VICTORIAN BAR

Candidate Number: XXXXX

ENTRANCE EXAM

VICTORIAN BAR READERS' COURSE

31 OCTOBER 2019

Annotated with Sample Answers

This document is a reproduction of the Readers' Course Entrance Exam which candidates sat with annotations included as a means of feedback. For each question requiring a written response (i.e. all questions bar the multi-choice questions), a sample of actual answers given by candidates in the examination immediately follows the question. For multi-choice questions, the correct answers are highlighted.

Attention is drawn to the following **important points concerning this document**:

- Each sample answer has been reproduced in type-written form verbatim, as it appeared in the candidate's actual examination script. Any errors and omissions contained in the candidate's original answer are therefore included. No attempt has been made in this document to correct such errors and omissions. Accordingly, each sample answer is **not to be regarded as perfect and necessarily exhaustive of all relevant issues disclosed by the particular question.**
- In assessing each sample answer, an examiner has applied a combination of quantitative and qualitative criteria and taken into account any errors and omissions in the answer. The candidate has been awarded either the maximum or near-maximum possible marks attainable for that question. For example, in the case of a question worth 2 marks the sample answer scored 2 marks, and in the case of a question worth 4 marks the sample answer may have scored 3½ or 4 marks.
- It is possible that other candidates' answers (not included in this document) obtained a similarly high mark for the same question but for different reasons. Accordingly, each sample answer represents only one way in which it was possible to score highly for a particular question.

Dr Jason Harkess
Chief Examiner
24 February 2020

EXAM DURATION: **3 hours** writing time

30 minutes perusal time (prior to commencement of exam)

INSTRUCTIONS TO CANDIDATES:

1) During the exam, you must not be in possession of anything other than writing implements, this exam script and the hard copies of the Reading Guide and examinable excerpts of legislation that have been provided. You are not permitted to have in your possession any other paper, notes, books, electronic devices, mobile phones, pencil cases or any other items that have not been specifically authorised by the Chief Examiner and/or Invigilators of the exam. Any item on your person, on your chair, or on your desk are deemed to be in your possession.

2) Your Candidate Number (but not your name) appears at the top of this page. Your Candidate Number represents your unique identifier for the purposes of this exam. You have previously been advised in writing of the Candidate Number which has been assigned to you. Please ensure that the Candidate Number above matches the Candidate Number which has been assigned to you. You **must not write your name** on any page in this exam script.

3) This exam tests your knowledge and understanding of rules of **Civil Procedure**, **Criminal Procedure**, **Evidence** and **Legal Ethics**. The exam consists of two parts – Part A and Part B. You **must answer all questions (and sub-questions) in both Parts of the exam**. The total number of marks allocated to questions in the exam is 100, so that the maximum score attainable by any candidate is 100. A total mark of 75 or more is required to pass the exam.

4) **Part A** contains 15 questions (Questions 1 to 15) and is worth a total of 50 marks. Part A commences with a preliminary statement of facts giving rise to a hypothetical **criminal proceeding**. Questions 1 to 15 then follow. In answering Part A, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part A informs you of the following: (i) whether you are being tested on rule(s) of criminal procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part A is: Criminal Procedure (22 marks), Evidence (19 marks) and Legal Ethics (9 marks).

5) **Part B** contains 13 questions (Questions 16 to 28) and is worth a total of 50 marks. Part B commences with a preliminary statement of facts giving rise to a hypothetical **civil proceeding**. Questions 16 to 28 then follow. In answering Part B, you should assume that all questions are referrable to the preliminary statement of facts. Each question posed in Part B informs you of

the following: (i) whether you are being tested on rule(s) of civil procedure, evidence or legal ethics (but note paragraph 6 of these instructions below); and (ii) the total number of marks allocated to the question. The total number of marks allocated to each subject area in Part B is: Civil Procedure (21 marks), Evidence (21 marks) and Legal Ethics (8 marks).

6) Although each question is designated as either 'Criminal Procedure', 'Civil Procedure', 'Evidence' or 'Ethics', you may refer to legal rules and principles outside the designated subject area if you consider these to be relevant in answering the question. With some questions, it may be necessary to do so in order to completely answer the question.

7) You must write your answers in the writing space provided after each question. The reverse side of each page in this exam script contains further writing space if required. Further additional blank writing pages have been provided at the end of this exam script.

8) In the case of multi-choice questions, you must simply circle the answer(s) you consider to be correct. Some multi-choice questions are worth 1 mark where **only one answer** may be circled, and other multi-choice questions are worth 2 marks where **two answers** may be circled. If you circle more than one answer for a 1-mark multi-choice question, or more than two answers for a 2-mark multi-choice question, a score of **zero marks will be recorded** for that question. If you wish to change your answer(s) to a multi-choice question, you will not be penalised for doing so provided that the change is effected in such a manner that clearly indicates your intended final answer(s).

9) Your attention is also drawn to the following:

   i) If an application of state law is necessary in answering any question, you should assume that the law of Victoria applies.

   ii) In answering questions, you are not required to cite section numbers or case names unless the question specifically directs you to do so. You may restate principles of law or rules in your own words. A significant degree of latitude is given to you paraphrasing rules and principles.

   iii) The standard of expression, spelling, punctuation, grammar, and conciseness will be taken into account in the assessment of your answers. Please take care to ensure your writing is legible.

10) It is suggested that you allocate time spent on each question proportionate to the number of marks allocated. The table below is provided to assist you in planning time (calculated on the basis of 180 minutes total writing time).

TABLE – SUGGESTED TIME SPENT ANSWERING QUESTION BASED ON MARKS ALLOCATED

Marks	**Time (approx.)**
1 mark	no more than 2 minutes
2 marks	3½ minutes
3 marks	5½ minutes
4 marks	7 minutes
5 marks	9 minutes
10 marks	18 minutes

11) You are **not permitted to remove this exam script** from the examination room.

PART A (Questions 1 to 15) – Candidates are required to answer ALL questions in Part A.

Assume the following prosecution summary of alleged facts relates to all questions in Part A.

The 'Temple of the Winds' rotunda ('the Rotunda') is a building located in Fitzroy Gardens, Melbourne. It was constructed in 1873 and comprises a domed concrete roof supported by 10 Corinthian columns. The Rotunda is on land owned and maintained by the City of Melbourne, a local municipal council.

Temple of the Winds
Image Source: http://citycollection.melbourne.vic.gov.au/

On the afternoon of 1 September 2019, between 400 and 500 hundred people gathered at Fitzroy Gardens to participate in a protest against global warming and climate change. The protest was organised by members of the Coalition of Australian Residents for the Environment, Inc ('CARE'), an environmental organisation based in Melbourne. None of the protesters nor CARE had sought permission from Victoria Police or the City of Melbourne to gather and protest in the gardens.

At approximately 2:15 PM, using the assistance of other protesters, 10 protesters hoisted themselves onto the domed roof of the Rotunda. They formed a circle, linked arms and sat against the dome, each protester facing outwards towards the gardens ('the dome protesters').

As soon as the dome protesters had secured themselves on top of the roof, another 10 protesters formed a circle on the ground around the base of the Rotunda, with each protester standing upright and facing outwards towards the gardens. The circle of protesters positioned themselves equidistant from one another, so that there was 1 protester between 2 pillars. Each protester raised their arms and placed the palms of their hands behind the pillar on either side of them. This had the effect of creating

a ‘human fence’ around the perimeter of the Rotunda (‘the human fence protesters’). Prior to placing their hands on the pillars, each protester had applied super glue (cyanoacrylate adhesive) to the palm of each hand.

Police and emergency service workers attended the scene of the Rotunda at approximately 2:25 PM. By this stage, the hands of each of the human fence protesters were firmly affixed to the pillars of the Rotunda by the super glue. Emergency service workers ascertained that police would not be able to forcibly remove the human fence protesters from the Rotunda without causing serious injury to the protesters’ hands. Because of the inability to easily remove the human fence protesters, police were also unable to enforce the removal of the dome protesters.

At approximately 2:50 PM, as police and emergency service workers contemplated how to remove the protesters from the Rotunda, the pillars on the northern side of the Rotunda buckled without warning. Four of the pillars collapsed, leading to the partial collapse of the concrete roof. The dome protesters fell to the ground, with several suffering non-life-threatening injuries. Fragments of the concrete roof fell onto several of the human fence protesters below. A large piece of falling debris struck one of the protesters in the head and knocked her unconscious. Other protesters were struck by falling debris and suffered scrapes and bruising.

The protester who was knocked unconscious was eventually freed from the structure and taken to The Alfred hospital for treatment. She remained under observation until she was later discharged that night. The other human fence protesters were eventually freed from the debris by emergency service workers who used a chemical to dissolve the super glue from their hands so that they could safely be separated from the pillars.

Following the collapse of the roof of the Rotunda, only 3 of the 10 pillars were left completely intact with no noticeable damage. However, the other 7 pillars had been significantly damaged. More than 80% of the domed roof had fallen away. The City of Melbourne arranged for the damaged structure to be assessed by a team of engineers. The engineering team considered that the Rotunda had ‘effectively been destroyed’ and was beyond repair. The City of Melbourne subsequently removed the remnants of the Rotunda.

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Many of the dome and human fence protesters have been identified and each charged with an offence under s 206 of the *Crimes Act 1985* (Vic), which provides:

> **206 Rioters demolishing buildings**
>
> (1) Whosoever is one of any persons riotously and tumultuously assembled together to the disturbance of the public peace who unlawfully and with force demolish or pull down or destroy or begin to demolish pull down or destroy any church chapel meeting-house or other place of divine worship, or any house stable coach-house outhouse warehouse office shop mill malthouse hop-oast barn granary shed hovel or fold, or any building or erection used in farming land or in carrying on any trade or manufacture or any branch thereof, or any building other than such as are in this section before mentioned belonging to the Queen or the Government of Victoria or to any municipal council or belonging to any university, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery (whether fixed or movable) prepared for or employed in any manufacture or any steam-engine or other engine for sinking working ventilating or draining any mine, or any staith building or erection used in conducting the business of any mine or any bridge waggon-way tramway trunk or shoot for conveying minerals from any mine, shall be guilty of an indictable offence, and shall be liable to level 4 imprisonment (15 years maximum).
>
> …

One of the protesters who has been charged is Davina LONGMAN, the president of CARE, who was one of the dome protesters. Her charge sheet and summons has been reproduced over the page.

FORM 3

Magistrates' Court Criminal Procedure Rules 2009

Charge-Sheet and Summons

(Copy for the Accused)

To the Accused			
	Davina LONGMAN 7/22 Berry Close Clayton VIC 3168	☐ Male ☑ Female	Date of Birth 01/12/1997
You have been charged with an offence. Read these pages to see what you must do.		Registration No. / State	
		Licence No. / State	

DETAILS OF THE CHARGE AGAINST YOU

What is the charge? (Description of offence)	1 **[INSERT DRAFT CHARGE]** *(YOUR ANSWER TO QUESTION 2)*		
Under what law?	☑State ☑ Act ☐ Other-specify ☐C'wealth ☐ Reg.	Act or Regulation No. *Crimes Act* 6231/58	Section or Clause (Full Ref.) 206(1)
Are there more charges?	☑No ☐Yes – See Continuation of Charges attached		
Request for Committal Proceedings	☐ No ☑ Yes		
Type of offence	☐ Summary Offence (You should go to Court)	☑ Indictable offence (You must go to Court)	
Who filed the charge-sheet(s)? (informant)	Kenneth WARING	Email: K.Waring@police.vic.gov.au	
Agency and Address	Caulfield Police Station 289 Hawthorn Road Malvern VIC 3162	Phone: (03) 9876 5432 Fax: (03) 1234 5678 Ref: PMZ4321/21	
Signature of Informant	*Kenneth Waring*	Date: 12 September 2019	

Charge filed at		on	
	MELBOURNE (Venue)		12 September 2019 (Date)

WHERE WILL THE CASE BE HEARD

Where you must go	The Magistrates' Court of Victoria at MELBOURNE			
Address	233 William Street, Melbourne VIC 3000		Phone: (03) 9628 7777	
When	Time 10.00am	Day 31st	Month OCTOBER	Year 2019

DETAILS ABOUT THIS SUMMONS

Issued at	Caulfield Police Station 289 Hawthorn Road Malvern VIC 3162	Date: 12 September 2019
Issued by (Signature)	*Kenneth Waring*	☐ Registrar ☐ Magistrate ☐ Public Official ☑ Member of Police Force ☐ Prescribed Person

QUESTION 1

Criminal Procedure:	How much time do the police have to file the charges against the protesters in this case?
Your answer: ***(circle ONE)***	a) 6 months from date of offending. b) 6 months from offender identification. c) 12 months from date of offending. d) 12 months from offender identification. e) 2 years from date of offending.
[1 mark]	f) Unlimited time.

QUESTION 2

Criminal Procedure: Refer to the charge-sheet and summons that has been reproduced on the previous page. Complete the charge-sheet by **drafting the charge**. Your draft charge should be set out in the answer space provided below. **[3 marks]**

Answer 1: The Accused on 1 September 2019 at Melbourne in the State of Victoria did riotously and tumultuously assemble together with other persons to the disturbance of the public peace, who unlawfully and with force demolished or destroyed a building (the temple of winds Rotunda) belonging to a municipal council, namely the city of Melbourne.

Answer 2: That the accused, Davina LONGMAN, on 1 September 2019 at Fitzroy Gardens in the State of Victoria, being one of a group of persons riotously and tumultuously assembled together to the disturbance of the public peace, did unlawfully and with force destroy the Temple of Winds Rotunda, which was a building belonging to a municipal council, namely the City of Melbourne.

QUESTION 3

Criminal Procedure: Why is there a 'charge' and not an 'indictment'? Explain the difference between the two types of document. **[2 marks]**

Answer 1: A charge is filled (or in case of a summons when charge sheet is signed) by a police member in the Magistrates' Court and formally commences a criminal proceedings (s 6). Charge Sheets must comply with Sch 1 (although can be amended – s 8/9). An indictment is a continuation of the criminal proceedings after an accused has been committed to stand trial (s

144) by a Magistrate – an indictment is signed by the DPP (Kerri Judd QC) or a Crown Prosecutor (s 159), and filed in the County or Supreme Courts. All Criminal matters (except direct indictment) begin with a charge sheet but only indictable matters which finalise in County Court or Supreme Court will have ab indictment because police have initiated the proceeding, there must be a charge sheet which will begin the committal proceedings until the committal hearing.

Answer 2: These proceedings have been commenced in the Magistrates' Court; accordingly, they have been commenced by a charge. A charge is the mechanism for commencing a proceeding in the Magistrates' Court even if it relates to a strictly indictable offence that is ultimately destined for the County Court or the Supreme Court. A charge must be in writing, signed by informant and comply with Schedule 1.

By contrast, an indictment does not usually commence proceedings. It is usually a document continuing proceedings files in the County Court or Supreme Court after committal (within 6 months or 28 days or 14 days, depending on the offence). An indictment must be signed by DPP or Crown Prosecutor in name of DPP. Must be in writing and comply with Schedule 1. Unlike a charge, an indictment must include names of committal witnesses and other witnesses for trial.

It should be rules that a direct indictment may commence proceedings when filed in the County Court and Supreme Court, However, the Prosecution have sensibly opted for charge so it can so through committal process.

For the purpose of answering further questions in Part A, assume the following additional facts:

- At the time of alleged offending, the Accused, Davina LONGMAN, was subject to a summons to answer a charge for another indictable offence which she is alleged to have committed while at another staged protest she had attended on 18 April 2019.
- The earlier charge alleges 'criminal damage', an indictable offence under s 197(1) of the *Crimes Act 1958* (Vic). It alleges that on 18 April 2019 Ms LONGMAN used a wooden stake attached to a picket sign to smash the windscreen of a car parked on a street in St Kilda.
- Apart from the 2 charges arising from different protests, Ms LONGMAN has no criminal history. She is 22 years old, a student of sociology and political science at Melbourne University, and lives with her parents in Brighton.

QUESTION 4

Criminal Procedure: Is bail on option for Ms LONGMAN in relation to the charge she is now facing under s 206(1)? You should include in your answer consideration of the matters that she will likely raise in any bail application, and what she will need to demonstrate to obtain bail. **[4 marks]**

Answer 1: Accused is able to apply for bail anytime after her arrest. She has allegedly committed a "Sched 2 Offence" – an indictable offence (under s 206 of the Crimes Act) alleged to have been committed while subject to a summons to answer to a charge for another indictable offence (s 197(1) of the Crimes Act). Accused is therefore presumptively not entitled to bail and "compelling reasons" why she should be granted bail, that is, forceful and convincing but not irresistible or exceptional reasons (*Re Ceylan*). The bail decision maker (BDM) will consider the surrounding circumstances in s 3AAA BA. There, the nature of the offence is a serious example of public property damage, the Accused has a criminal history of one similar offence in recent times, she allegedly committed this offence while subject to a summons to answer to a charge for another offence, but the Accused will argue that she is not a flight risk and is a young person. If successful, the Prosecutor would then need to show there is an "unacceptable risk" that the Accused would endanger the safety of a person or commit an offence when on bail. The BDM again will consider s 3AAA. Given the matters weighing against a grant of bail, A could suggest conditions being composed, such as imposing a curfew or restricting the Accused from contacting certain persons (fellow protesters) and to not attend any protests. Her parents can also act as sureties, On balance, the Accused is likely to be granted bail with condition.

Answer 2: An A has a prima facie entitlement to bail, s 4, unless they fall into a "Sch 1 or Sch 2" category. Here, the offence under s 206 of the Crimes Act does not appear in Schedule 1 or Schedule 2, however, as Ms L was in a summons in answer to a charge for an indictable offence and is now also charged with an indictable offence, Ms Longman falls into Schedule 2 category and has the onus to show compelling reasons. The A must demonstrate CR, which was considered by HIDBeach in Ceylan to be 'having regard' to all circumstances there exists forceful and therefore convincing reasons why the Applicants detention is no longer justifies. The crt in this case will consider the factors in 3AAA including the nature and seriousness of the alleged offending – here serious in nature, max, 5 yrs penalty, public disruption and damage to historical monument, strength pros case (unhuman at this stage), Ms L criminal history – nil, whether she was subject to a summons – yes. If CR demonstrated and shift to P to establish unacceptable risk. Crt will again consider s 3AAA – also s 1B – which requires crt to balance protection of community with A presumption innocence and right to freedom. Pros will submit that given this offence was committed while subject to summons for a similar offence protest and damage, there is an unacceptable risk commit further offence. Applicant will submit that conditions alleviate the risk – could impose curfew not to associate with 'CARE', reporting, residential – line with parents still given conditions available here, likely grant of bail.

QUESTION 5

Criminal Procedure: The offence of a rioter demolishing a building under s 206(1) of the *Crimes Act 1958* (Vic) is **not** an offence referred to in **Schedule 2** of the *Criminal Procedure Act 2009* (Vic). Explain the legal and practical implications of its omission from Schedule 2 for the protesters who have been charged with the offence. **[3 marks]**.

Answer 1: Given s 206(1) is an indictable offence and is not in Sch 2 of CPA, this means it legally cannot be heart summarily (ie it is not IOTS because it has a max penalty over Lvl 5 or 6 and is not in Sch 2) – s 28. Therefore it must be finalised in the CC (or SC but CC more likely). Practically this means there must be a committal proceeding – filing hearing, comment (s 125) then committal in MC before determination by mag re: sufficiency of evidence to support the change (s 144) before being committed be stand trial. If A PG – plea hearing in CC or SC, if A contesting charge will be determined at a trial with a judge (finder of law) and a jury (finder of fact) of 12. MC has cap on max penalty it can impose (2 yrs for single offence) but no such cap in CC/SC. Also appeal options differ in MC and CC/SC.

Answer 2: This means that s 206(1) is not an indictable offence that may be hears and determined summarily. It must be tried in the CC before a judge and jury, assuming that A is committed to stand trial after committal proceedings in the MC. Other implications are that:
The process would not be as quick or cheap as summary hearing (due to committal proceedings)
A is subject to harsher penalty (maximum of 15 years prison, cf. summary hearing: 2 years max or 5 years for multiple offences)
A cannot get benefit of adjournment for her to undertake diversion program
Appeal lies to the COA (need leave to appeal) for conviction and sentence or sentence only. (cf. summary hearing: de novo appeal hearing in CC)

For the purpose of answering further questions in Part A, assume the following additional facts:

- A total of 14 protesters have been charged with the offence under s 206(1) of the *Crimes Act 1958* (Vic).
- All of those charged were either one of the human fence protesters or one of the dome protesters.
- All persons charged are registered members of CARE.
- The Prosecution alleges that each Accused *'knew or contemplated the possibility that their actions would result in the likely damage or collapse of the Rotunda'*. A critical fact in issue in the case is the state of mind of each protester at the time they took part in the protest.
- The Prosecution further alleges that the Accused, Davina LONGMAN, convened a meeting to brief the protesters as to their plan in relation to the Rotunda at about 10:00 AM that morning in

an unused warehouse located in Richmond. It is alleged that Ms LONGMAN informed those who attended the meeting that *'…there's a chance the rotunda could collapse, but because it's so small nobody's going to get hurt…*'. Some members of CARE who attended the briefing expressed concern about damaging such an old building. However, Ms LONGMAN placated such concerns by saying *'this might be a necessary incident for the purposes of serving a greater environmental imperative.'* Some of the Accused human fence and dome protesters did not attend the briefing.

- Shortly after the 14 protesters were each served with the charge-sheet and summons, CARE's executive council convened a special meeting to discuss their strategy in defending the charge. All 14 charged protesters attended the meeting. Ms LONGMAN, as president, chaired the meeting. The motion was put by Ms LONGMAN that they should present a 'united front' in vigorously defending the charges. There was unanimous agreement amongst the charged protesters.

QUESTION 6

Ethics: Ms LONGMAN contacted a barrister and requested that the barrister represent all 14 Accused in defending the charges. Because CARE's resources are limited, she communicated her concern to the barrister that she would prefer not to engage a solicitor. It is CARE's view that only one lawyer (a barrister) needs to be briefed. Assume that you are that barrister. Would you accept the brief? Discuss. **[5 marks]**

Answer 1: This scenario raises two primary issues

(1) Ethical issues representing 2+ parties and

(2) Direct briefing.

(1) Joint Representation – a barrister can only represents more than one party to a proceeding it satisfies that there if no real possibility of conflict between the parties (R 119). This has been described as a 'real, sensible possibility'. B must determine whether conflict may exist as soon as practicable. In this case, Longman would explain to B that the accused have all agreed to 'united front' and therefore there is no conflict, However B should be very cautious about accepting this statement and would need too satisfy himself of this by speaking with other accused before taking brief. In this case, there is likely a real possibility that one or more protestors may seek to use a 'cut-throat' defence to blame Ms Longman for offence, given the concerns they expressed about damaging building. It is unlikely counsel could act for all in this circumstance.

(2) Direct briefing issue – B is not bound to accept a direct brief but may do so provided that B is satisfied that lack of instructor would not 'seriously prejudice' interest of client. In this

case, B should decline to act. Regardless of whether B represents one or all of accused, the offence charged is indictable and the trial will be complex involving many witnesses. B will require an instructor to assist with administrative tasks including witness conferences. If B did choose to accept direct brief (which he shouldn't), then would be required to comply with R22 and inform client in writing of effect of R11/13. That solicitors may be required and any disadvantages from lack of solicitor etc. Clients would all need to sign.

Answer 2: Direct Briefing – Counsel may accept a direct brief from a client (i.e. with no intermediate solicitor) if he or she complies with r 22 of Bar rules. The client must be informed of the nature and limitations of a barristers' work (in rr 11-13. The situations in which a solicitor may be necessary (and the disadvantages to the client if this doesn't occur), the relative capacity of counsel compared to having services of a solicitors also, and counsel's level of experience. The client must given written acknowledgement of these matters: r 22(b). In addition, counsel must refuse the brief from Longman (and other co-accused) where there is a reasonable possibility that the absence of a solicitor will seriously prejudice counsel's ability to advance their case: r 101(K). Multiple Accused – Counsel may only act for multiple accused where there is no real possibility of a conflict emerging between those clients (r 119). Counsel must return the brief where this possibility occurs.

Accept Brief? – I would not accept a brief for Longman and other accused as there is a real possibility that the other accused will seek to blame Longman as the leader of CARE for the incident that transpired. Also, given the number of potential witnesses to the event, this is not a basic brief, and I would require a solicitor before taking it on, as I am entitled to do: r 21.

For the purpose of answering further questions in Part A, assume the following additional facts:

The matter is to proceed to a committal hearing.

QUESTION 7

Criminal Procedure:	In which court or tribunal will the committal hearing take place?
Your answer: ***(circle ONE)***	a) Victorian Court of Committals. b) Magistrates' Court of Victoria. c) County Court of Victoria. d) Supreme Court of Victoria. e) Victorian Civil and Administrative Tribunal. f) Victorian Committals Tribunal.
[1 mark]	

QUESTION 8

Criminal Procedure:	A 'committal hearing' is most accurately characterised as an opportunity for:
Your answer: ***(circle ONE)***	a) the public to be informed about the case. b) witnesses to become familiar with the process of giving evidence. c) the defence to challenge the admissibility of evidence. d) the prosecution to reformulate its case. e) the court or tribunal to dismiss an unsustainable charge. f) All of the above.
[1 mark]	

For the purpose of answering further questions in Part A, assume the following additional facts:

- Each of the 14 Accused are now represented by different barristers.
- Samuel EDGES is 16 years old. His mother, Leonie EDGES, is one of the 14 Accused protesters. Leonie EDGES is the human fence protester who was knocked unconscious and taken to The Alfred. While Samuel attended the protest, he did not play an active role like his mother did. However, Samuel EDGES had attended the briefing of the protesters with his mother at the warehouse in Richmond earlier that morning.
- Samuel travelled with Leonie in the ambulance that took her to hospital after the collapse of the Rotunda. He was extremely upset by the whole incident. At The Alfred, police questioned him about the events while his mother was still unconscious (police did not consider him to be a suspect). He told police about the briefing given by Ms LONGMAN and how she had told everyone about the risk of the Rotunda collapsing. Police hand-wrote a statement for Samuel to sign at the hospital, which he did. At this point, Samuel was only too happy to sign the statement because he wanted those responsible for his mother's injuries to be held accountable.
- The matter has now proceeded to a committal hearing. Samuel EDGES' statement has been provided as part of the prosecution brief disclosed to all Accused.

QUESTION 9

Criminal Procedure: Several Accused (not including Samuel EDGES' mother) want Samuel EDGES to attend the committal hearing so that their barristers can question him about his observations of events that occurred at the Richmond warehouse. Explain the processes available to the Accused under the *Criminal Procedure Act 2009* (Vic) which can be applied to achieve this

purpose, and whether Counsel for the Accused are likely to be permitted to question Samuel EDGES at the committal hearing. **[3 marks]**

Answer 1: The accused persons must file a case direction notice s 118, 7 days prior to the committal mention outlining who they seek leave to XXB at committal hearing – including Samuel, setting out the issue, relevance, + justification for XXN. The Mag will take into account if the informant/pros opposes the application and determine the application pursuant to s 124 considerations – the serious nature of the charge, the witnesses young age (s 124(5)(b)) (must have regard to s 124(5) factor given Samuel's age) and if the pros case is adequately disclosed. Given how important S's evidence is as it goes to a central/critical issue (what did the protester's know (state of mind)) and it's probative value (extent to which S/s evidence could affect assessment of this issue it is, likely the Mag will grant leave to XXN at committal s124(5)(g).

Answer 2: A (through defence counsel, DC) seeks to cross-examine (XXN) Edges at the committal hearing. A must not do so without leave (s 124(1) CPA). MC may consider whether informant consents to or opposes such leave. MC must not grant leave unless satisfied that A has identified issue to which proposed questioning relates and explained why Edge's evidence is relevant to issue, and that XXN is justified (s 124(3)). Here, leave is likely to be granted as Edges can give direct evidence of what he saw at the protest and the briefing (i.e. organisation of protest leading up to alleged offences). In this regard MC must have regard to the need to ensure that P's case is adequately disclosed and to determine whether issues are well defined, among other things, with a view to determining whether ev' of sufficient weight to support conviction (s 124(4). The fact that Edges is a child is plainly relevant (s 124(5)(b) and he signed the statement "happily" to hold those accountable for mother; s injury, and his mother's injury would have been traumatic for him to witness (s 124(5)(a)(b)). If leave given, Edges may be called (s 130(2)) and he can only be XXNed on the above issues (s 132(I)) unless leave obtained for different issue (s 132A).

QUESTION 10

Evidence: Assume Samuel EDGES does not wish to give evidence for the prosecution because to do so would be contrary to his mother's wishes. Explain whether Samuel EDGES is a compellable witness for the prosecution at the committal hearing. **[3 marks]**

Answer 1: The presumption is that a competent W is compellable (s 12, 13 EA) and there is no evidence W is not competent. However, being the son of one of the accused he has a right to raise an objection to giving evidence on her proceeding under s 18 of the EA. Here he should received independent legal advice about raising the objection (organised by ORP). If he raises the objection and Mag is satisfied that he is the son of the accused the Ma will first decided whether there is a likelihood of any harm being caused to the relationship between W & A, or to W. Here Samuel E (the W) would raise the fact that he is close to his mother and that he fears that giving evidence would damage their relationship. Mag must the determine if the interest in compelling W to give evidence outweighs the desirability in excusing him. The Mag will take into account the nature of the offence (relatively serious) and the importance of the evidence (here quite high) and the level of harm likely (not great here). Overall the objection is likely to be overruled and Samuel is likely to have to give evidence as there is nothing to indicate a high level of harm given he is not a very young child dependent on his mother.

Answer 2: The evidence act applies to all proceedings in Vic Courts including committal proceedings. Therefore, under s 18 of the EA Sam may object to giving evidence as witness for the prosecution if he is the son of an accused person s 18. As his mother is one of the 14 accused persons this provision will apply in the case against his mother. (He will not have grounds to object if the matters are separated for some reasons and his mother is no longer an accused). Prior t giving evidence, Sam should object & the Mag will consider the factors in s 18(7) in considering whether there is a likelihood that harm would or might be caused to his r'ship with his mother or to him; and the nature/extent of that harm outweighs the desirability of having the evidence given. Here, Sam is young, and although his evidence is important, the nature & gravity of this offence does not justify the potential harm it would do to their r'ship. The court is likely to not require Sam to give evidence.

For the purpose of answering further questions in Part A, assume the following additional facts:

- 2 of the dome protesters, including Davina LONGMAN, and 2 of the human fence protesters have been committed to stand trial.
- Samuel EDGES is a compellable witness for the Prosecution. The Prosecution intends to call him as a witness at the upcoming trial.
- The Prosecution also intends to call Richard TRUONG who is a member of the public who attended the protest. He is not a member of CARE, however he freely admits having taken part in the protest on the day the Rotunda collapsed. He says he was standing very near the Rotunda when he observed the dome protesters climb onto the Rotunda's roof. He remained at that location until the Rotunda collapsed. He states that he remembers 2 of the dome protesters whose arms were linked talking about how the '*roof might collapse'* and 1 said to the other *'I think it's*

wobbling'. At this point, Mr TRUONG noticed that the pillars were slightly wobbling. The other dome protester then said, '*Let's rock a little bit to make it happen',* and then he observed both of the dome protesters rocking/jiggling slightly as if to encourage the Rotunda to rock more. He also remembers that about 5 minutes after observing the 2 dome protesters rocking, the Rotunda collapsed. Mr TRUONG does not remember exactly who the dome protesters were, except that they were both female. He cannot say positively that either or both of them are included amongst the 4 Accused.

QUESTION 11

Evidence: Counsel for all 4 Accused objects to the admissibility of Samuel EDGES' evidence relating to what occurred at the warehouse. In summary, their objections are that the evidence is 'irrelevant', 'hearsay', and 'unreliable because it's coming from a child'. Discuss the merits in the objection, including the likely response to the objection that could be made by the Prosecution. **[6 marks]**

Answer 1: The objection has little to no merit.

First, the evidence is relevant because thestatement at the meeting regarding the likelihood of damage to the Dome are, if accepted rationally capable of affecting the assessment of the probability that the protesters knw, or were reckless, as to that possibility.

Second, although EDGES will give evidence of previous representation, their representation could not be adduced to prove fact which the representors may reasonably be supposed to have intended to assert. Instead, the prosecution would correctly argue that they were being led to the non-hearsay purpose of proving the offenders state of knowledge of the matters about which they were speaking (s 60). It is to be noted that, in the case of an accused who made such a representation, that evidence would also be likely admissible as an implied admission (s 81, s 60(3)).

Third, the reliability of the evidence is irrelevant to the question of admissibility if the accused persons sought the exclusion of the evidence under s 137, the prosecution would argue that probative value is assessed on the assumption that the evidence is reliable – reliability is a matter for the jury. In any evidence, the prosecution would note that the fact that EDGES is young does not, without more, makes his evidence unreliable, and the JDA would prohibit any suggestion of this kind being made to the jury.

Answer 2:

Evidence is relevant if assuming it is accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. Here, the evidence of things said at the briefing meeting would be relevant to the state of mind/knowledge of risk of the protesters who attended the meeting and might have heard what was said about risk of building collapsing. The evidence would not be relevant in proceedings against any of the protesters who did not attend the meeting.

Hearsay is evidence of a previous representation adduced to prove the truth of fact that the representor might reasonably be supposed to have included to assert. Here, the evidence is arguably hearsay if adduced against Longman as the other speaker to assert that they were aware building might fall. However, evidence might be admissible for non-hearsay purpose – s 6- - if adduced not to prove the truth of what was asserted, but to prove that other accused's present heard it – i.e. relevant to listener's state of mind. This would be a non-hearsay purpose and make the evidence admissible under s 60 against close accused. They able to be used for hearsay purpose. Although note – s 60 not available for admissions.

QUESTION 12

Evidence: All Accused also object to the admissibility of the entirety of Richard TRUONG's evidence. Identify the most likely basis (or bases) for the objection and discuss whether the objection is likely to be successful. **[5 marks]**

Answer 1: An objection may be made on the basis of relevance. If Truong cannot identify the protesters he observed as aby of the accused, then it is hard to see how evidence f the representations of those other people might rationally affect the assessment of the probability that the accused had the relevant state of mind. Their objection has merit in my view.

If determined to be relevant, a further objection may be made on the basis that the previous representations are hearsay and excluded under the hearsay rule. However, this objection is likely to be overcome because the previous representation is being adduced for a non-hearsay purpose. He prove statements were made (so going to state of mind) this means that the facts asserted were true (i.e. the Rotunda will fall)

D Counsel may object on the basis that Truong's evidence offends the opinion rule which is that, evidence of an opinion about a fact cannot be adduced to prove the existence of that fact. A number of opinions are given here:

(i) Protesters were female

(ii) Protesters were rocking/jiggling slightly as if to encourage the Rotunda to rock more

(iii) After about 5 minutes Rotunda collapsed.

Those opinions will be admissible if they fall into the lay opinion exception; evidence of opinion would be admissible if the opinion is based on the what the person saw, heard or otherwise perceived about a matter or event (all opinions above meet this component) and evidence of the opinion is necessary to obtain an adequate account or understanding of the W's perception. Opinion (i) and (iii) are likely to satisfy this latter aspect to the test – opinions such as gender and time.

Answer 2: The most likely basis for objection is relevance, hearsay, admissibility and the discretionary exclusivity.

Firstly, the evidence is relevant to the state of mind of those on the Rotunda. Although it is unclear who made the comments, the evidence is still relevant to what the other protesters on the Rotunda heard. It is or relatively low probative value given it is under which court see it, but is still relevant. Again, this is probably not hearsay evidence as it is not adduced to prove the truth of the asserted fact. It is adduced to prove the state of mind of the protesters. The discretionary exclusivity is probably most relevant. Even if take at its highest, it is adduce with (R v IMM and R v Bauer) and viewed to be credible and reliable, it is weak and uncanning evidence (like the example of ID where is toggs condition discussed in R v IMM). It has low probative value. The uncertainty as to who said it may mislead or confuse the jury (s 135) and the might substantially outweigh the probative value it has. Furthermore, the danger of which prejudice than the jury might give the evidence more weight and be distracted from its task given it suggest that the protesters deliberately destroyed the monument, might outweight its low probative value. However, the witness can be cross-examined and prejudice could potentially be cured by a jury direction. On balance, the evidence would probably not be admitted, but it is likely balanced.

For the purpose of answering further questions in Part A, assume the following additional facts:

- The trial judge rules Samuel EDGES' evidence and Richard TRUONG's evidence admissible. Both witnesses will give evidence at trial that is largely consistent with what has been described above.
- The Accused, Davina LONGMAN, intends to give evidence following the close of the Prosecution's case. She has instructed her Counsel that:

- The Richmond warehouse meeting took place, which she chaired. She spoke at the meeting but never said anything about the possibility of the Rotunda roof collapsing.
- She had no idea that the Rotunda roof might collapse.
- The whole purpose of the protest was to draw attention to climate change in a peaceful manner. There was never any intention to damage any property of the City of Melbourne. As one of the dome protesters, she was in absolute shock when the roof collapsed. It was completely unexpected. She regrets that the Rotunda roof collapsed and, with the benefit of hindsight, would have done things differently if she had realised the Rotunda would not have been able to carry the weight of the protesters.

QUESTION 13

Evidence: Explain the rule in *Browne v Dunn* and how it is likely to applied by the Prosecution and/or the Defence in this case. What could happen if the rule is breached? **[5 marks]**

Answer 1: The rule in BvD is a rule of fairness that requires party to give a witness an opportunity to comment on so much of the party's case as may be inconsistent with the witness's evidence and that the witness is able to comment on. Here;

- Prosecution would need to XXN LONGMAN that at briefing meeting she adverted to possibility that roof would collapse. AND that she was aware of that possibility/likelihood.
- Defence would need to XXN Samuel E. that, at meeting A never said anything about possibility of roof collapsing.
- Defence may also need to XXN Truong that he must be mistaken because A never said anything about trying to make roof collapse.

Non-compliance with the rule us ordinarily addressed by having the witness recalled so the matter can be put to the witness.

Alternatively, the judge may direct the jury that the witness was not challenged on certain propositions and that is relevant to the jury's assessment of the evidence.

In very rare circumstances, if rule is breached judge may not allow party to lead the contradictory evidence however highly unusual in criminal proceedings and almost never used against A.

Answer 2: Counsel must put to a witness in XXN so much of her clients case as is inconsistent with the witness's evidence in sufficient detail to enable the witness to comment/accept/refute any essential elements of the party's case. It is a rule of fairness. The rule is applied less strictly to DC, given the burden on P to prove its case beyond reasonable doubt. DC would put to E "you were

mistaken about hearing Ms L talk bout the risks of the rotunda collapsing at the meeting, weren't you?" There are restrictions on when P can XXN an A about matters relating to credibility. First, A is not obliged to give evidence. Second P can only XXN A about credibility without leave if the XXN is about whether A is biased or has motive to be untruthful; or is/was unable to recall matters; or has made a prior inconsistent statement. However here, P can XXN A with leave because DC will have attacked the credibility of a P witness – i.e. Edges, as set out above. (see s 104(4)). Therefore, P would put to A "you did discuss the risks of the Rotunda collapsing at the meeting, didn't you?"

If the rule is breached, leave may be sought to recall a witness under s 46, the TJ may give an adverse direction to the jury re: being denied the opportunities to assess the witness's response & the weight of that evidence; and the breaching party may not be able to adduce the evidence that was not put to the witnesses

QUESTION 14

Ethics: In the course of his closing address to the jury, the Prosecutor made the following statement:

> …This was indeed a horrendous tragedy, ladies and gentlemen. But the tragedy is one largely attributable to the deliberate actions of each of the Accused. They prioritised their own environmental ideologies at the cost of compromising community safety and property. They destroyed what was once a quaint yet renowned feature of the Fitzroy Gardens. They did not care about the Temple of the Winds rotunda because their criminal cause was much more important. But I remind you, ladies and gentlemen, the criminal law provides for no exemption from liability for those persons who seek to destroy public property because their cause is, in their own minds, a noble one. Indeed, you may be inclined to take the view that their particular views on climate change are completely irrelevant. You may also take the view that their environmental concerns are extreme and beyond the realm of common sense. Certainly, common sense was nowhere to be seen when they leapt onto the roof and glued their hands to the pillars…

Has the Prosecutor breached any ethical obligation(s)? Discuss. **[4 marks]**

Answer 1: Yes. PC has a duty to fairly assist the court to arrive at the truth and must be impartial. PC also has to provide adequate submissions of law to enable the law be properly applied to the facts, s 83. PC must also comply with s 84 + 85 and must not press the D case for conviction beyond a full and firm presentation of the case. Importantly PC must not seen to inflame or bias the cvt against the Accused. Here, the C is using too emotive language for a prosecutor. Stating that the A practised their own environmental ideologies at the cost of compromising the community will inflame the jury (or has potential). This is also the case with the comment that the A environmental

views are extreme and beyond realm of common sense. It is improper language by a Pros and PC is at risk of an appeal as a result of the improper and emotive language used.

Answer 2: P must fairly assist the court to arrive at the truth ad seek impartially to place all the evidence before the court (r 83). P must not press its case beyond a full and firm presentation of the case for conviction (r 84). P must not seek to inflame or bias the court against the accused (r 85) P mist not argue a proposition incapable of leading to guilt or carrying weight (r 86). Arguably P has breached these obligations in referring to this as a horrendous tragedy and discussion the sentimental value of the Rotunda. Moreover P has alluded to the environment causes as possibly being "completely irrelevant" and "extreme" etc. which may amount to a personal opinion of the case – also a breach. The Good Conduct Guide makes clear that a prosecutor is no tin the same position as defence counsel; P effectively presents the community and its task is to facilitate the administration of justice, not to demonise an accused which is what has been done here.

P may face disciplinary action for UPC or PM as consequence.

QUESTION 15

Criminal Procedure: Assume all Accused are found guilty and sentenced to a term of imprisonment. Can they appeal? Explain the essential aspects of the appeal process from beginning to end. **[4 marks]**

Answer 1: An appeal from the CC/SC is not 'as of right' as it is in the MC. The A's all need to seek leave to appeal to the court. They should file a notice of appr for leave to appeal (NALTA) within 28 days of sent and Reg of Crim appeal will serve on Resp the NALTA within 7 days. The NALTA should state whether they appeal against sent or conviction. To be granted leave appeal a sent, The A's need to show there was a sent error and that a diff sent should be imposed. The COA may refuse leave where there is no reas prospect of the sent being reduced. On def. of the appeal if leave given) the COA will set aside the initial sent and give any sent it deems appropriate. If appealing conviction, also need leave, need to file NALTA within 28 days of sent and Crim Reg will serve on Resp within 7 days. Leave will be granted where the A's can demonstrate that the verdict is unreasonable or not supported by ev. As a result of the an error or irregularity there was a substantial miscarriage of justice or for any of the reason a subs. miscarriage of justice. If appeal granted court could make orders pers s277 CPA eg order new trial or acquit A etc.

Answer 2: The accused persons have option to appeal against conviction and/or sentence. If the accused seek to appeal against conviction, He may appeal to the COA if the COA gives leave. An application for an appeal is commenced under s 274 by filing a notice of application for leave to appeal within 28 days after the day sentenced (or any extension granted under s 313). The registrar will provide the respondent, the DPP w/ a copy. The COA must allow the appeal if satisfied that

(a) The verdict of the Jury is unreasonable or cannot be supported having regard to the evidence, or
(b) On the event of error or an irregularity in, or relation to, the trial there has been a substantial miscarriage of justice; or
(c) For any other reasons there has been a substantial miscarriage of justice.

In any other case, the COA must dismiss the appeal under section 274. If successful, order a new trial, enter a judgment or acquittal or alternate options re alternative offence under s 77(1)(c) and (d). In respect of an appeal against sentence, the COA must again give leave. An application is to be filed within 28 days (or extension period under s 313). The Registrar will provide a copy of the application to the DPP. The COA may refuse an application for leave to appeal under s278 in relation to any ground of appeal if –

(a) there is no reasonable prospect the COA would impose a less severe sentence than the are first imposed; or
(b) there is no reasonable prospect the COA would reduce the total effective sentence despite there being an error.

If crt satisfies there is an error and different sentence should be imposed it must allow the appeal. In any other case, the COA must dismiss the appeal.

END OF PART A

PART B (Questions 16 to 28) – Candidates are required to answer ALL questions in Part B.

Refer to the facts in Part A. The following further facts relate to all questions in Part B.

Bernardo KOZ was one of the 'human fence' protesters. After the Rotunda roof collapsed, the pillar on which his right hand was affixed broke into 2 pieces. His hand was glued to the top half of that pillar. The top half fell to the ground and rolled away slightly from its original position. Mr KOZ's hand was still stuck to it and, because his left hand remained affixed to the pillar that was still standing on the other side of him, the 'pulling' force of the rolling pillar resulted in his super-glued hands being pulled away from where they were affixed. The pain of the sheering forces was unbearable. He continued to scream out in agony. Many of the onlooking protesters became extremely distressed as a result of observing his pain. Emergency service workers attended to Mr KOZ and observed that a significant amount of blood was coming from his hands. A significant part of the skin had been torn away from the flesh of his hand that remain glued to the pillar.

St John ambulance paramedics administered methoxyflurane to Mr KOZ intravenously to ease his pain. They then applied an acetone concentrate liquid to dissolve the super glue. After about 10 minutes of dripping the acetone in between Mr KOZ's hands and the pillars, his hands eventually came free. He was then transported to The Alfred. At the hospital, doctors performed surgery on both his hands to reattach skin that had partially come away from the flesh. Hospital staff administered tetracaine as the local anaesthetic.

While extremely rare (1 in 5000), there is a risk that tetracaine may produce an allergic reaction in patients to whom it is administered. Apart from Mr KOZ, in the last 2 years The Alfred has had 3 patients suffer the allergic reaction. In all of those cases, the allergic reaction followed from a situation where the patient had been admitted due to 'super glue' being stuck to their skin, first-response paramedics had administered methoxyflurane for pain relief, acetone was used to remove the glue, and tetracaine was subsequently administered to the patient at hospital. None of those occasions of allergic reaction resulted in any longer-term complications or the death of the patient.

Mr KOZ suffered an allergic reaction almost immediately after being administered the tetracaine. He suffered elevated blood pressure and an increased heart rate. While doctors were concerned, the symptoms of the reaction were only mild. He was discharged a few hours later.

Over the course of the next 2 weeks, Mr KOZ began to develop a rash, beginning at his hands. Over subsequent weeks, it spread up his arms. Mr KOZ grew concerned and saw a GP who referred him

back to The Alfred. Doctors at the Alfred examined Mr KOZ and advised him that it was simply an allergic reaction and that the rash will eventually 'go away'. They did not perform any blood tests. Mr KOZ was told to go home.

Two days later Mr KOZ suffered a heart attack. He was not able to be resuscitated. A subsequent post-mortem examination revealed that, at the time of death, Mr KOZ had extremely high levels of an IgE antibody in his system which was the most likely trigger for the heart attack. The antibody was produced as a result of the tetracaine entering his system at The Alfred some 3 weeks earlier. The levels of the antibody continued to increase over that time to the point of the heart attack.

Sheila KOZ, in her capacity as executor of the estate of her deceased husband, has issued proceedings in the Supreme Court of Victoria on behalf of herself and her three children who are the beneficiaries under Mr KOZ's will. Mrs KOZ (as Executor) is named as Plaintiff. She has named Alfred Health as Defendant. In her pleadings, she has alleged negligence (committed against Mr KOZ) where she relies on her statutory right to pursue such claims under the *Wrongs Act 1958* (Vic). She has also pleaded claims based in negligence for the psychiatric injuries that she and her children have suffered as a result of Mr KOZ's death. She has alleged that Alfred Health is vicariously liable for the actions of its medical staff. The critical allegations in the claim include claims that:

- staff failed to inform Mr KOZ of the risk of an allergic reaction prior to administering the tetracaine;
- staff failed to effectively monitor and provide remedial treatment following the observations by medical staff of the immediate allergic reaction Mr KOZ suffered when he was originally treated for his hand injuries;
- staff failed to act with all due care when Mr KOZ presented himself at The Alfred 2 days prior to his death.

QUESTION 16

Civil Procedure:	Which of the following **TWO** propositions are most likely to be correct in this case?
Your answer: ***(circle TWO)***	a) The proceedings will be commenced by Notice of Proceedings. b) The proceedings will be commenced by Originating Motion. c) The proceedings will be commenced by Writ. d) The filed claim will include a 'arguable case' certification. e) The filed claim will include a 'no frivolous claim' certification. f) The filed claim will include a 'proper basis' certification.
[2 marks]	

QUESTION 17

Civil Procedure:	Which **TWO** of the following are overarching obligations in civil proceedings, as set out in Part 2.3 of the *Civil Procedure Act 2010*?
Your answers: ***(circle TWO)***	a) to maximise the number of claims/defences available. b) to act impartially. c) to act consistently. d) to co-operate with other parties in connection with the proceeding. e) to minimise litigation risk for all parties in the proceeding. f) to act honestly.
[2 marks]	

QUESTION 18

Civil Procedure: Consider the following proposition:

> In a criminal case, a valid charge alleging criminal negligence against a doctor may be expressed in as little as two or three lines. In a comparable civil proceeding, however, the pleaded and particularised allegations will span 20 to 30 pages.

To what extent is this likely to be true in Mrs KOZ's civil claim? With reference to the rules relating to pleadings and particulars, explain what will need to be included in her statement of claim and the justification for requiring Mrs KOZ to provide that level of detail at the commencement of the civil proceeding. **[4 marks]**

Answer 1: A pleading must contain in summary form a statement of all material facts on which a party settles as well as particulars in support of the allegations if necessary to enable the opposite party to plead, to define the questions for trial, or to avoid surprise at trial. All of these features should be included in K's statement of claim, but she should not plead by evidence by which the facts in her claim are to be proves (r 13.02). K must plead the material facts that give rise to the satisfaction of the elements of negligence (against the Alfred) (both Wrongs Act common law psychiatric harm). She should refer to the Wrongs Act in setting out the first of these claims. She should specify the relief she seeks and refer to the Wrongs Act. If she pleads conclusions of law, she must plead the material facts supporting it. Each claim must have proper basis (CPA s 18(d)). Other requirements include description of pleading (SOC) and date of service (r 13.01) divided into consecutive numbered paragraphs and signal by counsel/solicitor.

Answer 2: Pleading are the means by which a party sets out all the material facts or which they rely to make out the essential elements of the cause of action/claim. While it is not possible here to say precisely how long the pleadings in this case will be, it is fair to say that the pleadings will be

significantly long as then a counterpart criminal charge. This is because the job of pleadings and particulars is to put the other party in a position where they know what is being alleged against them to allow the parties to narrow + identify the issues in dispute, and to avoid taking the other party by surprising (in keeping with the overarching provisions in the CPA). Mrs KOZ's statement of claim will need to include all the material facts she relies on the make out the claim of negligence (duty, breach, causation, damage) but not the evidence by which those facts are proved. She will need to identify the relevant prov's, or of the Wrongs Act under which she claim, should made and state the relief she is seeking. She must plead all particulars necessary to allow D to plead, to define the issues and to avoid surprise.

QUESTION 19

Ethics: Specify:

i. **FOUR (4)** situations in which a barrister **must** refuse to act in a matter; **[2 marks]**

ii. **FOUR (4)** situations in which a barrister **may** refuse to act in a matter. **[2 marks]**

Answer 1: A B MUST refuse to act if:

1. B has reasonable grounds to believe that he may as a real possibility be a W in a case;
2. B has a material financial or property interest in the outcome of the case (apart from B's fee);
3. B has reasonable grounds to believe that B's own personal or professional conduct may be attacked in the case (except where B thinks allegations against B are designed so that B will not take the brief and those allegations can be met without materially diminishin the B's disinterestedness).

A B may refuse to act if:

1. The brief is not offered by a sol (eg direct access brief);
2. The instructing sol does not agree to be responsible for the payment oif B's fee;
3. The B has reasonable grounds to doubt that the fee will be paid reasonably promptly or in accordance with the costs agreement.
4. If brief, may as a real possibility require a B to XXM or criticise a friend or relative.

Answer 2: Must

(1) Where clients' interest conflicts with B's own interest

(2) B has reasonable grounds to believe will be a witness in the case

(3) B has RG to believe that own personal/professional conduct may be attacked in the case

(4) B has material financial or property interest in the outcome o the case, other than fees.

May:

(1) If brief is not offered by a solicitor
(2) If instructing solicitor doesn't agree to be responsible for paying B's fee.
(3) Brief may, as a real possibility, require B to XXN or criticise a friend or relative
(4) If B's advice as to preparation or conduct of case (not incl. compromise) has been rejected or ignored by I.S. or client.

For the purpose of answering further questions in Part B, assume the following additional facts:

- The Defendant has filed its defence. It has denied negligence and pleaded two affirmative defences, including:
    - ***ex turpi causa non oritur actio* (literally, 'from a dishonourable cause an action does not arise'):** The *ex turpi* doctrine, if applicable, provides that a plaintiff will be unable to pursue an action in negligence if the negligence arises in connection with the plaintiff's own illegal act. In this case, the Defendant points to the indisputable fact that the deceased, Mr KOZ, acted unlawfully by gluing his hands to the pillars and participating in the protest.
    - ***Volenti non fit injuri* (voluntary assumption of risk):** The *volenti* defence, if applicable, provides that a defendant who is the subject of a negligence claim may escape liability if it can be established that the plaintiff willingly placed themselves in a position where harm might result. The Defendant alleges that Mr KOZ place himself in harm's way by gluing his hands to the pillars and necessarily foresaw the risks that might follow (including medical treatment and the risks associated with such treatment).
- There is likely to be some intuitive appeal to these defences. However, the Plaintiff in her reply to the affirmative defences has denied the application of the defences on both a factual and legal basis.

QUESTION 20

Civil Procedure: The Defendant is contemplating making an application for 'summary judgment' on the basis of the two affirmative defences pleaded. What is 'summary judgment'? Explain the procedural steps that both the Defendant and Plaintiff would have to take in relation to such an application. Explain why you think an application for summary judgment is/is not a sensible course for the Defendant to take in this case. **[4 marks]**

Answer 1: Summary Judgment (SJ) is an application for judgment when the other side's case has no reasonable prospect for success, a more liberal standard than hopeless. Lysaght; CivPA Part 4.4. Order 22 is applicable to an application for SJ. Order 22 provides that D would make an application for SJ via summons supported by affidavit, which affidavit would verify the facts on which the defence is based and stating that the deponent has the belief that the P has no real prospect of success which is served no later than 14 days prior to the hearing of why the application for SJ should not be granted. The court may permit XXn of the affidavit deponents. The court may then dismiss the app, give judgment or dispose of the proceeding in a summary manner.

This case is not a sensible matter for the D to apply for SJ. SJ is more likely to be granted when the principle issues for determinations are legal issues. Both the P's statement of claims and the D;s defences make it clear that there is a lot of factual development to be done in this matter before it can be determined. The application for SJ may, in fact, violate the overarching obligations (applicable to the D as a party) because the application is unlikely to have a proper basis and would not be consistent with only taking steps to resolve the matter but rather is likely to lead to undue expense.

The court will consider overarching purpose (OP), ie the just, efficient, timely and cost-effective resolution of the real issues in dispute, in exercising its discretion. Fafoutellis; CivPA ss 7-9

Answer 2: SJ is an application for a proceeding to be determined summarily, what the hearing + determination of a full trial – w/0 the parties making discovery + putting an evidence +submissions, in circumstances where either the P's claim (or part of) or the D's defence (or part of) has no real prospects of success. The steps for D+P differ in a respect. Th P would apply for SJ by f/s a summons + signaturing all (alt. may be due in basis of info + belief, if the crt permits_ stating the facts on which the claim (a part of of) is based and the deponents belief that the D's defence has no real prospects of success (or any prospect is in relation to the amount of the claim, eg quantum of damages for negligence) (r 22.04). In response the D must show cause against the application by way of an affidavit and submissions (r 22.05) (again, alt may be based on information + belief,

if the grounds are set out). PS ____, must be served on the D 14 days before the date of the hearing, hand in 16 summons, and D's mist be served 3 days before. The P may then file/s an affidavit in reply to deponents of the affidavit may be XMMd (r 22.07) (at will then hear + determine the application (r 22.08) – in practice likely there'd ne at least directions hearing before the trial hearing.

If the D was applying for SJ, the process is the same as described above. The D must f/s a summa* and the D may elect to DF/s a supporting affidavit. Again, F/s 14 days before hearing.

Then the D may show cause by affidavit or submissions (r 22.19)

Again, F/s 3 days before hearing

Then, the court may by order allow the D to f/s an affidavit in reply.

The application isn't sensible here as it appears there will be contested facts that need to be determine in order for the D to established her cost and quantum of damages and for the D to establish its defence.

Such SJ is likely to be granted and the appl. courtesy to the CPA each be able of just, efficient, timely, cost effective resolution of real issues in dispute.

For the purpose of answering further questions in Part B, assume the following additional facts:

- There was no successful summary judgment application.
- There is likely to be a significant amount of evidence relevant to the determination of the factual issues in the upcoming civil trial that can be found in the police records relating to the criminal proceedings referred to in Part A above.

QUESTION 21

Civil Procedure: Explain the procedure(s) that may be invoked by the Plaintiff to obtain these police records. **[3 marks]**

Answer 1: P has the option of issuing a subpoena to the Vic Pol pursuant to O42 for the production of documents (Form 42B).

P needs to file the subpoena and serve it 5 days before the date of production, and the Vic Pol will need to comply 2 days before the date of production (e.g. produce the docs to court).

The subpoena should comply with R42.03 in terms of form (e.g. addressed to Vic Pol; identify the docs sought: and specify the date time and place for production).

The subpoena needs to be served personally.

The other option is to seek an order for third party disclosure form the Vic Pol.

P can do this by making an application to the court pursuant to 32.07 on the basis that the police are likely to have the docs in their possession. The app is made by summons and served on every party in the proceedings. The court may make an order that P needs to pay Vic Pol's cost of complying.

In my view, would be more appropriate to issue a subpoena – more straightforward and appropriate in this case.

Answer 2: My initial advice would be for P to seek discovery from non-party (Vic Pol), this would likely be better than subpoena because P may not know exactly what documents are looking for – so difficult to describe with necessary particularity. P would apply under r 32.07 and likely to be granted because Vic Pol likely to have docs in their possession that relate to questions in the proceeding. Application by summons served on all parties to proceeding and served personally on Vic Pol. Vic Pol would need to prepare affidavit of dos (claiming any relevant privilege) as per usual discovery process. Then notice to procedure etc.

Alternatively, P could seek to subpoena docs from Vic Pol. Should call Vic Pol's solicitors first to potentially narrow scope of subpoena and h---ts costs (*Hea Projects*). Then issue subpoena to produce docs under Order 42. As I said, I would suggest discovery against non-oerts.

For the purpose of answering further questions in Part B, assume the following additional facts:

- The Plaintiff has obtained the relevant police records for use in the upcoming civil trial.
- There were 15 members of Victoria police who made written statements for the purposes of the criminal investigation that led to the charges being laid against the protesters. Each of these statements contains relevant evidence for the purposes of the civil claim brought by Mrs KOZ.

QUESTION 22

Evidence: Rather than call each of police members to give oral evidence, Counsel for the Plaintiff proposes to tender into evidence the written statements themselves. Is this permissible? Discuss with reference to the case of *R v Adams (No 5)* [2016] NSWSC 1563. **[5 marks]**

Answer 1: The statements by police are hearsay evidence as they are previous representations made by a person which is being adduced to prove the truth of the facts asserted in the statements.

As a starting point they are therefore not admissible unless one of the exceptions applies.

In this case, the exception that P would argue is that the maker of the statement is available however it would result in too much of an undue waste of time to call the Witnesses. If P wants to do this, they need to give notice (s67) on D. D has the option to object to P's app to rely on the W statements, and this case may have good grounds to do so (evidence is important evidence and if it goes in, then may be unfairly prejudicial to D not to be able to XXM makers of the statements – s s 135).

The other option P may argue is that the statements by police are business records and therefore admissible as an exception to the hearsay rule (e.g. a record kept in the course of a business) The difficulty wit this is that, as per Adams if a document was prepared in connection with an investigation or proceeding then it does not satisfy the business records exception to the hearsay rule.

In that case there were two relevant documents- Exhibit G which was a statement given to a police officer by a woman who had been raped (allegedly by the A). Although that incident did not relate to the relevant proceeding (which was in relation to a different rape) some years later) it was still found to be made in connection with an investigation relating to a criminal proceeding.

In this case the police statements were clearly made in connection with an investigation leading to a criminal proceeding. It is irrelevant that it is a different proceeding to this one. As such the business records exemption would not apply to the police statements.

Answer 2: The statements are hearsay evidence (defined earlier s59) – not admissible to prove truth contents unless exception applies. Could argue civil proceeding makers available but would cause undue expense/delay (s64) but this seems like a weak argument given Vic Pol although there are 15 statements. Another argument for PC would be to say business records exception applies – s69.

1). Made by a business (in Adams Button J held NSW Police – business so this uins likely to succeed). Vic Pol

2). PR's made by persons reasonably believed to have personal knowledge of asserted fact (or chain of information – Adams) – given statement made by police members – anything in them directly going to what they observed/perceived etc, likely this ceins satisfied.

3). "Exception to the exception" Adams prepared for the purpose of an Australian proceeding (the criminal investigations) as per Adams can be any proceeding to fall into this ciins, not necessarily the proceeding in which records are south to be adduced. Likely on this ceins PC will

fail. DC will also argue 13 discretionary exclusion will apply if admitted . In Adams Button J held issue is if representation made in connection with proceeding, not if document (ie statement) – however still likely to fail this exception to exception.

For the purpose of answering further questions in Part B, assume the following additional facts:

- The Plaintiff proposes to adduce evidence relating to the 3 previous incidents of patients suffering an allergic reaction to tetracaine being administered at The Alfred. Counsel for the Plaintiff will submit that the evidence:
    - shows that The Alfred and its personnel were aware of the risks associated with tetracaine being adminsitered to patients in circumstances involving super glue and acetone;
    - establishes that The Alfred and its personnel ought to have been aware of the risks associated with administering tetracaine to Mr KOZ;
    - establishes a pattern of circumstances and behaviour that overwhelmingly demonstrates negligence on the part of The Alfred in relation to Mr KOZ, which negligence led to his death.
- Counsel for the Defendant intends to object to this evidence being admitted on the basis that it is tendency and/or coincidence evidence.
- Counsel for the Plaintiff argues it is not tendency and/or coincidence evidence and, in any event, it is admissible.

QUESTION 23

Evidence: Is the evidence of the 3 previous incidents involving other patients who were administered tetracaine admissible? In providing your answer, you should include the following:

(a) an explanation of 'tendency evidence' and how the evidence could be characterised as such;
(b) an explanation of 'coincidence evidence'and how the evidence could be characterised as such;
(c) the critical points of distinction between tendency evidence and coincidence evidence;
(d) discussion concerning whether evidence could be relevant for a purpose other than on the basis of tendency and/or coincidence reasoning;
(e) an opinion as to whether the evidence is likely to be ruled admissible.

[10 marks]

Answer 1:

(a). tendency ev ts ser that because of a particular way of acting, person has a tendency to do a particular act or have a particular SOM. It is not admissible unless s 97 is satisfied (reas notice given and sig. PV established). Here 101 not apply. Here it could be characterised a tendency for

the hospital to be negligent in treatment of allergic reactions. The reasoning would be that the hospital previously failed to take the required care so likely so again.

(b). coincidence ev is founded upon the probability of similar events (2 or more) being explained by coincidence. However, there is requirement of similarity. The reasoning would be that it is improbable that on 3 previous occasions a failure to take req care re administer of care (not being aware of the risks) that it is a coincidence that this occurrence in isrie was an emop or innocent/not negligent. Coin-ev needs to comply with s98 (reas notice + SPV).

3). The critical distinction is that for coincidence ev, similarity is the touchstone of admissibility. If the events are not similar it would be difficult to demonstrate that the acts were improbable as coincidence and that the person did the particular SOM (GGL v DPP). Tendency, whilst the ev of similar will certainly assist in demonstrating the PV of the ev, it is not a requirement of s97 and a particular modus operendi is no longer required. Coincidence is strongest when there is an abundance of similarity whereas tendency ev has been held to have SPV even where modus operendi is different.

4). Odgers discusses the concept that using ev to prove knowledge (which is technically not a coin or tendency use)still relies on the inferential reasoning. Which requires an inference that the person so acted on the occasion alleged. For this reason, I would say arguments that the use is to show knowledge is a weak argument as it relies on the mode of tend/coincidence – what has been described as ‘post-disstres’ behaviour. I think the tendency use would likely be admissible, but not the coincidence use the is not enough similarity – the reference to ‘skin’ as distinct from hands, the lack of any compliance after the fact and lack of knowledge of other complicity factors. Coincidence or may be possible, but tendency easier to prove. In asserting SPV, (Hughes) look at the extent to which the or proves the tendency (here yes, 3 incidents all involving superglue and paramedic treatment and then test administered) but more like more information reopen of the over which this occurred z) the extent to which the tendency mcker the more likely. Hie likely hospital negligently futed note correct proceeding and mentor appropriately.

Answer 2:

a). tendency evidence is evidence of the character, reputation or conduct of a person to prove that they had a tendency to act in a particular way or a state of mind. (s97) This evidence, assuming that the Alfred could be characterised as a person, could be used to show that the Alfred is likely to administer the substance without proper regard for the risks, and its failure to take care. The evidence will be admissible unless the P can demonstrate that is has significant probative value +

notice is given. In this case, the similarities between the cases mean that there is a good case for its admission. There are essentially two steps (Baver):

1). Does it show a tendency? Here the similarities will be helpful though not necessary (Hughes).

2). The tendency would go to a fact in issue, being the likelihood that the Alfred was negligent + also its state of mind.

- It will be necessary to know how are apart the incidents were to properly assess, but these incidents meet the F+C rule.

b). coincidence evidence is evidence that 2 or more events occurred where having regard to similarities between them, it is unlikely that they occurred coincidentally (s 98).

c). While tendency evidence doesn't require similarities, coincidence evidence does. The closest example is the baby bodies buried in multiple backyards of an A (Makik) – without further info as to similarities, it seems safer to rely on tendency here.

d). The evidence may also be relevant to state of mind. That is, whether the Alfred knew that is was a likely result of its actions. It may also go to rebut defences in that they were not operative given the significance of prior events (Dun + Watts).

e). On the basis of the above, the evidence is likely to be ruled admissible.

It may be the subject of an argument for exclusion under s135(a). Unfair prejudice would result where there is a risk that the evidence would be nuiuseol (Dicliman). In introducing priors events of prior harm caused, in particular if death resulted, the decisionmaker may be encouraged not becomes distracted from its essential task (Svager).

- However, here if the matter is heard without a jury, there is limited evidence of that risk.

- Accordingly, it is likely the evidence would be admissible.

QUESTION 24

Evidence: Assume the trial Judge requires that the issue concerning the admissibility of the 3 previous patient incidents is to '*be resolved by way of a voir dire*'. What is a 'voir dire'? Explain how a voir dire process could resolve the issue. **[2 marks]**

Answer 1: A VD is a "trial within a trial" a determination of preliminary question (ie about admissibility of evidence) generally held in absence of a jury (if any). Determined on BOP (s142), and evidence given a VD not to be adduced in trial unless w died to inconsistent evidence given.

VD process would enable TJ to hear arguments re: admissibility of evidence etc to determine how, if at all, the evidence can be used = smooth running of trial = s7CPA.

Answer 2: Voire dire is a preliminary process outside of a trial generally to determine issues of competency/compellability of W's and admissibility of evidence. Usually it occurs in advance of a trial so that it avoids the need to adjourn the trial to deal with these issues. Generally it happens in the absence of a jury (if the issue is about the admissibility of evidence for example needs to be in absence of a jury). The court has power under s192A to make advance rulings on matters such as admissibility which would be the power relied on to make a determination in voire dire.

In this case the admissibility of the police statements and tendency evidence could be determined in voire dire is not needed because the Court can make their rulings on admissibility without worrying about biasing the jury.

It is beneficial because it can avoid the need for the trial to be adjourned until the issue is resolved.

For the purpose of answering further questions in Part B, assume the following additional facts:

- Prior to trial, junior counsel briefed for the Defendant, Serina BROWN, had a conference with a senior administrative officer, Jared COLE, employed at The Alfred for the purposes of preparing their witness statements. In the course of the conference, Mr COLE let slip that there were significantly more patients that were likely to have suffered allergic reactions to tetracaine at The Alfred, other than the 3 which the Plaintiff's lawyers were aware of. Upon further inquiry, Ms BROWN quickly came to the realisation that there were probably in excess of 10 additional patients who suffered similar allergic reactions within the last 5 years and that all of the relevant hospital records relating to those patients had been deliberately destroyed on Mr COLE's instruction to 'cover up' the potential liability issues associated with Mrs KOZ's claim.
- Ms BROWN was appalled at Mr COLE's behaviour. At some point in the course of the conference, Ms BROWN activated her audio recording application on her computer without Mr COLE's knowledge. She managed to get him to repeat a sufficient amount of information for the recording to demonstrate that Mr COLE had deliberately destroyed a significant amount of evidence that could potentially have been of significant assistance to the Plaintiff in the upcoming trial.
- The day after the conference, Ms BROWN returned the brief. She forwarded a digital copy of the audio recording to Counsel for the Plaintiff, which Counsel for the Plaintiff listened to immediately.

QUESTION 25

Ethics: Discuss the ethical implications arising out of this situation, in relation to both Ms BROWN, as well as for Counsel for the Plaintiff who has now listened to the recording. **[4 marks]**

Answer 1:

1). Mrs Brown returned brief 1 day after conference → likely no breach rule 110 → allowing another barrister proper opportunity to take over case.

2). Overriding duty to act in the interests of administration of justice. Refusing to act is appropriate as can't knowingly mislead the court (r24).

3.) Brown has disclosed confidential info of client to opposing party breach r114 → should not have disclosed without consent should have told COLE not to falsify evidence not comply w discovery/destroy evidence and then refused to act.

1). Now aware of confidential info to other party – difficult position.

Should determine if evidence is able to be adduced given impropriety of the way it was obtained but likely should also cease to act for P because:

→ must robustly and fearlessly pursue clients interests but how can PC if has knowledge of these matters and evidence (theoretically) not able to be adduced.

Barristers have paramount duty s16 CPA to courts. CPA + BRs must be honest, not mislead deceive court = not maintaining confidence, must not bring profession into disrepute → secretly recording client and sending to other party.

Answer 2: Brown: B has a duty on her client to promote and protect fearlessly its best interests, Int she must do so by lawful and proper means (r35). Recording without his knowledge is illegal and B may face disciplinary action for UPC or PM. The information she obtained from C is subject to client legal privilege and is obviously confidential. To disclose it to her opponent is a serious breach of confidentiality. The fact that there may have been more than 10 additional patients, and that records were destroyed, does not affect this analysis. As for extra patients and destruction, B should have advised C to give truthful evidence and to depose that the records were destroyed, otherwise he faces perjury (and if he isn't called a Jones v Dunkel inference may be drawn). Counsel should not advise that false evidence should be given (r 69). If C refused to comply with B's instructions, B could have returned the brief (r105(g)).

Counsel for P: Counsel for P, in light of the above (which applies to her vis-à-vis the nature of the information received) should withdraw from the case. Like B, she faces a conflict of interest and may appear as a witness in the proceeding.

QUESTION 26

Evidence: Counsel for the Plaintiff proposes to call Ms BROWN as a witness for the Plaintiff in the upcoming trial to give an account of the conversation she had with Mr COLE in her chambers. Putting aside any 'ethical' issues discussed in your answer above, explain the relevance of such evidence and discuss its admissibility. **[4 marks]**

Answer 1: This evidence is improperly obtained under s 138. In determining whether to admit ort is to whether undesirability of admitting is not outweighed by desirability. In *Marjanocivic*, court held scale of seriousness with intentional conduct being waste – there breach intentional – client legal privilege should have attached, s119. Evidence is relevant as shows illegal conduct of Alfred and makes F11 very likely to occurred, potentially issue waiver (122(2) or misconduct waiver, but should be excluded to gravity of improper conduct.

Answer 2:

As set out above, evidence will not be admissible if it is not relevant. Relevance however, is a low threshold to satisfy – A piece of evidence is relevant if it can rationally affect (directly or indirectly) the assessment of the probability of a face in issue.

In this case the evidence is relevant to whether the Alfred ought to have known about the likelihood of an allergic reaction would occur and/or they thought they ought to known about the risks. However, I do not know if these facts in issue. We know that the Alfred's defence is in part that P cannot make out their client because the victim was engaging in illegal actions and he took risk, but I don't know if a fact that the Alfred is disputing that they knew about the risk or ought to have known.

If these are issues in dispute then the fact that there are previous incidents are relevant and the evidence is as a starting point admissible.

However, if I were acting for DC I would argue that Ms Brown should not be able to give evidence because the PV is outweighed by prejudice to D.
In this case P would argue that the PV is high – if we are trying to show that P knew about the possibility an allergic reaction previous allergic reactions are relevant. However, query relevance of allergic reactions which occurred as long as 5 years ago. DC would argue however, that even if

evidence has PV, it should not be admitted because of injustice to D (clearly it is unjust to allow evidence in which has been obtained in breach of barrister's obligations to act for client).

May also argue 138-improperly obtained and desirability of admitting is outweighed by undesirability. In this case, DC would argue that a fundamental principle of the legal system that clients should be able to have confidential conversations with their barrister's has been breached, and allowing brown to give evidence of what was clearly a confidential information is not in keeping with the public standard of what should be expected from the legal system.

QUESTION 27

Civil Procedure: Could this matter be heard before a jury? Explain your answer. **[2 marks]**

Answer 1: Yes, proceedings commenced by writ founded in lorr can be heard before a jury if

- Plaintiff gives notice in writ OR Def gives notice in writing to Plaintiff and Pronothary; AND
- Relevant party pays jury fees.

HOWEVER judge retains power to order trial by judge alone if jury trial not appropriate, for example because of complexity, length or potentially prejudicial material (Svajcer v Woolworths).

Here, the matter is of same complexity but juries capable of dealing with complex legal and factual matters (hums quoted in Svajcer) so if party gave notice and paid fees, likely to be heard by jury.

Answer 2: Yes, in Victoria, negligence claims, such as this claim, can be hear before a jury of 6 provided that a party files a jury notice within 10 days of last appearance + pays jury fee. The court had wide discretion to order no jury (Svajcer) but will exercise this power with caution given right to request. Here, although the case raises relatively complex legal and factual assess, there is no reason a jury could not grapple with the issues + determine the outcome. The judge will assume jury's capable of dealing with complex issues of law + fact. No prejudicial evidence here in a nature of Svacjer case (re child porn offence)

For the purposes of answering further questions in Part B, assume the following additional facts:

The matter was heard before a judge and jury. The jury returned a verdict in favour of the Plaintiff and awarded the sum of $300,000.

Two weeks after the Defendant was served with the Plaintiff's statement of claim, the Defendant's solicitors wrote a letter to the Plaintiff's solicitors marked '*without prejudice save as to costs'*, stating:

- The Defendant offered to pay $400,000 to the Plaintiff in full and final settlement of its claim;
- The offer was open to be accepted for 10 days from the date of the letter;
- If the offer was accepted by the Plaintiff, the Defendant would pay the sum of $400,000 within 30 days from the date of acceptance.

The Plaintiff did not respond to the letter within the 10-day time frame.

QUESTION 28

Civil Procedure: What is an 'offer of compromise'? Is the Defendant's letter such an offer? Explain with reference to the *Supreme Court (Civil Procedure) Rules 2015* and the significance of the Plaintiff's failure to respond to the letter. **[4 marks]**

Answer 1: An offer of compromise is an offer to settle any claim on settled terms. An OOC must be in writing & contain a statement that it is served in accordance with O26. It must also state whether the offer is inclusive or exclusive of costs. If the offer includes a time for acceptance, that time must be at least 14 days. Here, the D's letter does not comply with O26 – it does not state it is prepared in accordance with O26, it does not specify whether it is inclusive or exclusive of costs and the time for acceptance is too short. Instead the "WPSATC" written on the letter suggests it is a Calderbank Letter/Offer made outside the scope of O26. The court may still take it into account , and the Plf's failure to accept it, when ordering costs. Because the Plf didn't accept the offer and obtained a judgment will likely award the defendant some of its costs – eg incurred after the time for acceptance expired.

Answer 2: An offer of compromise is an offer to compromise the claim for a specified amount made in accordance to O26 of SC Rules.

Here, it is not clear whether letter is an offer of compromise or Calderbank letter. If Offer of comp must state served in accordance to O26 (not clear this has been done) + must remain open for 14 days (here only 10). Even if is an offer of comp it doesn't comply with the rules. If had been served in accordance with rules, then D would be entitled to ordinary costs from 11.00am on day after offer served as P has obtained judgment on less favourable terms (only $300K). As D has not complied, not engaged, D may still be able to rely on Calderbank principles to argue costs should be awarded + P's failure to comply relevant to that.

END OF PART B

End of examination

Additional Writing Paper

(Please clearly label the question number you are answering.)