



VICTORIAN BAR

THE VICTORIAN BAR INCORPORATED

25 OCTOBER 2020 EXAM

© COPYRIGHT 2020 - Victorian Bar

This exam is copyright. Subject to the Copyright Act 1968, they and any part of them may not be reproduced in any material form, performed in public, broadcast, transmitted by subscription, cable service, or adapted without the prior written permission of the Victorian Bar.

INTRODUCTION

This document is a reproduction of the Readers' Course Entrance Exam which candidates sat on 25 October 2020. This is provided as a sample for persons considering applying for the next available exam as a guide and advanced preparation tool. It is accompanied by the Chief Examiner's Reading Guide.

The Exam was delivered electronically using ExamSoft software.

To undertake the Exam, candidates must use their own laptop or other device which has a camera and which meets or exceeds the minimum system requirements for devices as determined by ExamSoft. More information about the software can be found on the Victorian Bar Exam webpage and on ExamSoft's webpage.

The Exam broadly covered content in each of the below listed categories. The categories will be covered in future exams however, the weightings of each may vary.

| Category Name | Number of Questions in Category | Total Points in Category |
|----------------------|--|---------------------------------|
| Civil Procedure | 7 | 23 |
| Criminal Procedure | 6 | 21 |
| Ethics | 4 | 15 |
| Evidence | 8 | 41 |

Total Number of Questions: 25

Total Exam Points:

100.00

Question 1. Criminal Procedure:

The Accused is Kelvin BRERETON. He has been charged with one count of bigamy, an offence under s 64 of the *Crimes Act 1958*, which provides:

64. Bigamy

Whosoever being married goes through the form or ceremony of marriage with any other person during the life of her or his husband or wife, shall be guilty of an indictable offence, and shall be liable to level 6 imprisonment (5 years maximum). Nothing in this section contained shall extend to any person going through the form or ceremony of marriage as aforesaid whose husband or wife has been continually absent from such person for the space of seven years then last past and has not been known by such person to be living within that time; or shall extend to any person who at the time of her or his going through such form or ceremony of marriage has been divorced from the bond of the marriage; or to any person whose marriage at such time has been declared void by the sentence of any court of competent jurisdiction.

The Prosecution alleges that on 12 June 2013, the Accused married Kimberly BRERETON (née KNIGHT) in New Zealand in accordance with the laws relating to marriage in New Zealand. On or about 4 March 2015, the Accused separated from Kimberly BRERETON and subsequently moved to live in Melbourne, Australia. The Accused met and developed a relationship with Anna SLOAN. The Accused and Anna SLOAN married in a private ceremony, administered by a registered marriage celebrant, on 15 April 2018. At that time, neither the Accused nor Kimberly BRERETON had taken any steps towards formalising their separation by way of divorce, annulment or otherwise. In accordance with the laws of both New Zealand and Australia the Accused remained married to Kimberly BRERETON at the time he married Anna SLOAN.

Draft the charge (particulars/description of offence) that will appear on the charge sheet in accordance with the requirements of the *Criminal Procedure Act 2009*.

[3 marks]

Question 2: Ethics:

Assume you have been contacted by your clerk and told that the solicitor acting for the Accused wishes to brief you to advise and act for the Accused in the criminal proceeding. You are informed by your clerk of the general nature of the charge as set out in Question 1. While your practice at the Bar is predominantly in the field of criminal law and procedure, you have a number of reservations about accepting the brief. These include the following concerns:

- (1) Due to your religious beliefs, you are personally disgusted by the allegation of bigamy against the Accused. For this reason, you have serious doubts as to whether you will believe the Accused's story when he gives you instructions.
 - (2) You have never conducted a case involving a charge of bigamy before. You feel that you don't have the necessary expertise to conduct the case for this reason alone.
 - (3) You would be inclined to advise the Accused to plead guilty for the above reasons. In fact, if your clerk can convince the solicitor to get the Accused to plead guilty, you would agree to take the brief.
 - (4) You believe attendances in relation to this matter, if contested, would take up valuable time which could be better spent doing more lucrative work on matters in relation to which you are much more familiar with the law (e.g., assaults, sex offences and drink-driving offences).
- Should you accept the brief given these concerns? Discuss.

[4 marks]

Question 3 Ethics:

Which of the following is a duty of the barrister? (*Select ONE answer only*)

- a) to act audaciously.
- b) to act bravely.
- c) to act conspicuously.
- d) to act immoderately.
- e) to act with impunity.
- f) to act without cause.

[1 mark]

Question 4: Criminal Procedure:

The Accused will be pleading 'not guilty' to the bigamy charge. He has expressed a preliminary view that he would like to have his case decided by a jury. Is this possible? What advice should Defence Counsel give to the Accused in this regard?

[4 marks]

Question 5: Criminal Procedure:

Assume the matter has been set down before judge and jury at the County Court in Melbourne. The Accused has asked the following questions in the lead-up to the trial:

- (a) What is the indictment?
 - (b) What is the arraignment?
 - (c) Do I have to plead 'guilty' or 'not guilty'? Is there a 'middle ground' I can take instead?
- How would you answer his questions as Defence Counsel?

[4 marks]

Question 6: Evidence:

Assume the Accused denies that he was ever married to Kimberly Brereton or to Anna Sloan. To prove its case, the Prosecution plans to tender the following documentary records into evidence:

- (a) Certificate of Marriage issued by the Registrar of Births, Deaths and Marriages (NZ) stating that the Accused married Kimberly Brereton (née Knight) on 12 June 2013 in Auckland, New Zealand and that the marriage remains current as at 1 May 2020 (i.e. there is no record of any divorce or annulment of the marriage).
- (b) Certified statement from the Registrar of the Family Court of New Zealand dated 13 May 2020 stating that no proceedings have been brought in relation to any proposed divorce, annulment or dissolution of the marriage of the Accused and Kimberly Brereton in New Zealand.
- (c) Certified statements from the Registrars of the Family Court of Australia and Federal Circuit Court of Australia stating that no proceedings have been brought in relation to any proposed divorce, annulment or dissolution of the marriage of the Accused and Kimberly Brereton in Australia.
- (d) Certificate of Marriage issued by the Registrar of Births, Deaths and Marriages (Victoria) stating that the Accused married Anna Sloan on 15 April 2018.

The Accused objects to the admissibility of all the documentary evidence referred to above. Explain the likely basis upon which such objections will be made, how the Prosecution could respond to the objections, and how the court is likely to rule on the objections.

[5 marks]

Question 7: Ethics:

Assume that a critical fact in issue in this case is whether the Accused knew or ought to have known that he might have still been married to Kimberly Brereton when he married Anna Sloan. Victoria Police investigated and charged the Accused with bigamy as a result of a complaint made by Kimberly Brereton in January 2020. Kimberly Brereton made a formal statement to police stating the following:

"I married Kelvin (the Accused) on 12 June 2013 after being in a relationship with him for about five years. In early 2015, our relationship started to break down. On 4 March 2015, Kelvin packed up all his things and left me. He told me that he was going away to think about everything but he never came back. I tracked Kelvin down in September 2019 with the aid of a private investigator. The investigator told me he was living in Australia and had remarried. I was devastated because I had always been hoping that he would come back to me. I have not taken any steps towards divorcing from Kevin or having our marriage annulled."

The Accused was interviewed by Police following his arrest. Assume that he admitted marrying Kimberly Brereton as alleged. However, he also told Police that Kimberly Brereton knew the relationship was over when he left her because he told her that he was never coming back and that he wanted a divorce. The Accused said that months after leaving her, he received an email from Kimberly in which she said words to the effect that *"I'm filing for divorce"*, to which he replied *"Great! Let me know when it's done!"*. Police confronted Kimberly about this information and asked if she had the email correspondence. Kimberly said that the Accused had lied and she refused to talk to the police any more about the matter.

On the first day of the trial, the Prosecutor took Kimberly into a private interview room outside court to ask her as to whether she communicated with the Accused after he left her on 4 March 2015. Kimberly said, *"Look, I'll say what's in my statement just as I said. That's all. Whatever he said he's lied!"*. The Prosecutor then said, *"You need to get your story straight. If you spoke to him about divorce and that comes out in court, then we will lose! Do you understand?"*. Kimberly nodded sheepishly. The Prosecutor, however, ultimately decided not to call Kimberly as a witness because he does not trust her to give the right evidence. The Prosecutor plans to rely on other evidence to prove the case.

Discuss the ethical implications arising from this scenario for the Prosecutor.

[5 marks]

Question 8: Evidence:

Part of the record of interview conducted by Police with the Accused is reproduced below:

Informant: So you married Kimberly on 12 June 2013?

Accused: Yeah.

Informant: And you left her on 4 March 2015?

Accused: Hmmm.

Informant: And then you married Anna on 15 April 2018?

Accused: Yeah.

Informant: But you were still married to Kimberly then?

Accused: No. You don't understand. Kimberly said she was organising the divorce. I thought she'd done it already.

The Prosecutor does not plan to tender the record of interview because of the conflict between inculpatory and exculpatory statements. Is this a sensible approach? Discuss.

[5 marks]

Question 9: Evidence:

The Accused was found guilty of the offence of perjury in 2012 by a jury in the District Court of New Zealand. The facts giving rise to the offence concerned a false insurance claim the Accused had made in relation to a car accident, with the Accused subsequently lying on oath in court when he gave evidence in the civil action. He served three months in prison for his crime.

Consider and discuss the general circumstances in which the Prosecution might be able to adduce evidence of the Accused's prior perjury conviction in the current proceeding relating to bigamy:

- (a) as evidence that the Accused has a tendency to mislead or deceive public officials; or
- (b) as evidence that undermines the credibility of the Accused's 'not guilty' plea; or
- (c) as evidence that shows the Accused is not a person of good character.

[6 marks]

Question 10: Evidence:

The Prosecution intends to call Anna Sloan to give evidence in the case against the Accused. Her evidence essentially involves her attesting to the fact that she met the Accused, developed a relationship and eventually married, as the certificate of marriage documents. She will also say that the Accused never mentioned the fact that he was previously married or that he had been in a serious relationship before he came to Australia. Since police knocked on her door and told her that the Accused was married to another woman earlier this year, Anna has been emotionally rocked by the news. She was also shocked at the revelation that the Accused had a prior conviction for perjury, which the Accused eventually told her. The Accused has spent a great deal of time attempting to repair the relationship with Anna since all of this information came out. He told her that she is his "true love" and that he only kept the previous relationship from her because he did not want to upset her. Anna is doubtful about whether he is telling her the complete truth but believes that she should try and make the relationship work because she still loves him.

Anna does not want to give evidence against the Accused. Does she have to? Explain.

[4 marks]

Question 11: Criminal Procedure:

Assume the Accused is found guilty of the charge of bigamy. At what point in time does this occur? (Select **ONE** answer only)

- a) When the jury informs the judge that they have reached a verdict.
- b) When the jury delivers its verdict in open court.
- c) When the judge declares "...you have been found guilty..." following delivery of the jury's verdict.
- d) When Defence Counsel commences the plea.
- e) When the judge passes sentence.
- f) All of the above (a finding of guilt is implicit in every one of the steps described).

[1 mark]

Question 12: Criminal Procedure:

Assume the Accused is found guilty of the offence of bigamy. Apart from his prior conviction for perjury in New Zealand, Mr Brereton has no known criminal history. He is now 32 years old. He remains married to Anna Sloan who has recently fallen pregnant with their first child. Mr Brereton has held a stable job as a carpenter since he moved to Australia. Anna Sloan has written a Victim Impact Statement stating that she forgives the Accused and does not want him punished at all. Kimberly Brereton has written a Victim Impact Statement that expresses her anger and outrage at being abandoned by the Accused and leading her to believe that they were still married. Explain how the following will bear upon the trial judge's ultimate sentencing disposition:

- (a) the fact that the Accused pleaded 'not guilty';
- (b) general deterrence;
- (c) specific deterrence;
- (d) denunciation;
- (e) protection of the community.

[6 marks]

Question 13: Criminal Procedure:

Assume the Accused is convicted and sentenced to undergo a community corrections order for a period of six months with certain conditions attaching, including supervision and a requirement that he complete 50 hours of community work. The Director of Public Prosecutions is not satisfied with the trial outcome and the sentence.

Can the Director seek a retrial and/or increase in sentence? Explain.

[3 marks]

Question 14: Civil Procedure:

Which of the following is a paramount duty of the parties in civil litigation? (Select ONE answer only)

- a) To act honestly at all times.
- b) To further the administration of justice.
- c) To minimise delay in conducting the proceedings.
- d) To disclose the existence of critical documents.
- e) All of the above.

- f) None of the above.

[1 mark]

Question 15: Civil Procedure:

Which of the following is not an overarching obligation of the parties in civil litigation? (Select ONE answer only)

- a) To act fairly towards other parties to the proceeding.
- b) To narrow the scope of the issues in dispute in the proceeding.
- c) To cooperate with other parties to the proceeding.
- d) To avoid engaging in conduct that is likely to be misleading or deceptive.
- e) To take only those steps that are reasonably necessary to resolve the proceeding.
- f) To act promptly in conducting the proceeding.

[1 mark]

Question 16: Civil Procedure:

Assume that the relationship between Anna Sloan and Kelvin Brereton completely breaks down shortly after the conclusion of the criminal proceeding. Anna has decided to leave Kelvin and bring up their child on her own. She struggles mentally and financially in doing so. She has decided to bring proceedings in the Supreme Court of Victoria against the online dating agency through which she and Kelvin met, PERFECT SPOUSE PTY LTD ("Perfect Spouse"). By the terms found on its website, Perfect Spouse promises paying clients, such as Anna, to put them in touch with their *"lifelong soulmate, who will match your particular needs, mental and financial, providing you with a real chance of success in long-term partner happiness and bliss."* Anna paid more than \$15,000 for the "marriage package", which, by the terms contained on Perfect Spouse's website, assured Anna that Perfect Spouse *"would complete a background check"* on Kelvin before she decided to emotionally invest in the relationship. Anna claims that Perfect Spouse never conducted the checks that it had promised to carry out in relation to Kelvin. Had Perfect Spouse conducted even the most basic checks, it would be led on a train of inquiry that would have revealed both Kelvin's previous and existing marriage to Kimberly Brereton and Kelvin's prior conviction for perjury. Anna claims that she would never have pursued a relationship with Kelvin if she had been apprised of such information. She has decided to bring claims for breach of contract, negligence and breach of the *Australian Consumer Law*.

Consider the following types of court document:

- (a) affidavit;
- (b) originating motion;
- (c) statement of claim;
- (d) writ.

What is the purpose of each of the above court documents? Which are most likely to be filed by Anna to commence her proceeding? If she selects the wrong document, will that be fatal to her claim? Explain your answers to each of these questions.

[5 marks]

Question 17: Ethics:

Anna Sloan's case against Perfect Spouse caught the attention of mainstream media outlets as soon as it was filed. A journalist approaches a barrister who has acted for Perfect Spouse in the past in

other cases and has sought her comment on the proceeding brought by Anna. The barrister is only too happy to assist, saying to the journalist: *"There is likely to be considerable strength in the case against Perfect Spouse. From what I've read in the claim, they've failed to do appropriate checks. I'm not surprised that they didn't do them. In the cases I've been involved in, Perfect Spouse's systems and procedures are a basket case. They take tens of thousands of dollars from clients desperate for a match made in heaven and all they give back is a list of potential partners using a pretty superficial algorithm. They promise background checks and their clients get none. They promise to pay their barrister's fees and they leave them high and dry. They still owe me \$12,000. Good luck to Anna Sloan, I say!"*. The barrister's comments are quoted in the newspaper the next day.

Discuss the ethical implications for the barrister who made these comments.

[5 marks]

Question 18: Civil Procedure:

Assume that Perfect Spouse intends to defend Anna's claims and that it denies all of the critical allegations. The proceeding has now moved to the discovery stage.

- (a) Explain the obligation and purpose of discovery in civil proceedings.
- (b) Identify **FOUR** specific categories of document that might be sought by the Plaintiff to be discovered in this proceeding.

[4 marks]

Question 19: Evidence:

As a result of the media attention the proceeding has received since it was filed, several of Perfect Spouse's former clients, both men and women, have contacted Anna's solicitors to tell them that they had similar experiences with the online dating agency. It appears that there are no less than seven such clients of Perfect Spouse who are prepared to give evidence that they, too, had been matched with a partner, with promised background checks that never eventuated, with it subsequently being discovered that the matched partner had a dubious history. Anna's solicitor has taken statements from each of the seven former clients. Counsel for Anna proposes to call each of them at trial to give evidence in support of Anna's case.

Counsel for Perfect Spouse has indicated that they will object to this evidence on the basis that *"it is irrelevant and otherwise inadmissible by the operation many different rules of evidence."* Discuss the admissibility of the evidence of the seven former clients at Anna's trial.

[6 marks]

Question 20: Civil Procedure:

Assume that the trial judge will rule that the evidence of the seven other clients of Perfect Spouse is admissible. After Perfect Spouse has served its affidavit of documents, Anna wants to force Perfect Spouse to disclose all other documents relating to former clients who have complained about inadequate background checks of the people they have been matched with. Perfect Spouse has been operating for more than a decade and has over 100,000 former and current clients on its records. It would take a considerable amount of time to search through them all and it will resist any attempt by Anna to force disclosure for this reason alone.

Describe the court process by which Anna could seek to force Perfect Spouse to disclose all such documents. Do you think Anna will be successful? Explain.

[3 marks]

Question 21: Civil Procedure:

Assume that Anna fails in her attempt at obtaining a court order to force Perfect Spouse to disclose the further documents. The trial judge found the application to be a *"fishing expedition that lacked any merit whatsoever"*. Perfect Spouse has been put to considerable expense in resisting the interlocutory application. It had briefed senior counsel and two junior counsel in relation to the application. It incurred \$42,000 in legal costs just for the unmeritorious application alone. Perfect Spouse seeks to recover these costs from Anna immediately, even though the proceeding is yet to be finally determined. Anna does not have the immediate financial means to pay any costs ordered against her, although she could potentially take out a personal loan to meet any costs order. However, such an order would be personally very burdensome.

Perfect Spouse seeks to have its costs on the application taxed immediately and for the proceeding to be stayed until those costs are paid. Should the trial judge make this order? Discuss the situation that now presents itself with reference to *Rozenblit v Vainer* (2018) 262 CLR 478 and section 47 of the *Civil Procedure Act 2010*.

[5 marks]

Question 22: Evidence:

As part of its defence, Perfect Spouse has pleaded that its *"systems and procedures for conducting background checks, including those carried out in relation to Kelvin Brereton at the request of Anna Sloan, are administered in accordance with the legal advice received from Perfect Spouse's legal advisors"*. The legal advice to which this pleading refers is dated 12 June 2011 and, although identified in the discovery process, has not been disclosed by Perfect Spouse to Anna's solicitors. Anna now seeks production of that written advice for inspection. Perfect Spouse is refusing to provide it. Is the court likely to order its production? Explain.

[4 marks]

Question 23: Evidence:

Anna intends to give evidence at the trial relating to a phone call she had with Perfect Spouse earlier this year, shortly after she discovered that Kelvin was previously married and had a prior conviction for perjury. She will say *"I spoke with Raquel, the relationship consultant who I had always spoken to whenever I had concerns. I told her about Kelvin being married and about his criminal history in New Zealand. She suddenly became evasive and didn't want to speak to me anymore. I started crying and told her that my life was falling apart. Then she said that she was sorry and that they often don't have time to do the full background checks. I think she felt very guilty as I could hear her voice breaking and she started crying too."*

Counsel for Perfect Spouse intends to object to the evidence on the basis that it is *"irrelevant, hearsay, and opinion evidence"*. Consider whether the objection will be successful.

[5 marks]

Question 24: Evidence:

Assume Anna's evidence about what Raquel said to her is admissible. Counsel for Perfect Spouse has been instructed by her client that the conversation between Anna and Raquel never happened.

Explain the following:

(a) how the rule in *Browne v Dunn* will apply to Counsel for Perfect Spouse in relation to this issue;

- (b) how the rule in *Jones v Dunkel* will apply to Perfect Spouse in relation to this issue;
- (c) how the rule in section 38 of the *Evidence Act 2008* could operate in the event that Raquel gives evidence not in accordance with Perfect Spouse's instructions.

[6 marks]

Question 25: Civil Procedure:

Assume that Anna succeeds in her action and obtains judgment in the sum of \$575,000 against Perfect Spouse. Explain exactly what Anna would need to have done, by way of making an offer of compromise, to obtain an order for indemnity costs in relation to the entire proceeding.

[4 marks]
