

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 UNIT 12 – PUBLIC LAW

JUNE 2023

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

All the candidates had revised sufficient material to enable them to make genuine attempts to answer four questions.

In the problem questions (Section B) the top candidate was able to identify the issues raised by the facts and applied the law effectively and in detail, reaching well-reasoned conclusions. The other candidates, while generally able to identify the majority of issues in most of the problem questions, were not as consistent in their application of the law to the facts, and their analysis was at times superficial.

Overall the answers to the essay questions (Section A) were not as good as those for the problem questions. Candidates need to read the command words carefully, and ensure they provide critical evaluation where it is required, rather than providing answers that are merely descriptive.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

No candidates answered Question 1.

Question 2

This was a question in two parts. The first part covered how the Westminster Parliament has devolved powers to Scotland, while the second part covered how devolution has impacted parliamentary supremacy. The candidates covered the basics of devolution well and also showed some knowledge of recent developments. The candidates defined parliamentary supremacy well, although two of them struggled to deal with implied repeal effectively as they did not demonstrate sound understanding of constitutional statutes.

Question 3

This question required candidates to evaluate whether the law on privacy protected the freedom of the press. Unfortunately, one candidate who scored a lower mark tended to make broad generalisations about privacy and freedom of expression and was not able to analyse the key issues raised by the question in sufficient depth. Another candidate identified the main issues, enabling them to evaluate the relevant case law, albeit somewhat superficially, but their answer lacked the clarity needed for a higher mark.

A good answer to this question could be structured as follows:

- Potential conflict between Articles 8 and 10 ECHR
- Historically no tort of privacy in English law, but development of 'horizontal effect' principle post-HRA 1998
- Claimant needs to establish their Article 8 rights have been engaged – 'reasonable expectation of privacy'
- Courts balance claimant's Article 8 rights with newspaper's Article 10 rights (Campbell v MGN (1984))
- Conclusion.

No candidates answered Question 4.

Section B

Question 1

One candidate structured their answer systematically, identifying which facts gave rise to a given ground of review. They analysed the majority of the potential grounds of review for each potential claimant, though did miss some points. Another candidate was less well organised in their answer and failed to identify some grounds of review. Neither candidate dealt with the ouster clause well.

Question 2

The question covered police powers of search, arrest etc. The top candidate used their statute book effectively and identified the sections in PACE that related to the police powers that were being exercised in the question. They also used case law effectively and applied the law to the facts well, reaching well-reasoned conclusions regarding the legality of the police conduct in question.

Other candidates' answers tended to be superficial and did not analyse the issues in sufficient depth and also contained errors; e.g. not realising that on the facts it was unlikely that the police would be able to refuse an arrested person access to a solicitor; the circumstances in which such access may be refused are limited.

Question 3

In part (a) of this question, regarding police powers to control processions and meetings and to carry out searches, a candidate with a higher mark applied the law regarding police powers to the facts effectively, reaching sound conclusions in relation to the police conduct described in the question. However, another candidate did not deal with the power to control processions adequately, though analysed the power to control meetings effectively.

As regards part (b) regarding which criminal offences an individual might have committed, candidates dealt with offences under Part I of the Public Order Act 1986 well (e.g. violent disorder), but did not cover the possibility of an offence under s 12, failing to comply with a condition imposed by the police.

No candidates answered Question 4.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 UNIT 12 – PUBLIC LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none">• Background to the HRA: incorporates the Convention rights in Schedule 1 into UK law• Section 2: duty to 'take into account' decisions of the European Court of Human Rights; e.g. <u>Ullah</u> principle• Section 3: interpretative obligation on the courts; e.g. <u>Ghaidan v Godin-Mendoza</u> (2004)• Section 4: declarations of incompatibility; e.g. <u>Bellinger v Bellinger</u> (2003)• Section 6: unlawful for public authorities to act incompatibly with Convention rights• Section 10: power to make remedial order where declaration of incompatibility issued	13



	<ul style="list-style-type: none"> Section 19: duty on government minister to make statement of compatibility or that government nonetheless wishes to proceed <p>Responses could include:</p> <ul style="list-style-type: none"> Possible shift in approach of UK courts to judgments of the European Court of Human Rights 	
1(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> HRA and parliamentary sovereignty; <ul style="list-style-type: none"> HRA does not prevent Parliament enacting incompatible legislation Declaration of incompatibility does not invalidate offending Act Political pressure on minister to make statement of compatibility and on government to amend/repeal incompatible legislation <p>Responses could include:</p> <ul style="list-style-type: none"> Principle of legality: Lord Hoffmann (<u>R v Secretary of State for the Home Department, ex p. Simms</u> (2000)) Government proposals to 'update' HRA 	12
Question 1 Total:25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> Devolution legislation: Scotland Acts 1998, 2012 and 2016 Definition of 'devolved matters' and 'reserved matters'; policy areas affected Scottish Parliament's legislative competence: can legislate on all issues apart from reserved matters Supremacy of UK Parliament: impact of Sewel Convention Impact of independence referendum: devolving of further powers Scotland Act 2016 – codification of Sewel Convention, referendum requirement Case law (e.g. <u>Miller (No.1)</u> (2017), <u>Continuity Bill</u> case (2018), <u>Lord Advocate's reference re independence referendum</u> (2022)) <p>Responses could include:</p> <ul style="list-style-type: none"> Disagreements between Scottish and Westminster Governments regarding Brexit 	10

2(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Dicey’s definition of parliamentary sovereignty, including <ul style="list-style-type: none"> - Parliament’s unlimited legislative competence - No person/body can question an Act of Parliament • Express/implied repeal • Definition of implied repeal (<u>Ellen Street Estates v Minister of Health</u> (1934)) <ul style="list-style-type: none"> - Qualification of doctrine in relation to ‘constitutional statutes’ (<u>Thoburn v Sunderland City Council</u> (2002)) - Definition of constitutional statutes to include Scotland Act 1998 (as amended) • Permanent status of Scottish Government and Parliament • Referendum requirement to abolish Scottish Government and Parliament • Political constraints on the repeal of the Scotland Act; constitutional crisis likely if UK Parliament seeks to undermine devolution settlement <p>Responses could include:</p> <ul style="list-style-type: none"> • Referendum requirement as manner and form provision (<u>A-G of NSW v Trethowan</u> (1932)) • ‘Enrolled Act’ rule: courts cannot scrutinise parliamentary procedure 	15
------	--	----

Question 2 Total:25 marks

Question Number	Suggested Points for Responses	Marks (Max)
3	<p>Responses should include:</p> <ul style="list-style-type: none"> • No right to privacy in English law (<u>Wainwright v Home Office</u> (2006)) • Human Rights Act 1998: Horizontal effect of Convention rights (<u>Douglas v Hello! Ltd</u> (2005)) <ul style="list-style-type: none"> - Article 8: ECHR: right to private and family life - Development of breach of confidence as vehicle for enforcing Convention rights • Reasonable expectation of privacy <ul style="list-style-type: none"> - Analysis of case law such as <u>Murray v Express Newspapers Ltd</u> (2007) regarding circumstances leading to a reasonable expectation of privacy • Article 10 ECHR: Newspaper’s right to freedom of expression • Analysis of Proportionality: Approach of courts where two Convention rights are involved • Evaluation of case law in which courts seek to strike an appropriate balance between the right to private life and freedom of expression (<u>Campbell v MGN</u> (2005)) 	25



	Responses could include: <ul style="list-style-type: none"> • Development of tort of misuse of private information 	
Question 3 Total:25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4	<p>Responses should include:</p> <ul style="list-style-type: none"> • Aim of FOIA to provide public access to information held by public bodies • Definition/examples of public authorities • Duty of public body to respond to FOI request unless exempt • ‘Class’ or absolute exemptions • ‘Qualified’ exemptions – public authority must apply public interest test • Information Commissioner - Enforcement notice • Ministerial veto <ul style="list-style-type: none"> - May override Information Commissioner - Subject to judicial review (<u>Evans v Attorney-General</u> (2015)) • Critique of FOIA; e.g. <ul style="list-style-type: none"> - Scope of exemptions - Effect of ministerial veto <p>Responses could include:</p> <ul style="list-style-type: none"> • Certain bodies only covered for some information; e.g. public service broadcasters (<u>BBC v Silver</u> (2012)) • Appeals process 	25
Question 4 Total:25 marks		

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1	<ul style="list-style-type: none"> • Amenability of decision for review/standing to bring claim including pressure group/remedy • Effect of ouster • Grounds: Lord Diplock’s categorisation • Nazreen <ul style="list-style-type: none"> - Illegality: fettering of discretion - Illegality: relevant considerations ignored - Illegality: ulterior purpose/ irrelevant considerations • The Alliance <ul style="list-style-type: none"> - Irrationality: <u>Wednesbury</u> (1948) unreasonableness - Procedural impropriety: rule against bias/ direct interest • Reasoned application to the facts which is supported by authority • Response is appropriately structured 	25



	<p>Responses should include:</p> <ul style="list-style-type: none"> • Amenability/ Standing <ul style="list-style-type: none"> - The CSLA is a public body - Public law matter - Standing - in particular the Alliance as a pressure group (<u>ex p. WDM (1995)</u>) • Timing • Remedies – see below • Ouster: Complete ouster clauses do not protect ‘nullities’ (<u>Anisminic v FCC (1969)</u>) • Nazreen <ul style="list-style-type: none"> - Illegality: Fettering of discretion: over-rigid application of policy; CSLA should be willing to listen to someone with something new to say (<u>British Oxygen v Ministry of Technology (1970)</u>); - Illegality: Failing to take into account relevant considerations; Nazreen’s excellent reputation/ references/ business plan (<u>Roberts v Hopwood (1925)</u>) - Illegality: Ulterior purpose; financial viability of well-established business is an improper purpose (<u>Congreve v HO (1976)</u> and/or irrelevant consideration (<u>Padfield v Minister of Agriculture (1968)</u>) • The Alliance <ul style="list-style-type: none"> - Irrationality: definition of <u>Wednesbury (1948)</u> unreasonableness - Procedural impropriety: rule against bias; Jefferson has direct interest due to his loan to BPD (<u>Dimes v Grand Junction Canal (1852)</u>) • Remedy: quashing order <p>Responses could include</p> <ul style="list-style-type: none"> • Whether quashing order could be prospective only <p>This question should be marked flexibly; e.g. candidates who cover illegality or procedural impropriety well even if they omit irrationality can still obtain high marks. Also, discretion to award marks for other reasonable arguments.</p>	
Question 1 Total:25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
2	<p>Responses should include:</p> <ul style="list-style-type: none"> • Arrest <ul style="list-style-type: none"> - Power of arrest – s 24(3) PACE: reasonable grounds for suspecting an offence has been committed - Arrest necessary – s 24(5) PACE - to allow prompt and effective investigation of the offence (s 24(5)(e)) - Manner of arrest – fact of arrest and grounds, even if obvious (s 28) - PC Watling does not state grounds of arrest adequately • Detention at police station <ul style="list-style-type: none"> - Arrest lawful once s 28(4) complied with - Detention reviews not carried out every six hours (s 40) • Refusal of access to solicitor <ul style="list-style-type: none"> - Right to consult a solicitor (s 58) - May be delayed if access will hinder the recovery of any property obtained as a result of an indictable offence; theft is indictable - Written authorisation provided by officer of correct rank (superintendent) - <u>Samuel</u> (1988) – police objections have to relate to specific solicitor • Search of house <ul style="list-style-type: none"> - Power to enter premises occupied by person arrested for indictable offence subject to written authorisation by inspector or above (s 18) - Reasonable grounds for suspicion that there is evidence at the premises relating to that offence or to connected/similar indictable offence - Search of flat unlawful: No written authorisation by inspector, even if reasonable grounds for suspicion that evidence at the premises exists • Analysis of ss 76 and 78 and relevant case law <ul style="list-style-type: none"> - s 76 - confession inadmissible if obtained by oppression or in circumstances which make it unreliable - s 78 – discretion to exclude evidence if its admission would have adverse effect on fairness of proceedings <p>Responses could include:</p> <ul style="list-style-type: none"> • Section 117: Arrest of Janice unlawful, so police cannot use reasonable force • Police complied with s 30: Janice taken to police station promptly after arrest • Access to solicitor – right to a fair trial (Article 6 ECHR) 	25
Question 2 Total:25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<ul style="list-style-type: none"> • The march <ul style="list-style-type: none"> - Section 12 POA 1986 – Power of senior police officer to impose conditions on ‘public processions’ - Grounds for imposing conditions • The meeting <ul style="list-style-type: none"> - Section 14 POA – Power of senior police officer to impose conditions on a ‘public assembly’ - Grounds for imposing conditions • Stop and search <ul style="list-style-type: none"> - Police power to stop and search persons (s 1 PACE) - Conditions for lawful search • Reasoned application to the facts which is supported by authority • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • The March <ul style="list-style-type: none"> - Section 12 Public Order Act 1986 (POA) – Senior police officer may give directions imposing conditions if he reasonably believes that public procession will cause serious public disorder/ damage/ disruption or has intimidatory purpose - Disruption includes noise which may result in persons connected with organisation not being reasonably able, for a prolonged period of time, to carry on their activities - Senior police officer (in response to s 11 notice before the march): Chief officer of police, i.e. Chief Constable - Inspector Kempton not chief officer of police - Grounds for reasonable belief: march may generate noise, but unlikely to be for prolonged period • The Meeting <ul style="list-style-type: none"> - Section 14 POA – powers arise if meeting a ‘public assembly’ (s 16) - Definition of public assembly - Senior police officer may give directions imposing conditions if he reasonably believes that assembly will cause serious public disorder/ damage/ disruption or has intimidatory purpose - Grounds for reasonable belief – may disrupt visitors to pier, but unlikely to be sufficiently serious - PC Clyde – not the most senior officer present • Stop and search <ul style="list-style-type: none"> - Police power to stop and search for prohibited articles in public place (s 1(1) and (2) PACE)) 	16

	<ul style="list-style-type: none"> - Definition of 'prohibited article': 'offensive weapon' (s 1(7)/s 1(9)) - Reasonable grounds for suspicion – whether bulge in jacket provides grounds (s.1(3)) <p>Responses could include:</p> <ul style="list-style-type: none"> • Breach of the peace – whether police have power to disperse meeting due to possible breach of the peace (<u>Bibby v Chief Constable of Essex Police (2001)</u>) 	
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Failing to comply with s 12 condition <ul style="list-style-type: none"> - Offence if person knows or ought to know that the condition has been imposed - But condition was probably unlawful, so no offence committed • Violent disorder <ul style="list-style-type: none"> - Three or more persons used or threatened to use violence and the conduct of them (taken together) is such as to cause a person of reasonable firmness, if present, to fear for his safety. - Such a person does not actually need to be present - Offence probably committed <p>Responses could include:</p> <ul style="list-style-type: none"> • Consideration of alternatives; e.g. riot (s.1), affray (s.3), s.4, s.4A (use of threatening words) 	9
Question 3 Total:25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Illegal election practice <ul style="list-style-type: none"> - to make a false statement of fact regarding a candidate's personal character or conduct – the bribery allegation - with the purpose of affecting the return of any candidate at the election • Whether defendant had reasonable grounds for believing, and did believe, statement to be true – meeting with high-level employee • Conclusion <ul style="list-style-type: none"> - Possible that the election court will declare the by-election result void - Vacate the seat/disqualify Harry from standing. 	12

4(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Section 1 Contempt of Court Act 1981 – ‘strict liability rule’: Elements of the rule <ul style="list-style-type: none"> - Publication: s.2(1) – clearly satisfied; publication via social media - Substantial risk’ that the course of justice will be ‘seriously impeded or prejudiced’: s.2(2) – probably satisfied - Proceedings must be active: s.2(3) and (4), Schedule 1 - clearly satisfied • Defences: <ul style="list-style-type: none"> - Innocent publication: s.3 – not applicable on the facts - Contemporary report of legal proceedings: s.4 – not applicable on the facts; the social media posts go well beyond reporting • Discussion of public affairs: Publication made as part of a discussion in good faith of public affairs does not infringe the strict liability rule if risk of prejudice is merely incidental: s.5 (<u>A-G v English</u> (1983)) – not applicable on the facts <p>Responses could include:</p> <ul style="list-style-type: none"> • Comparison with common law contempt of court 	13
Question 4 Total:25 marks		