CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 6 - UNIT 12 – PUBLIC LAW

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

Candidates generally performed well on this question paper, and some high marks were achieved. Results showed a wide range of marks with many candidates achieving Merits or Distinctions.

The strongest candidates were able to demonstrate breadth of knowledge and understanding across the Unit Specification and could cite specific sections of legislation as well as case law. These candidates were able to move beyond memorisation of facts to evaluation and analysis of the topics.

Amongst the weaker performances some factors stood out:

- Omission to use legislation either at all or accurately. This is surprising given that candidates are permitted to bring a statute book into the exam. For example, on Section B Q1 (P.A.C.E 1984) some candidates attempted to answer the question without citing specific sections from P.A.C.E 1984.
- Copying large sections of statute, with little commentary in which to demonstrate understanding.
- Omission to develop analysis and evaluation in Section A questions.
- Omission to balance law and application in Section B questions.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was a popular question and most candidates who answered it demonstrated a reasonable understanding of the doctrine of separation of powers and could give examples of overlaps between the legislature and executive as well as checks and balances. The best answers began with a clear definition of the doctrine and its purpose, and then moved on to analysis of the relationship between legislature and executive in the U.K. Strong candidates were able to cite examples of checks and balances that ranged across the Unit Specification.

Question 2

This question was answered by only a few candidates. Part (a) required analysis of S.76 and S.78 P.A.C.E. 1984 with consideration of case law. A good answer to this question explained the law clearly and then moved on to an evaluation of how effective (or not) the law is in safeguarding individuals' rights. Part (b) required understanding and analysis of an even smaller area of the Unit Specification, namely the powers of the police to take and retain fingerprints and DNA evidence. Weak answers simply repeated statute while a good answer included discussion of case law and critical evaluation of the powers given to the police by Parliament.

Question 3

Candidates struggled to write structured essays on this question. Defining terms and citing their sources is always a good place to begin, along with putting the question in its appropriate context (here, grounds for judicial review). Good answers discussed the grounds of irrationality and proportionality – but also recognised the importance of Wednesbury 'unreasonableness.' Those candidates who performed well were able to note the impact that Europe has played (both within EU Law as well as the jurisprudence of the European Court of Human Rights) in establishing the ground of proportionality in UK judicial review law. Evaluation of the grounds would have noted that judges making use of these grounds sometimes appear to stray into ruling on the merits of an executive decision or action and thus move into the political domain. Analysis of relevant case law was essential for this question.

Question 4

This was a popular question and there were a wide range of marks. Most candidates were able to explain the rule of law, but many struggled to fully describe and give examples of Parliament's privileges. Good answers focused initially on definitions of parliamentary privilege and rule of law, along with examples of the privileges Parliament enjoys and examples of how the rule of law manifests itself in practice. Once the basis is set with definitions, good answers proceeded to answer the question by assessing the importance of parliamentary privilege and whether its exercise conflicts with the rule of law.

There were some good examples of this. This will have necessitated demonstrating how they both intersect and conflict, along with case law and news examples that illustrate this.

Section B

Question 1

This question required a thorough and detailed knowledge and understanding of the Police and Criminal Evidence Act 1984 ('PACE 1984'). Most candidates who answered this question were able to identify and address the key events: the stop and search of Eugene and the subsequent arrest, Eugene's detention and then the search of the flat where Eugene had been staying. Some candidates demonstrated a weak understanding of the relevant PACE 1984 provisions, paraphrasing the police powers very casually. For example, the police do have a power to stop and search but must have a 'reasonable suspicion' that they will find stolen or prohibited articles. Very few candidates actually stated this – many referring to a 'belief', some mentioning no standard at all, others simply saying that the police must have a 'suspicion' – but not specifying what the suspicion must be about. With regards to the arrest, many candidates stated that Eugene should be 'read his rights.' A better answer would state that Eugene must be 'cautioned' and then state the caution. Considering that candidates are able to bring a statute book into the exam, this is disappointing. Credit was given for reasonable conclusions and application.

Question 2

This question required a comprehensive knowledge and understanding of judicial review.

(a)

This part of the question focused on grounds for judicial review. Most candidates were able to apply appropriate grounds to the facts sensibly. Some candidates relied too heavily on the ground of irrationality, when other grounds could have been more easily applied. For example, some candidates stated that the appointment of Andrea was irrational or unreasonable. In fact, the appointment is simply *ultra vires* considering the requirement in S.3 of the Act. Candidates were strong on the ground of procedural impropriety, though a better explanation of the two rules on natural justice would be helpful.

(b)

Most candidates handled the procedural points of judicial review well.

Question 3

Most candidates who answered this question were able to demonstrate understanding of the Public Order Act 1986 ('POA 1986') and the ECHR/Human Rights Act 1998. While candidates demonstrated understanding, this was not always supported by precise statutory references. For example, stating that the police must be given notice of a proposed procession only goes so far. Stating that this is found under S.11 of the POA 1986 is also necessary. Some candidates were aware of the case of Austin v

MPC (2005) though fewer showed understanding of R (on the application of Laporte) v Chief Constable of Gloucestershire (2007).

Question 4

This question required knowledge of a range of issues.

(a)

This part of the question required knowledge and application of various constitutional issues. Candidates needed to know the procedure for making an Act of Parliament as well as issues such as the convention of collective responsibility, the doctrine of the Supremacy of Parliament, and the impact of the HRA 1998 on the making of legislation. A good answer demonstrated wide understanding of the Unit Specification and synthesised various factors into appropriate advice to Andrea.

(b)

This part of the question focused more narrowly on the HRA 1998 and required detailed knowledge and understanding of its various sections and how to apply them to the facts of the scenario. Good answers addressed the local authority's duty under S.6 HRA 1998, as well as whether the parents are considered 'victims' under S.7 to bring a case. Ss.2 and 3 HRA 1998 should have been analysed and applied, along with the appropriate Convention rights. Some good candidates noted that Article 8 ECHR is a qualified right, and so the parents' rights will have to be balanced against the interests of the local authority as well as Charlie's. Some candidates were able to explain that a S.4 HRA 1998 declaration of incompatibility is an option for the court if the Act cannot be interpreted in accordance with the Convention rights.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 12 – PUBLIC LAW

SECTION A

Question 1

The doctrine of the separation of powers was described by Montesquieu, a French philosopher, in 1748. The state is composed of three branches: the legislature, the executive and the judiciary. The doctrine states that each branch should operate independently of the other two, having its own roles and responsibilities. In the context of the U.K.:

- Legislature: Parliament, or the body which makes the law.
- Executive: this is the body which governs and applies the law. In the U.K. the executive branch comprises the government, local authorities, the police, armed forces, and bodies such as the N.H.S., prison service, and the B.B.C.
- Judiciary: judges, magistrates and members of tribunals, whose role is to apply the law to disputes.

The focus in this question is on the role of Parliament and the Executive. For Montesquieu, this was a particularly vital relationship, and one where the separation of powers was acutely important. In his words: "When the legislative and executive powers are united in the same person ... or ... same body, there can be no liberty." (De L'Esprit de Lois, 1748). The English philosopher John Locke also wrote on the separation of powers, arguing that it is necessary to avoid the abuse of power which would follow if one person had the power to both make the law and apply it, the risk being that they would make the law to suit their own purposes.

It is generally accepted that a complete separation of powers is not possible in a well-functioning state, and that a certain amount of overlap in terms of roles is inevitable. Checks and balances are essential to prevent the abuse of power that Locke and Montesquieu knew and feared so much.

The main overlaps that exist between the executive and Parliament consist of:

- Prime Minister – who is both an M.P. in the House of Commons, and leader of the political party who leads the government of the day.
- Ministers – by convention all ministers are drawn from either the House of Commons or the House of Lords, but also hold key positions in the government.
- Lord Chancellor –since the changes made by the Constitutional Reform Act 2005, the Lord Chancellor is a member of the government and has a seat on the Prime Minister's cabinet but is also a member of the House of Commons or House of Lords.

As a result of these overlaps, the 'government' in the U.K. actually sits within the legislature. This was described by Bagehot as the 'efficient secret' of this constitution. Because the government of the day effectively controls Parliamentary business (providing that it has a sufficient majority) laws can be passed relatively quickly, and business can be accomplished efficiently. This stands in contrast to systems such as in the United States where the legislature and executive are quite separate, and can be run by different political parties, the result of which can be very ineffective and slow law-making.

The checks and balances that prevent this from becoming an 'elected dictatorship' (Lord Hailsham 1976) are governed by convention as well as statute. The House of Commons Disqualification Act 1975 limits to 95 the number of people the Prime Minister can appoint from Parliament to ministerial posts. Parliament checks the power of the executive further through the system of questions and debates. Once a week the Prime Minister appears before the House of Commons to be questioned by MPs and is held accountable for government policy. Other ministers must appear on a rota system before both Houses of Parliament. The system has been criticised as ineffective because Ministers have advance notice of the questions and can prepare answers. Many people find that Prime Minister's Questions is ineffective as it tends to dissolve into a shouting match with the leader of the Opposition party. Parliament also has the power to scrutinise the government through debates where ministers must explain and provide account for Bills and proposed policies.

The Constitutional Reform Act 2005 addresses separation of powers and the role of the Lord Chancellor. While the Lord Chancellor remains both a

government minister and a member of Parliament (either in the House of Commons of House of Lords) the holder of this position no longer holds the senior role of the Speaker in the House of Lords, and no longer sits as a member of the judiciary, thus demonstrating a restriction on this once significant area of overlap.

One of the most effective methods by which Parliament checks the powers of the Executive and maintains its independence is though the Select Committee system. There are select committees that 'shadow' each of the main government departments, plus others such as the Public Accounts Committee and the Committee on Standards and Privileges which meet regularly but are not tied to a particular department. Select Committees can call ministers, civil servants, interest group representatives, public authorities, academics, etc. to give evidence. Ministers and MP's cannot be compelled to give evidence, though civil servants can be. Hearings are open to the public, and reports are drawn up at the end of an inquiry and are available to both Parliament and the public. Whilst the committees lack sanctions, cannot compel ministers to attend, and sometimes do not gain the public's attention, the work they do is considered effective in careful scrutinising of work.

Under the Fixed Term Parliament Act 2011, Parliament has the authority to hold a vote of no-confidence in the government prior to the expiry of 5 years following a general election, further demonstrating the independence of the legislature from the executive branch.

Finally, while certain members of the government can exercise 'prerogative powers' without the consent of Parliament, it has long been the case that the prerogatives can be restricted or abolished by statute, demonstrating a further check the the legislature provides over the executive. The case of R (Miller) v Secretary of State for Exiting the European Union (2017) is an important recent case. The Supreme Court ruled that the executive government does not have the power to use its prerogative power to 'trigger' Article 50 of the European Communities Act 1972 to bring about Britain's exit from the EU, and that legislation is necessary to do so. This emphasises the control that the legislature in Parliament has over the use of executive power.

On the other side, the Executive checks the powers of Parliament through the fact that it controls the majority of MPs in the House of Commons. It also operates a system of 'whips' who pressure and cajole MPs of the majority party to support the government.

In summary, despite the lack of formal separation of powers and significant overlap, there are checks and balances which enable Parliament to hold the executive to account and vice versa. The adequacy of these checks and balances is, however, a matter that requires continual supervision through the courts, the media and ultimately the electorate.

Question 2(a)

The Police and Criminal Evidence Act 1984 ('PACE') addresses the issue of improperly obtained evidence in Sections 76 and 78. Together they provide guidance as to the extent to which such evidence can be used in criminal proceedings.

Section 76 provides that where a confession has been obtained by oppression or by any other means that makes it unreliable, the trial court 'shall not allow

the confession to be given in evidence.' The use of the words 'shall not allow' impose a mandatory obligation on a trial court to exclude such confessions. Examples of what amounts to 'oppression' are stated in s76(8) PACE and include torture, inhuman or degrading treatment by the police, and the use of threats of violence. The threshold for oppression is set high, and a court will require both a high level of improper action on the part of the police and clear evidence of this before excluding a confession on the basis of 'oppression'. The Court of Appeal held in R v Fulling (1987) that the word 'oppression' should be given its natural meaning - behaviour that is unjust, cruel, authority which is exercised in a burdensome, harsh or wrongful manner. In that case, oppression was not found to have led to the confession in question. In the case of R v Miller; Parris; Abdullahi (1993) the Court of Appeal held that the excessive questioning over many hours of a man with learning disabilities, led to a 'confession' that was inadmissible under s76 PACE. Conducting interviews in a raised voice and with shouting was held in R v Emmerson (1991) to fail to reach the threshold of oppression.

Section 76 also refers to confessions that are obtained by means that make them unreliable. This will include a range of circumstances of a procedural nature: very aggressive or hostile questioning, failure to caution the suspect, failure to follow the Codes of Practice on the treatment of a suspect in detention, failure to make accurate recordings of the interviews.

Exclusions under Section 76 are based on the principle that the form of treatment makes the resulting confession unreliable as evidence.

Section 78 provides that a trial court has a discretionary power to exclude evidence on which the prosecution intends to rely if, having regard to all the circumstances, including how the evidence was obtained, its admission would have an adverse effect on the fairness of the proceedings. This section focuses on evidence which would otherwise be admissible, but where it would be unfair to place it before a court. Examples of circumstances where s78 have been relied on include where a suspect has been denied a solicitor (R v Samuel (1998)), interviewing a suspect with insufficient breaks (R v Trussler (1988)) and tricking a suspect to believe that his fingerprints had been found (R v Mason (1988)).

Beyond PACE 1984, Parliament provides further safeguards to the use of improperly obtained evidence through the Human Rights Act 1998. Article 6 ECHR provides for the right to a fair hearing, which will include the admission of evidence that has been obtained correctly and fairly. Article 8 ECHR provides an individual with the right to respect for private and family life, which will provide some protection for unlawful searches of the person or premises. Finally, Article 3 ECHR provides for protection from torture, inhuman or degrading treatment or punishment, all potentially relevant in cases of improper questioning of suspects.

Through Ss 76 and 78 PACE, and the rights contained in the ECHR, Parliament has sought to protect suspects from having evidence (including confessions) admitted to trial which have been improperly obtained. Case law demonstrates that the courts are willing to challenge the use of police powers and make rulings that uphold citizens' rights to be treated fairly when in police custody and during questioning. It must be recognised, however, that improperly obtained evidence **can** be adduced in court (in contrast to other jurisdictions), as the so-called 'fruit of the poisoned tree' doctrine is not recognized in England and Wales. Particularly where a judge has discretion to

exclude or admit such evidence, case law can also demonstrate judicial willingness to admit evidence that has been improperly obtained if it is relevant.

2(b)

S.61 PACE permits the police to take fingerprints of a suspect without the suspect's consent, where the suspect is detained for or charged with a recordable offence. A recordable offence is one which carries a sentence of imprisonment and can also include other minor offences. Other bodily samples such as blood can be obtained under Ss. 62 and 63 PACE but only with the authorisation of a senior officer and with the consent of the suspect. The current law on retention of samples is found in the Protection of Freedoms Act 2012, which follows the case of S and Marper v United Kingdom (2010). The European Court of Human Rights held that the UK was in breach of Article 8 ECHR by allowing the indefinite retention of fingerprints and DNA samples. The Protection of Freedoms Act 2012 amends S64 PACE and provides that where a suspect is not convicted of an offence for which fingerprints or DNA samples were taken, those prints and samples are to be destroyed after a set period of time, usually 6 months. Where a person is convicted of an offence and fingerprints or DNA have been taken, then that evidence can be retained indefinitely. Where a person is charged but not convicted of an offence, samples and fingerprints can be retained for three years, with an extension for a further two years obtained from a district judge. This Act therefore seeks to strike a balance between protecting the Article 8 ECHR rights of suspects who are not charged or convicted, whilst allowing the police to conduct effective investigations.

Question 3

In Council for Civil Service Unions v Minister for the Civil Service (1985) Lord Diplock stated that the grounds for judicial review fall into three broad categories: illegality, irrationality and procedural impropriety. This question requires a focus and analysis of the middle ground, irrationality.

This ground is used when a decision appears to fall within the legal parameters of the power of the decision-maker but is nevertheless so absurd or extreme or unreasonable as to make it necessary for the court to interfere. Prior to CCSU v Minister for Civil Service (1985) the authority for this ground was the ruling of Lord Greene in Associated Provincial Picture Houses v Wednesbury Corporation (1948). In this case the Wednesbury Corporation had imposed a ban on children under the age of 15 entering cinemas on Sundays. The Associated Provincial Picture Houses brought a claim for judicial review of this decision. While the claim failed, the case is notable because Lord Greene described the circumstances where a court can interfere with an otherwise lawful decision by a public body. He stated that while a public body may act "within the four corners" of its legal powers, it may nevertheless come to a decision that is so unreasonable that no reasonable body could have ever come to it. In such a circumstance, the court is entitled to intervene.

In the case of CCSU v Minister for Civil Service (1985) Lord Diplock described what he understood by the ground of 'irrationality.' Referring to Wednesbury unreasonableness and restating it, he said it applied to a decision that is "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." It might be argued that this raises the threshold for a court

to intervene, as the decision must be 'outrageous', defying moral logic, and contrary to moral standards in order for the court to interfere, whereas under the Wednesbury test, the decision only has to be so unreasonable that no reasonable person would have made it.

More recently, courts have applied the concept of 'proportionality' derived from the European Court of Human Rights' jurisprudence and EU Law. Applying this ground, a court will first assess the objective that the decision-maker aims to achieve. It will then assess whether the means used to achieve it are no more than necessary. The key issue is whether the means employed are in balance with the objective. The test of proportionality has had a major impact in the field of human rights and EU law and must be applied in any case in which legal issues in these areas arise.

Judicial review is based on the principle that judges should not interfere with executive decisions, thus upholding the doctrine of the separation of powers. In judicial review proceedings, therefore, the judge is not concerned with the merits of a decision - whether a public body made a 'right' or 'wrong' decision. Rather, the judge should focus on whether the decision was lawful and within the decision-maker's powers as set down by Parliament or derived from the prerogative powers. When exercising the principle of proportionality, however, a judge does have to assess the merits of a decision – this is because the judge will have to assess the decision itself, in the context of the objective it aims to achieve. Some judges have, however, denied that this is the case.

The principles have been applied in many cases. In R (on the Application of Daly) v Secretary of State for the Home Department (2001) the approach for a judge to follow in applying the ground of proportionality was clarified. It was held that:

- There must be a legitimate objective;
- The measures used to meet that objective are connected to it;
- The measures used to meet that objective are no more than necessary to achieve it.

It has been applied in terrorism cases such as A v Secretary of State for the Home Department (2001) where the government's indefinite detention without trial of suspected terrorists was held by the House of Lords to be in breach of Article 5 ECHR and also disproportionate. In the later case of R (Lord Carlile of Berriew) v Secretary of State for the Home Department (2014) the Supreme Court applied the test of proportionality to a decision to refuse a visa to an Iranian woman invited to address Parliament but deferred to executive discretion to take action on national security issues. This was stated in other cases such as International Transport Roth GmbH and others v Secretary of State for the Home Department (2002) and SS (Nigeria) v Secretary of State for the Home Department)2013).

In summary, the test of proportionality is the appropriate test to apply in cases where Convention rights are engaged, as well as issues of E.U. law. It may be that this test will eventually supplant the tests of 'unreasonableness' and 'irrationality' as it is difficult to sustain a variety of tests for situations that are essentially of a similar nature.

Question 4

Parliamentary privilege refers to a collection of rules comprising both rights and immunities that belong to Parliament alone. The sources of these rules are in statute (The Bill of Rights 1689, Parliamentary Papers Act 1840 and Broadcasting Act 1990) as well as in common law precedent. The rules derive from the historical understanding of Parliament as the 'High Court of Parliament', having judicial control of its own members. The purpose behind the various privileges is to permit Parliament to function fully and effectively without interference from any outside body or individual. It is, most importantly, intended to allow Parliament to be independent from outside influences and pressures. Its origins lie in some significant historical events, notably the occurrences in 1629 when three Members of Parliament were arrested and sentenced to prison for using words amounting to 'sedition' in the eyes of Charles I. Later in 1640 Charles I himself stormed into Parliament with a small army to arrest those Members hostile to the Royalist cause.

The Bill of Rights 1689, Article 9, made it crystal clear that henceforth Parliament was to be free from outside interference and influence: "The freedom of speech or debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

The rights and immunities that fall under 'parliamentary privilege' fall into two categories: those claimed by the Speaker at the beginning of each new Parliament, and those accepted but not expressly claimed. The former include:

- Freedom from arrest
- Freedom of speech
- Freedom of access to the Crown through the Speaker
- That the Crown will place the most favourable interpretation on deliberations within the House

The latter include:

- Right of Parliament to regulate its own internal composition
- Right of Parliament to regulate its own internal proceedings
- Right to punish for breach of privilege and contempt
- Right of impeachment
- Right to control government finance and to initiate all financial legislation

The rule of law is one of the UK's key constitutional doctrines. It was described by A.V. Dicey (1885) as meaning that there should be an absence of arbitrary power within a State, that every individual is equal before the law, and that individual rights are protected by the ordinary law and applied in courts by judges. The rule of law therefore supports the idea that law is applied in a transparent way and that breaches of the law should be established in a legal manner before courts. The exercise of wide, arbitrary or retrospective power would therefore offend the idea of the rule of law. All individuals, including those who hold positions in government, are subject to the ordinary law of the country – no one is above the law. The constitutional rights of citizens are best protected through the ordinary judicial decisions of the courts and made by independent judges.

The rights and privileges of Parliament clearly have some legitimate purposes. Members of Parliament it is argued must feel free to speak freely in Parliamentary proceedings. Hence Article 9 Bill of Rights 1689 protects MPs or other persons from civil or criminal proceedings in respect of words used, meaning that they cannot be sued for defamation, libel, sedition, blasphemy and others. The privilege is absolute. However, there are also clear potential conflicts with the doctrine of the rule of law.

In the case of R v Chaytor (2010) the Supreme Court stated that Article 9 might best be limited to cases for which it was intended – where the executive or judiciary seek to interfere with Parliamentary business. In this case, three members of Parliament were facing criminal charges of false accounting and claimed that the criminal proceedings could not take place because this would breach parliamentary privilege. On the one hand, they claimed that the matter of their payments and expenses were a 'parliamentary proceeding' and hence protected under Article 9 Bill of Rights 1689. On the other hand, they claimed that Parliament has the right to manage its own affairs without interference from outside Parliament. The Supreme Court dismissed their appeals. They held that the submission of expenses claims did not amount to 'parliamentary proceedings' and hence is not protected by parliamentary privilege. Secondly, the court held that criminal matters have for some time been the responsibility of the courts, but that Parliament retains the privilege to deal with matters of contempt of Parliament. Matters relating to the expenses scheme do not fall under Parliament's exclusive jurisdiction especially where criminal offences have been committed.

A more recent example of conflict between parliamentary privilege and the rule of law is evident in the case of ABC and others v Telegraph Media Group Ltd (2018) where a member of the House of Lords, Lord Hain, revealed the identify of an individual who was the subject of an interim injunction granted by the Court of Appeal preventing the publication of anything which would reveal the identity of those involved in the case. Lord Hain did reveal the identity of Sir Philip Green, claiming that he could do so under parliamentary privilege of freedom of speech, protected by Article 9 of the Bill of Rights 1689, on the basis that this was necessary for the public interest. The rule of law demands that the rights of citizens are protected by the courts, and that citizens can rely on and trust in the certainty and predictability of the law being respected. For an MP to disregard a court order and speak out contrary to that order – relying on privilege - poses a great challenge to the rule of law. Additionally, the member of Parliament does not have the benefit that the judge will have had in hearing all the evidence, crucially from both sides.

To date, no legislation exists to limit the use of parliamentary privilege to disregard a court injunction, including the so-called 'super injunctions.' However, much has been said in criticism of the use of privilege to undermine the rulings or orders of a court.

SECTION B

Question 1

Eugene's experience raises several issues under the Police and Criminal Evidence Act 2004 and its accompanying Codes of Practice.

Stop and search

Case law demonstrates that the police are entitled to stop people to ask questions (Donnelly v Jackman (1970) but that no one is legally obliged to answer such questions short of being arrested (Rice v Connolly (1966). Collins v Willcock (1984) demonstrates that the police will act unlawfully at this point if they grab a person in such a way as to detain them, prior to conducting a stop and search or arrest. When the officer grabs Eugene 'forcibly by the arm, swings him around' it is possible that he acts unlawfully.

Under S.1 Police and Criminal Evidence Act 1984 ('PACE') a police officer may stop and search any person for stolen or prohibited articles as long as the officer has a reasonable suspicion that these will be found. Code of Practice A provides that reasonable suspicion must not be based on personal factors such as race, religion, dress and hairstyle. The facts suggest that Eugene may be of African descent, and is walking in the early evening, carrying a briefcase. On their own, these facts do not indicate grounds for reasonable suspicion that Eugene is in possession of stolen or prohibited articles. S.2 PACE provides safeguards regarding the search, namely that the officers must identify themselves and state the object of the search. The facts do not indicate that either has been done. Identification of the officers occurs only after the search has taken place, and as such the search is likely to be unlawful (Osman v DPP (1999)). Lawful stops and searches can only occur in public places or places to which the public have access. This part appears to be acceptable, as the search has occurred on a city street. A search of suit jacket, pockets and briefcase is acceptable.

Arrest

S.24 PACE provides that a police officer may arrest a person without warrant where an offence has been committed, is being committed, or may be committed – or where the officer has reasonable grounds to suspect any of these. The map of London with streets highlighted where burglaries have been known to take place may be sufficient to create a reasonable suspicion that an offence has taken place or will take place. The arrest must also be necessary according to one of the factors in s.24(4) PACE. S.24(4)(e) is the most likely to be relied upon, namely that the arrest is necessary to allow for prompt and effective investigation by the police.

Under s.28 PACE, the officers must comply with lawful arrest procedure. Eugene must be told of the fact and reasons for his arrest either at the time of the arrest or as soon as reasonably practicable afterwards. It does not appear from the facts that the reasons or grounds for the arrest are communicated, and so this part of the arrest is unlawful (Abbassy v MPC (1990)). Simply telling Eugene that he is being arrested is insufficient. Most importantly, Eugene must be cautioned, being told that 'you do not have to

say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.'

Under s.30 PACE Eugene must be taken to a designated police station as soon as practicable after the arrest. The incident with the police begins in the 'early evening' and they arrive at the station at 7:30pm. Therefore, it would be necessary to obtain information from Eugene and the officers as to the precise timing of the stop and search.

Under s.117 PACE the officers are permitted to use reasonable force in the exercise of any of their powers. When Eugene is put into the car he is 'forced' into the car – he also bumps his head as this happens. What is reasonable will depend on the circumstances, especially how Eugene is behaving. The facts suggest that Eugene is frightened and submissive. Unless he struggles or attempts violence or escape, it is possible that the police have used unreasonable force against Eugene.

<u>Detention</u>

At the station, Eugene must be taken before a custody officer, whose responsibility it is to ensure that Eugene is treated appropriately and in accordance with PACE as well as the Human Rights Act 1998. The custody officer must make a decision as to whether Eugene should be released or detained. Under s37 PACE, Eugene must be released unless there are reasonable grounds for believing that detention for questioning is necessary to secure or preserve evidence relating to the offence for which he has been arrested. The custody officer should at this point clarify to Eugene why he has been arrested.

Eugene can initially be detained for a maximum of 24 hours under s.41 PACE. During this time, he is entitled under s.56 to telephone a relative or friend, and under s.58 he is entitled to consult a solicitor. The arresting officer does tell Eugene that he can telephone a solicitor and does not overtly refuse this to happen. However, his words are not encouraging, and Eugene is not offered to consult with a duty solicitor. Questioning must comply with PACE provisions as well as Code of Practice C. Any interviews must be recorded or a written record made, which Eugene can read and consent to. Eugene must be cautioned every time he is interviewed. Further under Code C, breaks from questioning should be every two hours, and Eugene is entitled to a continuous period of rest of 8 hours. Meals and drinks should be provided at appropriate intervals.

Eugene's request for a short break to pray is refused. While this may not be specifically mentioned in Code of Practice C, the refusal is questionable as the tone of Code of Practice C is to respect the rights of the suspect as much as possible. As a public authority, the police also have a duty under s.6 Human Rights Act 1998 to ensure that their actions comply with Eugene's convention rights. His right under Article 9 to practice and manifest his religion. This right can be interfered with on the basis of public safety, protection of public order, protection of health or morals, or for the protection of the rights and freedoms of others. None of these would apply if Eugene simply wanted a short break alone to pray, and so the police may be acting unlawfully by not even considering his request. It has certainly not been put to the custody officer.

Search of flat

Under s.18 PACE the police have the power to conduct a search of premises occupied by a person under arrest for an indictable offence if they have a reasonable suspicion that evidence may exist of evidence relating to the offence for which Eugene was arrested or a similar offence. It is not clear whether the officers have obtained the required permission, nor whether they have established in interview sufficient evidence that a search of the flat will provide further evidence relating to burglary. Under s.19 the police can seize anything they believe has been obtained in the commission of an offence and seizure is necessary to prevent it being concealed, lost, damaged or destroyed. If the search under s.18 is unlawful, however, the police do not have the power to seize the cannabis they find. Evidence obtained by unfair means can be excluded under s78 PACE, though the case of R v Chalkley (1998) indicates that a court will focus more on the evidence rather than the method by which it was obtained. The method is only one factor to be considered (Button v Tannahill (2015).

Question 2(a)

The grounds for judicial review fall into three main groups as explained in CCSU v Minister for the Civil Service (1985): illegality, irrationality and procedural impropriety.

There are several issues of concern to Michael:

First, the local authority is potentially in breach of S.3 of the Act by not appointing three local growers. Public bodies act illegally if they exercise their powers contrary to the clear wording of a statute. S.3 explicitly states that a minimum of three local growers must be appointed to the association. As the local authority has acted contrary to the clear requirement of the Act, it is likely that its action will be declared *ultra vires*, and the appointment decision therefore void (Attorney-General v Fulham Corporation (1921)).

Secondly, it appears that the committee has focused on an issue that it should not have focused on in appointing Andrea. All public bodies have a duty to act according to the purpose for which their powers were established. If they fail to do so, and exercise their powers for an improper purpose, or by taking irrelevant considerations into account, they have acted ultra vires, and illegally (Congreve v Home Office (1976)). The Act's stated purpose is to support local farmers and small growers and address the issues of climate change. The facts state that Andrea is the CEO of a company that promotes the importing of food products for supermarkets and wholesalers. Andrea's interests appear, therefore, to be contrary to what the Act aims to promote. It therefore appears that the local authority might have taken into account Andrea's usefulness in terms of their development objectives, and not considered the relevant considerations of sustainability and reducing the impact of climate change.

Third, the local authority has failed to comply with its own procedure for responding to unsuccessful applicants. The ground of procedural impropriety includes the principle that individual applicants such as Michael have a legitimate expectation that public bodies will adhere to their own stated procedures (Mandalia v Home Secretary (2015) and R v North and East Devon Health Authority ex p Coughlan (2001)). Where a public body publicises its procedures, an individual such as Michael has a legitimate expectation that

that procedure will be followed – failure to do so means that the local authority has acted unlawfully.

Finally, there are several potential breaches on the ground of procedural impropriety in the way the appeal hearing is conducted. The right to a fair hearing, one of the two rules of natural justice, establishes minimal standards that make a hearing 'fair'. Michael has a legitimate expectation that his written statement will be considered as he was asked to bring one. He has a right to be able to prepare in reasonable time – one day's notice of an appeal is insufficient. Michael is also entitled to a reasonable amount of time to put his case – two minutes is probably insufficient. Finally, the committee's refusal to allow Michael's wife into the appeal hearing, whilst technically permissible, is also potentially a breach of the rules of natural justice, and hence a further example of procedural impropriety.

2(b)

The local authority is a public law body as it exercises functions laid down by Parliament – in this case, the Local Growers Act 2018. The issue here – namely the appointing of an association of local growers by the local authority – is a public law issue as the local growers association has the power to grant licenses to market traders.

Any application for judicial review must be made promptly, without delay and in any event within three months of the date of the decision which is being reviewed (s.31(6) SCA 1981 and Part 54.5 CPR).

When making his application, Michael will also need to identify an appropriate remedy for the court to make. All remedies in judicial review are discretionary, and, indeed, the court can find in Michael's favour and yet not award a particular remedy. The available remedies are outlined in s31 Supreme Court Act 1981, though the names of some were altered by the Civil Procedure Rules. Michael will want to have the local authority's appointment decision nullified by means of a quashing order on the basis that it acted ultra vires. This would then result in the local authority making a fresh decision within its legal powers. Michael will also be concerned to have the decision of the appeal committee quashed on the basis that it breached the rules of natural justice. Quashing orders can now be sought against all public bodies regardless of whether they 'act judicially' or perform administrative functions.

The applicant to a judicial review claim must have 'sufficient interest' (s. 31(3) SRA 1981). Michael clearly has sufficient interest as he applied for membership of the LGA and was turned down. However, whether the Eco Farmers Group has sufficient interest to apply is more questionable. The Eco Farmers Group has not been directly affected by the decision to refuse Michael's application, and therefore according to R v IRC ex p National Federation of Self-Employed and Small Businesses Ltd (1982) should not be able to apply. However, cases such as R v Secretary of State for Foreign Affairs ex p World Development Movement Ltd (1995) and R v S/S Environment ex parte Greenpeace (No 2) (1994) show more flexibility on this rule. It would need to be shown that:

- There is a need to uphold the rule of law
- The matter is an important one
- There is unlikely to be another responsible challenger

- The pressure group has greater expertise and knowledge than any single applicant

Applying these, it is likely that the Eco Farmers Group will be successful in bringing a claim as it is unlikely individual growers will have the resources to bring individual claims. They are also a suitable applicant as issues such as 'sustainability' and 'climate change' will be relevant.

Question 3

This scenario raises many issues relating to public order law. The traditional approach is that individuals are free to do whatever is not prohibited by law. This is now supported by Article 11 ECHR which states that everyone has the right to freedom of peaceful assembly to freedom of association with others .." Any restrictions on this right by the State must be prescribed by law and necessary in the interests of national security or public safety, for the prevention of disorder of crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Public procession

The general rule on public assemblies and processions is that people are free to meet together in public as long as this is not prohibited by law. Under the Public Order Act 1986 ('POA'), s.11 any person organising a procession must give the police six clear days' written notice to the police. Failure to do so constitutes a criminal offence. This appears to have been done, as the police have been in communication with the organisers.

Under s.12 POA a senior police officer may impose conditions on the procession being planned, or actually ban it, if he has reasonable belief that the procession will result in serious public disorder, serious damage to property, or serious disruption to the life of the community. Conditions may relate to the route, the number of people, or the day and time of the procession. We are told that the police have imposed a particular route on the procession, but that the organisers are unhappy with this. Whether the conditions are lawful depend on what route was originally planned and when, as well as how many people are expected to take part. The facts that they propose to distribute leaflets and talk to interested members of the public does not indicate that they intend to create public disorder.

A further condition is imposed on Sam during the procession, which is lawful under s.12 as long as it is imposed by a senior police officer. As the procession is approaching a park, and there are now 400 people involved, the request to avoid the park and move around it appears to be within the parameters of s.12, as the march may cause serious disruption to the life of the community – in this case a small park with small children playing.

Cordon in the park

When the marchers reach the park and enter it they form a public assembly, which is defined in s.16 POA as 20 or more persons who meet in a place which is wholly or partly open to the air. Under s.14 a senior police officer present at the scene may impose conditions on the assembly if he reasonably believes that it will result in serious public disorder, serious damage to property, or serious disruption to the life of the community – or where the purpose of the assembly is to intimidate others.

When the police decide to cordon off the park, thus containing everyone inside it, they are effectively imposing a condition on the assembly under s.16. This is reminiscent of the facts in Austin v MPC (2005) where a group of demonstrators were 'kettled' in a confined area in London to protect them from other protesters who were en route to disrupt the demonstration taking place there. The House of Lords ruled that the conditions imposed did not breach the rights of the participants under Article 5 ECHR to liberty, as they were unavoidable in the circumstances and necessary to prevent injury and damage and were no more restrictive than necessary to achieve those objectives.

Sam's arrest could be under s14 POA on the ground that he did not comply with the condition of moving the procession away from the park. In addition, he could be arrested for breach of the peace. Under the common law (R v Howell (1982), the police can arrest without warrant anyone who has committed a breach of peace in their presence, or anyone whom they reasonably believe is about to commit a breach of the peace. The police may have believed that as Sam was leading the procession, his arrest was necessary to bring the procession to an end. Under s28 PACE 1984, Sam must be told the fact and reason for his arrest. It appears here that Sam has been told the fact of his arrest, but not the reason. There is no set form of words the police must use (Abassy v MPC (1990) nor does a specific legal offence have to be cited. Sam should also be cautioned at this point. The participants holding the disturbing photographs have likely been arrested under s5 POA for using threatening or abusive words, behaviour or displays within the hearing or sight of a person likely to be caused harassment, alarm or distress. They will be guilty of the offence regardless of whether actual harassment, alarm or distress was actually caused as long as they intended their posters to be alarming or to cause distress, or were aware that it could be interpreted that way. However, the offence is only proved if the police have ordered them to desist and the participants have ignored that order.

Coach

The scenario regarding the coach is similar to the facts of R (on the application of Laporte) v Chief Constable of Gloucestershire (2007). The key issue in this case was whether the police can lawfully arrest for an anticipated breach of the peace. In that case there was evidence of members of a group disposed towards violence on the coach. The facts of this can be distinguished, as those on the coach are children and their parents and teachers. The police can only take their action on the grounds of an anticipated breach of the peace if this is actually imminent, meaning that it is about to happen or will take place in the very near future. We are told that there will be pickets outside the zoo, where participants will deter members of the public from entering the zoo. Whether the children's arrival will result in a breach of the peace in the sense of causing harm to a person or his property, or where a person is put in fear of being harmed through assault, affray, riot or unlawful assembly (R v Howell (1982)) is doubtful.

Question 4(a)

Andrea's bill appears to be a public bill, as it is made on behalf of her department. She is a minister, and so this is not a private member's bill. Andrea intends to present her Bill to the House of Commons for its First Reading even though some of her Cabinet colleagues have reservations about

it. The first reading is essentially a formality, and if successful a date will be set for the Second Reading.

At the second reading, the Minister who is proposing the Bill must make a statement under s.19 Human Rights Act 1998 as to whether the contents of the Bill are, or are not, compatible with the ECHR. This is known as a 'statement of compatibility.' Under the doctrine of the supremacy of Parliament, no Parliament is able to bind a future Parliament as to how it intends to legislate. The Human Rights Act 1998 is in one sense no different from any other Act of Parliament, and so cannot bind the Parliament to which Andrea proposes her Bill. In principle, then, Andrea is able to state (in writing) that there are still some concerns relating to the compatibility of her Bill with the ECHR.

Presenting the Bill to Parliament highlights some constitutional issues. On the one hand, if Andrea proceeds without the full support of her Cabinet colleagues, it raises issues of collective responsibility, a constitutional convention according to which members of the cabinet present a united voice to the public. Whilst free to disagree in private, decisions made in Cabinet must be collectively supported in public. The decision to proceed also raises issues of parliamentary supremacy. Andrea's Bill can become an Act of Parliament as long as there is a majority to Pass it – even if parts of it are contrary to the ECHR. This is the result of the principle of supremacy of Parliament as A.V. Dicey defined it in 1885: Parliament can make or unmake any law and no person or body has the power to question the validity of an Act of Parliament. The underlying message here is that in spite of its importance, the Human Rights Act 1998 does not bind future Parliaments. The enactment of the Bill will depend, however, on its process through Parliament, which is a matter of politics as opposed to law.

4(b)

The Human Rights Act 1998 ('HRA') provides in s.6 that it is unlawful for a public authority to act in a way that is incompatible with rights under the European Convention on Human Rights ('ECHR'). As Charlie is attending a state school this will be deemed a public authority as it is performing a public function in providing educational services and is under statutory and local education authority control.

Under s7 HRA a person who is a victim of a breach of a Convention right can bring proceedings in an appropriate court or tribunal. While the decision to give Charlie a social media account appears to affect only Charlie, Amy and Ben will argue that the decision also directly affects them as parents, as in their view the decision undermines their right to make decisions for Charlie while she is still a child. They are, therefore, victims of the decision as well and therefore have standing to bring a claim against the school. Also under s7 HRA any action brought by Amy and Ben must be within 1 year of the school's decision regarding Charlie.

Under s2 HRA a court hearing Amy and Ben's case must take into consideration the judgments and jurisprudence of the European Court of Human Rights in Strasbourg. This does not oblige a court to apply case law from Strasbourg, but it must 'take it into consideration' by being aware of it and make its decisions in the context of those decisions, whether their rulings are followed or not.

S3 HRA provides that "*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."* S.3 places an express duty on all UK courts and tribunals to interpret and apply domestic legislation in a way which makes it compatible with the principles of the Convention and the thinking of the Court in Strasbourg. This should be done even if the resulting interpretation is not literal, strained, or involves the reading in of words. In the case of S (Children) and Re W (Care Orders) (2002) the House of Lords explained that the exercise of s3 HRA does not allow a court to amend or rewrite Acts of Parliament – amendment of statutes is a matter entirely for Parliament. This is in accord with the doctrine of the supremacy of Parliament and also respects the doctrine of the separation of powers. Where an interpretation of an Act changes substantially the meaning of the Act or the intention of Parliament it can be said that the court has 'crossed the constitutional boundary' between legislature and judiciary.

In this case, a court hearing Amy and Ben's case will have to interpret and apply s.10 of the Act so far as is possible to be compatible with their rights under Article 8 ECHR to respect for their private and family life. The parents will argue that 'family life' includes making decisions about how to raise children, including what they should have access to via social media and how often. The court will consider that Article 8 is a qualified right and must be balanced with the State's obligation to protect legitimate aims such as public safety, protection of health or morals, and the rights and freedoms of others. The school will argue that interference with the parents' rights is in accordance with the law. They may also note that interference with the rights under Article 8 ECHR may be justified if it is necessary to protect children in terms of their health and morals and that the stated purpose of the Bill is to protect children from the potential harm of social media.

If s.10 of the Act cannot be interpreted in a way which is compatible with Article 8 ECHR a higher court (High Court or above) may make a declaration of incompatibility under s4 HRA 1998. A declaration of incompatibility does not invalidate a statutory provision. It does not affect the "validity, continuing operation or enforcement" of the statute. The statute remains fully in force and effective. The declaration rather signals to Parliament and the government that current legislation is felt by the court not to be in line with the Convention rights. As Parliament is supreme, the court cannot compel Parliament to amend the statute. Likewise, as the statute remains in force until such time as Parliament may choose to amend it, Amy and Ben will find that s10 of the Act remains in force.