

**CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS**

**JANUARY 2020**

**LEVEL 3 - UNIT 11 – CRIMINAL LITIGATION**

**Note to Candidates and Learning Centre Tutors:**

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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**

Overall the paper was done reasonably well by many candidates. Some candidates excelled and had prepared adequately for the exam whilst others were very under prepared and either had not put the work in or were not ready to sit the paper.

Candidates generally answer certain topics, such as arrest and detention and procedure and funding better than others, such as disclosure. However, there was an exception to this in that candidates struggled with one of the arrest questions as it concerned citizens arrest under s.24A PACE which is less commonly examined than police powers of arrest under s.24 PACE.

Candidates and learning centres should remember that every learning outcome in the unit specification has to be examined and should, therefore, be revised.

It is important to ensure a certain level of detail is developed during revision, including relevant case law or detail of specific legislative provisions to allow questions to be answered fully. Candidates and learning centres should also remember that each Act needs to be outlined in full the first time it is referred

to, for example Police and Criminal Evidence Act (PACE) 1984. It is then fine to abbreviate the case reference throughout the remainder of the paper. Where candidates have not done this then they are losing marks, even where they may in fact know the name of the Act. Over the whole paper candidates could potentially lose several marks for this one simple issue. Candidates are also reminded that they need to cite the specific section of the Act where at all possible, for example s.63 Police and Criminal Evidence Act 1984.

It is highly recommended that candidates attempt past papers and carefully look at the suggested answers, in particular what each question asks and the depth of answer expected to achieve good marks.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1

(a)(i) This question concerned arrest procedure. It was generally answered well, although some candidates mentioned both s.24 PACE and s.28 PACE when the question required only s.28 and s.30. Some candidates were confused and focused on s.24 rather than s.28 and lost marks as a result. Candidates are advised to ensure that they understand the distinction between grounds for arrest and the procedure on arrest.

(ii) This was a straightforward application question and candidates answered it well, even those who had confused what was required in 1(a)(i)

(b)(i) This question was done relatively well by most candidates who managed to identify the correct provision and one or two additional points. The case law and the European Convention on Human Rights (ECHR) references were the weak areas and candidates are advised to ensure that they prepare with sufficient detail including specific provisions and case law.

(b)(ii) As with 1(a)(ii) candidates did well with this application question.

(c) This question was done well with candidates picking up most of the available marks. Candidates needed to make more reference to specific legal provisions i.e. Code C of PACE. Also, candidates are advised to be specific in the examples that they select from the case study, for example, citing oppressive behaviour by the police, but also explaining what the behaviour was, such as slamming on the desk or shouting. Candidates are advised to make full use of the case study when answering the application questions.

### Question 2

(a) This question was done very well.

(b) Most candidates were able to cite at least two of the four functions.

(c) Most candidates did well on this question, identifying that aspects of the legal advisor role involve advising the magistrates on law and procedure, with some candidates identifying other functions such as administrative functions.

(d) This question required an element of legal knowledge and application and was done reasonably well. Most candidates identified that Bobby was likely to

be granted bail. There was scope for candidates to include greater detail about reasons for bail being granted. This relies on candidates demonstrating specific knowledge about the relevant law, i.e. the Bail Act 1976. Good answers made reference to specific reasons why an accused may be denied bail, i.e. if the court feels that they would not surrender to custody, that they would commit another crime or offence while on bail, or that they would interfere with witnesses. Good answers would have used the case study to explain whether any of these reasons applied to Bobby.

(e) This question proved challenging for many candidates. Stronger candidates were able to identify the relevant law and to explain the duty to disclose material that meets the disclosure test, and were also able to cite the two parts of that test. Good answers needed to explain the disclosure test, i.e. to disclose material which undermines the prosecution or assists the defence. This is a topic that candidates need to study in detail.

(f) This question also proved challenging for most candidates. Again, the stronger candidates understood the disclosure issues in this case and were able to apply their knowledge of disclosure to the case study. For many, the lack of knowledge of disclosure meant that they did not appreciate the need to consider the witness statement of Mrs Leech with reference to the disclosure test.

(g) This question, concerning the exclusion of confession evidence, resulted in mixed responses from candidates. Many were able to cite at least one relevant provision, for example s.76 or s.78 PACE, but there was some confusion about the nature of those provisions. Only some candidates were able to clearly explain the effect of the provisions. This is an area for centres and candidates to focus on for revision, to promote better understanding of the potential for exclusion of evidence. Candidates should be able to correctly cite the provision, for example section 76 PACE, together with a clear narrative explanation of that provision in order to gain the full credit.

(h) Candidates either knew this or they didn't. As a result, candidates either scored full marks or no marks. Those who did know it were able to cite the relevant case of R v Galbraith (1981) and give a clear explanation of the no-case to answer submission and its effect on the trial. Others spoke about the forensic evidence and making arguments about that.

### **Question 3**

(a)(i) This question proved challenging for many candidates. Although some were able to identify the fact that Kelly Jacklin potentially had a power of arrest under section 24A PACE, only stronger candidates were able to supply specific detail about the grounds of arrest. Candidates and centres are advised to focus more attention on s.24A in addition to s.24. S.24A is examinable and candidates missed out on a number of marks on this and the following question as they were not prepared for it. The case study featured a store detective and this should alert candidates to the fact that there may be an arrest under s.24A.

There was also some confusion about what is meant by the grounds for arrest. Candidates ought to be able to distinguish, for both s.24 and s.24A, between grounds for arrest and other aspects of an arrest, such as the necessity conditions or the procedure on arrest.

Stronger candidates appreciated that s.24A applies only to indictable offences and that indictable are all those which are triable on indictment, i.e. both either way offences and indictable only offence. Other candidates either did not identify this requirement for the offence to be 'indictable' or thought that it referred to indictable only offences.

(ii) Those candidates who did well in 3(a)(i) went on to do well in this application question also. However, only a small number performed well across both parts of 3(a). Some candidates picked up some marks in this part but were not able to supply the detailed explanation of the grounds in 3(a)(i).

(b) This question was mostly done well. Most candidates correctly identified non-intimate samples and the correct provision of PACE. Only some were able to give the level of detail about the effect of the provision and the circumstances within which non-intimate samples can be taken though.

(c) This was done very well and almost all candidates picked up the mark available.

(d) This question was also done very well. There were plenty of points which candidates could have selected and most candidates scored high marks.

(e) Performance was mixed on this question. Stronger candidates achieved high marks and demonstrated a good knowledge of this aspect of bail. Others struggled and were not able to show any knowledge. Many candidates did not know this provision or the rules regarding appeal of a bail decision. Generally, this was a weak area and candidates lost marks on this question. Candidates and centres are advised to ensure that they study appeal against bail decisions when studying other aspects of bail.

#### **Question 4**

(a)(i) Most candidates achieved at least one mark by identifying that it is concerned with ensuring that the defendant is dealt with leniently. Several were able to achieve the second mark by showing extra detail about the specific purpose of the plea in mitigation, such as to achieve a lesser sentence term or a lesser type of sentence.

(ii) This application question was mostly done well by candidates. Most candidates were able to achieve good marks.

(b) Most candidates gained some marks on this question, although performance was mixed. Some candidates had a very good knowledge of this funding and were able to clearly explain the relevant parts of LASPO. Others lacked the detail to achieve high marks.

## SUGGESTED ANSWERS

### LEVEL 3 - UNIT 11 – CRIMINAL LITIGATION

#### Question 1

(a)(i) Under s.28 Police and Criminal Evidence Act (PACE) 1984, a suspect must be told the facts of, and the grounds for, the arrest. The facts and grounds must be communicated to the suspect, even if they are obvious. There is no need for precise reasons or technical language – Adler v CPS (2013).

A suspect must also be cautioned. Section 30 PACE 1984 provides that a suspect must be taken to a designated police station as soon as is practicable after arrest.

(a)(ii) The correct procedure does not appear to have been followed, as Bobby does not appear to have been told of the fact of and grounds for the arrest. Bobby was not cautioned upon arrest. Bobby does appear to have been taken to the nearest police station.

(b)(i) Under s.117 PACE 1984, reasonable force may be used to carry out an arrest. What is reasonable depends on the circumstances. Excessive force may render the arrest unlawful. Any force used must occur after the officer has made the decision to arrest (Elkington v DPP (2012)). Article 3 European Convention on Human Rights (ECHR), prohibition against torture, inhuman or degrading treatment or punishment, may be applicable.

(b)(ii) The force used in Bobby's case appears to be unreasonable as Bobby was pushed to the ground, had his head smashed against the pavement and was elbowed in the back.

(c) Candidates could have given any four relevant breaches including the following:

There is no mention in the interview transcript of the caution being given at the start of the interview, which is in breach of Code C of PACE 1984. There appears to be the use of oppression by the police (s.76 PACE 1984), as there is shouting, slamming the photograph on the desk and persistent questioning. There is an inducement to confess, with the offer of being able to contact his mum and to have the glove returned (Code C). There is a question mark over Bobby's fitness to be interviewed (Code C); there is also a suggestion that he is in need of medical attention and this is not offered; there was no appropriate adult present (Code C) - we are told that Bobby has learning difficulties and as such he would be regarded as a vulnerable suspect and ought to have an appropriate adult present. There was no legal adviser present in the interview (Code C); Bobby requested a legal adviser but the police have continued without.

#### Question 2

(a) Candidates could have identified either-way offences and given examples such as burglary or theft. Candidates may have identified indictable only offences and given examples such as murder or manslaughter.

(b) Functions of the Magistrates' Court include bail hearings, trials, sentencing hearings, allocation hearings, sending/committal procedures and issuing warrants for arrest/search.

(c) Candidates could have identified any two of the following aspects of the role of legal adviser in the Magistrates' Court: being responsible for court administration; advising the magistrates on matters of law; evidence; and procedure.

(d) S.4 Bail Act 1976 provides a *prima facie* right to bail which means a presumption in favour of bail for the defendant. This puts the onus on the prosecution to show a good reason why bail should be withheld. There does not appear to be a good reason to refuse bail in Bobby's case and the likely outcome is that he will be granted unconditional bail.

(e) Under s.3 Criminal Procedure and Investigations Act 1996, the initial disclosure test, the prosecution must disclose any unused material that might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused. This is an objective test. Disclosure must be made as soon as practicable after the Defendant pleads guilty and if no such material exists then they must inform the Defendant of that.

(f) Under s.7A Criminal Procedure and Investigations Act (CPIA) 1996, the prosecution must serve any further unused material required in light of the defence statement, in compliance with its ongoing obligation under s.7 CPIA, which is to keep disclosure under review. Given that the statement of Mrs Leech could support the defence case and/or undermine the Prosecution case then there is a duty to disclose this.

(g) Under s.76 PACE 1984, a confession can be excluded if obtained by oppression or if it is unreliable because of things said or done. Confession evidence in breach of PACE is not automatically excluded, but under s.78 PACE 1984 it may be excluded if the inclusion of it would have an adverse effect on the fairness of the proceedings. Under s.82 PACE 1984, a court can exclude evidence where the prejudicial effect outweighs its value.

(h) The defence could make a submission of no case to answer (R v Galbraith (1981)). If successful, it means that the case effectively stops without the need for the defence to call any evidence at all.

### **Question 3**

(a)(i) Section 24A PACE 1984 provides Kelly Jacklin with a power of arrest. However, she can only arrest Paulina if she is in the act of committing an indictable offence or if she has reasonable grounds for suspecting her to be committing an indictable offence.

She could also have grounds for arrest where an indictable offence has been committed and she can arrest Paulina if she is guilty of the offence or if she has reasonable grounds for suspecting her to be guilty of it.

(ii) The offence in question is theft, which is indictable as it is triable either way. However, as Paulina is 50 metres away from the shop at the time Kelly Jacklin sees her, and as Kelly does not know what happened in the betting shop, the facts do not appear to support an arrest on the basis that an

indictable offence is being committed or Kelly Jacklin having reasonable grounds to suspect this. Kelly Jacklin does not know what has occurred in the betting shop with sufficient certainty to say that an offence has been committed.

(b) A hair sample is a non-intimate sample. Such samples may be taken under s.63 PACE 1984 with the consent of the person detained or, with the authority of a police inspector using reasonable force.

(c) The purpose of an allocation hearing is to determine the trial venue, i.e. Magistrates' or Crown Court, in cases of either way offences.

(d) Candidates could have cited factors which would support a decision to elect Crown Court trial such as higher acquittal rates; a judge is better equipped to deal with complex evidence/legally qualified; and it would mean trial by her peers. Candidates could also have cited factors which would potentially dissuade a defendant from electing Crown Court trial, such as the cost of Crown Court trials; and the time delay in getting to trial compared to magistrates. Other factors could be the increased formality and publicity of Crown Court trials.

(e) An accused who is refused bail by the magistrates can apply to a Crown Court judge under s.81 Senior Courts Act 1981. Applications are usually dealt with within 48 hours of the refusal, although the Defendant must give 24 hours notice to the prosecution of their intention to appeal. The appeal will be heard before a Crown Court judge in chambers and will comprise a re-hearing.

#### **Question 4**

(a)(i) The purpose of a plea in mitigation is to enable the defence to put forward an argument to persuade the court to sentence the defendant as leniently as possible. Its purpose could be to persuade the court to reduce the length of sentence, for example 100 hours of unpaid work in the community rather than 240, or 3 months imprisonment rather than 6 months. Its purpose could also be to persuade the court to sentence the defendant to a less severe type of sentence, for example, a community order rather than a term of imprisonment.

(a)(ii) Candidates could have identified the fact that Paulina has a previous conviction for theft as an aggravating factor. Another aggravating factor could be the fact that the offence appears to have been carried out under the influence of alcohol. Two mitigating factors could be the fact that she is a single parent to three young children and the fact of her recent cancer diagnosis and impending treatment.

(b) Under Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012 a representation order may be available if a defendant passes a means test and an interests of justice test. The interests of justice test is automatically passed in Paulina's case as her case is to be tried in the Crown Court. The application must be made online using eform CRM14. The means test is based on a contributory scheme, assessing income and capital.