

Recorder 2011 22/23 June 2011

Crime Qualifying Test Feedback Report

Purpose

The purpose of this report is to provide general feedback on candidate performance in the Recorder 2011 Crime Qualifying Test. The first part of the report describes how the Judicial Appointments Commission (JAC) developed the test and marking schedule, and how the test was structured.

The second part provides information on the overall performance of candidates in the Crime test, identifying areas where they performed well and where they performed poorly. The third part gives more detailed comments in relation to each of the ten questions in the test.

Qualities and abilities

The test was set to assess:

Intellectual capacity:

- High level of expertise in your chosen area or profession.
- Ability to quickly absorb and analyse information.
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire knowledge where necessary.

Authority and Communication skills:

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved.

Efficiency:

- Ability to work at speed and under pressure.
- Ability to organise time effectively and produce clear reasoned judgements expeditiously.

Development of the Crime test

The test and marking schedule were devised by two Circuit Judges, who are both experienced in the Crime jurisdiction.

The JAC Advisory Group offered advice and guidance during the test development. It is composed of senior judiciary and representatives of the legal profession.

In common with all qualifying tests used by the JAC, both the test and marking schedule were subject to an extensive quality – and equality – assurance process. The effectiveness of the test was assessed by means of a dry run with a range of volunteer barristers, solicitors and members of the legal professions.

Structure of the test

The 90 minute test presented candidates with ten questions based on three different case scenarios set in the Crime jurisdiction. The test paper was split into Parts A, B and C to reflect these three scenarios. – Part A had six questions with 72 marks in total available, Part B had three questions and a total of 32 marks available, Part C had one question with 26 marks in total available.

The Part A scenario dealt with two defendants who were facing a two count indictment related to a wounding and assault incident, where one of the defendants had previous convictions. The Part B scenario focused on a newly appointed Recorder, a week before sitting in court they had experienced a burglary. The judge's first case was a case of domestic burglary. In addition, on the sitting day, the Recorder unexpectedly encountered a family acquaintance in court. The Part C scenario was based on the trial of a defendant charged with grievous bodily harm.

Supporting materials were provided for all candidates immediately prior to the test. An additional 15 minutes was provided before the test for reading of these materials, and candidates were permitted to have these materials to hand throughout the test. The supporting materials provided extracts of relevant statutory law and practice guidance.

Marking schedule

The marking schedule provided suggested answers and a marking scheme for each question. It allowed for all answers that demonstrated the required qualities and abilities to be rewarded. 130 marks were available for responses against the marking schedule. Discretionary marks of up to two per question were available to the markers, with the exception of question ten where up to six discretionary marks were available. These could be awarded for the quality of the reasoning offered to support an alternative decision made by the candidate or an exceptional, well reasoned answer.

Marking of the test

The Senior Presiding Judge nominated seven judges experienced within the Crime jurisdiction to mark the test papers. JAC staff provided a full briefing to the markers at the outset of the marking exercise. The lead drafting judge also attended and contributed to this briefing.

The markers worked in pairs while marking test papers so that any queries could be professionally considered and reviewed with a marking colleague. Any subsequent decisions required on the interpretation of the marking schedule and use of discretionary marks were taken, only following a full discussion within the team and with the drafter. Such decisions were recorded and formed a precedent for the marking of subsequent test papers. All test papers were marked anonymously.

Moderation

Markers were invited to identify and put forward for moderation any test papers where it was felt that a strict application of the marking schedule had caused either over- or under- reward. A twenty per cent sample of the test scripts was selected for moderation. Those selected included the scripts identified as candidates for moderation by markers; samples of the high-, low- and mid-scoring test papers; a substantial proportion of those close to the prospective cut-off point for invitation to selection days; and a further random sample.

Such tests were re marked by a second marker, without sight of the original markers score schedule. Where the total for the whole paper awarded in the first and second marking differed, candidates were awarded the higher of the two overall marks.

The moderation process concluded that the markers had been consistent and fair during the first round of marking, and that marking overall had been fair and robust.

It is JAC policy for a Director and the JAC Commissioner assigned to the selection exercise to undertake separate quality assurance checks. As part of that process, a sample of papers was identified to be placed before the markers for review. Once all these steps had been completed, the Director and Assigned Commissioner were satisfied that the approach taken to marking had been robust, consistent, and thorough.

Distribution of marks

The highest mark awarded was 89 out of a possible 130 total marks available, and the lowest mark awarded was 8.

General comments on candidate performance

General approach taken by markers

Although some questions offered opportunities for candidates to demonstrate good reasoning skills, other questions could be answered briefly and succinctly. Candidates who appreciated this difference and focused their efforts and time accordingly, tended to perform better.

Markers used discretionary marks sparingly and had a previously agreed understanding of the circumstances in which discretionary marks would be awarded, in order to ensure a consistent approach. A good example of this was in relation to question 4, where it was agreed that discretionary marks could be awarded to candidates who mentioned warning the jury in relation to the use of special measures. In addition, where a candidate offered a well-reasoned alternative in some questions which was considered an arguably appropriate decision, markers also attributed discretionary marks.

The markers agreed that they would overlook minor errors made by candidates where the meaning was obvious, for example referring to Smith when they clearly meant Jones.

Overall conclusion

Overall, markers found the standard of papers to be mixed. As will be seen from the comments on each individual question below, candidates generally tended to score more highly on some questions than others. Candidates who managed their time efficiently often scored significantly better than those who failed to answer all questions, especially as the final question carried a significant number of marks.

Markers felt that the test provided a challenging but fair opportunity for all candidates to demonstrate their suitability for the post of Recorder in relation to the qualities and abilities. Time was clearly an issue for a significant number of candidates, some of whom started well in the test but lost marks towards the end.

Areas where candidates could have attracted more marks

Some candidates failed to pay sufficient attention to the specific aspects of the question and what was actually being asked. Several candidates also failed to appreciate that many questions required a specific decision. Answers which were conditional or qualified using expressions such as “potentially”, “possibly” or “I might” were not awarded points where the question required a clear decision. For example, question 3 required a candidate to state the test (fear) not simply refer to which section the test can be found (the answer given by some candidates). In effect candidates were being asked to demonstrate acting as a judge.

Where appropriate, bullet point answers tended to score effectively and allowed a candidate to include more core information and to gain a time advantage.

Well-structured rulings gained candidates additional discretionary marks.

Those candidates who spent a little time making an informed decision as to the order in which they answered the questions, and especially in allocating the time to be spent on each question, tended to score more highly than those who simply answered the questions in numerical order without planning.

Most candidates chose to provide word processed answers. Where candidates had elected to hand write scripts, there were some examples where the handwriting was so poor as to be illegible, with an inevitable impact on the marks that could be awarded.

Question by question comment:

PART A

Question 1 asked candidates to consider a prosecution application to adduce previous convictions of Smith, asking a) under which gateways the evidence is admissible and b) what the ruling would be.

The first part of this question could properly be answered by bullet points. A number of candidates wasted time by referring to all gateways or gave unnecessary additional information. Marks were deducted for inclusion of clearly incorrect gateways. This is a good example of a question where time could be gained or lost depending on the candidate's appreciation of the specific terms of the question.

In part b) most, but not all candidates did give a ruling, although quite often these were conditional on further information or poorly structured. Higher marks were obtained by those candidates who demonstrated in their reasoning a good understanding of the purposes to which the bad character evidence could be put.

Question 2 concentrated on the inferences to be drawn from silence in interview, how the jury ought to be directed in approaching the issue of drawing inferences and finally the effect of legal advice to make no comment.

In broad terms candidates scored poorly on this question. In part a) there was a general failure to specify the inferences that could actually be drawn by the jury – many candidates simply said that the jury could draw such inferences as were proper. This form of answer failed to assist the jury as to whether a particular inference could or could not properly be drawn. A good answer in this part of the question indicated that the inferences that might be drawn were, that the defendant had since invented his account or had tailored it to fit the prosecution case.

In part b) candidates often failed to mention basic points that a judge must direct the jury upon when dealing with adverse inferences. For example, many candidates failed to state that an adverse inference should not be drawn if the explanation for silence was considered reasonable. In this area it was not uncommon for candidates to score few marks.

In relation to the effect of legal advice, many candidates correctly stated that a defendant was not entitled to hide behind legal advice, but very few stated that an adverse inference must not be drawn if the defendant genuinely relied on the legal advice.

Question 3:

Part a) asked candidates to identify the test (“what is the test?”), when a witness is afraid to give evidence.

Part b) asked candidates to set out the procedure and nature of enquiries that they would follow in order to make a decision as to whether the test was satisfied.

Part c) asked for the considerations to be identified that should be taken into account when deciding whether to allow the evidence to be read.

Part d) required candidates to set out their ruling on the application.

In part a) many candidates simply indicated the statutory source for the test rather than the test itself. This showed a failure to focus carefully on the terms of the question.

In part b) few candidates made it clear that this procedure would take place in the absence of the jury. However, generally most candidates considered that more information should be sought and evidence given as would enable them to make an informed decision.

In part c) most candidates mentioned the difficulties for the defence concerning cross examination and the potential use of special measures, however significantly fewer mentioned the interests of justice and the weight to be given to untested evidence.

In part d) not all candidates gave a recognisable ruling but those who did scored well, and, as indicated above reasoned rulings gained discretionary marks.

Question 4 proceeded on the assumption that the witness must give oral evidence and asked the candidate to identify what other measures were available to assist him in doing so, and part b) asked what order would be made.

Most candidates scored well in this question by identifying appropriate special measures, for example, allowing the evidence to be given from behind a screen and the use of video.

Question 5 required candidates to identify points that Jones should have included in his defence statement.

Answers offered in merely general terms failed to score highly. Candidates who chose to answer in detail and/or with bullet points tended to score higher marks. Some of the points that Jones should have included in his defence statement were that his defence is self defence, that he was attacked first and that he disputes causation of injury.

Question 6 raised issues concerning a defendant's election not to give evidence.

Part a) asked "what do you do?" on being informed of this decision. Most scored well by giving full details of the appropriate procedure though often the fact that this takes place in the presence of the jury was omitted.

Part b) asked what inferences might be drawn by the jury from the fact that the defendant did not give evidence. This required a simple answer that referred to the available inference namely that the jury might conclude that the defendant had no answer to the prosecution case or none that would stand up to scrutiny.

Part c) required a candidate to identify the appropriate direction to the jury. Of the various points that could have been mentioned it was notable that most candidates failed to direct the jury that they must not assume that the defendant is guilty merely because he has chosen not to give evidence.

PART B

Question 7 required candidates to consider the implications that arose when confronted with a prosecutor who had some personal connection to the judge.

Most candidates indicated that they did have some concerns and would raise them with counsel in court, hear submissions and make a decision as to whether or not to recuse themselves on the individual merits of each case.

Question 8 concerned a sentence in a domestic burglary case where the judge had recently been the victim of a similar offence.

Candidates were asked whether they would deal with the case, how they would deal with any concerns and what matters they would take into consideration when deciding whether or not to recuse themselves. Most candidates rightly said that they would deal with the case, having received submissions from counsel. Some candidates referred to the health issues affecting the defendant but few to the need to complete the list efficiently and to the fact that the case could not be transferred to another court, as was indicated clearly in the question.

Question 9 raised issues that are commonly encountered relating to an unrealistic basis of plea agreed between the parties, and how candidates would deal with any concerns that they had about proceeding on this basis.

Almost all candidates indicated that they had concerns and would not deal with the case on the agreed basis. Few candidates indicated that they would enquire whether the prosecutor had consulted the victim and taken her views into account before agreeing the basis. As to part b), this asked candidates to identify the matters that they took into account when deciding how to proceed. In this area the majority indicated that they would direct a Newton hearing notwithstanding the agreed basis. Almost all candidates indicated that the proper sentence could not be established without the factual basis being resolved. In answering this question a significant number of candidates failed to gain marks by reason of providing qualified or conditional answers.

PART C

Question 10 related to an application by the defence that there was no case to answer at the close of the prosecution case.

The evidence in the case was clearly set out in the question and candidates were asked the following “You must now rule on whether or not to stop the case. Write down your ruling”. This question carried by far the greatest number of marks of any question in the test. A number of candidates, recognising this, chose to answer this question first. Others ran out of time and did not answer this question at all, thereby depriving themselves of the opportunity to score many marks. A maximum number of 6 discretionary marks were available for candidates who gave well-reasoned rulings.

A good answer to this question showed an appreciation of the value of structure in rulings. Further, a clear review of the evidence attracted a number of marks. Many candidates, however, failed to appreciate that the defence submission was made under the first limb of Galbraith (no evidence), as was clearly stated in the question, and therefore that it was appropriate to deal firstly with that point. Many candidates simply proceeded to deal with the submission on the basis that there was some evidence. A good analysis led a candidate to reject the actual submission and then went on to identify the second limb of Galbraith as being the appropriate test to consider on the facts (some evidence, but of a tenuous character). Thanking counsel for their submissions and showing sensitivity to the victim's injuries was rare, yet both points carried marks.