not admit the evidence unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence obtained this way. The court will take into consideration the probative value of the evidence, the importance of the evidence, nature of offence, gravity of impropriety, whether deliberate or reckless, whether any other proceeding will be taken in relation to it and the difficulty of obtaining the evidence without the impropriety or contravention. In this case, the impropriety was deliberate and involved the offence of stealing. The evidence could have been obtained by way of forensic procedure ordered by the court and therefore the evidence should be ruled to be inadmissible as its gravity, contravention of the processes of the court and administration of justice is severe.

Answer 2: Counsel would argue that the evidence should be excluded because the hair which was used to confirm ID of samples #1 and #4 was improperly or illegally obtained. Section 138 of the EA is the relevant section. Counsel would argue that the hair was obtained by Hui by illegal conduct e.g. trespass in office and theft of brush. Trespass more difficult to establish because Hui likely had licence to be in office but theft easier to establish because no evidence of permission from A that Hui can take personal item. Counsel only has to establish on balance of probabilities that evidence obtained improperly/illegally (s142 EA). Once impropriety established by D, then onus on prosecution to establish that desirability of including evidence outweighs undesirability of admitting it in evidence improperly obtained (relevant factors in s138(3)). Counsel would succeed in having evidence excluded because courts would not want illegal conduct e.g. theft to be encouraged or rewarded.

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 1: PC must inform the court immediately as PC has a duty to not mislead the court. Rule 79 is engaged but here modified as P not have a client. However P has duty to not press P's cause beyond full and fair presentation of case (r.84) and cannot make closing submissions referring to RG's evidence etc as that would be misleading. Could seek leave to recall RG and to allow DC to XXN her. Issues is that P is a witness – may need to step aside.

Answer 2: The prosecutor has an obligation to fairly assist in arriving at truth (r.83) and must disclose to opponent as soon as practicable any evidence which constitutes evidence of guilt or innocence of the accused (r.87). Prosecutor has to also disclose matters within prosecutor's knowledge that goes to reliability of witness. Here the prosecutor must tell defence of what prosecutor heard and witness may be recalled. Prosecutor should also seek that someone else take over prosecution because prosecutor may be called as witness if Graves denies what she said.

END OF PART A

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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:
    - summarily dismissing Ms Porter on 1 October 2015; or
    - 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

Civil Procedure: *Your answer:* ***(circle TWO)*** **[2 marks]**	Which of the following **TWO** propositions are most likely to be correct in this case? a) The proceeding will be commenced by originating motion. b) The proceeding will be commenced by *ex parte* application. c) The proceeding will be commenced by writ. d) The proceeding will be commenced in the Magistrates' Court of Victoria. e) The proceeding will be commenced in the County Court of Victoria. f) The proceeding will be commenced in the Supreme Court of Victoria.

QUESTION 22

Ethics: *Your answer:* ***(circle ONE)*** **[1 mark]**	Who is bound by the overarching obligations in civil proceedings, as set out in the *Civil Procedure Act 2010*? a) A party to the proceeding. b) Counsel acting for a party. c) Litigation Funder. d) Expert Witness. e) All of the above. f) None of the above.

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 1: It is a document that must be completed by the lawyer and filed with the first substantive document filed by that party in the proceeding. The lawyer must certify that all allegations and denials have a proper basis, i.e. they are based on reasonable belief in their truth, and that all non-admissions have a proper basis, i.e. the lawyer does not know if they are true or not. Failure to comply can be taken into account by the court when it makes any orders in the proceedings.

Answer 2: Proper basis certification is the filing of a certificate made by a lawyer with the first substantive document certifies all allegation, non-admissions and denials have a proper basis based on the factual and legal material available at the time (reasonable belief as to the truthfulness). P's lawyers must file it with the statement of claim in relation to each allegation. Failure to certify does not invalidate the proceeding but may be taken into account when making orders including as to costs in the proceeding (s46 CPA).

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 1: Para 23 fails to give particulars of malice as required by r.13.10(3) of the SCR. Para 38 contains evidence relating to the allegation. Pleadings are only to contain a summary form of all material facts on which the party relies, but not the evidence (r.13.02(a) of SCR). D could request that the P provide further and better particulars, by way of letter, and if the request is not complied with the court may then make this order (r.13.11). The D could also request that the p amend their pleadings to omit the evidence and in the absence of this being actioned, could apply to the court for the pleading to be struck out on the basis of being embarrassing and failing to disclose a cause of reason (r.23.02).

Answer 2: Para 23 - does not set out material facts on which P's rely in making an allegation – it just states that they did it (i.e. the allegation). Pleadings should contain summary of material facts and may plead conclusion of law but only if facts support it. This is not the case here. Also must contain necessary particulars to allow D to plead; to define questions at trial and to avoid surprise. Therefore, here should explain what was motivating the Ds – i.e. improper purpose or reckless indifference.

Para 38 – pleadings should not plead evidence – this is a statement of evidence P intends to rely on. Therefore D should write to P and request further and better particulars. If still don't comply, court may order further and better particulars. If not produced with further and better particulars D may apply to court to have claim (or part thereof) struck out on basis it is embarrassing as defence don't know how to plead.

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 1: Counsel can only represent multiple parties if there is no real possibility the interests of the parties would conflict. If so, the barrister must return one brief or both if confidential information is already disclosed. Possibility counsel could act for Ms G and Ms H if they both run the argument there was no maliciousness, but a genuine belief in her guilt. Overall, it may be that the parties, even where interests appear aligned at first, would be both separately represented as they may seek contribution from one another down the track. They should have separate counsel as there is a real possibility that they will blame each other.

Answer 2: Essentially, counsel can represent two parties if there is no real possibility of a conflict (Bar Rules 119). On the facts here, Counsel is unlikely to act for two parties in the proceeding. None of the defendants have the same interest as the plaintiff. Arguably D1, 2 & 3 have the same interest in the 'malicious prosecution' matter but likely to be questions as to contributions of each defendant and so there may be conflicts. Could argue D2 and D1 have same interest but D2 needs to answer another claim (misfeasance) and also different questions as to contributions on malicious prosecution matter. Counsel should not represent two parties in this matter.

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

Counsel has just been briefed to act for the Second Defendant (Ms Hui) and draft the defence. Shortly after receiving the brief, Counsel's instructing solicitor telephones her to provide further information. In the course of the conversation, the solicitor says:

> '*Between you and me, this case is a cash cow. The state government is paying the costs of our client and they've made it pretty clear that there's no way they're going to cave in to the plaintiff's claim. It won't settle... AT ALL! Leave no stone unturned with the defence. Take a scatter gun approach. We need to bog the plaintiff down with procedure so that she'll eventually give up. Don't worry about your fees. It's the state government. They'll pay whatever you invoice. Hahahahaha!'*

QUESTION 26

Ethics: Discuss the ethical implications of the instructing solicitor's suggestions and the possible consequences if Counsel were to accede to his suggestions. **[3 marks]**

Answer 1: Counsel has an overarching obligation to ensure that cases are heard in a just, efficient, timely and cost-effective manner. If counsel were to comply with the solicitor's instructions they would be in breach of their obligations to the court (s.15 of CPA), specifically their duty to narrow the issues in dispute, use reasonable endeavours to resolve the dispute, to cooperate, to only take steps towards resolution, to minimise delay, ensure costs are reasonable and proportionate (Part 2.3 CPA). The court may make such orders as to costs or further steps in proceedings (ss 28, 29) but will only do so where it furthers overarching purpose (Hadspeth). Conduct may also ground action for unsatisfactory professional conduct or professional misconduct.

Answer 2: Counsel is obliged under s58 to advance the administration of justice effectively by taking only those necessary steps to resolve the real issues in dispute, including succinct and clear identification of those issues. Counsel is also obliged to take steps which are only necessary, reasonable and proportionate to the issues in dispute, and should not take unnecessary and costly steps for tactical advantage (CPA ss23-25) (*Oswal*). Counsel is also not permitted to rack up costs for personal advantage in a way that puts him at odds with his paramount duty to the court. If counsel accedes, risks referral to Ethics Committee and steps taken under the Legal Profession Uniform Act e.g. proceedings for professional misconduct.

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

Shortly after the Plaintiff filed and served her claim, the Plaintiff's solicitors discovered that the First Defendant, Ms Graves, has put her Toorak house up for sale, advertised on www.realestate.com.au. The Plaintiff's solicitors conduct a title search on the property and see that it is registered solely in the name of Ms Graves and completely unencumbered (i.e. no registered mortgage), giving Ms Graves 100% equity in the home. A further search on www.onthehouse.com.au reveals that Ms Graves' house is valued between $2.1m and $2.4m.

The Plaintiff thinks that Ms Graves may be '*selling-up, taking her assets and fleeing the country and retiring in the Caribbean to avoid court judgment*', although apart from selling her house, this proposition would appear to be highly speculative. There is no evidence that Ms Graves has done anything other than put her house on the market.

QUESTION 27

Civil Procedure: What steps could be taken by the Plaintiff in this proceeding to minimise the risk of obtaining a 'hollow' judgment in this case? Your answer should identify information that may need to be placed before the Court, and address considerations the Court would most likely take into account, in determining any application(s) the Plaintiff may make. **[4 marks]**

Answer 1: The P could seek a FO under O38A. It can only do so to prevent a prospective (here) argument being frustrated (not to secure for P) by a party; absconding or removing or disposing of assets. There must be a real possibility of this risk – not mere speculation and no more than 50%. Here unlikely grant. P better to seek an ancillary order so that RG can give evidence as to her intentions. To make FO, P would need to make application (which can be ex parte – ie no summons) with affidavit addressing 34A.02(5) including: basis of relief, amount of claim $3m (total), full and frank disclosure of any defence; D's assets value; that P has good arguable case; and why risk D will abscond etc. Also any 3rd party affected – here buyer of house. Could freeze proceeds. D need reasonable living expenses and legal costs. Court not want to freeze more than necessary – so need to know D's assets and likely judgement. Likely ex parte for short duration reasonable so D can be heard.

Answer 2: The P should make an application for a freezing order under order 37A. The application should be made on summons together with a supporting affidavit that sets out:

- The basis of the claim for relief
- The amount of the claim ($3m)
- Any possible defence (if application made without notice – which it should not be given there is no urgency in this case as the house sale is likely to take at least a few weeks)
- The nature and value of R's assets (her house is valued at $2.1 - $2.4m)
- The identity of any other person the order may affect

The court will only make the order if they are satisfied on the balance of probabilities that there is a real danger any further judgment would be left wholly or partially unsatisfied if the asset is sold or diminished in value. In this case, the assets are not outside Australia or being diminished in value by the sale. While the property (assets) are being dealt with, there is no evidence before the court that A intends to dispose of the sale revenue.

The court is unlikely to make the order.

QUESTION 28

Civil Procedure: Explain the obligation and purpose of 'discovery' in civil proceedings. Identify FOUR (4) categories of documents (specific to the likely issues to arise in this proceeding) that would be sought/discovered by any of the parties to the proceeding. **[4 marks]**

Answer 1: The purpose/obligation of discovery is two-fold. First, to fairly put other side on notice of relevant documents in proceeding and to limit issues in dispute. SC Rules 29.01.1 set out the scope of discoveries.

Essentially, parties need to discover documents upon which party rely, adversely affect their case or another party's case, or support another parties case. However, if reasonably believe in other party's possession, do not need to discover. Specific docs sought here could include:

- Docs re internal reviews of Vic Pol by ethical standards division raising questions as to whether Ms Porter appropriately charged
- Docs re Ms Porter's summary dismissed (e.g. text message by Ms Hui)
- Docs re Victorian Auditor-General in relation to Department's involvement in prosecution (NB: may need discovery from non-party)
- Docs research of Plaintiff's office (e.g. instructions from police to Ms Hui to carry out search)
- Docs from criminal proceedings (e.g. judgment and transcript of Judge's apology to plaintiff)

Answer 2: (3.5/4) The purpose of discovery is to facilitate disclosure, define issues for trial, avoid surprise and allow parties access to relevant docs. A party must discover: docs on which they rely/docs which adversely affect their case/docs that adversely affect another parties case/docs that support another parties case. Four categories:

- D/S Crane: must discover his notes of the criminal prosecution
- Graves: must disclose any notes/docs relating to working relationship with Porter
- Hui: must discover employment file of Porter
- Porter: must discover medical/psych reports that relate to damage to her mental health/emotional well-being.

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 1: The letter is prima facie privileged – it is a communication of legal advice from a lawyer made for the dominant purpose of conveying legal advice in confidential circumstances. Arguably, as a government department speaking to another, it is not legal and true procedural in nature (on government policy). However, it appears to meet the test. The claim is justified.

Arguably, privilege is lost because as the contents of the letter bear directly on whether Ms H ignored advice and was therefore malicious. The contents therefore affect the rights of Ms P (s121(3) EA) namely her right to seek damages in his claim for malicious prosecution.

Arguably the advice is affected by fraud/misconduct, though there is no suggesting it was prepared for that purpose.

If D wants to argue as defence she was justified in her actions, she may also behave inconsistently with maintaining privilege by relying on her set of communication without disclosing all valid communications necessary to give a full picture of the advice she received.

Answer 2: A party may claim legal professional privilege where the document was prepared by a lawyer or client for the dominant purpose of providing legal advice. 'Legal advice' is advice about what may sensibly and prudently be done in the relevant legal context. Here, dominant purpose is the purpose which predominates over everything else.

Here, the document appears to contain legal advice – it is from the VGSO to Ms Hui and gives advice whether Ms Hui may dismiss the plaintiff. The document likely would not have come into existence but for the provision of legal advice – and as such, it is likely covered by the CLP. It was not made for an improper purpose or in the furtherance of a fraud.

The plaintiff may challenge the claim for privilege. Here, the plaintiff may rely upon 'issue' waiver. If the second defendant seeks to defend herself by asserting that she was acting within her rights to dismiss the plaintiff, she may be directly putting the substance of the evidence in issue in the proceeding. If this occurs, privilege will be lost – this is an

essential rule of fairness. The defendant is not able to put the advice in issue and then deny to the plaintiff the very evidence which it requires to make good its claim.

Disclosure waiver!!

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 1: As 'in possession' of a non-party (VicPol and OPP) can seek to subpoena the documents (provide conduct money) and serve in accordance with under O42 or use non-party discovery under O32. The latter under 32.07 is made by summons and supported by affidavit stating facts and describing the documents or class of documents sought. May need to pay addresses (R's costs in either event accompanying (or non-party, for attending).

Answer 2: The plaintiff has two options. First, she may subpoena Vic Pol and the OPP to provide documents at the commencement of trial. The subpoena must clearly describe the documents which are sought, provide at least 5 days' notice, and provide conduct money. However, an O 42 subpoena only provides for the person to provide the documents at the commencement of trial.

If the plaintiff requires the documents prior to trial, she may apply for an order for discovery against a non-party under r32.07. Discovery maybe ordered where the documents relate to any question in the proceeding. This application is made by summons with an affidavit in support clearly specifying the documents sought. The plaintiff should also make clear the prejudice which she will suffer if she is unable to obtain the documents prior to trial. Absent this, the court may be slow to award discovery against a non-party given the existence of subpoena options.

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 1: P could seek to join the OPP as a defendant under r9.02 on grounds that there is a common question and rights to relief arise from same transaction. SD/TD should seek to file a 3rd party notice against the State on the grounds of indemnity (r.11.01(a)). State would then become a party. P could seek to join State by getting leave (9.02). Alternatively court might consolidate or try together after hearing claim against ST/TD before considering their indemnity claim against the State.

Answer 2: Here, the plaintiff may join the OPP as a defendant to the proceeding. This may occur under r9.02 as there is a common question of fact and law and the right to relief arises from the same facts. The plaintiff may also seek to join the Victoria Police if they believe there is a cause of action against Vic Pol (potentially vicariously liable for the actions of D/C Crane). This will be done under the same rule r9.02.

The second and third defendant's should file a third party notice on the State of Victoria as they are seeking an indemnity or contribution from that entity. A third party notice is filed in Form 11A and must be indorsed with a statement of claim. It should be personally served upon the putative third party.

QUESTION 32

Evidence: Refer to the opening statement of facts for Part B above, and in particular to the references relating to the Auditor-General's report. Counsel for the Plaintiff will be seeking to tender into evidence the Auditor-General's report in its entirety at trial. Identify **TWO (2)** possible objections that could be made as to the admissibility of this evidence and explain how those objections are likely to be resolved by the trial judge (***Note:*** in answering this question, do not identify as one of your objections the objection that is the subject of Question 32 below). **[4 marks]**

Answer 1: (1) The report contains opinions, prima facie inadmissible, about what was lawful – conclusions/inferences drawn from observed facts. Arguably the opinion is expert, coming from the Auditor General who has specialised knowledge in avoiding these issues based on training and experience. However, her report will contain input from various people, so experience is difficult to ascertain. Moreover, her report makes conclusions the jury are being asked to make for themselves, taking into account similar issues – arguably the report is not based on expertise, but what anyone could conclude after investigating the circumstances. May not even be relevant in that case (*Smith*).

(2) The report is also hearsay – prior representations made to press the truth of when they assert and prima facie inadmissible. If the single writer was available to testify, it may be admissible as 'fresh from the memory' but here all multiple authors. It could be a business record but is more a publication containing findings, not a record of business done. If it is, information provided by those with 1st hand knowledge, may be admissible (directly or indirectly supplied).

Answer 2: The report contains an opinion, namely "that the secretary seemed intent on holding Ms P liable." It is an inference drawn from the observation of the author and as such is prima facie inadmissible by operation of 76. Trial Judge may find that it is lay opinion but unlikely as it is not a necessary opinion to understand what the author perceived. It is also not based on specialised knowledge from skill, learning or experience and is not admissible under s79. Trial Judge likely to exclude.

The report also contains hearsay, so is prima facie inadmissible under s59. Trial Judge likely to find that it is admissible as a business document s69, also possibly if the author is available under s64 of the Act.

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 1: Section 97 concerns the admissibility of tendency evidence in civil proceedings. In order for tendency evidence to be admissible, the party seeking adduction must have served a tendency notice upon the other side a reasonable time in advance of the hearing. Second, the evidence must have 'significant probative value'.

The decision in Velkoski concerned the admissibility of tendency evidence. There, the court made plain that similarity is the touchstone of admissibility for tendency and coincidence evidence. Their Honours considered that 'striking similarity' set the bar of admissibility too high and was not required (although was almost always sufficient), and stated that 'mere relevance' was too low. Rather, they considered that the evidence should show a pattern of conduct, underlying unity or modus operandi. In considering the probative value of tendency evidence, the VSCA stated that the following factors were relevant: (a) the time-gap between the conduct (b) the number of occasions in which the conduct has occurred (c) the degree of similarity between the conduct (d) the degree of similarity between the circumstance (e) the strength of the evidence (f) the issue to which the tendency was relevant (g) whether the evidence is disputed.

It is likely that the tendency relied upon is that Ms Hui (the second defendant) has the tendency to summarily dismiss female employees without the following due process.

Having regard to the test laid out by their Honours in Velkoski:

(a) Time gap: here, the conduct spreads over the period of 6 years (2009-2015)
(b) Number of occasions: there are four occasions
(c) Degree of conduct: on two occasions (Bryce and Baker) the second defendant dismissed without explanation and summarily. On the other two, the dismissal occurred at the end of contracts and with some explanation as to why
(d) Degree of circumstance: all occurred in similar circumstances and with female employees
(e) Issue to which it is relevant: whether Ms Hui has this tendency is clearly important to the proceeding

As a result, the tendency evidence might be admissible in relation to Selena Bryce and Marilyn Baker. This is because the tendency is similar enough to the current occasion (summary dismissal without explanation). In relation to Thames and White, the relevant matter is not dismissal but non-renewal of contracts. Tendency notice must be served.

Answer 2: It is not clear whether a tendency or coincidence notice has been filed; in the absence of such a notice we must speculate as to the tendency or coincidence sought to be drawn. Note that, per Velkoski, the notice must be drawn from the actual acts evidenced in the prior incidents and will be more probative the more narrowly drawn it is. The evidence is presumably sought to be admitted for the purpose of demonstrating (i) a tendency of Hui to dismiss female Deputy Secretaries without proper basis, thereby making it more likely that Hui sought to dismiss the plaintiff without proper basis and (ii) that it is improbable that Hui dismissed four previous female Deputy Secretaries improperly but did not dismiss P improperly.

Per Velkoski, the touchstone of significant probative value is similarity. It need not be striking but must have something to elevate it to significance e.g. a significant pattern or MO. Other relevant factors might include the timing, the number of incidents, the circumstances of the 'victim', the general surrounding circumstances etc. The mere relationship of employer/employee is unlikely to be distinctive in circumstances where the complained conduct is dismissal of the employee.

A voir dire may be necessary to better understand the similarities and differences in the previous incidents and their probative value, e.g. how many male Deputy Secretaries had been employed (if none, then fact that improperly dismissed DSs are female is less distinctive).

Subject to any other information admitted on the voir dire, the number of incidents and relative consistency (despite the variances in length of time each employee stayed) probably demonstrates sufficiently similar circumstances and pattern to meet the significant probative value, at least at the civil standard (there is no way these would be admissible under the s101 restriction in criminal proceedings).

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

At the commencement of trial, the trial judge raises the following issue with Counsel:

> **Judge:** These are very serious allegations. I know they're torts, but they're almost criminal really, aren't they?
>
> **Counsel for First Defendant:** Yes your Honour, and so the Plaintiff must necessarily bear a significant burden in conducting its case.
>
> **Counsel for Plaintiff:** I must correct my learned friend your Honour. That's not quite right.
>
> **Judge:** What do you mean? These are intentional torts, are they not? Who bears the burden and what standard must be met if I am to be satisfied that the Plaintiff has made out her claims?

QUESTION 34

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

Answer 1: In this case, the burden of proving the claim lies with the P and it must be proved on the balance of probabilities, taking into account the nature of the cause of action, subject matter and gravity of the matters alleged (s.140 of EA).

Answer 2: The standard of proof for civil matters in the Evidence Act (s140) is the balance of probabilities. However, in determining whether the matter reaches the balance of probabilities, the evidence act expressly allows the trial judge to consider (a) the nature of the cause of action, (b) the nature of the subject-matter of the proceeding (c) the gravity of the matters alleged.

This makes provision for what is called the Briginshaw principle – that is, where an allegation of serious fraud or impropriety is alleged, the court may consider that the standard of satisfaction required to make good the allegation is increased. It should be noted that the test remains unaltered – the standard is still the balance of probabilities. However, the balance of probabilities is not a mere mechanical exercise (i.e. 51% is sufficient). Rather, it requires a standard of satisfaction, and the strength of the evidence or material required to meet this standard may at times be increased having regard to the nature of the evidence.

The plaintiff bears the onus of proof on any matter she asserts (the plaintiff is claiming intentional tort and must prove it on the balance of probabilities).

Answer 3: As this is a civil proceeding, the standard of proof in section 140 applied, i.e. "balance of probabilities". The P bears the onus of proving her case to that standard, and any party making a Third Party claim also bears that onus. However, in accordance with s140(2), given the gravity and seriousness of the matters alleged, the Court should be particularly careful in ensuring the evidence is strong enough to meet that test. The test does not change, but more careful analysis and strong evidence may be required.

QUESTION 35

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

Answer 1: Yes. The claim is commenced by writ and is founded on tort (r.47.02). P or D may elect (P on writ, D in writing) and must pay jury fee. Court has discretion to order non-jury trial if considers should not be jury trial – eg complex facts or law.

Answer 2: This matter may be heard before a jury upon request by plaintiff or defendant. The plaintiff may request a jury in the Writ, and the defendant(s) may request in a notice requesting jury filed within 10 days of their notice of appearance. Notwithstanding any request for a jury, the court may order that the matter be heard as a Cause before a Judge sitting alone. Here, it is likely that the court will order that the proceeding be heard before a judge having regard to the complexity of issues, number of parties.

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 1: PC docs have a proper basis to make the claim – B required to not allege fact amounting to criminality unless has reasonable grounds based on material (here clearly does) and C instructs to do so (in accordance with r.65). However PC should not make a suggestion in XXN on credit unless has reasonable grounds to believe it would diminish W's credit (r.67). Here this is satisfied – would be admissible under s.103 exception to CR as substantially affect W's credit. DC could object on grounds that PC should not respond with 'liar' at this stage. Since W seems not to recall perjury conviction, IC should put substance of it to him to allow W to identify it (s.43(2)) and give W chance to comment on it (Browne v Dunn) and perhaps adopt it. If not PC could then seek to admit it (she convictional in another W under resultant (s.106 – not need leave as it is a P's). By PC saying 'there you go again' he/she is showing personal view of evidence which is impermissible.

Answer 2: Here, the issue is credibility. Counsel for the plaintiff may cross-examine a witness about any matter which they consider is capable of substantially affecting the assessment of the witness' credibility. In compliance with its ethical obligations, a barrister should not make any allegation on credit unless they believe on reasonable grounds that the suggestion is capable of diminishing the witness' credibility.

Here, the matter is clearly capable of such an effect. If established, it demonstrates that the witness has previously knowingly made false representations while under an obligation to tell the truth.

However, a barrister should not quarrel with the witness nor make accusations that the witness is a liar. The barrister must only ask questions and should not ask improper questions (s41) – here the questions are unduly annoying and intimidating and may be disallowed. The barrister should accept denials made by the witness and approach the issue another way.

For example, if there is a factual basis for the allegation, counsel for the plaintiff should have attempted to lead evidence in response to a denial under s.106(2) (previous convictions).

The barrister may have sought to interpose a witness to establish independent proof of the fact.

END OF PART B

End of examination

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