THE VICTORIAN BAR INCORPORATED

25 OCTOBER 2020 EXAM

ANNOTATED WITH SAMPLE ANSWERS

INTRODUCTION

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 submission. 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.

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

Total Number of Questions: 25 **Total Exam Points:** **100.00**

Question 1. Criminal Procedure:

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

> **64. Bigamy**
>
> Whosoever being married goes through the form or ceremony of marriage with any other person during the life of her or his husband or wife, shall be guilty of an indictable offence, and shall be liable to level 6 imprisonment (5 years maximum). Nothing in this section contained shall extend to any person going through the form or ceremony of marriage as aforesaid whose husband or wife has been continually absent from such person for the space of seven years then last past and has not been known by such person to be living within that time; or shall extend to any person who at the time of her or his going through such form or ceremony of marriage has been divorced from the bond of the marriage; or to any person whose marriage at such time has been declared void by the sentence of any court of competent jurisdiction.

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

Draft the charge (particulars/description of offence) that will appear on the charge sheet in accordance with the requirements of the *Criminal Procedure Act 2009*. **[3 marks]**

Model Answer 1:

That the accused did, at Melbourne on 15 April 2018, go through the form or ceremony of marriage with another person, namely Anna Sloan, during the life of his wife, namely Kimberly Brereton (nee Knight).

Model Answer 2:

That on 15 April 2018 at Melbourne the Accused, being married, went through the form or ceremony of marriage with another person, Anna SLOAN, during the life of his wife, Kimberly BRERETON. (NB: I would not need to specifically negate the matters in the second sentence of the section - any provisos/qualifications etc. need not be denoted in the charge sheet unless they have already been put in issue.)

Question 2: Ethics:

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

(1) Due to your religious beliefs, you are personally disgusted by the allegation of bigamy against the Accused. For this reason, you have serious doubts as to whether you will believe the Accused's story when he gives you instructions.

(2) You have never conducted a case involving a charge of bigamy before. You feel that you don't have the necessary expertise to conduct the case for this reason alone.

(3) You would be inclined to advise the Accused to plead guilty for the above reasons. In fact, if your clerk can convince the solicitor to get the Accused to plead guilty, you would agree to take the brief.

(4) You believe attendances in relation to this matter, if contested, would take up valuable time which could be better spent doing more lucrative work on matters in relation to which you are much more familiar with the law (e.g., assaults, sex offences and drink-driving offences).

Should you accept the brief given these concerns? Discuss. **[4 marks]**

Model Answer 1:

A barrister is required by the cab rank principle to accept a brief in a field in which they practise if they are available, the fee is acceptable and the matter is within their capacity, skill and experience, unless rr 101, 103-105 permits or requires them to refuse the brief: r 17. Thus, the starting point is that I am obliged to accept the brief unless a relevant exception is engaged or r 17 is not satisfied. None of the identified factors allows me to refuse the brief. Therefore, I must accept it. Religious beliefs My religious beliefs, and the fact that because of them I may not believe the accused's account, are not a sufficient reason for me to refuse the brief. On the contrary, my duty is to act fearlessly to advance a client's interests by all proper and lawful means, without regard to personal interest: r 35. Thus, I am not permitted to refuse the brief on this basis. Nor would I inform the solicitor of this fact because my duty requires me to ignore my religious beliefs when representing the client, and so it is irrelevant. No experience in bigamy cases The fact that I have no experience in bigamy cases does not allow me to refuse the brief. I practise principally in criminal law. The accused is charged with a criminal offence. Accordingly, the cab rank principle applies to me and the fact that I lack specific experience with bigamy cases does not change this. Indeed, it may be doubted that there are many barristers who have tried bigamy cases before. The better view is that the matter is within my field and my experience. Advising to plead guilty I cannot require my clerk to ask the solicitor to convince the accused to plead guilty in any circumstances, and not as a condition of accepting the brief. Although, if I am briefed, I am required to advise the client about the plea generally (r 39) and may advise him in strong terms that he is unlikely to escape conviction and that a guilty plea will be seen as a mitigating factor (r 40), this assumes that I have accepted the brief. I cannot try to persuade the client to offer the brief on terms that he will plead guilty. Taking up time I may only refuse a brief on the ground that it takes up time if I am unavailable (r 17) or if I believe on reasonable grounds that the time and effort involved would prejudice my practice or professional or personal engagements: r 105. In this case, the fact I would rather do more lucrative and familiar

work does not satisfy this test. There is no evidence that I am not available to do the work, or that it would prejudice my practice; only that I don't want to do it for religious reasons and because I could earn more money through other work which I am more familiar with. This does not satisfy rr 17 or 105. Thus, I cannot refuse the brief.

Model Answer 2:

Per the cab rank rule in r 17, I must accept the brief to appear in a field in which I profess to practice if it is within my capacity/skill/experience, I am available, the fee offered is accepted and I am not otherwise obliged or permitted to refuse the brief. Here: (1) Religious belief. This is not an adequate reason. A barrister must advance and protect the client's interests by all lawful and proper means and to the best of their skill and diligence (see s 35). The fact that I may feel personal disgust about his actions is not a ground for refusing the brief, and upon accepting the brief I must comply with my general duty. (2) Bigamy. The fact that I have not accepted a brief on this particular criminal offence is not strictly to the point. Given I profess to act in the field of criminal law, r 17 applies and my lack of expertise on bigamy does not provide a basis for avoiding it. (3) Advise guilty. This is an improper basis on which to accept the brief. A barrister's duty is to advise the client generally about any plea, but they must make clear that the client has responsibility and complete freedom about how to plead - at most, I could in an appropriate case advise the client that they are unlikely to escape conviction and a guilty plea is ordinarily seen as mitigation (rr 39-40). (4) Other work. Rule 105(b) permits a barrister to refuse ea brief if they consider on reasonable grounds that the time or effort threatens to prejudice the barrister's practice or other professional or personal engagements. Here, the case for refusal seems weak. While it would take up time that could be spent on other work, it does not appear that this threatens my practice: rather, the fact that other work may be more lucrative is a matter of personal preference. This would not be an adequate reason. For these reasons, I should accept the brief.

Question 3 Ethics:

Which of the following is a duty of the barrister? (*Select **ONE** answer only*) **[1 mark]**

Answer. B

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

Question 4: Criminal Procedure:

The Accused will be pleading 'not guilty' to the bigamy charge. He has expressed a preliminary view that he would like to have his case decided by a jury. Is this possible? What advice should Defence Counsel give to the Accused in this regard? **[4 marks]**

Model Answer 1:

In Victoria offences are categorised as either summary (less serious offences dealt with in the Magistrates' Court) or Indictable offences. Here the bigamy charge is an indictable offence because it is punishable by level 6 imprisonment: s 112(1) SA. Therefore, this is a charge that can and ordinarily would, be heard in the County Court and determined by a jury (with reference to the process in Chapter 4 prior to being committed for trial). This is, however, an offence that can be heard and determined summarily because it is level 6 per s 28. This means the matter would be heard and determined in the Magistrates' Court and on a PNG would be considered by a Magistrate alone. There are benefits to summary jurisdiction (Sum JUR), these include: * More efficient court processes, less delay and court appearances - which means less costly * Better appeal rights - right to appeal sentence or conviction de novo (re hearing) by right to the County Court * Less formal procedures * More limited sentencing range (2 years for a single offence, 5 years for multiple) than a County Court Judge The benefit of proceeding to the County Court is that you get the opportunity to run your trial before a jury (as the A wants) which may be a less cynical tribunal of fact than a Magistrate (if you proceed in summ JUR you lose this option). The other benefit is your case goes through committal proceedings so you can test evidence. Here, subject to the A wishes my advice would be to apply for summary JUR per s 29. If the A wants a jury this is his right. Summary JUR can be applied for by the A, OPP or court any time prior to matters being committed: s 30. The Mag can make the order where the A consents and they are satisfied it is appropriate for the charge to be heard in MC with reference to s 29(2). Here A would argue: * Sufficient sentencing options in the event found guilty (subject to any prior history) * No voluminous disclosure that would be better placed being managed by the more rigorous CC procedures * Magistrate capable, experienced decision maker able to appropriately consider questions and make determination. OPP would likely opposed on the basis that the charge is a novel one not often dealt with in either court (but especially not the MC). The A is pleading guilty and there might be complexities in relation to questions of law and fact that would be better suited to the time and pre-trial processes in the CC.

Difficult to assess merits without proper understanding of the basis of the allegations but in light of the novelty of the offence and fact the A pleading not guilty it is likely it would proceed in Committal stream.

Model Answer 2:

Yes, it is possible. The charge is within the Crimes Act and therefore deemed indictable unless the contrary intention appears. Thus, any offence punishable by a level 1-6 term of imprisonment or fine (i.e. 5 years 600 PU or more) is presumed to be indictable (if less, presumed to be summary, per s 112 SA). DC should also advise A that the offence may also be heard and determined summarily in the Magistrates Court (MC - s 28). This is because (here) it is punishable by less than 10 years imprisonment. A (or lawyer) or informant may apply for a summary hearing at any time before a charge is committed for trial (s 30 - though, usually at a committal mention hearing). If the summary hearing is granted (s 29), then the charge must be determined in accordance with Part 3.3 MC will grant SJ if it is appropriate (considering s 29(2) factors) and A consents. Here, DC should advise A to apply for SJ because the MC has more limited sentencing powers than the County Court Victoria (CCV), per ss 113A and 113B SA) and A will have de novo appeal rights to the CCV on both conviction and sentence. Whereas very specific errors need to be established in appeals from the CCV to the COA. Further, while it will deprive A of a right to trial by judge and jury of 12, there are significant time and cost inefficiencies having the matter kept in the MC. At the application, DC/A should argue: the offence is not that serious and there are few/none aggravating factors apparent. There are no co-accused, little planning, and the evidence would appear simple MC would have adequate sentencing range A appears to have no prior convictions If an application is made, the SJ app would likely be granted.

Question 5: Criminal Procedure:

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

(a) What is the indictment?
(b) What is the arraignment?
(c) Do I have to plead 'guilty' or 'not guilty'? Is there a 'middle ground' I can take instead?

How would you answer his questions as Defence Counsel? **[4 marks]**

Model Answer 1:

(a) An indictment is a statement in writing of the indictable offences with which an accused is charged. It will usually be filed after the accused is committed to stand trial. To be valid, an indictment must be signed by the DPP or a CP, in writing and compliant with Sch 1, eg by giving particulars necessary to give reasonable information as to the nature of the charge: s 159(3). A defective indictment is not necessarily invalid (s 166) and may be amended to cure the defects (s 165).

(b) Arraignment is the process by which an accused confirms their identity and pleads guilty or not guilty to the charges. Arraignment must occur in the presence of the jury unless the accused pleads guilty on all charges. The trial commences upon arraignment in the presence of the jury: ss 210, 215, 217.

(c) The accused is obliged to enter a plea of guilty or not guilty. If the accused fails or refuses to enter a plea on arraignment, the court may enter a plea of not guilty: s 221.

Model Answer 2:

An indictment is a formal charging document that sets out the charges against the A. It needs to be in numbered paragraphs, signed by the DPP or a Crown Prosecutor and comply with Schedule 1 (state the charge with sufficient particularity to give reasonable information as to the nature of the charges): s 159. The indictment in this matter must be filed 6 months after the committal (s 163) and served on A as soon as practicable: s 171. In the event there are defects in the indictment it wont invalidate the proceedings, the OPP can seek leave to amend the indictment which will be granted as long as it doesnt produce any injustice to the A: s 165. The arraignment, in the context of a trial, is the process that commences the trial. It involves the Judge's associate confirming the A name and asking them to confirm their plea to the charges on the indictment before the jury panel: s 210, 215, 217. In the event the A doesn't cooperate, the court may enter a plea of not guilty on their behalf per s 221. In the context of a plea hearing this is conducted to put the plea on the record (often before the commencement of the reading of the opening). It can also be done at a Directions Hearing prior to the matter being formally listed for plea. The A may be able to have his matter considered for a sentencing indication per s 208. This can only be done with the consent of the Prosection (OPP) and the Court: s 208. In order to enable the OPP to make this decision usually the A would be required to provide them with all docs relied on at the sentencing indication. In the event the indication proceeds a Judge would hear about the allegations and brief submissions from the DC in order to give an indication about whether they would impose a period of immediate imprisonment or some other penalty (less specific than a sentencing indication in the summary JUR): s 209. If the indication isnt accepted the matter proceeds to trial. No subsequent decision maker is bound by the indication and usually a different judge would then consider the balance of the matter. In the event the indication is accepted, the A would enter a formal plea and proceed as a plea of guilty (Judge cannot then renege from the indication). Here the A might wish to just finalise the matter if he could avoid imprisonment.

Question 6: Evidence:

Assume the Accused denies that he was ever married to Kimberly Brereton or to Anna Sloan. To prove its case, the Prosecution plans to tender the following documentary records into evidence:
(a) Certificate of Marriage issued by the Registrar of Births, Deaths and Marriages (NZ) stating that the Accused married Kimberly Brereton (née Knight) on 12 June 2013 in Auckland, New Zealand and that the marriage remains current as at 1 May 2020 (i.e. there is no record of any divorce or annulment of the marriage).

(b) Certified statement from the Registrar of the Family Court of New Zealand dated 13 May 2020 stating that no proceedings have been brought in relation to any proposed divorce, annulment or dissolution of the marriage of the Accused and Kimberly Brereton in New Zealand.
(c) Certified statements from the Registrars of the Family Court of Australia and Federal Circuit Court of Australia stating that no proceedings have been brought in relation to any proposed divorce, annulment or dissolution of the marraige of the Accused and Kimberly Brereton in Australia.
(d) Certificate of Marriage issued by the Registrar of Births, Deaths and Marriages (Victoria) stating that the Accused married Anna Sloan on 15 April 2018.
The Accused objects to the admissibility of all the documentary evidence referred to above. Explain the likely basis upon which such objections will be made, how the Prosecution could respond to the objections, and how the court is likely to rule on the objections. **[5 marks]**

Model Answer 1:

Adducing the documents Per s 48, the PC may tender a copy of the documents, extracts or authorised copies of public documents . There is a rebuttable presumption that the documents are accurate: s 146. No facts to suggest any of these documents are inaccurate so DC cannot object to copies being adduced. Admissibility This evidence meets the first threshold of relevance per ss 55, 56 because if accepted it could rationally affect the assessment of the probability of the existence of a fact in issue, namely, establishing the pre-existing marriage to Kimberly. This is a low bar that doesn't consider reliability or credibility: IMM. Secondly the documents are HS, being previous representations made by a person that are being adduced as proof of the existence of the fact that the maker intended to assert. HS evidence is prima facie inadmissible: s 59. The PC will need to satisfy the court of an exception for the evidence to be admissible. They all appear to have been made with the input of a person so no arguments can be made re: computer generation to take them outside the basic definition of HS. The most obvious exception to the HS rule that might be relied on is the business records exception in s 69, that is, that the HS rule doesn't apply to business records that are made by someone with personal knowledge or on the basis of information supplied by someone with personal knowledge where they form part of the records of a business: s 69. Government departments meet the definition of business. The requirement for personal knowledge is an easy test to meet. Here DC will argue that these records (particularly the certified statements) do not adhere to the business record exception because they were documents generated, prepared or obtained in connection with an Australian proceeding or investigation: s 69(3). DC would argue this is the only reason the extracts exist and thus they fall outside the business record rule. PC would likely argue successfully that the certificates were documents that pre-dated the commencement of the proceeding and were kept/maintained as part of the conduct of the registry's business. They would have greater issues with the extracts. Unlikely these would be admissible. The alternate path for the admissibility of the Marriage Certificates (a) and (d) is to argue they amount to an admission by the A, that is, a previous statement made by the A that is adverse to his interest in the outcome of proceedings (definition section). PC would argue that the document is required to be signed by the A and was signing constituted a rep that he intended to marry both women. For the purpose of considering whether an admission was made the court will find it was where reasonably open to do so (here it clearly is): s 88. It is my view this argument would succeed and the certificates would be

admissible as admission evidence, the HS rule thus doesn't apply: s 81(1). No merit in arguments in relation to ss 137, 135. This is not opinion evidence (extracts) because it is based on raw data.

Model Answer 2:

As a starting point, all evidence that's relevant is admissible. Evidence is relevant if it could rationally affect the assessment of the probability of the existence of a fact in issue: ss 55-56. Facts in issue here are whether the accused was married to Kimberley Brereton and the time he married Anna Sloan (that also being a fact in issue). The evidence is clearly relevant. The accused would argue that these records contain evidence of previous representations made by a person adduced by the P to prove asserted facts - being that he (a) he was and is still married, (b) there has been no divorce, (c) no proceedings for divorce have commenced, and (d) he has married Anna Sloan. Subject to exceptions applying that evidence is inadmissible as hearsay: s 59. The evidence is being adduced to prove the truth of the asserted facts and so the P must show that a relevant exception applies. The P would argue that the exception in s 73 applies, as the evidence contained in these certified statements and certificates contains evidence as to the accused's reputation of being married to Brereton and Sloan and particular times: s 73(1). The accused would argue that exception doesn't operate unless it tends to contradict evidence of a kind that has been admitted: s 73(3). Here, we do not have facts to suggest the evidence has been admitted, and so that exception wouldn't operate as to items (a) and (d). Doesn't appear to be a basis for excluding the evidence under s 74. Alternatively, the P might argue that this evidence is admissible through the business record exception (s 69) on the basis that the certificates (at least) were records belonging to Registrars in BDM containing previous representations, produced in the course of the BDM's business, and those PRs were made on the basis of information (at least) indirectly supplied by someone with personal knowledge as to the asserted facts - ie status of marriage. The same reasoning could apply to the certified statements from the Registrar of courts - the records don't appear to have been made in contemplation of a proceeding. Likely that the court would rule inadmissible under s 73, but admissible under s 69.

Question 7: Ethics:

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

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

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

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

Discuss the ethical implications arising from this scenario for the Prosecutor. **[5 marks]**

Model Answer 1:

First, the prosecutor has likely breached rr 69 and 70. A barrister must not coach witnesses by suggesting answers to be given to questions: r 69. It is permissible to test evidence in conference and point out inconsistencies and difficulties: r 70. However, the prosecutor's discussions with KB went further than that. KB has indicated that she will give evidence consistent with her statement. However, the prosecutor has then told her that she needs to get her story straight and that if she spoke to the accused about the divorce then the prosecution will lose; this is an impermissible suggestion that she give evidence to assist the prosecution case. It does not matter that KB had already indicated that she would give evidence that would in effect be consistent with the prosecution case, because a fair reading is that the prosecutor is pressuring her to answer questions in a particular way, albeit that that is consistent with her evidence. Second, r 89 requires the prosecutor to call all witnesses whose evidence is admissible and relevant to presentation of the whole of the relevant circumstances, except where specified exceptions apply. Here, it was not open to the prosecutor to not call KB. Although there is an exception where evidence is plainly untruthful and unreliable, that standard is not met by KB's evidence. The proper course would be to call KB and allow those matters to be exposed in XXN, rather than to exclude her evidence altogether. Further, although it is permitted not to call a witness where facts are adequately established by other evidence, the evidence of KB is crucial and so this exception likely does not apply either; in any event, there is no other evidence that establishes that KB did not make this statement to the accused, so KB must be called. Thus, the prosecutor breached r 89 in not calling KB. Further, if the prosecutor did not call KB then they were obliged to inform defence counsel promptly of their intention and the ground for not calling them unless revealing the ground would harm the interests of justice: r 90. There is no evidence that the prosecutor did this, and so it appears that r 90 may also have been infringed. Professional disciplinary action is likely appropriate having regard to these matters.

Model Answer 2:

There are two ethical implications arising: First, the prosecution must not advise or suggest to a witness that they should give false or misleading evidence and must not coach a witness by advising the answers they should give to questions which might be asked or encourage a witness to give evidence other than what they believe to be true (BR, 69) . However the prosecution may caution the witness to tell the truth, as he has done here (BR, 70). He may also test her evidence in conference including drawing her attention to inconsistencies and difficulties in her evidence. Here, the prosecution did not breach this rule by encouraging Kim to get her story straight and drawing her attention to the clear inconsistency between her evidence and that being given by Kelvin: Kelvin says Kim knew the relationship was over because he said he wanted a divorce and was never coming back and she emailed him re divorce. Kim says he says he was going to think about it and that sh did not hear from him again and that she never contacted him. Second, the prosecutor has likely breached his duty to call all witnesses whose testimony is admissible and necessary for the presentation of the relevant circumstances or could provide admissible evidence relevant to any matter (e.g. opportunity witnesses in Pell) (BR, 89). He must call all evidence that could fairly inform the jury about the guilt or otherwise of the accused with limited exceptions (Nguyen). The fact that she may give evidence favourable to the accused is not a sufficient reason not to call her. The prosecution could only decline to call her if her evidence was plainly untruthful or unreliable or established by other witnesses (Nguyen). Here, it is key evidence and she must be called. The prosecutor could seek a direction under 38 to question her as if XXN if he considered her evidence would be relevantly unfavourable, and could then put the identified inconsistency in discharge of his obligations under the rule in Browne v Dunn. This would also apply if Kim gave evidence contrary to her statement as this is a prior inconsistent statement. If the prosecution does not call Kim, he must inform the accused and the grounds (BR, 90). This would be an unexplained failure and defence may request the trial judge give the jury a direction that they may infer her evidence would not have assisted the prosecution case (JDA, 43).

Question 8: Evidence:

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

Informant: So you married Kimberly on 12 June 2013?

Accused: Yeah.

Informant: And you left her on 4 March 2015?

Accused: Hmmm.

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

Accused: Yeah.

Informant: But you were still married to Kimberly then?

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

The Prosecutor does not plan to tender the record of interview because of the conflict between inculpatory and exculpatory statements. Is this a sensible approach? Discuss. **[5 marks]**

Model Answer 1:

No, this is not sensible. First, the statement, whether mixed or not, must first be relevant (s 55). Here it is clearly relevant because of the comments go to facts in issue (FII) being the elements of the bigamy offence. It is then necessary to consider exclusionary rules and exceptions. The hearsay rule excludes evidence of a previous, out of court, statement made by a person to prove the existence of a fact that it can reasonbly be supposed they intendedto assert. There are two mechanisms by which, these admissions, may be admitted. First, under s 81(1), the admissions against A's interests in the outcome of the proceeding and the hearsay rule does not apply - for example, that he married Kim, and then later married Anna, which are clear admissions. The second is via consent (s 190(1)). Exculpatory material (EM) by definition is not an admission. It may, however, be admitted as context for admissions under s 81(2) - in that the previous representations (PR) were made in relation to the admission, shortly before/after that time, or it is reasonably necessary to refer to them to understand the admission. No narrow approach should be taken. Here, A's comments about 'never going back', sending an email (see question 7), and here that Kim was organising the divorce are all EM which are necessary to not only understand the admission but raise a possible defence against the charge (maybe, honest and reasonable mistake of fact?). These facts raise similar problems as explored in Nguyen and the Queen 2020 HCA 23. There the appellant was charged with unlawfully causing serious injury and assault after a fight. During the interview with police, Nguyen made admission and explained his version of events including raising self-defence. P declined to admit the ROI at the second trial for 'tactical' reasons. After questions of law were referred to the NTCCA, and appealed to the HCA, the HCA considered that the ROI should have been tendered. From an evidentiary perspective, the EM should be admitted here because there appears no good or valid reason not to do so because, it is difficult or impossible to separate the EM from the admissions, and the EM seems to qualify or modify the admissions. From a fairness perspective, the admissions and Em should be admitted (here, it was made together - part and parcel - in a ROI with police) because: it is the first response to the allegations it avoid jury speculation and does not force A into giving evidence without it, would present less than complete picture of the Crown case. Depending on the content of the admissions, P/DC may seek an unreliable evidence direction (s 32 JDA; Burns v R 1975 132 CLR 258). This may also include a mixed statement, essentially directing the jury to give less weight to the EM. It should be noted that DC cannot tender the ROI himself. This is because EM can only be introduced as an exception to the hearsay rule when it is tendered with admissions relied on by the crown as part of its case. Put another way, a statement which is purely excupatory or self-serving is not evidnece of the truth of its contents and is not admissible - or 'a party is not permitted to make evidence for himself' (R v Rudd 2009 VSCA 213; R v Roberts 1942 1 All ER 187 at 191).

Model Answer 2:

While P has the discretion to decide which witnesses are to be called and what evidence is necessary for the proper presentation of the Crown case, P also has an obligation to puts its case both fully and fairly before the jury. This situation is analogous with the HC case of Nguyen v The Queen. There, the P similarly decided not to tender a ROI containing 'mixed statements' (inculpatory and exculpatory statements made by A) as a 'tactical decision' designed to advantage P, asserting an 'absolute discretion' as to whether or not to tender the ROI. The HC ultimately held that if the P seeks to rely upon an admission or other incriminating statement, the whole statement made by A must be put before the jury, including exculpatory statements. This practice reflects the fundamental obligation that the P must put its case fully and fairly; they may not pick and choose between statements that assist their case and those that do not. This interview contains mixed statements - the A admits to marrying K and then marrying Anna, however asserts that K was organising the divorce and he thought she had done it already. This is directly relevant to facts in issue in the case - including whether A thought was divorced. Applying the decision of Nguyen, P must tender the mixed statements made by A unless there was a good reason not to do so. There does not appear to be any reason on the facts for P to fail to tender it given the significance of the evidence. The admissions are rendered admissible under s 81 which provides that the hearsay rule does not apply to evidence of an admission. Section 81(2) provides for a further exception to the hearsay rule which does not apply to evidence of a previous statement that was made in relation to an admission at the time or shortly after that t ime and to which it is reasonably necessary to refer in order to understand the admission. As a result, the mixed statement ROI is admissible and should be tendered by P to avoid any potential for a miscarriage of justice.

Question 9: Evidence:

The Accused was found guilty of the offence of perjury in 2012 by a jury in the District Court of New Zealand. The facts giving rise to the offence concerned a false insurance claim the Accused had made in relation to a car accident, with the Accused subsequently lying on oath in court when he gave evidence in the civil action. He served three months in prison for his crime.
Consider and discuss the general circumstances in which the Prosecution might be able to adduce evidence of the Accused's prior perjury conviction in the current proceeding relating to bigamy:
(a) as evidence that the Accused has a tendency to mislead or deceive public officials; or
(b) as evidence that undermines the credibility of the Accused's 'not guilty' plea; or
(c) as evidence that shows the Accused is not a person of good character.
[6 marks]

Model Answer 1:

(a) Tendency In order to use the evidence as tendency (s 97) P needs to give notice (unclear whether done here) and court needs to conclude that evidence has SPV and PV substantially outweighs any prejudicial effect (s 101). Tendency evidence (TE) asserts that a person is more likely to commit certain acts, based on the assertion that they have done so before in a similar fashion. This tendency

makes more likely the facts making up the charge offence (Hughes). The court take the evidence at its highest not considering reliability or credibility (IMM). Here, the tendency to mislead or deceive public officials appears on the face of it to be a strong tendency. This is something out of the ordinary and not something that many would do. The misleading was a false insurance claim and then lying on oath in court. However, there is some nuance here to be explored - while this first step is strong, there is some question about how this connects to the FII or makes more likely that A committed bigamy. While there is an element of deception in the bigamy charge, it is less focused on deceiving a public official (i.e. the Registrar of BDM Oz or NZ) and more about whether the person knew they were married when they married another. It appears that the TE argument falls down at the second Hughes limb. The court is likely to find that the evidence does not have SPV or that it does not sub. outweigh the UP. It wrong, DC would still argue that (udner s 101 and/or ss 135 and 137): the evidence is misleading because it doesn't go to proving more likely a FII - it may mislead and/or overwhelm the jury the jury may place too much weight on the TE the evidence is somewhat tenuous as there is only one instance and P's arguments lack specificity.

(b) Credibility A must not be XXn'd as to credibility unless the court gives leave and only if he has adduced evidence which has tended to prove that a prosecution witness has a tendency to be untruthful and was relevant solely or mainly to that witnesses credibility (s 104(2) and (4)). The requirements ofs 103 also aply and whether the evidnece could substantially affect A's credibility. Thus, if A XXn'd his first wife about her being a liar (i.e. re the email sent/not) then he would ahve oepend the door to be XXN'd about his own dishonesty conviction and credibility. Here, unless P is XXN A about having a motive to be untruthful, having memory diffiuclties or a Prior inconsistent statement - leave is not likely to be granted.

(c) Character A may lead good character evidence either generally or in a particular respect and certain evidence rules don't apply (s 110). It can be used to show it less likely he committed an offence or to bolster credibility. P requires leave (s 192 factors) to XXN A about character evidence (ss 14 and 110). Similar evidentiary rules do not apply (s 110). Here, it is not clear that A has put his character in issue, for example, it is unclear whether he has or not called good character evidence. An obvious example is calling a character witness who spoke of A's honesty and integrity. In such circumstances P would almost certainly get leave - here, it is unlikely but this has not occurred. The court will still consider the PV and UP and the role (if any) of P opening up the character issue. DC is likely to be successful on an argument, anyhow, that such XXN may lead to impermissible tendency reasoning and P should not be granted leave.

Model Answer 2:

(a) Evidence of a person's character, reputation, conduct or tendency is not admissible to prove that they have or had a tendency to act in a particular way or have a particular state of mind, unless certain requirements are satisfied. The evidence of A's prior conviction is being used for a tendency purpose. First, therefore, P would need to be provide reasonable notice in writing. Second, the evidence must have significant probative value. This requires that the evidence strongly support proof of a tendency, and that the tendency strongly support proof of a fact in issue. This requirement will be difficult to satisfy in the present case. First, there is only one instance of prior

conduct said to ground the tendency. Second, the prior conduct is quite distant in time from the present offence - over 5 years. Third, although similarity is not the touchstone of the probative value of tendency evidence, there are significant differences between the prior conduct (A lying in court in a civil claim) and the present offence (A getting married while still married to another person). Further, to be admissible in criminal proceedings, probative value must substantially outweigh any prejudicial effect on A (e.g. the likelihood of the jury overvaluing or misusing the evidence). There is a significant risk of such prejudice here, as the jury may simply think A is a bad, dishonest guy because of his previous conviction. Given the doubts about the evidence's probative value, it is unlikely to satisfy this requirement for admissibility.

(b) The evidence could not be adduced for this purpose. A's 'not guilty' plea is not evidence in the proceeding, and the prior conviction cannot be adduced to undermine its 'credibility'. P might try to adduce it as credibility evidence under ss 101A-104, but this could only occur if A chose to give evidence and if certain other conditions were met (e.g. leave required and A must give up his shield against cross-examination on credibility), which do not appear to be met here.

(c) P could only adduce this as bad character evidence if A made a conscious decision to adduce evidence that they were of good character (e.g. by testifying that they always tell the truth and are an honest person), either generally or in a particular, relevant respect (EA ss 110, 111). There is no suggestion that A is planning to do so.

Question 10: Evidence:

The Prosecution intends to call Anna Sloan to give evidence in the case against the Accused. Her evidence essentially involves her attesting to the fact that she met the Accused, developed a relationship and eventually married, as the certificate of marriage documents. She will also say that the Accused never mentioned the fact that he was previously married or that he had been in a serious relationship before he came to Australia. Since police knocked on her door and told her that the Accused was married to another woman earlier this year, Anna has been emotionally rocked by the news. She was also shocked at the revelation that the Accused had a prior conviction for perjury, which the Accused eventually told her. The Accused has spent a great deal of time attempting to repair the relationship with Anna since all of this information came out. He told her that she is his "*true love*" and that he only kept the previous relationship from her because he did not want to upset her. Anna is doubtful about whether he is telling her the complete truth but believes that she should try and make the relationship work because she still loves him.
Anna does not want to give evidence against the Accused. Does she have to? Explain. **[4 marks]**

Model Answer 1:

Prima facie, Anna is competent and therefore compellable to give evidence: s 12. There is no suggestion that she is not competent. Absent some exclusion, a witness could face a penalty for not attending at court on the day they are required to. Here, Anna could object to giving evidence under s 18 of the EA. She would inform the court that, as (either) the spouse or (at least, if the marriage is unlawful) the de facto partner of the accused and so she objects to giving that evidence. The EA provides that a de facto partner is defined in the same way as the Family Law Act. The facts here are

limited, but here it would suggest that they are still in a relationship together and so that definition will apply (Dictionary). Having heard the objection, the court must determine whether there's a likelihood that Anna will suffer harm, or that her relationship with the accused might be harmed, were she to give evidence: s 18(6). Here, whilst there might not be a danger of physical harm to her, there would clearly be a risk of harm to her relationship with the accused if she gives evidence against him (e.g. breaching trust between spouse). The court must then weigh that risk of harm against the desirability of her giving evidence, and ask whether it outweighs the harm, taking into account the factors in s 18(7). Here, the nature and gravity of offending is not high. Her evidence would be important as, without it, the P might not have evidence as to the status of their relationship (if certificates are ruled inadmissible). Weighed against this, she is in a relationship with the accused and would be required to disclose evidence of conversations in confidence with the accused. For the foregoing reasons, my view is that she would not be compelled to give evidence as the risk of harm to her relationship would outweigh the desirability of giving evidence. The objection under s 18 (e.g., her status as de facto) may need to be determined on a voir dire.

Model Answer 2:

Anna appears to be competent and is thus prima facie compellable to give evidence (EA ss 12, 13). The spouse of an accused can object to giving evidence against them (EA s 18). Anna is A's spouse, although there may be a legal argument to be made that the fact that A was already married renders his marriage A void in law. Setting aside this technical legal argument and assuming that Anna counts as A's spouse, Anna would need to make an objection to giving evidence, which would then be resolved by the court. The court must consider the harm or likely harm that giving the evidence could cause to Anna or to her relationship with A, and whether this harm outweighs the desirability of the evidence being given (EA ss 18(6)-(7)). It must consider the nature and gravity of the offence (serious), and the importance of Anna's evidence (in this case, not important, given the existence of the marriage certificate). Therefore, on balance, if Anna objects, the court is unlikely to make her testify against A, given that the crucial fact in issue (the fact of their marriage) on which Anna is able to give evidence can be proved by other evidence.

Question 11: Criminal Procedure:

Assume the Accused is found guilty of the charge of bigamy. At what point in time does this occur? *(Select **ONE** answer only)* **[1 mark]** Answer: B

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

Question 12: Criminal Procedure:

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

Model Answer 1:

In sentencing the Court must only impose sentences for a combination of the purposes set out in s 5(1) of the SA with regard to the matters in s 5(2). DC will argue he has positive prospects of rehab, in his employment and family life stabilising. DC will argue that imprisonment would serve limited purpose and it is in the Communities interest the A is able to remain in the community supporting his partner and family and continuing to rehabilitate. (a) Not guilty plea The A has a right to test the police allegations and have them determined in a court. Deciding to do so is not a matter that can be considered aggravating in deciding the appropriate sentence for him. He will not, however, be able to submit he should attract a discount for pleading guilty. This discount is applied where a person opts to plead because it demonstrates a willingness to facilitate the course of justice in avoiding lengthy trials, W having to give evidence and juries having to be exposed to difficult subject matter. It can also be submitted it is evidence of remorse (thus increasing prospects of rehabilitation and lessening the need to specific detternce). Here the A would not receive a sentencing discount because they have been found guilty at trial. (b) General deterrence This is the proposition that a sentence should be imposed that send a message to the general community about the seriousness of the offending and the consequences for doing so. The obvious example of this is mandatory drink driving penalties to licence and the idea that this deters others from behaving in this way. Here the PC would argue this is a novel offence that gives rise to a need for a message to be sent to the public. They would argue he is an appropriate vehicle for this because he has not got any Verdins vulnerabilities or cognitive issues. DC would argue this is, broadly, a victimless crime and that the novelty of the offending means there is less need to impose a heavier sentence to deter others than say, a violent glassing at a pub. On balance it is likely the TJ will consider general deterrence but not at the forefront of his/her mind. (c) Specific deterrence This is the proposition a sentence ought to be imposed that deters the offender themselves from offending in a like manner or generally. Where a person for example continuously comes before the court with similar offending, a disposition that is harsher is needed to send them a message re: consequences of their behaviour. Here, the A has commit this offence in very unique, specific circumstances. DC will submit there is not a need to

weigh specific deterence heavily in sentencing because it is extremely unlikely a similar set of circumstances would arise again. The offending did not occur because of some underlying drug issues/mental health issues so there is no evidence to support it would be likely to occur a second time (contrasted with e.g. trafficking where the A is a drug addict). The A experience of the trial would've given him some insight into his actions and less need for specific deterrence in light of that (particularly given consequences to his family life). (d) Denunication This involves a sentence designed to denounce the conduct of the criminality as not being appropriate in the community. Here the PC would argue this is a case where the A must clearly understand they have acted innapropriately. DC will argue this is a reckless failure to adhere to the rules as opposed to deliberate. It is not offending frequently appearing at court so less need to denunciation. (e) Protection of the community Proposition a sentence ought to be imposed to achieve community protection from the A. Here there is no obvious risk that the A poses a risk to the community (of marrying more women). While this would be appropriate in the context of violent, sexual or ongoing risky driving-style offending, there is clearly less risk here DC would argue no risk and this sentencing matter shouldnt be considered.

Model Answer 2:

(a) the fact that the accused pleaded not guilty is not a factor in sentencing. There is a utilitarian benefit in teh Crown not having to prove its case. If the offender pleads guilty, then the court can apply a sentencing discount (in fact, they must in certain circumstances: s 6AAA SA). However, a guilty plea should be seen as a mitigating factor. A not guilty plea should not be seen as an aggravating factor.

(b) General deterrence is a sentencing purpose set out in s 5 of teh SA. It is the principle that a sentence should seek to generally deter members of the community from committing bigamy. In essence, the idea is that the punishment given to the Accused should reflect a public interest in incentivising people from not committing bigamy, because of teh public and moral offence which it causes. It may weight in favour of a harsher punishment, which a custodial sentence, to send a message to teh community.

(c) Specific deterrence is also a sentencing purpose which is set out in s 5 of the SA. It is the idea that the specific offender should be deterred from committing this offence. This is unlikely to have application here as there is no evidence that the accused has committed bigamy in the past. ALthough he does have another prior conviction, which will be taken into account in sentencing as part of teh accused's prior history and characteristics, the risk that the accused will commit this risk again appears slim. Likely weighs in favour of a slimmer sentence.

(d) Denunciation is another sentencing purpose which is set out in s 5. It requires that a sentence reflect public outrage about a particular crime. THis may be reflected here as bigomy has a 'moral' element in that it is important to ensure that the community's expectations in terms of denouncing or proclaiming that the offender has done a bad thing is reflected in teh sentence. This would mitigate in favour of a harsher sentence.

(e) Protection of the community favours a custodial sentence in that it essentailly mitigates in favour of putting an accused in jail or out of the general public where there is less chance that they would cause harm to other members of the community. Unlikely to be a key factor here as the nature of the offending is more of a 'moral' offence with limited prospects of harm ot individuals within the community. Also appears that given his stable family life, the risk of damage to teh community is low.

Question 13: Criminal Procedure:

Assume the Accused is convicted and sentenced to undergo a community corrections order for a period of six months with certain conditions attaching, including supervision and a requirement that he complete 50 hours of community work. The Director of Public Prosecutions is not satisfied with the trial outcome and the sentence.
Can the Director seek a retrial and/or increase in sentence? Explain. **[3 marks]**

Model Answer 1:

The A was found guilty. The OPP would not (and can't) appeal this finding (can't appeal convictions). The OPP can appeal the sentence per s 287 to the COA. They can appeal where they consider there was an error, a different sentence should be imposed and there is a public interest in appealing: s 287. Appeal must be signed by the DPP herself: s 288. The OPP will need to file the notice of appeal within 28 days of the date of sentence and serve it on the A within 7 days of filing. A copy must be provided to the A solicitor: s 288. The COA will allow the appeal where they are satisfied there was an error in the original sentence and a different sentence ought to be imposed. They cannot consider the proposition of double jeopardy: s 289. If they are satisfied the appeal is allowed they can re-sentence the A or remit the matter with directions. Here there is no obvious error in law with the disposition imposed. The CCO is within the appropriate time frame and no conditions fall foul of the SA. The basis for the appeal is manifest inadequacy which is difficult to establish - this is that the TJ sentenced in a manner outside the appropriate range. Appeal unlikely to succeed.

Model Answer 2:

The DPP can only appeal against his sentence. The Crown can seek leave to appeal against the sentence imposed by the CCV, to the VSCA (s 287), if satisfied that it would be in the public interests. The VSCA may refuse leave if there's no reasonable prospect it would impose a less severed sentence or reduce the TES: s 280(1). If leave is granted, the court may only allow the appeal if satisfied that the original sentence was effected by error and it believes a different sentence ought to have been imposed. If the appeal is allowed, the court must set aside the sentence and either (s 282) impose a new sentence it considers appropriate, or remit the matter to the CCV (not for 'retrial', but for resentencing). The appeal would be conducted on House v R principles. The P would argue, for example, that the sentence was wholly outside the range of sentences available to the judge and therefore was manifestly inadequate. Aside from this, no ability to seek a retrial. The DPP can also refer questions of law to the VSCA, but that doesn't seem relevant here: s 308.

Question 14: Civil Procedure:

Which of the following is a paramount duty of the parties in civil litigation? (Select ONE answer only) [1 mark]

Answer: B

a) To act honestly at all times.
b) To further the administration of justice.
c) To minimise delay in conducting the proceedings.
d) To disclose the existence of critical documents.
e) All of the above.
f) None of the above.

Question 15: Civil Procedure:

Which of the following is not an overarching obligation of the parties in civil litigation? (Select ONE answer only) [1 mark]

Answer: A

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

Question 16: Civil Procedure:

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

Consider the following types of court document:
(a) affidavit;
(b) originating motion;
(c) statement of claim;
(d) writ.
What is the purpose of each of the above court documents? Which are most likely to be filed by Anna to commence her proceeding? If she selects the wrong document, will that be fatal to her claim? Explain your answers to each of these questions. **[5 marks]**

Model Answer 1:

(a) An affidavit is a sworn written statement that is made by a person, the deponent, in accordance with the requirements under O 43. Its purpose is to provide proof of matters for fact in the course of civil proceedings (e.g. to provide proof of matters of fact that support a particular application, such as an application for summary judgment).

(b) An originating motion is a form of originating process. It must be used to commence proceedings where there is no defendant, where an Act authorises an application to the Court, or where authorised by the SCR. It may be used where it is unlikely that there will be any substantial dispute of fact and it is therefore appropriate to have no pleadings or discovery (r 4.05, 4.06).

(c) A statement of claim is the first pleading in a proceeding commenced by writ. It must set out the material facts on which the plaintiff relies, any specific statutory provisions relied on, and any specific remedy or relief claimed. Its purpose is to enable the other party to know the case against them, to define the questions for trial, and to avoid any surprises at trial.

(d) A writ is another form of originating process. It is the standard form of originating process, used to commence all civil proceedings that are not commenced by originating motion (r 4.04). Anna is most likely to file a writ to commence her proceeding. An originating motion is not required, because there is a defendant. Further, Anna is unlikely to choose to commence by originating motion because there are likely to be significant disputes of fact (e.g. whether PS conducted the requisite background checks), which therefore warrant pleadings and discovery (to help define and marshal the evidence required to resolve those questions of fact). However, if Anna mistakenly commences by originating motion, that will not be fatal to her claim. Proceedings commenced by originating motion can be continued by writ under r 4.07. In that case, the court can make appropriate further orders to place the proceeding on the right footing (e.g. requiring a party to provide further particulars of their claim if they have not done so already).

Model Answer 2:

Purpose of each document A writ is a form of originating process by which proceedings are commenced. An originating motion is another form of originating process. Each is a means by which a proceeding is commenced in the Court. An OM must be used where there is no defendant, the rules provide (eg Order 56) or an Act provides for making of an application, and may be used where

there is unlikely to be any substantial dispute of fact such that pleadings and discovery are inappropriate: rr 4.05-4.06. Otherwise, a writ must be used: r 4.04. A statement of claim is the indorsement of the writ and sets out the material facts necessary to establish the cause of action (or defence) and must also set out particulars necessary to enable the other side to plead, to define the issues and to avoid surprise at trial, but must not contain evidence: rr 13.02, 13.10. An affidavit is a legal document containing evidence. Evidence in interlocutory applications is generally by affidavit: r 40.02. Affidavits must inter alia be in consecutively numbered paragraphs and based on personal knowledge of the deponent, except in interlocutory applications, where they can be based on information and belief where the grounds are set out: r 43.03. Anna's filings In this case, Anna will commence her proceeding by writ and statement of claim. It is likely that there will be disputes of fact in the case, eg as to whether Perfect Spouse ("PS") breached the contract, was negligent, or engaged in misleading or deceptive conduct, and therefore pleadings and discovery will be appropriate to define the factual issues in contention. Accordingly, there is no basis on which Anna could commence by OM, so writ endorsed by SOC will be appropriate. Wrong document It will not be fatal if Anna selects the wrong document. Under r 4.07 the court may order that, where a proceeding was commenced by OM but ought to have been commenced by writ, it shall proceed as if it were commenced by writ: r 4.07.

Question 17: Ethics:

Anna Sloan's case against Perfect Spouse caught the attention of mainstream media outlets as soon as it was filed. A journalist approaches a barrister who has acted for Perfect Spouse in the past in other cases and has sought her comment on the proceeding brought by Anna. The barrister is only too happy to assist, saying to the journalist: *"There is likely to be considerable strength in the case against Perfect Spouse. From what I've read in the claim, they've failed to do appropriate checks. I'm not surprised that they didn't do them. In the cases I've been involved in, Perfect Spouse's systems and procedures are a basket case. They take tens of thousands of dollars from clients desperate for a match made in heaven and all they give back is a list of potential partners using a pretty superficial algorithm. They promise background checks and their clients get none. They promise to pay their barrister's fees and they leave them high and dry. They still owe me $12,000. Good luck to Anna Sloan, I say!"* . The barrister's comments are quoted in the newspaper the next day.
Discuss the ethical implications for the barrister who made these comments. **[5 marks]**

Model Answer 1:

The barrister has breached several ethical rules. First, a barrister must not use or disclose confidential information obtained in the course of practice unless the person gives their consent to its use by the barrister as they think fit: r 114. Here, it is highly likely that the barrister's observations as to Perfect Spouse's systems and procedures, and so forth are based on confidential information. It does not appear that waiver of confidentiality occurred, and so r 114 has been breached. Second, counsel are limited in their capacity to make media comments. Here, although the barrister has previously appeared for Perfect Spouse it does not appear likely that they will appear in the proceeding against Anna; thus, r 77 does not apply. However, r 76 provides that barristers must not disclose confidential information, make inaccurate statements or convey a personal opinion as to

the merits except in the course of genuine educational or academic discussion. Here, confidential information has been disclosed as explained above, so that aspect of r 76 is breached. Further, the barrister has expressed personal opinion about the merits, by suggesting that Perfect Spouse is unlikely to succeed. It is not apparent that this was a genuine educational or academic discussion, although it might be argued that journalists are entitled to ask for such opinions. On balance, at least the first limb of r 76 is infringed. Indeed, having regard to the nature of the comments it is arguable that there has been sub judice contempt. Further, the intemperate nature of counsel's comments are apt to bring the administration of justice, the profession and counsel into disrepute, contrary to r 8. The reader will infer that counsel is unhappy that they have not been paid promptly for their work and that this is a means of expressing that anger and perhaps obtaining some retribution. While non-payment of fees is a ground to return a brief or refuse under r 105, it is certainly not a ground to make comments of the kind that the barrister made in tone that was used. The barrister's conduct is quite inappropriate and they are liable to be dealt with for UPC or PM.

Model Answer 2:

The barrister has breached his obligations by: 1 - disclosing confidential information pertaining to Perfect Spouse; and 2 - communicating with the media in an improper way. His conduct was clearly unethical and has the potential to prejudice the present proceeding. It would likely result in the barrister facing disciplinary sanctions, including a finding of UPC or PM on the basis that he has breached the BCRs: s 298 LPUL. Given he has disclosed confidential information, it may persuade VCAT that a finding of PM is appropriate as his conduct falls sufficiently far below that of a fit and proper person engaging in legal practice. 1. Confidentiality Counsel appears to have previously acted for Perfect Spouse - suggested by the unpaid brief fees. He has breached his obligation in rule 114 by disclosing confidential information pertaining to Perfect Spouse, e.g. that their procedures are a basket case, they use a superficial algorithm (etc) seemingly without Perfect Spouse's consent. 2. Media comment The barrister is not briefed in the current proceeding. He was required to comply with r 76, and could only respond to the questions posed by the journalist if r 76 were met. He couldn't give answers (a) known to be inaccurate, (b) disclosing confidential information, or (c) expressing his personal opinion on the merits of the current proceeding (or any future proceeding) between Sloan and Perfect Spouse, otherwise than in the course of a genuine educational or adacemic discussion of the merits of Sloan's case on the law. Applied to his statements here: That there is considerable strength in the case - that is personal opinion on the merits of the proceeding, and in breach r 76; That they failed to do appropriate checks - again, this is his personal opinion and goes beyond a genuine educational or academic discussion; the remainder of this comments: this has disclosed confidential information pertaining to Perfect Spouse, and is clearly in breach of his obligations under r 76. It's apparent, for example, that he has previously acted for them, is aware of their internal processes and, whilst disgruntled about non-payment of his fees, has disclosed confidential information in response to the journalist.

Question 18: Civil Procedure:

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

(a) Explain the obligation and purpose of discovery in civil proceedings.

(b) Identify **FOUR** specific categories of document that might be sought by the Plaintiff to be discovered in this proceeding.

[4 marks]

Model Answer 1:

(a) The obligation of discovery requires a party to discover all documents within their possession, custody or power of which they are aware after a reasonable search and on which the party relies, that adversely affect its case, that assist another party's case or that adversely affect another party's case: r 29.01.1. The purpose of discovery is to ensure that each party has access to all material relevant to the issues in dispute. This enables the party to narrow the issues in dispute, and also to avoid surprise at trial because each will have had the opportunity to review all relevant material. Discovery is requested by notice of discovery in Form 29A (r 29.02) and is made by affidavit of documents in Form 29B, served within 42 days of receipt of the Form 29A: rr 29.03-29.04. (b) Four categories of discovery in the present case are as follows: PS's policies and other materials evidencing its approach to background checks. Any documents relating to background checks conducted by PS on Brereton. Terms on the website and any other representations made by PS to Anna as to the promises as to the services it offers to clients. Copy of the contract between PS and Anna.

Model Answer 2:

(a) The obligation of discovery is to disclose all documents of which a party is aware after a reasonable search, which are or have been in the party's possession, custody or power, and which fall into four categories: (a) documents on which the party relies, (b) documents that adversely affect the party's case, (c) documents that support another party's case, and (d) documents that adversely affect another party's case (r 29.01.1). A party is not required to disclose documents that they reasonably believe are in the other party's possession already, or copies of documents. And discovery of particular documents can be resisted on the grounds of privilege. Discovery is a continuing obligation: if you subsequently come into possession of documents after having made discovery, you must discover those documents. The purpose of discovery is to enable accurate fact finding by the court. Discovery obligations recognise that the parties to the litigation will generally hold information that is relevant to, and necessary for the correct determination of, the issues in dispute. Once the parties have discovered those documents to each other, each party is in possession of all available information and can decide how to prove facts before the court.

(b) Four categories of documents that the Plaintiff might seek in this proceeding are: (i) documents relating to any background checks PS performed in relation to Kelvin (ii) documents relating to PS's policies and procedures for identifying potential matches and conducting background checks (iii)

documents relating to PS's algorithm for identifying potential matches (i.e. its design and operation) (iv) documents relating to PS's public advertising and campaigning, and in particular any documents shedding light on the basis for PS's public claims about it services and whether PS staff were aware that those claims might be false or misleading.

Question 19: Evidence:

As a result of the media attention the proceeding has received since it was filed, several of Perfect Spouse's former clients, both men and women, have contacted Anna's solicitors to tell them that they had similar experiences with the online dating agency. It appears that there are no less than seven such clients of Perfect Spouse who are prepared to give evidence that they, too, had been matched with a partner, with promised background checks that never eventuated, with it subsequently being discovered that the matched partner had a dubious history. Anna's solicitor has taken statements from each of the seven former clients. Counsel for Anna proposes to call each of them at trial to give evidence in support of Anna's case.
Counsel for Perfect Spouse has indicated that they will object to this evidence on the basis that *"it is irrelevant and otherwise inadmissible by the operation many different rules of evidence."* Discuss the admissibility of the evidence of the seven former clients at Anna's trial. **[6 marks]**

Model Answer 1:

Relevance Evidence is relevant, and thus prima facie admissible (s 56), if it is rationally capable of affecting the assessment of the probability of the existence of a fact in issue (s 55). The court is to determine this on the assumption that the evidence is credible and reliable (IMM). The court is not concerned with the extent to which the evidence is capable of bearing on the assessment (cf probative value). The evidence is relevant because it may be evidence of a tendency not to (diligently) conduct background checks, which may in turn be relevant to showing that Perfect Spouse was negligent, or breached its obligation to conduct such a check under the contract, or was misleading or deceptive in making such claims. It cannot be said that the evidence is so inherently lacking in credibility and reliability as to be incapable of rising to the level of relevance (IMM). Such an objection would be without merit. Objections Tendency: per above, the most likely use of this evidence is tendency - namely, that Perfect Spouse engaged in conduct (namely, matching partners without carrying out background checks), or had a tendency (e.g. a systemic practice or culture of not carrying out background checks), which is used to prove that it had a tendency not to carry out background checks, which in turn goes to a fact in issue in this case - whether a background check was carried out in this case. There must be written notice of the intention to adduce. Assuming that to be so, the question is whether the evidence will have significant probative value (again assuming that the jury will accept it as credible and reliable). This turns on the Hughes test of the extent to which the evidence supports proof of a tendency, and the extent to which the tendency supports proof of a fact in issue (being one that makes up a cause of action). There do not need to be "operative features of similarity", or a "pattern of conduct" or "underlying unity". Thus the fact that the clients may have different circumstances, or that some of them are men, or for example that the "dubious history" of the matched partner may have been different, is not to the point. In the present case, it seems that the evidence does provide relatively strong support for the tendency: there is as

partner match / failure to conduct a background check / dubious history, which seems to show a tendency. Moreover, that tendency may be strongly indicative of the fact in issue here – although this may perhaps depend on how representative the sample of seven clients are. In sum, this probably has significant probative value. Coincidence: this is probably best characterised as tendency evidence, but it could also possibly be adduced as coincidence evidence, in the sense that it is improbable that all seven of these incidents could have occurred coincidentally. However, the issue here will focus on similarity, which is the "touchstone" of admissibility (PNJ). Here, there are some fairly significant similarities (as already discussed) between the cases. There are some differences: e.g. it may be significant here that not all of the clients are women. However, the fact that there are dissimilarities are not fatal to significant probative value. That said, more information would be required to know if this could be admissible as coincidence evidence. Exclusion: The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial, be misleading or confusing or cause or result in an undue waste of time. Probative value has already been discussed - it seems that the probative value is quite high, at least if it is used as tendency evidence. Unfair prejudice refers to the risk that the jury may engage in impermissible reasoning or otherwise misuse the evidence, or if there is procedural fairness. Although tendency evidence always carries some risk of prejudice, it does not seem that there is any particular issues here that would lead to this effect substantially outweighing the probative value, which as noted is quite high. Moreover, no real suggestion that this is misleading or confusing. And if this is done by judge alone (as seems likely because there is a statutory cause of action in the mix), neither of these objections is likely to be accepted anyway. At best the objection could be on the ground of undue waste of time, but this does not seem to be the case - the evidence would not be unnecessarily duplicative, as the evidence of the seven former clients is needed in order to demonstrate the tendency. In sum the evidence is likely to be admissible.

Model Answer 2:

Relevance: evidence is relevant if it could, rationally affect directly or indirectly the assessment of the probabilities of the existence of a fact in issue in the proceedings (s 55(1)). Relevant evidence is admissible unless an exception applies (s 56(1)). HEre, the evidence of each of the seven former clients is relevant as circumstantial evidence only. In other words, it is evidence from which teh fact finder could infer a fact in issue in teh proceedings, namely whether D breached obligations regarding duty under contract or tort to match partners. P may attempt to argue that it is not relevant as tendecy evidence only but is also relevant as it proves D's state of mind or knowledge that algorithms were ineffective and failure to do background checks resulted in breakdown of many relationships. Assume for purposes of question using tendency evidence only (noting if fails test for admissibility for tendency then cannot be used for this purpose even if relevant for another purpose, s 95). Here, P will likely use the evidence as tendency evidence (s 97). Here being evidence of D's tendency to not perform background checks such that D did not perform background checks on this particular occasion and therefore failed obligations under contract or tort (fact in issue). P will need to give reasonable written notice (s 99). Note that evidence is taken at its highest (IMM) and therefore it is of no regard that each of the W has essentially an unproven allegation. For purpose of assessing tendency, TJ will assume credibility and reliability (does not appear to be example where evidence is so unreliable or incredible that it could not rationally affect assessment of probabilities

of existence of fact in issue: IMM). No need to prove s 101 as this is a civil trial not criminal. [Note that coincidence here is unlikely or will be difficult to argue on the basis that so little is known about each of the W proposed to be brought by P and as coincidence requires similarities, unlikely to be able to argue similarities exist such that it is improbable that D did not conduct background backs or failed to comply with contractual obligations on this occasion. Unlike tendency, the touchstone of coincidence is similarities. If further information was provided could argue coincidence, namely that the similarities in circumstances are more than can be explained by a coincidence: Pfennig. However as it currently stands, D would rightly argue that breakdowns in relationship are stock in trade for dating agencies.] Back to tendency: For this to be admissible, P will need to establish two step test in Hughes: extent to which evidence proves tendency (here, this appears to be the case as each W is asserting that the partners they were matched with had a dubious history such that no background checks were conducted) and extent to which evidence makes facts in issue more likely (can infer that because of this tendency of D to not conduct background checks it is likely that this was not so done here). Note that similarity is no longer required (Hughes overturned Velkoski), however TJ may require VD to understand further information regarding each of these W (s 189) to determine if indeed they bear out D's tendency to breach contractual obligations and fail to properly do DD on relationships and matching. On balance, P likely to find sig PV on basis that taking evidence at its highest, it does have sig PV that it can be inferred that D has tendency to fail to do proper checks such that relationship fails (thereby making P's case more likely). D will argue for exclusion of the evidence on basis of s 135. Namely that its PV (extent of relevance) is substantially outweighed by danger that evidence would be unfairly prejudicial to party (here teh risk is real overvalue of evidence by fact finder that could not be overcome by appropriate jury directions) or otherwise misleading or confusion (there are numerous reasons why relationships fail and jury or fact finder will be unable to distill or separate failure to do background checks from actual issues in this case). In particular, D would argue that the evidence of each of the 7 former clients has low PV because it does not indicate D's particular tendency to do background checks (potentially would need to determine this preliminary fact regarding why relationships broke down on VD, s 189). D would argue that in the context of this trial the PV would not substantially outweigh unfair prejudice (here being real risk of overvalue or fact finder reasoning emotionally due to the sadness of so many relationships failing) or be misleading or confusing or otherwise, given the low value of the litigation result in undue waste of time. On balance, given that the tendency evidence from seven former clients is likely to have sig PV (as discussed above), unlikely to be excluded under s 135 but probably appropriate jury directions will be given regarding use of evidence.

Question 20: Civil Procedure:

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

Describe the court process by which Anna could seek to force Perfect Spouse to disclose all such documents. Do you think Anna will be successful? Explain. **[3 marks]**

Model Answer 1:

If PS refuse to disclose the documents sought on the basis of the burden/cost, then the Court has significant powers to make orders in relation to Discovery in s55 CivPa. Also under r29.05.2 Anna could seek an order for expanded discovery, or particular discovery under r29.08. Such applications would be on summons, supported by affidavit deposing to the relevant information and belief about the documents and existence thereof. If they fail to comply with such orders, the court may make further orders (r29.11), or striking out of defence (r29.12.1). It would also be a breach of the overarching obligations by PS. Anna is likely to be successful in part, but may need to limit the scope of discovery sought further, and be more specific otherwise the court may not find that she has adequately linked the request to the proceedings and the facts in issue. She is required to narrow the issues, and use reasonable endeavours to resolve, not conduct expansive searches or make unreasonable demands. The court is also able to make orders in relation to costs, timing or stages to manage the proceedings.

Model Answer 2:

In light of the OO that apply to Anna and her counsel/legal reps, Anna should first write to D to request the documents. Assuming this fails to produce the documents (as it is likely to given the volume of documents...) Anna could then make an application for particular discovery per r29.11 of docs relating to former clients who have complained re background checks - that application would be by summons and should set out in an accompanying affidavit the reason why P seeks all of those documents and why P says they are relevant (even not strictly required, this will assists court's process/determination of application and reduce delay - see OOs). D will then be required to put on responsive affidavit re its possession of the particular documents and may include information as the volume of documents and why the request is oppressive/not reasonable. The court has an extremely broad discretion to make 'any order or give any directions' re discovery under s55 CPA - while it has the power to make an order for all docs in D's possession to be produced: s55A, given the OP and the requirement to make orders in effect of OP (s7, s8) the court is much more likely to tailor its discovery requirement in order to facilitate the timely, cost effective resolution of the issues in dispute, and require (for example) that D make discovery of sample documents re background checks or only discover documents of the kind requested within the past say, 3 year period: s55(2), (3).

Question 21: Civil Procedure:

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

Perfect Spouse seeks to have its costs on the application taxed immediately and for the proceeding to be stayed until those costs are paid. Should the trial judge make this order? Discuss the situation that now presents itself with reference to *Rozenblit v Vainer* (2018) 262 CLR 478 and section 47 of the *Civil Procedure Act 2010*. **[5 marks]**

Model Answer 1:

Section 47 of the CPA gives the Court broad case management powers to ensure that a civil proceeding is conducted in accordance with the overarching purpose under the CPA, ie to facilitate the just, efficient, timely and cost-effect resolution of the real issues in dispute (s 7). At the same time, however, Rozenblit v Vainer makes clear that the overarching purpose of the CPA does not displace or alter the primary consideration of the courts to safeguard the administration of justice (Gordon and Edelman JJ at [76]). It is relevant to the exercise of the Court's powers that generally speaking, a person is entitled to submit a bona fide claim for determination by the Courts. In Rozenblit v Vainer, Rozenblit had two outstanding costs orders against him for failed attempts to amend his Statement of Claim. Those costs had been ordered to be taxed immediately, but Rozenblit had not paid. On a third application to amend the Statement of Claim, the primary judge granted leave to amend but on the condition that the proceedings be stayed until Rozenblit paid the costs previously ordered. Rozenblit's sworn evidence, not not challenged by the Respondents, was that he could not pay the costs. The High Court unanimously held that the primary judge's discretion to order a stay under r 63.03(3) of the Rules had miscarried. The Court held, in three separate judgments, that where the consequence of a stay order is the effective termination of the proceedings, there must be strong grounds for its exercise. Kiefel CJ and Bell J ovserved that if a stay is contemplated and its effect may be to bring the proceedings to an end, all reasonable alternatives to a stay must be investigate (at [34]). Keane J came to a similar view at [47]-[48], as did Gordon and Edelman JJ at [111]. In Rozenblit, Rozenblit's conduct was considered to have warranted some criticism, but was not conduct warranting condemnation so as to justify the effective termination of proceedings, particularly where the Rozenblit's conduct had not be shown to have a serious impact upon the progress of the proceeding or cause real prejudice to the respondents ([28]-[29]). Applying the principles from Rozenblit to the current facts, it would not be appropriate for the trial judge to make the stay order. While Anna's application for further disclosure was unsuccessful, it does not evidence a pattern of behaviour warranting condemnation. Given Anna's financial situation, the stay order may risk stultifying what is a legitimate proceeding if Anna is unable to obtain a loan to pay. There is no evidence that Perfect Spouse has been seriously prejudiced. The circumstances here are

arguably even weaker than those in Rozenblit for a stay order (where there had been multiple failed applications and Rozenblit had been found to have a "cavalier disregard" for the respondents' rights). The alternative course reasonably open to the Court is to order that costs be taxed immediately but not make the stay order.

Model Answer 2:

Section 47 of the CPA - Court must ensure that civil proceeding is managed and conducted in accordance with overarching purpose. Here, note P's 'fishing expedition that lacked merit whatsoever' is likely to breach several overarching purpose of efficient conduct of business of the court, facilitating the just, efficient, timely and cost-effective resolution of real issues in dispute (s 7(1). This will be relevant in considering whether P's conduct justifies not only an order that costs be immediately taxed (conduct warranting criticism) but that proceedings be stayed pending payment of those costs (conduct warranting condemnation, given potentially P is impecunious). Case of Rozenblit v Vainer (R). Facts: In R, two prior applications by P to amend SoC were rejected and was ordered to pay D's costs taxed immediately. P brought third application to amend Soc (in line iwth original intent of claim). D separately sought to have the proceedings stayed pending payment of costs. Court granted leave to amend on condition that proceedings be stayed until P paid teh costs. As P was impecunious this effectively resulted in stay. In finding that the TJ did not have discretion to grant they stay, the following principles were handed down (plus application to current facts): As a fundamental principle (Basal principle) litigant is entitle dto determination unless to allow claim to proceed would amount to abuse of process or would clearly inflict unnecessary injustice in which case proceeding should be halted. There is not a presumptive rule against making of stay order, rather power to stay should be exercised when it would not risk injustice to P (Kiefel CJ and Bell, R). Must be strong grounds for exercise of stay. Note SCR are informed by inherent jurisdiction of court to grant stay. SCR and court's inherent powers must be in conformity with insersection of CPA and particularly the overarching purposes and obligations. Only way to do justice between teh parties: Stay should only be ordered where it is the only way to do justice between teh parties having regard to teh conduct of a party and the consequences of such an order (Gordon and Edelmane and Keane). Where there are other options available, a stay order should not be made. On application to current facts, D could distinguish R on the basis that there is no other other than can be made here (for example, this is not an application where court could order proposed amendment to pleadings be subject to and conditional on costs occasioned by teh amendment), and if P cannot meet costs, then stay should be granted. P would argue that conduct is worthy of criticism (hence order for immediate taxation) but does not justify stay of proceedings - there are other ways that justice can be done between teh parties, including immediate taxation, not immediate taxation plus stay. P's conduct: Court should consider conduct of P and whether it amounts to level found in Gao or whether it is conduct which falls for criticism rather than condemnation (Kiefel and Bell). In particular, court should be mindful of finding factors that go beyond conduct that resulted in order for immediate taxation. In considering conduct here, the conduct must be sufficiently serious to warrant proceedings being brought to an end. It should be informed by overarching purpose and obligations. HEre, as per previous question P's conduct does breach overarching obligations. It is no matter that P did not intend for conduct to be so oppressive to D (Keane) The fact that P is impecunious (however question this if could get a loan) does not mean a stay will not be granted. D

would argue here that the conduct of modern litigation requires granting of stay as only practical way to ensure justice as a result of CPA overarching purpose and obligation, and here, P should or ought to have known that conduct was oppressive, thereby justifying further condemnation by granting stay order. In reply, P would argue that judgment of Kiefe and Bell should be followed such that P's conduct does not even give rise to occasion to consider whether there is a sufficient basis for making of a stay order - the point at which alternative means should have been considered is not required. D must argue points of distinction from principles in R. Factors that distinguish R: 1. P could pay the costs - this is different as P is not PF impecunious. 2. D has incurred incredible expenses as a result of P's actions. 3. P should have known that conduct would amount to conduct breaching OO and is worthy of condemnation. 4. P does have means to pay and therefore stay would not bring proceedings to an end. On balance, court could likely find that there are other ways of doing justice between the parties (other than ordering a stay) and while P's conduct is certainly worth of criticism, it is not worth of condemnation such taht stay order should be made. In particular, P has a proper bona fide claim and a stay would inflict unnecessary injustice on P (Journeau). Where consequence of stay order is effective termination of proceedings there must be strong grounds for its exercise (Journeau). HEre. P's conduct does not amount to level of harrassment as per Gao and only warrants criticism by immediate taxation, not stay. The overarching purpose and obligations (as informed by court's inherent power) do not require the courts to be safeguarded from P's conduct by granting a stay on this occasion.

Question 22: Evidence:

As part of its defence, Perfect Spouse has pleaded that its *"systems and procedures for conducting background checks, including those carried out in relation to Kelvin Brereton at the request of Anna Sloan, are administered in accordance with the legal advice received from Perfect Spouse's legal advisors"*. The legal advice to which this pleading refers is dated 12 June 2011 and, although identified in the discovery process, has not been disclosed by Perfect Spouse to Anna's solicitors. Anna now seeks production of that written advice for inspection. Perfect Spouse is refusing to provide it. Is the court likely to order its production? Explain. **[4 marks]**

Model Answer 1:

Perfect Spouse is refusing to discover that legal advice on the basis that it is a confidential communication between it and its lawyers made for the dominant purpose of Pefect Spouse being provided with legal advice (or it being provided with professional legal services): ss 118-119. It can resist disclosure of material subject to client legal privilege under s 131A, which protects it from disclosing such material in response to discovery, This would be recorded in its affidavit of documents. Anna will argue that privilege has been waived over the advice, on the basis that Perfect Spouse has acted inconsistently with the maintenance of that privilege by referring to and putting that advise in issue in its pleadings: s 122. The court will inspect the legal advice in order to determine whether Perfect Spouse's objection is upheld. On the facts presented, s 122 will likely operate as it has referred to the content of legal advice in its pleadings. This will mean that privilege has been waived and Perfect Spouse will be required to produce the written advice.

Model Answer 2:

Client legal privilege attaches to confidential documents prepared by a lawyer for the dominant purpose of legal advice: s 118. The document referred to in the defence appears to clearly satisfy the dominant purpose test as it is the advice itself. The privilege applies to disclosure orders such as the present by virtue of s 131A. However, client legal privilege can be lost where a party conducts itself inconsistently with the continued maintenance of the privilege: s 122(2). Here, Anna will argue that privilege has been lost because it has been waived by the defendant through "issue waiver". Perfect Spouse has pleaded that its background checks are in accordance with legal advice, presumably to meet the allegation that its checks are insufficient or constitute a breach of the duty of care. Thus, it has placed the legal advice in issue by pleading it; this is textbook issue waiver. It is also arguable that privilege was waived by referring to the document in the affidavit of documents without claiming privilege over it, as a party is entitled to do in the affidavit under r 29.03. However, the strongest argument is by reference to the pleading, which squarely places the adequacy and contents of the advice in issue. Although Perfect Spouse might argue that this was simply by way of context and not meant to answer any allegation, this is a weak argument; the better reading is that the advice is placed in issue. Thus, in pleading by reference to the legal advice Perfect Spouse waived privilege, and the court is therefore likely to order its production.

Question 23: Evidence:

Anna intends to give evidence at the trial relating to a phone call she had with Perfect Spouse earlier this year, shortly after she discovered that Kelvin was previously married and had a prior conviction for perjury. She will say *"I spoke with Raquel, the relationship consultant who I had always spoken to whenever I had concerns. I told her about Kelvin being married and about his criminal history in New Zealand. She suddenly became evasive and didn't want to speak to me anymore. I started crying and told her that my life was falling apart. Then she said that she was sorry and that they often don't have time to do the full background checks. I think she felt very guilty as I could hear her voice breaking and she started crying too."*
Counsel for Perfect Spouse intends to object to the evidence on the basis that it is *"irrelevant, hearsay, and opinion evidence".* Consider whether the objection will be successful. **[5 marks]**

Model Answer 1:

Relevance Relevant evidence is evidence that could rationally affect directly or indirectly the probability of the existence of a fact in issue: s 55. The evidence is relevant because it goes to the question whether PS was aware, through its employees, of the fact that there had been no background check of Brereton, and also because Raquel's statement (as discussed below) evidences knowledge of their inadequate background checks. The evidence is therefore prima facie admissible: s 56. Hearsay The evidence Anna will give is hearsay because it is evidence of a previous representation, ie statements made other than in the course of giving evidence. It is therefore

inadmissible under s 59. It is first-hand hearsay because Anna had personal knowledge of what Raquel said to her: see s 62. Opinion It is arguable that the evidence also contains statements of opinion. An opinion is an inference from observable and communicable data: Allstate v ANZ. Opinion evidence is not admissible to prove a fact in respect of which the opinion is asserted: s 76. Here, it might be argued that Raquel's statement that PS doesn't have time to do full background checks is a statement of her opinion of its capacity, rather than any statement of fact. The better view is that this is correct and that the statement constitutes an opinion. Further, it is not necessary to obtain Raquel's account of any matter that she saw, heard or perceived and so is not an admissible lay opinion: s 78. Nor does she have any expertise sufficient for s 79 purposes. Admission However, the hearsay and opinion rules do not apply to admissions: s 81. There is a strong argument that the statements of Raquel are admissions. An admission is a statement by a person who is or becomes party to a proceeding that is adverse to their interest. The statement is plainly adverse to PS's interest in the proceeding because it tends to show knowledge that the background checks were inadequate. Anna will argue that the statements of Raquel are attributable to PS under s 87(1)(b) because she is an employee and made statements within the course of her employment. However, PS will argue that Raquel is a relationship consultant who is neither qualified nor authorised to make statements about background checks; rather, her job is to match up clients. This is a weighty argument. However, given that Raquel may well have had knowledge of the inadequacy of the background checks, and that the court must find that a party made an admission if it is reasonably open (s 88), the better view is that the statements are admissible as admissions. Unfair prejudice Finally, although PS might argue that there is unfair prejudice as the court might attach too much weight to Raquel's statements and not account for her lack of knowledge, this is quite a weak argument and the better view is that the PV is not substantially outweighed by PE: s 135.

Model Answer 2:

Relevance Anna's evidence will be relevant if it could rationally affect the assessment of the probability of the existence of a fact in issue. Here, the evidence is relevant as to whether Perfect Spouse performed appropriate background checks. That objection will have no merit. Hearsay Anna's evidence contains both direct evidence and evidence of previous representations. Her evidence contains previous representations made by a person (both made by her, and 'Raquel') being adduced by the plaintiff to prove the existence of the asserted facts: s 59. Here, the plaintiff will place particular emphasis on the response from Racquel - that she 'was sorry' and said that Perfect Spouse didn't have time to perform the background checks. The defendant will argue that using the evidence in such a way is inadmissible to prove that they didn't perform the checks. In turn, the plaintiff will argue an exception ought apply as either (1) evidence of an admission (below), (2) or on the basis that Anna is giving evidence of a previous representation made by Raquel, who could reasonably be supposed to have personal knowledge of the asserted fact - that the checks weren't performed, and that this is admissible as FHH evidence. There's no suggestion Raquel was not competent at the time, although it's possible she didn't have first-hand knowledge of the events (e.g. she may have looked at her computer to determine that the search hadn't been performed, meaning this would be SHH or more remote). Assuming it were FHH, and Raquel is unavailable (in that she cannot be located), Anna's evidence of this previous representation would be admissible under s 63 as she heard it being made. Opinion Anna has given evidence that Raquel felt very guilty,

she could hear her voice breaking and she stared crying. She has also given evidence that Raquel was being evasive,. The defendant will argue that this is evidence of an opinion being used to prove the existence of facts about which the opinion was expressed, i.e. that Raquel was evasive and felt guilty. The plaintiff will argue certain aspects are opinion - e.g. that she heard her cry is not evidence of opinion, it is previous representation (admissible if above/below applies). As to her being guilty and evasive, they will argue that this is admissible lay opinion evidence as it's based on what Anna heard/perceived and the evidence is necessary to obtain an adequate account of her understanding of events: s 78. Applied here, she heard/perceived the crying and formed the opinion that Raquel was being evasive and was guilty, and that her voice was breaking, based on her perception of events. That evidence is necessary to obtain an adequate account of her understanding, although arguably that Raquel seemed 'guilty' wouldn't be, as this was merely speculation. Accordingly subject to this, it would be admissible opinion. Admission? The plaintiff could argue in any event that the opinion and hearsay rules ought not apply as this is evidence contains admissions made by Raquel - particularly the apology and statement that they didn't have enough time to make backgrround background checks. Here, it would be reasonably open for the court to find (although may need to be determined on voir dire) that 'Raquel', who answered the call and can be inferred is an employee, had authority to make such an admission on behalf of Perfect Spouse. Accordingly, that evidence would be admissible as evidence of an admission and hearsay/opinion wouldn't operate.

Question 24: Evidence:

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

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

(b) how the rule in *Jones v Dunkel* will apply to Perfect Spouse in relation to this issue;

(c) how the rule in section 38 of the *Evidence Act 2008* could operate in the event that Raquel gives evidence not in accordance with Perfect Spouse's instructions.

[6 marks]

Model Answer 1:

(a) The rule in Brown v Dunn is a procedural rule of fairness that creates a requirement to cross-examine a witness if it is intended to contend that the witness's evidence or account should not be accepted. This involves giving a witness an opportunity to comment on or explain some matter in issue. This generally requires that only the substance and not every detail be put to the witness, although sometimes a particular detail may be significant. The rule does not reverse the burden of proof in any proceeding. Here, PS's counsel [PSC] must: question Anna and put to her that the conversation between here and Raquel never happened and, essentially, that it was made up.

(b) The rule in Jones v Dunkel is that an adverse inference may be drawn from the failure of a party to adduce particular evidence (witness/document), where such evidence would reasonably be expected and there is no reasonable explanation or satisfactory answer for the failure. That is, an

inference that the uncalled evidence would not have assisted the party's case, which is particular relevant where it is the party which is the uncalled witness. Here, it would be considered that Raquel is in the camp of PS and would need to be called because her evidence would elucidate a particular matter being the conversation between her and Anna.

(c) PSC may, with leave (s 192 - here, likely given because of the importance of Raquel's evidence and need to get a complete account; note: advance ruling is possible per s 192A), to XXN Raquel (their own witness) under s 38 because Raquel has given unfavourable evidence; or is not making a genuine attempt to give evidence about the conversation, a matter about which she is reasonably supposed to know; or has made a prior inconsistent statement. The court will consider s 38(6) factors including notice (unclear here on the facts) and the likely scope of questioning. Here, it is likely that leave to XXN under s 38 will be granted. Once leave has been granted to XXN, PSC can put passages of the prior statement (assuming one was made to solicitors involved) per s 42 to Raquel and complying with the rules inf s 43 and also in Brown v Dunn (as above; and note operation of bar rule 67). As this substantially affects Raquel's credit and it occurs in XXN, it is arguable that no leave is required (s 103) and the evidence will then be admitted for its hearsay purpose (s 60). However, if for example Raquel denies the conversation or says that her statement made to the solicitors is inaccurate or doesn't recognise it, then PSC can tender the statement or call the witness to the statement in rebuttal udner s 106. Note that the court may then place limits on its use (s 136).

Model Answer 2:

(a) The rule of Browne v Dunn is a fundamental rule of fairness in the conduct of litigation that where a party proposes to lead evidence that contradicts or discredits an earlier witness, it must be put to the witness in XXN so they have the opportunity to respond. A breach can result in the witness being recalled per s 46, an adverse direction to the jury (not relevant for civil) or, in exceptional circumstances, the party may not be allowed to adduce the contradictory evidence. Here, Perfect Spouse's case is that Anna's discussion with Raquel did not occur, which is clearly inconsistent with Anna's evidence. Counsel should put to Anna that the discussion didn't happen and Raquel never made the comments Anna said she did.

(b) This is a civil proceeding, so the rule in Jones v Dunkel may be applied. Here, if Perfect Spouse decides not to call Raquel and does not provide a satisfactory explanation, the rule in Jones v Dunkel will apply to allow the judge to infer from Perfect Spouse's failure to call Raquel (who is an employee and can be presumed to be in their camp) that Raquel's evidence would not have assisted Perfect Spouse's case.

(c) Counsel cannot put leading questions to Raquel in examination in chief (presuming Raquel is Perfect Spouse's witness) (s 37). If Raquel's evidence departs from what counsel understands to be Perfect Spouse's position, counsel should seek leave to treat Raquel as unfavourable under s 38 on the basis the evidence she is giving is unfavourable and/or inconsistent with a prior statement she has made (assuming Perfect Spouse has previously asked for her statement re the conversation). The court will consider the factors in s 192 and is likely to grant leave here as would be unfair to Perfect Spouse to do otherwise. Once declared an unfavourable witness, counsel can put leading questions

to Raquel (s 42). Counsel must comply with s 43 and inform Raquel of enough of the circumstances of Perfect Spouse's case which is inconsistent with the evidence Raquel is now giving (presumably the previous statement from Raquel - not necessary to show Raquel any actual such document). This evidence is prima facie credibility evidence but it is evidence which could substantially affect the assessment of Raquel's credibility so it is not inadmissible for that reason (s 103). If Raquel continues to diverge from her previous evidence, counsel can rebut any deniable by tendering her previous statement under s 106. If Raquel hadn't made a formal statement, but spoke with a manager or someone at Perfect Spouse, could use oral XXN of the manager to rebut the denials under s 106. Leave is not required because evidence tends to prove a prior inconsistent statement. Once admitted for the credibility purpose, could use any previous statement for a hearsay purpose (s 60).

Question 25: Civil Procedure:

Assume that Anna succeeds in her action and obtains judgment in the sum of $575,000 against Perfect Spouse. Explain exactly what Anna would need to have done, by way of making an offer of compromise, to obtain an order for indemnity costs in relation to the entire proceeding. **[4 marks]**

Model Answer 1:

An offer of compromise is an offer to settle any claim in a civil proceeding on specified terms, prepared in accordance with O 26. At the very outset of the proceeding, Anna would need to have drafted an offer to settle the proceeding in writing, containing a statement that it was prepared in accordance with O 26, stating that it was exclusive or inclusive of costs, and that not expressed to be open for less than 14 days after service. The offer would need to have been for an amount that was no more favourable than the judgment she eventually received. So, for example, she could have made an offer to settle the proceeding for any amount up to $575,000, exclusive of costs. If PS rejected this offer, then Anna would have been entitled to indemnity costs from 11am on the second business day after the offer was served. This may not technically cover the entire proceeding, as Anna would have already incurred some costs in filing the claim, but it would cover almost all of her costs. Alternatively, Anna could issue a pre-litigation offer of compromise under r 26.08.1. This would have to be in writing and open for a reasonable time, and again for any amount up to $575,000. This would not have guaranteed her indemnity costs, however, because a court may only take such an offer into account in awarding costs.

Model Answer 2:

To serve an offer of compromise, Anna would have needed to serve a formal offer in writing to settle the proceeding for an amount equal to or less than the judgment sum ($575,000) and the offer must have complied with the requirements in SCR O 26: in writing; headed in the same way as any document prepared for use in court; states that it is served in accordance with O 26, states that it is inclusive of costs or that costs are to be paid in addition to the offer, and remain open for acceptance for not less than 14 days after service. The offer would have needed to be served before judgment (r 26.03(1)). Then, assuming Perfect Spouse did not accept the offer, then the costs presumption in r 26.08 would apply. Note that this does not appear to be a personal injury claim to there is no general presumption that Perfect Spouse pay the entirety of Anna's costs on an

indemnity basis. Rather, the presumption is that Perfect Spouse would pay Anna's costs on an ordinary basis up to 11am on the second business day after the offer served, and on an indemnity basis thereafter. Thus, in order to maximise the costs benefits and obtain indemnity costs for as much of the proceeding as possible, Anna would have needed to have served the offer as early as possible in the proceeding.