



NEW SOUTH WALES
BAR ASSOCIATION®

NSW Bar Examination

February 2025

Candidate Number

F25 - _____

Do **NOT** write your name on this book or any part of the exam

Criminal Examination Questions

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Question 1 [ES Q1]**P&P****10 marks**

Your client instructs that he wants to plead guilty to a serious domestic violence offence. He has a history of two non-domestic violence offences from 4 years ago when he was experiencing an untreated mental health condition. At the time of the present offences, he was self-medicating on stimulant drugs. For the past 3 months, your client has been receiving treatment in a full-time residential drug treatment centre and is doing well. You form the view that your client will be sentenced to either an intensive corrections order or, alternatively, full-time imprisonment. You have sought advice from a couple of senior criminal law barristers who agree with your assessment. Upon notifying the prosecution that your client will be entering a plea of guilty on the next occasion, the prosecutor informs you that they will be filing a detention application.

Explain what advice you would give to your client about the tests that may apply when the court is determining the detention application.

Question 2 [ES Q2]**Evidence****8 marks**

You are briefed to appear for the Crown in a sexual assault trial. This is the second time that the trial is proceeding. The first time the trial proceeded, the accused was found guilty, appealed his conviction and the appeal court ordered a new trial. The evidence of the complainant in the first trial was recorded. Your instructing solicitor asks you if the recording of the complainant's evidence in the first trial is admissible in the second trial and whether she will be required to give any further evidence at the second trial.

How do you respond?

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Your client, Max, is to stand trial in relation to one count of robbery in company which is alleged to have occurred at a convenience store in Paddington. The shop attendant has made a statement that two men entered the store, both carrying knives and threatened him. They stole cash, cigarettes and his wallet. CCTV shows both co-accused wearing similar black tracksuits and black balaclavas. The prosecution has presented a joint indictment and therefore intends for Max to be tried jointly with the co-accused. The evidence against Max comprises of DNA on the shop counter which matches his DNA profile and a black balaclava and black tracksuit top which police found when they searched his home at the time of arrest. There is evidence that the co-accused's DNA matched a DNA swab taken from the cash register. The prosecution intends to adduce tendency evidence against the co-accused, on the basis that he has been convicted of 3 previous robberies in company offences in shops in Paddington 1 year prior to the present offence. In relation to the 3 prior matters, he was in company and in both circumstances, the co-accused were both wearing balaclavas and knives were used to threaten the shop keepers. The tendency evidence is not admissible against your client. Your client has never been charged with a robbery offence.

Your solicitor asks for advice about:

- a. whether you can ask the court for Max to be tried separately from the co-accused and if so, what matters are considered when the Court determines whether a separate trial should be ordered **(6 marks)**;
- b. if an application can be made **(6 marks)**:
 - i. When should your solicitor notify the prosecution and the Court that you intend to apply for a separate trial; and
 - ii. How should the application for a separate trial be made?

What advice do you provide?

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The accused is to stand trial for one offence of wounding with intent to inflict grievous bodily harm. The victim alleges that the accused stabbed him with a knife to the stomach which resulted in significant blood loss and hospitalisation for one week.

Constable New arrested the accused at 11pm at night in his home, about a month after the alleged offence.

The accused was born in Italy and Italian is his first language. He moved to Australia 3 months prior to his arrest. At the time of his arrest, he could not understand or speak English beyond very basic words. When arresting the accused, Constable New spoke to him in English, including when giving the caution. Constable New asked the accused's flatmate: "[the accused] speaks French, yeah?" to which she replied: "no, just Italian. He has been to France on holidays". Constable New said to his offsider, Constable Julian: "we can usually get a French interpreter any time of night but would have to wait until tomorrow for an Italian one, I reckon".

Constable New conveyed the accused to the station and he was entered into custody. The custody manager and Constable New could not arrange an Italian interpreter but instead booked a French interpreter to assist with interpreting communications between Constable New and the accused by phone. Constable New heard the interpreter and the accused speaking to each other and determined that the accused and the interpreter understood each other as they were speaking back and forth to one another. Neither Constable New nor the custody manager asked the accused or the interpreter if they could understand each other sufficiently. Constable New asked, through the interpreter, if the accused wanted legal advice before he participated in a record of interview with police. The interpreter asked in French "Do you want a lawyer" and the accused shrugged. Constable New asked for the following words to be interpreted: "we can wait for an Italian interpreter or we can just do the interview. It's your choice". When the French interpreter interpreted these words, the accused shrugged and repeated in English "it's my choice". Constable New determined to conduct a record of interview. At this stage it was 2am in the morning and the accused is seen yawning during the interview. Constable New again cautioned the accused, which was interpreted in French. During the interview, the interpreter said that the accused said:

"I hurt the person and ran. I was hurt and he was hurt" ("Response A")

In conference the accused, through an Italian interpreter, tells you he has never been in trouble before. He could not understand the French interpreter and provided answers in response to words he was picking up that were familiar to Italian. He said that what he was trying to say when he said "I hurt the person and ran. I was hurt and he was hurt" was that the alleged victim ran at him with a knife, the accused pushed him to avoid getting stabbed and he must have hurt himself with the knife when he fell.

Your solicitor obtains an expert report from a suitably qualified interpreter who is accredited to interpret Italian to French and French to Italian. She provides opinions including:

- French and Italian are linguistically related but they are distinct languages and the majority of the words are different;
- While the accused understands some words in French, he struggles to understand sentences in French;

- The accused was responding at times in Italian and other times by using basic French words;
- The interpreter appeared to understand some words in Italian but was not fluent in Italian.

Assume the opinions are unchallenged and the expert will need to be called at the trial if the interview is not excluded to explain the accused's responses.

The accused was entitled to the following rights pursuant to the Law Enforcement Powers and Responsibility Act 2002 (LEPRA) while he was in police custody:

- a. The right to communicate with a lawyer;
- b. The right to have access to an interpreter for the record of interview if the police had reasonable grounds for believing that he was unable to communicate with reasonable fluency in English.

[Note: for the purpose of this question, you do not need to consider any other possible breaches of LEPRA besides (a) and (b) above.]

You are seeking to have the interview, or at least **Response A** excluded.

Prepare an outline of submissions which includes the basis/bases upon which you will object and state the key points you would make in support of your argument.

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Question 5 [ES Q5]**Ethics****15 marks**

Nicholas has been practising continuously as a barrister for 10 years. 3 years ago, when applying for life and income insurance, Nicholas knowingly failed to include in the application information about his health history which may have impacted the insurance company's determination to grant cover. On the same application, he also deliberately exaggerated his income. The insurance company became aware of the false information and declined the application and made a complaint to police. As a result of supplying the false information, he was charged and pleaded guilty to an indictable offence. Nicholas was extremely embarrassed about the whole situation and worried about the impact it might have on his professional reputation. He represented himself and hoped that the matter would be dealt with quickly and without any of his colleagues or instructing solicitors hearing about it. He was convicted and fined \$5000. The presiding magistrate referred the matter to the NSW Bar Association. Nicholas was unaware that the Magistrate referred the matter and assumed that, having paid the fine, it was all water under the bridge.

What consequences may flow for Nicholas?

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Question 6 [ES Q6]

P&P

15 marks

You are briefed to advise and appear for Ruby Jones who is charged with obtaining a financial advantage from her employer, Rover Ray. Ms Jones was charged by way of a court attendance notice. The prosecution elected to have this matter dealt with on indictment at the second mention and committal proceedings are currently before the Local Court.

It is alleged that Ms Jones, the accounts manager at Mr Ray's pet food company, transferred \$100,000 from her employer's business account to a fake supplier's account in the name 'Delicious Dog Biscuits' which she set up.

The brief of evidence proves that only Mr Ray and Ms Jones have access to the company's business bank account and that \$100,000 was transferred from the company account to the 'Delicious Dog Biscuits' account in various transactions over 6 months.

There is no evidence that Ms Jones set up the 'Delicious Dog Biscuits' account. You are told that your instructing solicitor has informed the prosecution by letter 4 months ago that:

- Mr Ray dislikes Ms Jones and she believes he has set up the account and transferred the money himself as a basis of terminating her employment;
- Police should obtain the bank records relating to the 'Delicious Dog Biscuits' account and CCTV from the bank to show Mr Ray set up the account;
- Mr Ray has two prior offences of fraud on his record (Ms Jones is aware of this as Mr Ray disclosed this to her before their relationship turned sour).

The Magistrate previously granted an extension for the filing of the charge certificate to the next mention date (tomorrow) which is 8 months since the first return date. You are briefed to appear. The prosecution called your solicitor and said that they are not ready to file the charge certificate and will be asking the court for a further 12 weeks adjournment to obtain the bank records relating to the 'Delicious Dog Biscuit' account and to file the charge certificate on the next return date.

Your client is upset. She is a single parent, is working 2 jobs and is not eligible for legal aid. The protracted legal proceedings are causing her financial stress and mental health issues.

What is your advice to your client and solicitor in relation to:

- a. The requirements for the filing of charge certificates by the prosecution **(5 marks)**
- b. The position you should take to the prosecution's adjournment application/extension of time to file charge certificate and what arguments you would make to support your position **(6 marks)**
- c. Whether any costs can be recovered, should the court grant the prosecution application and what arguments would you make in support of a costs application. **(4 marks)**

Question 7 [ES Q7]**Ethics****6 marks**

When making suggestions to a sexual assault complainant in cross examination, what ethical obligations govern decisions made by a barrister in relation to the manner of questioning?

Question 8 [ES Q8]**P&P****3 marks**

Before a magistrate sentences a person to a term of imprisonment, what must they consider? Are there any restrictions on the length of the term of a sentence imposed which may preclude an intensive corrections order being imposed?

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Question 9 [ES Q9]

Ethics

10 marks

You are undertaking some of your criminal reading hours with a barrister who is appearing for an offender who is being sentenced for one count of assaulting an elderly person in their home. The barrister you are appearing with tells you that the offender has instructed that he is not guilty but he is pleading guilty because he wants the case over and done with and because he is more likely to stay out of prison if he pleads guilty. During the sentence hearing, the defence barrister calls a witness, Tony, who gives evidence that he employed the offender 6 months ago on a full-time basis and the offender will continue to work with him if he remains in the community. The Judge indicated in Court that the evidence of the offender's employment is important to his assessment of the offender's prospects of rehabilitation. At some point the Judge asks the Crown prosecutor what penalty that should be imposed, the Crown submits:

Your honour, this matter clearly requires a sentence of full-time imprisonment and a sentence of not less than 3 years would be appropriate.

The Judge adjourns the case for submissions the following day.

After leaving Court, the defence barrister and you go for coffee. The barrister says

"my instructing solicitor just sent me a text saying the offender was laughing after the hearing because he has never worked a day in his life! Tony's evidence is going to get him across the line, what a good mate he must be!"

- a. Was it permissible for the barrister to enter a guilty plea when the client said he did not do the crime? **(3 marks)**
- b. Were there any aspects of the Crown or defence barrister's conduct that are a cause for concern? **(7 marks)**

Question 10 [ES Q10]

Evidence

3 marks

You are appearing at a hearing in the NSW Local Court for an accused who is defending a charge of possess prohibited drug. The officer in charge of the investigation has been called to give evidence. After the officer takes the oath, the police prosecutor asks that the police officer to read the written statement that he has prepared for these proceedings.

Do you object to this request by the prosecutor?

Question 11 [ES Q11]**Evidence****5 marks**

You are appearing for a client charged with assaulting his partner. The complainant gave evidence on the first day of the hearing. The matter went over part-heard to a day four months later. One week before the hearing, the police prosecutor served a tendency notice on your instructing solicitor. Your solicitor is concerned about receiving the notice so late and what must be stated in the notice.

What is your advice to your solicitor about the notice requirements?

Question 12 [ES Q12]**Ethics****9 marks**

You are assisting a Senior Crown Prosecutor develop training for newly appointed Crown Prosecutors. You have been tasked with drafting a short memo explaining 3 important prosecutorial duties set out in the Bar Rules and demonstrating an example of each duty from the case law.

What do you present in your memo?

End of Exam Paper.