



NEW SOUTH WALES  
BAR ASSOCIATION®

# NSW Bar Examination

## June 2023

Candidate Number

**J23** - \_\_\_\_\_

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]

4 marks

You are appearing for Karla who is defending a charge of break, enter and steal which occurred 3 years ago. The issue at the hearing will be identification. On your assessment of her history and the seriousness of the offence and you come to the conclusion that if convicted, she is likely to go to prison whether she pleads guilty or is found guilty after the hearing. However, she would be entitled to a discount on her sentence if she pleads guilty. In conference, Karla tells you and your instructing solicitor that she did commit the offence for which she is charged, however, she is adamant that she wants to defend the matter. This is because she has turned her life around and if she goes to prison, she would lose her housing and custody of her children.

**Should you continue to act for this client? If so, what limitations would be placed on how you present the case?**

## Question 2 [ES Q2]

16 marks

You are briefed to appear for George who is charged with importing a commercial quantity of ecstasy (MDMA) under the *Commonwealth Criminal Code*. He was arrested 6 weeks ago and refused bail by police. When he first appeared at Burwood Local Court, his solicitor made a release application for him seeking conditions that he return to live at his unit (where the drugs which are the subject of the charge had been delivered) and report to police daily. This application was refused by the magistrate.

The charge is strictly indictable and therefore is subject to the Early Appropriate Guilty Plea Scheme. The magistrate ordered the brief of evidence and adjourned the matter for 8 weeks. Since being on remand George has been assessed as eligible and suitable to enter into a 9 month residential drug rehabilitation facility on the Central Coast. The rehabilitation facility has confirmed George can be admitted on the day of his next court appearance. George's parents have also confirmed they can offer \$100 000 as surety, which was not available at the first release application. His case is due to return to court in 2 weeks. You are having your first conference with George via audio-visual link.

- a. **What advice do you give George about whether he may make a further release application in the Local Court when his matter returns to court and if so, what tests will the magistrate apply to determining the application? You should reference relevant legislative provisions and case law (8 marks)**
- b. **What advice do you give George in relation to the procedural steps the matter must take in the Local Court before being committed to the District Court for trial? (5 marks)**
- c. **Explain to George the objectives of the case conference to be held and how it will be conducted (3 marks)**

## **Question 3 [ES Q3]**

**8 marks**

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Patrick is charged with dangerous driving causing grievous bodily harm. The maximum penalty for this offence is 7 years imprisonment. You are appearing for him at his trial.

Patrick is a doctor employed at a regional hospital. There is no dispute that at 5am on 16 February 2022 he was the driver of a vehicle which was involved in an impact causing the passenger of his car to suffer grievous bodily harm. Patrick had fallen asleep at the wheel. The prosecution allege Patrick was driving in a manner dangerous because he drove knowing he was fatigued. Patrick's defence is that he honestly believed on reasonable grounds that it was safe to drive.

On the same morning, he took part in an electronically recorded interview with police (without a lawyer present). He confirmed that he owned the vehicle and was driving at the time of the impact but refused to answer any further questions. This interview was adduced at his trial.

The prosecution adduced evidence from the nursing manager at the hospital that Patrick commenced his shift in the emergency department at 6am on 15 February 2022 and finished at 6pm on the same day. She said that she saw Patrick at 8pm having dinner and again working on the ward at 4am on 16 February 2022. Patrick gave evidence at his trial that he stayed at the hospital after dinner in the nurse's quarters with a woman he was in a relationship with. He slept solidly from 8:30pm until 3:30am when the hospital called and asked him to fill in for a doctor who was running late. His girlfriend was also sleeping in the room with him. He said he worked for an hour until the doctor arrived, had some breakfast and travelled home with his work colleague. He did not feel tired.

At the end of the trial, Crown prosecutor raised with the judge that he was intending to submit to the jury that Patrick's hadn't mentioned anything to police in the interview that he had a 'solid sleep' and that the jury might be concerned that this story was a recent invention. The trial judge asks the parties what directions should be given in relation to the fact that the person Patrick says he was sleeping with was not called to give evidence in the defence case. What submissions do you make to the judge about the Crown's proposed submission and the judge's directions?

## **Question 4 [ES Q4]**

**3 marks**

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You receive a brief to appear at Kempsey Local Court at a defended hearing next week for an accused facing a domestic violence allegation. The accused denies the offence ever occurred. You review the brief of evidence and identify that you previously provided an advice for the complainant relating to the impacts of a finding that she gave false evidence at a commission of inquiry. You did not go on to act for the complainant in any proceedings following the advice. What should you do?

## **Question 5 [ES Q5]**

**4 marks**

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You are briefed to appear in a defended hearing at the Downing Centre Local Court for a client charged with breaking, entering and stealing cash from a convenience store. The evidence against your client is a match between your client's DNA and DNA identified on a swab taken from the service counter from the store. When your client was arrested, he told police he was working in the mines in Western Australia at the time of the alleged offence and provided police with his employer's name and phone number. On the day of the hearing, the prosecutor said to the Magistrate: "this is the defendant's lucky day, Your Honour, the prosecution are withdrawing the charges. The prosecution called the defendant's boss yesterday and we know now he was in WA at the time of the offence." Before the matter concludes, your client asks you if the prosecution can pay the legal fees he has incurred in defending this matter. What do you advise him?

*[Space intentionally left blank]*

## Question 6 [ES Q6]

18 marks

You are briefed to appear at trial as counsel for Richard, who has been charged with child sexual assault offences (indictable offences which cannot be dealt with summarily). Richard is a 18 years old. He has a mild intellectual disability. The complainant is the son of family friends. Richard was living with the family at the time of the alleged offences and was being paid to do manual labour on their rural property.

A chronology of the events on the night of Richard's arrest is as follows:

Time	Event
Approx. 21.30	<p>Complainant discloses alleged offences to family.</p> <p>Family tells Richard to drive with them to the supermarket. Unbeknown to Richard, the family call police to report the alleged offences and indicate the whereabouts of Richard to police.</p>
22.50	<p>Sergeant Z and three other officers meet the family of the complainant at the supermarket car park. Sergeant Z observes Richard asleep in the back seat of the car. SZ wakes Richard and says, while shining the torch on his mobile phone in his face:</p> <p>“My name is Sergeant Z. I’m going to question you about alleged sexual offences but before I do I need to tell you that you do not have to say anything. Tell me now, did you touch the private parts of [the complainant] like he says you did?” Richard answers “Um, yeah, OK.” (<b>“the first admission”</b>)</p> <p>Sergeant Z informs Richard he is under arrest and directs him to exit the car. He then makes a note of the first admission in his notebook. Your client is not asked to sign the notebook.</p>
23.20	<p>Your client is placed into a police vehicle and conveyed to the nearby police station.</p>
00.25- 00.34	<p>After establishing that your client has “an intellectual impairment and limited understanding”, the custody officer telephones Joan (Richard’s mother) to ask her to come to the station to be Richard’s support person. She lives 2 hours away.</p> <p><i>[In these circumstances, Richard is entitled to have a support person present during any investigative procedure, including a recorded interview, because he has an intellectual impairment].</i></p>
03.42	<p>Joan arrives at the police station.</p>

04.08-04.23	Joan arranged for Ava (solicitor) to provide legal advice to Richard. After speaking to Richard on the phone, Ava tells the custody officer that Richard does not wish to be interviewed by police and does not wish to be taken to the interview room.
04.28	The custody officer calls Detective X, who is upstairs in the Detectives' office, to tell him Richard and his mother have had their rights explained to them and Richard has spoken to a solicitor. Detective X comes downstairs to take charge of the investigation. Joan tells Detective X that Richard does not want to be interviewed.
04:30	Detective X took Joan to the police station garage and said to her that Richard "might as well just continue and get it over with" and when Joan said to him that Richard had spoken to a lawyer and wouldn't be saying anything, he replied "I know all that but he's already told us things. Let's just go back and I'll have a talk to him and see what he says"
04:40	Detective X then went back to Richard and said to him: "If you're happy to go through we'll continue with the interview. You've already started so you might as well just get it out of the way. It'll be better for you in the long run – you're going to go to gaol either way but if you tell us you did it the judge will take that into account in your favour." Your client replied "OK."
04.48-0.53	Detective X and Sergeant Z commence an interview with your client with Joan present. During the course of the interview Detective X adopted a mode of questioning where he would put the complainant's allegations to Richard and then say words to the effect of "You did that, didn't you?" In response your client makes full admissions to the allegations of sexual assault (" <b><u>the second admissions</u></b> ").
07.08-10.43	Richard is charged with the alleged offences.

**Your instructing solicitor seeks your advice in relation to the prospects of successfully objecting to evidence being led by the prosecution of the first and second admissions.**

**What grounds for the exclusion of the first admission and second admissions would you address in your advice, based on the information in the chronology set out above? What considerations would you take into account when advising in relation to the strength of each ground for exclusion of the first admission and second admissions?**

[Note: you do not need to understand or refer to any issues arising under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) beyond the information which is referred to in the question].

## **Question 7 [ES Q7]**

**6 marks**

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You are appearing for a prosecuting authority at the sentence hearing for an offender who has pleaded guilty to failing to provide proper shelter to a number of animals on his property over a 3 month period. Since being charged, the horses now have adequate shelter, and have been assessed by a vet who has stated that the animals have not suffered any substantial injuries and will make a full recovery from the exposure. Your instructing solicitor has included the following paragraph in draft written submissions for your consideration:

15. The animals were exposed to the elements during winter. They could have died a slow and horrible death due to exposure had the offender not been reported. The cruelty he has shown towards these animals is monstrous and the court would reject any suggestion he was remorseful.

16. Having regard to the seriousness of the matter and the offender's history, the offender should be sentenced to at least 3 months imprisonment for this offence, a day for every day the voiceless creatures suffered.

**Should these submissions be made? In your answer, refer to your duties to the court and relevant**

## **Question 8 [ES Q8]**

**5 marks**

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- a. In circumstances where you are representing a person in a criminal matter, what are your general (ethical) obligations in relation to advising clients about pleas?
- b. What are your obligations where:
  - i. the prosecution case is strong and you are of the view there is no prospect of acquittal?
  - ii. Your client instructs that he is not guilty but insists on pleading guilty? Explain any limitations that apply to representing a client in these circumstances.

## Question 9 [ES Q9]

15 marks

You are briefed to appear for Rachael at her sentence hearing which is listed before the NSW District Court. Rachael pleaded guilty to one charge of stealing \$90 000 from her employer pursuant to s156 of the *Crimes Act 1900* (NSW). Rachael maintained through the committal process that she was not guilty and instructed to commit her matter for trial. No offers were made by defence at the case conference. A week before the trial, Rachael instructed her lawyers to enter a plea of guilty to the charge. Her matter was re-listed and the plea of guilty was entered the following day and adjourned for sentence.

Rachael has a criminal record for Centrelink fraud (defrauding the Commonwealth of \$35, 000) Her current and past offending is linked to a gambling addiction. A psychiatric report has been prepared for her sentence hearing. The expert opines that Rachael has a diagnosis of Major Depression which was undiagnosed and therefore untreated at the time of her offending. The report has been served on the prosecution who have indicated that they will not object to the report including the opinions expressed. Rachael is now being effectively treated for her mental health concerns and is 2 weeks into a 6 month gambling treatment program. The expert opines that there was a causal link between her mental condition, gambling addiction and her offending and that her prognosis is good. You have also obtained evidence from NSW Corrective Services that there are no gambling programs in custody and she will not be able to have regular sessions with her treating psychologist with whom she has a good rapport. Despite the positive steps she is now taking, there is a real possibility that she will be sentenced to full-time imprisonment.

**During the course of the proceedings, the sentencing Judge asks the following questions, how do you respond:**

- a. **What discount should apply to the sentence that I am going to impose? Do I have any discretion? do any of the exceptions apply? (3 marks)**
- b. **With your client's history and the amount of money involved, I am going to impose a sentence of imprisonment, possibly an intensive corrections order (ICO). What steps do I need to take prior to making the final order by which a sentence of imprisonment is imposed, to be served by way of an ICO? In your answer submit why an ICO should be imposed (as opposed to full time custody) (10 marks)**
- c. **If I do impose an ICO, my feeling is that there is enough supervision with the gambling program and her doctor. Can I dispense with the requirement to impose conditions on the offender? (2 marks)**

*[your answer need only refer to relevant sections of the Crimes (Sentencing Procedure) Act (CSP Act) and any relevant case(s) form the prescribed reading list]*

## Question 10 [ES Q10]

4 marks

You appeared for the prosecution in a sentence hearing at the NSW District Court which was adjourned for judgement in 7 days time. When you return to chambers, you become aware of a new comparative sentencing decision just handed down from a superior court which is relevant and supports your submissions. Should you send the case through to the Judge's associate? Would your answer be different if the court had contacted your chambers and directed that you email any additional comparative cases relied upon within 3 days?

## Question 11 [ES Q11]

18 marks

You are celebrating your first year at the Bar with some members from your floor. A barrister, James, who you have been doing some work with, was showing you a post on a defence lawyers' Facebook page about another barrister (Saskia) on your floor who recently won an award. James said 'She has no talent whatsoever' and that he could not stand her at University. James typed the following personal message to the barrister and showed it to you before he pressed send:

*Hey @Saskiabarrister, great job on the award!! Whoever gave it to you obviously did not see you in court last week! Had you read the brief?!! I guess they overlook losing cases. Lol. Just kiddin' you're a superstar.*

A few hours later, James was drunk. He came over to you and showed you 10 public and private messages he had written over the past month on Instagram, twitter and Facebook to or about Saskia which include making fun of her failing Evidence at university and having trouble "doing a mention" on the Bar practice course.

- **What Bar rules and/or Guidelines would James be in breach of as a result of his conduct towards Saskia? (5 marks)**
- a. **Saskia complains to the NSW Bar Association about James' conduct. It emerges that over the past year, James has engaged in similar conduct with respect to two other barristers, one of whom decided to leave the profession. They have also complained. What disciplinary consequences might follow for James? (9 marks)**
- b. **What steps are appropriate for you to take at the time or immediately after the barrister shows you the message he then sends to Saskia? (4 marks)**

## **Question 12 [ES Q12]**

**5 marks**

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What is the rule in *Browne and Dunn*? If a party fails to comply with this rule, what application may be made to remedy the breach?

## **Question 13 [ES Q13]**

**5 marks**

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You are briefed by the Crown Solicitor's Office to appear for the NSW Commissioner of Police. Your instructing solicitor emails you a subpoena which has been served on your client. The subpoena seeks production of documents to the NSW District Court tomorrow. You advise that the breadth of the documents sought in the schedule are unacceptable wide and many of the documents do not appear to have any relevance to facts in issue in the case. Your client wants to resist production. Explain the grounds that might be available for resisting the subpoena and the procedure for doing so.

*[Space intentionally left blank]*

## Question 14 [ES Q14]

9 marks

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You are briefed by the NSW DPP to prosecute an accused charged with reckless wounding. There is no dispute about the facts of the matter. The alleged victim (Barry) and the accused (Trevor) were friends. They were at the pub together. Barry was drinking bourbon and Trevor was drinking zero alcohol beer. Trevor made a joke which Barry misunderstood and thought Trevor was insulting him. Barry shaped up to Trevor and pushed him with both hands causing him to fall to the ground. Barry was standing over Trevor, yelling and pointing at him. Trevor immediately picked up his beer glass that fell to the ground with him and struck Barry across the face. The glass broke on Barry's face, causing a wound across his left cheek. Trevor has raised self-defence.

Defence have served a psychiatric report by Dr Kylie Hudson. Dr Hudson's CV indicates that she is a clinical and forensic psychiatrist, specialising in trauma associated with family violence. She has practised clinical psychiatry for 20 years including as a Director of a family violence specialist clinic for the past 5 years.

Dr Hudson's report outline's Trevor's history of exposure to family violence in his childhood including being physically assaulted by his father, usually after he had been drinking. She was provided with the brief of evidence and conducted a comprehensive assessment of Trevor. Dr Hudson diagnosed Trevor with post-traumatic stress disorder (PTSD). She also opined that:

Trevor's PTSD and past exposure to family violence caused him Trevor to feel extreme stress. It is highly likely that Trevor's reaction in striking Barry was a trauma response to protect himself triggered by the threat he believed Barry posed to him (**first opinion**).

Dr Hudson referred to the hospital records which indicated the wound was a 5cm laceration with a depth of 0.5mm. She opined that such a wound would not require a significant amount of force to be inflicted which indicated that Trevor's response was an immediate reaction (**second opinion**).

It is accepted that both opinions, if otherwise admissible, are relevant to the issue of self-defence. Your instructing solicitor seeks your advice as to the admissibility of the first and second opinions.

*Note: You do not need to address the legal test of self-defence in this question or whether the opinions are relevant to a fact in issue in the proceedings.*