

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

1. The HKLS Examination was held as an open book examination. The examination paper has three questions, all carrying the same total marks of 50 marks. The candidates were required to answer two out of the three questions.
  
2. *Question Selection:* Almost all candidates chose to answer Question 1, which was on the topical issue of the institution of the Non-Permanent Judge of the Hong Kong Court of Final Appeal from a common law jurisdiction outside Hong Kong. There seems to be a relatively even division in the choice between Question 2, which concerned the protection of rights in the investigation of crimes and the prosecution of criminal offences, and Question 3, which concerned the approach of statutory interpretation in Hong Kong.
  
3. *Question 1:* This question has three parts. The *first part* asks candidates to discuss the purpose and advantages of the HKSAR being able to appoint Non-Permanent Judges from a common law jurisdiction outside Hong Kong and the HKCFA being able to invite them to sit in the adjudication of cases from time to time. This part therefore has two perspectives. Candidates provided a range of answers. The stronger answers referred to a variety of advantages, including drawing on the experience of senior common law judges, ensuring the benefit of comparative considerations, and reputational benefits for the Hong Kong Judiciary, the users of the Hong Kong legal system and the participants in the Hong Kong economy, including investors. Competent answers often referred to the quotation of Lord Cooke of Thorndon NPJ in the *Chen Li Hung* case (2000). Some answers described how judges of the different categories in the HKCFA are appointed and were not able to provide a fuller discussion of the advantages. The *second part* asks the candidates to discuss the relevance and importance of judicial independence and judicial integrity, on the part of the HKCFA, to the maintenance of the Rule of Law and holding the executive to account regarding administrative decisions. Candidates rightly discussed the jurisdiction exercised by the HKCFA to review legislation and administrative action, and the possible limitations to the exercise of such jurisdiction, often with examples, including the recent adjudications related to the Hong Kong National Security Law. Candidates who were able to outline the substantive content or qualities of the Rule of Law and judicial independence, but not being able to connection them to the work and working environment of the HKCFA, were unable to achieve a more than average score for this part. The *third part* seeks to direct the candidates to address the current debate about the continued use of Non-Permanent Judges from a common law jurisdiction outside Hong Kong. Many candidates answered with reference to a past discussion over a critique that Non-Permanent Judges from a common law jurisdiction outside Hong Kong were ‘parachute judges’ unfamiliar with Hong Kong. Only some candidates pointed to the factors for the longer term, including the presence of a pool of talent of local judges in the Hong Kong Judiciary and legal profession,

whether eminent jurists outside Hong Kong would be discouraged from accepting appointment because of critical opinions in their home countries, and whether there are subject matters that may not need the assistance of Non-Permanent Judges from a common law jurisdiction outside Hong Kong.

4. *Question 2:* This question has two parts sharing the theme of protection of the parties involved in the criminal justice process. The *first part* concerns crime detection and investigation. The *second part* concerns the prosecution of criminal offences. The question points out that all parties involved in the criminal justice process include complainants, victims, suspects, witnesses and defendants. Many candidates provided focussed on the protection by the Basic Law and the Hong Kong Bill of Rights for suspects and defendants, the two-tiered police complaint mechanism (of the Complaints Against Police Office and the Independent Police Complaints Council), and the Prosecution Code. Some candidates mentioned facilities protective of victims and witnesses. None were aware of a victims charter produced by the Department of Justice and the Hong Kong Police Force stating several specified rights. Some candidates included in the discussion the institution of the Ombudsman but they were not aware of Schedule 2 of the Ombudsman Ordinance (Cap 397), which provides, inter alia, that the following actions are not subject to investigation by the Ombudsman and her office: “2. The commencement or conduct of any proceedings, whether civil or criminal, before a court of law or tribunal in Hong Kong, including any decision whether or not to prosecute any person for an offence ... 9. Any action taken by ... the Hong Kong Police Force in relation to the prevention, detection or investigation of any crime or offence ...”.
5. *Question 3:* This question is focussed on the interpretation of statutes or legislation (Ordinances and subsidiary legislation). The *first part* asks for an outline of the general principles of statutory interpretation, and the *second* and the *third parts* asks about specific issues on the interpretation of statutes in Hong Kong. Regarding the *first part*, a competent answer would include a synthesis of section 19 of the Interpretation and General Clauses Ordinance (Cap.1), the approach of purposive interpretation coming from cases such as *HKSAR v Cheung Kwun Yin* (2009), the “rules” and/or presumptions of the common law in the interpretation of legislation, and intrinsic and extrinsic aids to interpretation (such as the explanatory memorandum to the Bill, the structure and related provisions in the same legislation, Law Reform Commission reports, and statement made by a responsible officer of the Government in the Legislative Council). However, a sizeable number of candidates gave answers based on the HKCFA’s approach in interpreting the Basic Law and these answers had to be scored as less than competent. Regarding the *second part*, a competent answer would need to address what the courts of the HKSAR adopt in interpreting a legislative provision in the English text and the Chinese text (which would include discussion of section 10B of the Interpretation and General Clauses Ordinance and the two step approach that ultimately seeks to best reconcile the texts with regard to the object and purpose of the legislation). An answer outlining the bilingual legal system of the HKSAR by reference to Article 9 of the Basic Law and the Official Languages Ordinance (Cap.5) is not sufficient. Regarding the *third*

*part*, the question asks of the limits under which courts can apply legislation to new circumstances. The topic had been in discussion recently; see *HKSAR v Yuong Ho Cheung* (2020) 23 HKCFAR 311 (paragraph 55) and *HKSAR v Chan Chun Kit* [2021] HKCA 1493 (11 October 2021) (paragraphs 25, 26, 66-71). While some candidates wrote to suggest a limited application of this notion, others, influenced by their choice to answer the first part of the question using the principles of interpretation of the Basic Law (a constitutional instrument), suggested a broad approach in applying legislation to changing social circumstances. The latter way of answer the *third part* had to be scored as less than competent.

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