PCLL Conversion Examination
August 2022
Examiner's Comments
Hong Kong Legal System

1.   *Question Selection*: Almost all candidates chose to answer Question 2, which was on the familiar topic of the use of juries in the legal system of the HKSAR. As between Question 1, which concerned the "nationality requirement" for judges of the HKSAR, and Question 3, which concerned reciprocal legal assistance between Hong Kong and Mainland China, there was a slight preference for Question 1.

2.   *Question 1*: This question has three parts. The *first part* asks candidates of the current "nationality requirement" of judges of the HKSAR. Full marks would be given to an answer that states unequivocally the terms of Article 90 of the Basic Law of the HKSAR. However, more than a few candidates appeared to have understood this part to be concerned predominantly with "foreign" judges or non-permanent judges from a common law jurisdiction outside Hong Kong of the Hong Kong Court of Final Appeal, and thus did not give the correct answer. The *second part* asks candidates the reasons for the current "nationality requirement" of judges of the HKSAR. The candidates who gave an incorrect answer to the first part suffered in this part as well. The *third part* asks candidates the general question of whether all or most judges should be subject to a nationality requirement in the long run. An answer that presents an argument for or against the proposition based on the correct facts with sensible reasoning (such as the greater number of locally trained lawyers of suitable knowledge, experience and excellence in the longer term and the maintenance of Hong Kong as an international and regional dispute resolution centre in sync with the maintenance of Hong Kong as an international financial centre, and centre of trade, commerce and innovation) would receive more than half of the prescribed marks.

3.   *Question 2*: This question has three parts over the use of juries in the legal system of the HKSAR. The *first part* has two sub-questions concerning the current use of juries in the legal system and the function of the jury. Many candidates were awarded nearly full marks for stating the relevant facts. On the other hand, some candidates appeared to have written down very similar sentences in their answers but these sentences do not state in full the relevant facts. The *second part* asks the candidates to discuss the merits and demerits of using juries in the adjudication of cases. All candidates have provided a competently written and balanced answer to this part. The *third part* asks the candidates to consider whether the Secretary for Justice should have the power to designate a trial to be conducted by a panel of judges and not by a judge sitting with a jury. The substance of the answers varied. Some candidates focused narrowly on the power granted to the Secretary for Justice under the Hong Kong National Security Law to certify a trial of an offence prescribed under the HKNSL before the Court of First Instance to be conducted by a panel of three judges instead of a judge sitting with a jury, and they were only able to receive a fraction of the prescribed marks. Some candidates did not give consideration to the Secretary for Justice's positions of principal official, government legal adviser and officer in charge of or supervising prosecutions, and the conflict of interests

and undesirability these positions would affect the fair and impartial discharge of a function to determine whether a trial should be conducted by a panel of three judges or by a judge sitting with a jury. Not many candidates picked up the issue that arose in the *Tong Ying Kit v Secretary for Justice* case ([2021] HKCA 912, 22 June 2021) in which leading counsel for Tong conceded that a trial before a panel of three judges was not "less fair" or "unfair" when compared with a trial before a judge sitting with a jury. This issue impacts upon the potency of the concern that a choice by the Secretary for Justice for a trial by a panel of three judges disadvantages the defence and favours the prosecution.

4.　　*Question 3*: This question is divided into two parts, with the *first part* asking the candidates to name the current arrangements for mutual legal assistance between the HKSAR and Mainland China that are not for the combatting of crime; and the *second part* asking the candidates about the current arrangements for mutual legal assistance between the HKSAR and Mainland China that are for the combatting of crime and to discuss the limited achievement between the two sides in relation to the combatting of crime. Most candidates who attempted this *first part* of this question were able to name: (i) the arrangements for reciprocal recognition and enforcement of civil and commercial judgments based on the choice of court agreement between the parties; (ii) the arrangements for reciprocal enforcement of arbitral awards, and (iii) the arrangements for reciprocal assistance in insolvency (including bankruptcy) proceedings. Some candidates were able to include the arrangement for assistance by interim relief in arbitration matters. Only very few candidates were able to name the arrangement for service of documents in civil proceedings and the arrangement for mutual recognition and enforcement of judgments in matrimonial and family cases. Regarding the *second part* of this question, many candidates referred, underlined erroneously, to the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525). Section 3(1) of the said Ordinance states that it "shall not apply to the provision or obtaining of assistance in criminal matters between Hong Kong and any other part of the People's Republic of China". On the other hand, most candidates did discuss in some detail and with examples the conflict of jurisdiction between Mainland China and Hong Kong over crimes committed in Hong Kong.

5.　　It has to be noted that a few candidates answered a question *without* addressing each of the parts of the question *separately*. Although examiners attempted to score the composite answer by reading closely the matters written down, the better approach for candidates has always been to read each part of the question distinctly with reference to the perspective(s) indicated in the wording of that particular part of the question and provide a specifically tailored answer.