



## CHIEF EXAMINER REPORT

**JANUARY 2024**

**LEVEL 6 UNIT 12 - Public Law**

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

### Chief Examiner Overview

On the very limited evidence available due to the small cohort size, there is nothing to suggest any concern. However, the Chief Examiner wished to express the following:

- In the essay questions in Section A, better candidates answered both questions well, identifying the key issues, analysing and evaluating the topics in a systematic manner rather than simply writing out what they knew. Others had insufficient knowledge of the relevant constitutional principles relevant to Question 1 and struggled to evaluate them effectively.
- In the problem questions in Section B, better candidates were generally able to identify the issues raised by the questions and applied the law to the facts systematically, reaching well-reasoned conclusions. The cohort did seem to make some use of their statute books for Question 3 to cite the relevant sections of PACE, though they could have used them more fully to provide further detail of the applicable statutory provisions.

## Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking this examination limits the scope for constructive and valid feedback to be given and for firm conclusions to be reached and embraced for positive use by candidates.

Therefore, no feedback on candidate performance has been included.

### Section A

Question 1	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"><li>• Unwritten/uncodified nature of the UK constitution<ul style="list-style-type: none"><li>- Background/overview</li></ul></li><li>• Statute:<ul style="list-style-type: none"><li>- Examples of constitutional statutes; e.g. Bill of Rights 1689, Parliament Acts 1911 and 1949, Human Rights Act 1998, European Union (Withdrawal) Act 2018</li></ul></li><li>• Case law:<ul style="list-style-type: none"><li>- Common law; e.g. development of civil liberties/natural justice (<u>Entick v Carrington</u> (1765))</li><li>- Statutory interpretation (<u>Miller (No 1)</u> (2017))</li></ul></li><li>• Constitutional conventions<ul style="list-style-type: none"><li>- Definition (<u>Re amendment of the constitution of Canada</u> (1982))</li><li>- Examples, e.g. collective cabinet responsibility, Sewel Convention</li></ul></li><li>• Royal prerogative<ul style="list-style-type: none"><li>- Definition</li><li>- Examples, e.g. royal assent, signing of international treaties</li><li>- Links between prerogative and conventions</li></ul></li><li>• Arguments in favour of codification; e.g.<ul style="list-style-type: none"><li>- Clear and formal separation of powers</li><li>- More effective judicial protection of human rights</li><li>- Promotion of civic cohesion</li></ul></li><li>• Arguments against codification; e.g.<ul style="list-style-type: none"><li>- Legitimacy – who would draft it?</li><li>- Lack of flexibility – uncodified constitution can more readily adapt to changing circumstances</li><li>- Current system protects human rights adequately</li></ul></li><li>• Reasoned conclusion either supporting codification or opposing it</li><li>• For: codified constitution could remove anomalies in current devolution settlement</li><li>• Against: codified constitution would transfer power from elected Parliament to unelected judges</li></ul>	

Question 2a	6 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Reference to the three branches of government</li> <li>• Functions and personnel of the three branches should be kept separate</li> <li>• Check and balances - separation needed as safeguard against arbitrary government</li> <li>• Historical background - Montesquieu</li> </ul>	

Question 2b	19 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>(i) Executive/legislature <ul style="list-style-type: none"> <li>• How Parliament can hold the government to account; e.g. votes of no confidence, parliamentary questions/debates, select committees.</li> <li>• Areas of overlap, in particular the executive's dominance of Parliament</li> </ul> </li> <li>(ii) Executive and judiciary: <ul style="list-style-type: none"> <li>• Constitutional Reform Act 2005 (CRA): judicial appointments</li> <li>• Other safeguards; e.g. security of tenure/constitutional conventions</li> </ul> </li> <li>(iii) Judiciary and legislature: <ul style="list-style-type: none"> <li>• CRA: removed Law Lords from the House of Lords and created Supreme Court</li> <li>• Judicial law-making through case law</li> </ul> </li> <li>• Executive/legislature <ul style="list-style-type: none"> <li>- Risk of politicisation of judiciary</li> <li>- Quasi-judicial functions of ministers</li> </ul> </li> <li>• Judiciary/legislature: <ul style="list-style-type: none"> <li>- Limited powers/self-restraint of judiciary; e.g. no power to strike down statutes</li> </ul> </li> </ul>	

Question 3a	15 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Definition of defamation – elements of the tort</li> <li>• Need to strike balance between protection of reputation and freedom of expression</li> <li>• Publication on matter of public interest (s 4) - defendant must show the statement was on a matter of public interest and reasonable belief that its publication was in the public interest</li> <li>• Aim to protect serious investigatory journalism</li> <li>• Duty-interest test; factors to be considered and analysis</li> <li>• Other relevant case law, e.g. <u>Flood v Times</u> (2012)</li> <li>• Link with other protections in statute and case law; e.g. limitation on damages</li> </ul>	

Question 3b	10 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Section 10 CCA 1981: No court may order disclosure of sources except in the interest of justice/national security or for the prevention of disorder/crime</li> <li>• Case law regarding disclosure; e.g. <ul style="list-style-type: none"> <li>- National security; courts less likely to order disclosure</li> <li>- Interests of justice; dependent on specific facts of case</li> </ul> </li> <li>• Impact of Article 10 ECHR/ Interpretive obligation in s. 3 HRA 1998</li> <li>• Rule of law: Arbitrary action by Secretary of State</li> </ul>	

Question 4	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Freedom of expression and association – Articles 10 and 11 ECHR in relation to the English legal system/Human Rights Act 1998.</li> <li>• Statutory powers to control public processions, including provisions in POA 1986: <ul style="list-style-type: none"> <li>- Section 11: notice</li> <li>- Section 12: power of senior police officer to impose conditions on public processions</li> <li>- Section 13: power to apply for ban on processions</li> </ul> </li> <li>• Statutory powers to control public assemblies, including provisions in POA 1986: <ul style="list-style-type: none"> <li>- Section 14 – power of senior police officer to impose conditions on public assemblies</li> </ul> </li> <li>• Common law: breach of the peace <ul style="list-style-type: none"> <li>- Definition (<u>R v Howell</u> (1982))</li> <li>- Case law; e.g. <u>R (Laporte) v CC of Gloucestershire</u> (2006)</li> </ul> </li> <li>• Articles 10 and 11 as qualified rights <ul style="list-style-type: none"> <li>- Articles 10(2) and 11(2)</li> </ul> </li> <li>• Proportionality: test in <u>Bank Mellat v HM Treasury (No 2)</u> (2013) <ul style="list-style-type: none"> <li>- Case law; e.g. <u>Laporte</u> (above)</li> </ul> </li> <li>• Section 14A POA 1986: power to apply for ban on trespassory assemblies</li> <li>• Locking on offences: Public Order Act 2023</li> <li>• Rule of law: Statutory provisions and case law provide safeguards against arbitrary action</li> </ul>	

## Section B

Question 1	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"><li>• Dicey's definition of parliamentary sovereignty, including<ul style="list-style-type: none"><li>- Parliament's unlimited legislative competence</li><li>- No person/body can question an Act of Parliament</li></ul></li><li>• Enrolled Act rule: Courts will not normally scrutinise validity of Acts of Parliament (<u>Pickin v BRB (1974)</u>; cf. <u>R (Jackson) v Attorney-General (above)</u>)</li><li>• Use of Parliament Acts 1911-1949 procedure to enact PPA 2018<ul style="list-style-type: none"><li>- Parliament Acts reduced delaying power of the House of Lords</li><li>- Challenge to use of Parliament Act procedures in <u>R (Jackson) v Attorney General (above)</u>: 1911 Act could not be used to pass 1949 Act</li><li>- House of Lords rejected challenge: Parliament Acts can be used to pass any Public Bill other than one extending the life of Parliament</li></ul></li><li>• Express repeal - meaning</li><li>• Definition of implied repeal: Where two statutes conflict, the latter will prevail (<u>Ellen Street Estates v Minister of Health (1934)</u>)<ul style="list-style-type: none"><li>- Qualification of doctrine in relation to 'constitutional statutes' (<u>Thoburn v Sunderland City Council (2002)</u>)</li><li>- Analysis of constitutional statutes: statute that significantly affects fundamental rights and duties or the overarching relation between citizen and state</li></ul></li><li>• Conclusion: Whether use of Parliament Acts is unconstitutional</li><li>• Conclusion: Whether CPA 2023 repealed the inconsistent provisions of TBJA 2020</li><li>• Examples of statutes enacted using the Parliament Acts</li><li>• <i>Obiter</i> in <u>R (Jackson) v Attorney General (above)</u> on the power of the courts to strike down 'unconstitutional' statutes</li></ul>	

Question 2	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Amenability/ Standing <ul style="list-style-type: none"> <li>- The MGA is a public body</li> <li>- Public law matter</li> <li>- Standing</li> </ul> </li> <li>• Timing</li> <li>• Remedies – see below</li> <li>• Ouster: Complete ouster clauses do not protect ‘nullities’ (<u>Anisminic v FCC (1969)</u>)</li> <li>• Illegality: Fettering of discretion: over-rigid application of policy; MGA should be willing to listen to someone with something new to say (<u>British Oxygen v Ministry of Technology (1970)</u>);</li> <li>• Illegality: Failing to take into account relevant considerations; Latika unable to attend hospital due to her stroke (<u>Roberts v Hopwood (1925)</u>)</li> <li>• Illegality: Ulterior purpose; encouraging Maths teachers to work in state schools is an improper purpose (<u>Congreve v HO (1976)</u> and/or irrelevant consideration (<u>Padfield v Minister of Agriculture (1968)</u>)</li> <li>• Irrationality: definition of <u>Wednesbury (1948)</u> unreasonableness</li> <li>• Procedural impropriety: rule against bias; Dr Ainslie likely to have either a direct interest (<u>Dimes v Grand Junction Canal (1852)</u>) or indirect interest (<u>Porter v Magill (2001)</u>) due to successful negligence claim against him</li> <li>• Remedy: quashing order</li> <li>• Whether Dr Ainslie’s conduct could constitute misfeasance in public office</li> </ul>	

Question 3	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Arrest <ul style="list-style-type: none"> <li>- Power of arrest – s 24(3) PACE: reasonable grounds for suspecting an offence has been committed</li> <li>- Arrest necessary – s 24(5) PACE - to allow prompt and effective investigation of the offence (s 24(5)(e))</li> <li>- Manner of arrest – fact of arrest and grounds, even if obvious (s 28)</li> <li>- PC Carey does not state grounds of arrest adequately</li> </ul> </li> <li>• Section 117: Arrest of Rachel unlawful, so police cannot use reasonable force; force used may be unreasonable</li> <li>• Detention at police station <ul style="list-style-type: none"> <li>- Arrest lawful once s 28(4) complied with</li> <li>- Detention reviews not carried out very six hours (s 40)</li> </ul> </li> <li>• Refusal of access to wife <ul style="list-style-type: none"> <li>- Right to have someone informed of arrest and detention (s 56)</li> <li>- Police may delay if for up to 36 hours if reasonable grounds for believing that telling named person of arrest will <u>lead</u> to interference with or harm to evidence connected with an indictable offence: assault with intent to cause abh is indictable, but tenuous grounds for reasonable belief</li> <li>- Written authorisation must be provided by officer of correct rank (inspector): Sergeant (wrong rank) signed authorisation</li> </ul> </li> <li>• Search of flat <ul style="list-style-type: none"> <li>- Power to enter premises occupied by person arrested for indictable offence subject to written authorisation by inspector or above (s 18)</li> <li>- Reasonable grounds for suspicion that there is evidence at the premises relating to that offence or to connected/similar indictable offence</li> <li>- Search of flat unlawful: No written authorisation by inspector, even if reasonable grounds for suspicion that evidence at the premises exists</li> </ul> </li> <li>• Seizure of birds' eggs <ul style="list-style-type: none"> <li>- Power to seize where reasonable grounds exist for believing items obtained in consequence of an offence (s 19)</li> <li>- Seizure necessary to prevent loss etc of items</li> <li>- Reasonable grounds may exist, but seizure unlawful as search itself is unlawful</li> </ul> </li> <li>• Police complied with s 30: Rachel taken to police station promptly after arrest</li> <li>• Illegality of search: possible impact on admissibility of birds' eggs in evidence at subsequent trial</li> </ul>	



Question 4a	12 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Crown Proceedings Act 1947: ended Crown immunity for breach of contract</li> <li>• Principle of executive necessity as justification for conduct which would otherwise be a breach of contract; e.g. <u>Amphitrite v R</u> (1921)</li> <li>• Whether appropriation by Parliament of requisite funds is a condition precedent to the validity of Crown contracts; e.g. <u>Churchward v R</u> (1865)</li> <li>• Contract entered into as part of ordinary functions of government enforceable against the Crown; e.g. <u>Bardolph v NSW</u> (1934)</li> <li>• Even if executive necessity succeeds, Abstotic entitled to a <i>quantum meruit</i> payment</li> </ul>	

Question 4b	13 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Explanation of PII and its development through case law – courts moving away from original deferential approach</li> <li>• Distinction between class claims and contents claims: <ul style="list-style-type: none"> <li>- Class claims where disclosure would normally not be ordered because of the category to which the document belonged;</li> <li>- Contents claims where disclosure should not be ordered because the document's contents should remain confidential</li> </ul> </li> <li>• Background to and discussion of Scott Report</li> <li>• Courts less likely to order disclosure in class claims than contents claims</li> </ul>	