

**PCLL Conversion Examination**  
**January 2017**  
**Examiner's Comments**  
**Evidence**

**Question 1**

This question was generally answered to a satisfactory standard. A good number of candidates were able to describe the rule against hearsay, the rationale behind the rule, and to give three examples of exceptions to the rule against hearsay and to briefly explain the rationale for each of those exceptions. Examples of exceptions to the rule against hearsay included, but were not limited to, dying declarations, declarations against pecuniary or proprietary interest, co-conspirators' evidence, statements in public documents, out-of-court statements (where used to challenge the credibility of a witness and admissible only to the extent of the fact of the inconsistency), evidence in former proceedings and *res gestae*. A number of candidates did not give a sufficiently elaborated description of the rationale behind the rule against hearsay and/or the rationale behind each exception to the rule against hearsay. This was typically encountered in the case of a number of candidates who appeared to be quoting from materials in circulation rather than demonstrating that they were independently capable of articulating the rationale behind those rules.

**Question 2**

This question was about whether and to what extent certain types of witness can be called upon to give evidence in defence of the defendant, and against the defendant. Helen is John's wife and therefore falls under the category of a spouse testifying for/against the defendant. Candidates were expected, at a minimum, to explain the applicability and application of the relevant provisions in the Criminal Procedure Ordinance (cap. 221), in particular section 57, and addressing issues of competence and compellability. Martin falls under the category of a co-defendant testifying for/against the defendant. Candidates were expected to apply relevant provisions such as those of the Criminal Procedure Ordinance, the Evidence Ordinance (cap. 8) and the Hong Kong Bill of Rights. In both (a) and (b) candidates could and should have cited common law authorities in support of their answers. Most candidates made a fair attempt at this question, though further elaboration was required in a number of instances.

**Question 3**

Legal professional privilege formed the main issue in this question, and candidates were expected to explain the principles and rules of legal professional privilege. They were also expected to apply those principles and rules to the facts of Charles' case, preferably with support from relevant citation of provisions such as from the Hong Kong Bill of Rights or common law. It should have been explained that disclosure of Charles' "confession" (which did not necessarily relate to the same offence to which Charles pleaded "not guilty" in the facts), without Charles' consent, would erode his right against self-incrimination. Even if the view was taken that Charles made a voluntary confession,

the court retained discretion to exclude it from evidence, particularly in view of legal professional privilege and the right against self-incrimination. Some candidates erroneously took the view that the public interest in counsel for Charles revealing the “confession” would override Charles' right against self-incrimination.

#### **Question 4**

This question was designed to elicit knowledge and understanding of the principles and rules on the use of memory-refreshing documents by a witness in court. Most candidates made a fair attempt at this question. Appropriate use of common law authorities, in particular, should have been cited. Examples of points which could have been explored were that a witness may, during their giving of evidence in court, refresh their memory from a document made or verified at the same time as the events to which it relates, such as a police officer's notebook; the fact that, if a memory-refreshing document is used, counsel for the other side may ask to inspect the document and, if cross-examination is limited to the parts of the document used to refresh memory, can cross-examine without the document being put in evidence, but that if cross-examination goes further than that, counsel for the other side can insist that it becomes evidence in the case itself; and that a witness may be permitted to refresh his or her memory from their witness statement once already in the witness box. Good answers would have discussed these issues and more with appropriate support from common law authorities.

#### **Question 5**

The facts in this question raised two issues. The first was leading questions, namely questions directly or indirectly suggesting or prompting the witness to give a particular answer. It should have been explained that leading questions are ordinarily forbidden in examination-in-chief or where the question assumes the existence of certain facts and in doing so invites the witness to adopt those facts. It should have been explained why, as a matter of principle, the general rule against leading questions is in place. However, it should have also been explained that some leading questions may be permitted in cross-examination. The second issue in the question was related but distinguishable, namely that counsel is not permitted to question the witness in a way that is intimidating, humiliating, bullying or oppressive. It could in this vein have been explained that not only are the witness' interests in fairness and procedural regularity at stake, but also the integrity of judicial proceedings. Some candidates made appropriate reference to the Code of Conduct of the Hong Kong Bar Association in relation to the proper ethical conduct of counsel, including during court proceedings. Answers to this question were variable in quality, and some candidates discussed irrelevant issues.