CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

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 2021 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 performed well overall with marks ranging from 50%-82%, so everyone who sat this exam passed. A pass rate of 100%, even for a relatively small cohort of candidates, is very unusual and so is highly pleasing. There were, however, only one merit and one distinction which was a bit disappointing.

The main reasons for the comparatively low number of merits and distinctions are:

- Lack of structure in answers: While some candidates undoubtedly had sufficient knowledge and understanding to obtain higher marks, they did not organise their answers in a systematic manner but tended to jumble their thoughts on different aspects of the question together.

- Poor use of statute book: Two of the problem questions were very much based on applying statutory provisions to the facts. Although the statutes in question were in candidates' statute books, some candidates did not refer to specific provisions and provided very general answers.

- Lack of consistency: Some candidates who obtained marks in low 50s answered three questions satisfactorily, but then performed poorly on their fourth question. Despite managing to pass, it seems that these candidates might not have revised a sufficient range of topics and so did not attain as high a mark as they should have.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Question 1 was very popular; it involved analysing the separation of powers and the extent to which it existed in the UK with reference to a statement by a prominent judge. Most candidates were able to define the separation of powers well and the best answers were able to analyse the inter-relationship between

- the executive and the legislature,
- the judiciary and the executive, and
- the judiciary and the legislature.

However, some candidates did not distinguish sufficiently clearly between the different aspects of separation. Nonetheless, the question was well answered overall.

Question 2

Question 2 was a question in two parts. Part (a) required candidates to analyse how the Human Rights Act 1998 incorporated the European Convention on Human Rights into UK law with reference to case law, a key part of legal analysis. Part (b) required candidates to discuss whether the 1998 Act should be replaced by a British Bill of Rights. Only two candidates answered this question. One covered part (a) satisfactorily, but part (b) very poorly. The other covered part (a) poorly, but made a good effort to address the issues raised by part (b).

Question 3

Question 3 required candidates to evaluate whether the law on privacy struck a fair balance between the freedom of the press and the rights of the individual. It provided a good test of the candidates' ability to put together a systematic argument addressing the issues raised by the question. This question was generally well answered, with a majority of candidates adopting a clear structure, enabling them to evaluate the relevant case law. However, a few candidates did not answer this question in an organised manner, and consequently their answers lacked overall coherence as they made generalisations about privacy and the freedom of expression and did not analyse the key issues in the depth required for a higher mark.

Question 4

Question 4 required candidates to analyse whether the UK's electoral system should be reformed. Only one candidate answered this question. While they

were able to explain the different voting systems, they did not label them properly. Nonetheless, overall they covered the issues satisfactorily, albeit in a somewhat unstructured manner.

Section B

Question 1

This question was answered by many candidates and was generally well answered. As well as being able to identify the relevant grounds of judicial review, the better candidates structured their answers systematically, dealing with the preliminaries first and then analysing the potential grounds of review for each potential claimant; they identified clearly which facts gave rise to a given ground of review. Weaker candidates were disorganised in their answers and leapt around between the three potential claimants and, while they were usually able to recite the grounds for review, they struggled to identify which were actually relevant on the facts.

Question 2

This was a very popular question on police powers of search, arrest etc. Many candidates used their statute books effectively and identified the sections in PACE that related to the police powers that were being exercised in the question. Generally candidates used case law effectively and applied the law to the facts well, reaching well-reasoned conclusions regarding the legality of the police conduct in question. However, some candidates did not appreciate that on the facts it was unlikely that the police would be able to refuse an arrested person access to a solicitor; the circumstances in which such access may be refused are limited. Also, many candidates did not realise that the power to search premises under s 18 PACE depends on the written authorisation by an inspector or above.

A few candidates did not refer to the relevant sections of PACE which was surprising as they had access to the statute book. To do well in an exam question, it is vital to cite relevant authority.

Question 3

In part (a) of this question, regarding police powers to control processions and meetings and to carry out searches, most candidates applied the law regarding police powers to the facts effectively, reaching sound conclusions in relation to the police conduct described in the question. However, some candidates did not appreciate that the six clear days' notice usually required by s 11 might not be needed as on the facts it might not have been reasonably practicable to have given notice of that length.

Part (b), regarding which public order offences Toby might have committed, was generally well answered, though some candidates seemed uncertain about the key elements of the possible offences.

Again, as with Question 2, a few candidates did not make adequate use of their statute books in answering this question.

Question 4

Question 4 required candidates to analyse a problem scenario in order to establish whether a newspaper and a journalist had any defences to a defamation action. The stronger candidates analysed the issues effectively, showing sound knowledge of the definition of defamation and relevant defences in the Defamation Act 2013 and case law, in particular the public interest (previously Reynolds) defence. The weaker candidates did not analyse the defence of honest opinion in sufficient depth.

SUGGESTED ANSWERS

LEVEL 6 – UNIT 12 – PUBLIC LAW

SECTION A

Question 1

The separation of powers in its modern form is ascribed to Montesquieu, the French philosopher who developed the doctrine in his seminal work, L'esprit des Lois (1748). The doctrine provides there should be three separate branches of government with discrete functions and personnel. These branches are the legislative, executive and judicial.

- The legislative/law-making branch. This usually includes an elected legislature;
- The executive, responsible for administering the laws. This comprises central and local government, police, armed forces, etc.;
- The judiciary, responsible for resolving disputes regarding the law. Typically, there is an independent court system.

Montesquieu believed that the separation of powers was vital in securing liberty and averting tyranny. 'Checks and balances' were essential in thwarting any branch from accumulating excessive power.

In the UK the traditional view is that there is some separation of powers, but it remains largely informal because of the 'unwritten' or uncodified nature of the UK constitution. This contrasts sharply with the USA's constitution which provides for strict separation. To evaluate Lord Thomas's statement, the relationship between each of the branches will be examined in turn.

(i) Executive and legislature

Section 2 House of Commons Disqualification Act 1975 limits the number of government ministers who can sit in the Commons to 95, providing for some separation between Parliament (the legislature) and the executive. However, to remain in office those ministers must support the government.

There are numerous ways in which Parliament acts as a check on the government. Parliamentary debates, select committees, Prime Minister's question time and the convention of ministerial responsibility all help Parliament hold the government to account. Ultimately it can pass a vote of no confidence in the government which will lead to a general election unless an alternative government is formed (Fixed-term Parliaments Act 2011).

Conversely, significant areas of overlap between the executive and legislature exist. Government ministers (executive) are members of the House of Commons or Lords (legislature) as convention requires the government to be drawn from Parliament. Provided the government has a parliamentary majority, the executive dominates the legislature; accordingly, law-making powers and policy formation/implementation are largely in the same hands. This arguably breaches the doctrine significantly. However, before the December 2019 general election, the Conservative minority government was unable to implement its Brexit policy as the Commons took control of the parliamentary timetable and passed legislation forcing the government, against its will, to ask for a delay in the UK's exit from the EU.

The executive possesses substantial legislative power. Statute often enables ministers to enact delegated legislation, including 'Henry VIII' powers which empower them to repeal and amend even primary legislation.

This degree of executive dominance was labelled an '*elective dictatorship*' by the late Lord Hailsham; once a majority government has been elected, it can usually secure parliamentary support for its programme and legislation until the next general election.

(ii) Executive and judiciary

Historically the separation between the executive and judiciary was regarded as largely informal, but the Constitutional Reform Act 2005 ('CRA') formalised the separation between them considerably. For example, the creation of the independent Judicial Appointments Commission has restricted the Prime Minister's and Lord Chancellor's participation in judicial appointments. Ministers are precluded from attempting to influence judicial decisions through special access to judges, while the Lord Chancellor has an express statutory duty to uphold judicial independence.

Well established rules and conventions safeguarding judicial independence supplement these provisions:

- Judges possess security of tenure and cannot be dismissed by executive decree. Accordingly senior and Supreme Court judges hold office 'during good behaviour' and may only be removed following a petition to the monarch by both Houses of Parliament (s.11 Senior Courts Act 1981, s.33 CRA).

- By convention, government ministers do not criticise judges, although breaches of this convention have occurred. In particular ministers have sometimes criticised judicial decisions concerning human rights and Brexit related issues. In return, the judiciary refrains from participating in party politics.

- Judicial review enables the judiciary to exercise a check on the executive's decision-making.

Nonetheless, some areas exist where separation may be blurred. The Human Rights Act 1998 ('HRA') and Brexit-related decisions have led to allegations pf politicisation of the judiciary, as demonstrated by R (Miller) v Prime Minister and Cherry v Advocate General for Scotland (2019) where the Supreme Court declared the lengthy prorogation of Parliament was unlawful.

Some government ministers have quasi-judicial duties which are difficult to reconcile with their party-political roles. However, the Home Secretary's power to set the tariff of prisoners sentenced to life imprisonment was removed following the ECtHR judgment in Stafford v UK (2002).

(iii) Judiciary and Legislature

Significant judicial separation from the legislature exists. Judges cannot be MPs (s.1 House of Commons Disqualification Act 1975). Additionally, the CRA, by establishing the Supreme Court, ended the Law Lords' legislative role by removing the UK's highest court from the House of Lords.

The UK judiciary (unlike its US counterparts) lacks the power to declare statutes unconstitutional. While the UK judiciary may make a declaration of incompatibility under the HRA, this does not invalidate the incompatible statute. However, Lord Steyn suggested *obiter* in A-G v Jackson (2005) that judges might strike down legislation violating the rule of law; e.g. legislation excluding judicial review.

Pursuant to the *sub-judice* rule, Parliament should not debate cases currently before the courts, and MPs by convention should not criticise judicial decisions in Parliament.

Conversely judges play a quasi-legislative role through developing the common law and statutory interpretation (the legislative theory). Parliament may, however, always enact further legislation overruling judgments it dislikes (Burmah Oil v Lord Advocate (1965)). Furthermore, the judiciary exercises restraint in its law-making role.

Conclusion

The extensive overlap between the legislature and executive suggests that Lord Thomas's view that Parliament and the government are linked and are not isolated from each other is correct. Conversely, particularly after the changes introduced by the CRA 2005, a considerable degree of separation now exists between the judiciary and the other branches so it is arguable that the judiciary is somewhat isolated from the other branches.

Question 2(a)

Incorporation of the European Convention on Human Rights ('the ECHR')

The Human Rights Act 1998 ('HRA') incorporated most of the rights and freedoms contained in the European Convention on Human Rights ('ECHR'), an international treaty, into UK law. The ECHR protects rights such as the right to life (Article 2), the right not to be tortured (Article 3), the right to a fair trial (Article 6), the right to a private and family life (Article 8), and freedom of religion, expression and association (Articles 9-11).

Prior to the HRA, individuals in the UK could only enforce their ECHR rights by taking their case to the European Court of Human Rights ('ECtHR') in Strasbourg after exhausting all domestic remedies. Now the HRA enables individuals to rely on them before UK courts.

Most rights and freedoms protected by the ECHR are incorporated via the HRA (s.1 and Schedule 1). The HRA defines them as 'Convention rights'. Under s.2, courts must 'take into account' decisions of the European Court of Human Rights ('ECtHR'). Section 3 requires courts to interpret primary and secondary legislation in a way which gives effect to Convention rights so far as possible. Accordingly, in Ghaidan v Godin-Mendoza (2004) the House of Lords interpreted provisions in the Rent Act 1977 protecting the original tenant's surviving spouse to include the tenant's surviving same-sex partner.

If it is impossible to interpret UK legislation compatibly, s.4 enables the higher courts to declare a statute to be incompatible with Convention rights ('declaration of incompatibility') (Bellinger v Bellinger (2003)). However, such a declaration does not invalidate the statute which remains in force, nor does it bind the parties to the action (s.4(6)).

Where a declaration of incompatibility has been made, the government may amend the incompatible legislation by adopting the s.10 'fast-track' procedure enabling ministers to amend the legislation by making a 'remedial order' where 'compelling reasons' exist. Alternatively, the government may submit a Bill to Parliament. However, the HRA does not oblige the government or Parliament to remedy the incompatibility.

Finally, s.19 requires ministers introducing legislation into Parliament to make a statement, before the Bill's second reading, that the Bill is compatible with Convention rights or that, despite not being able to make such a statement, the government nevertheless wishes to proceed with the Bill.

2(b)

British Bill of Rights

The Conservative Party's 2015 general election manifesto included a promise to replace the HRA with a British Bill of Rights. These plans were deferred pending Brexit, but following the 2019 election have returned into focus due to government plans to establish a Constitution, Democracy & Rights Commission to recommend proposals aimed at restoring trust in the UK's institutions and how democracy operates. The Conservative manifesto also set out the need to 'update' the HRA.

A previous commission had concluded in 2012 that there were strong arguments supporting such a Bill, particularly the lack of ownership by the public of the existing HRA and the ECHR, and the greater protection that a British Bill of Rights would provide against abuses of power.

The problem with a British Bill is that individuals whose claims were rejected by the Supreme Court could still bring a claim against the UK government before the ECtHR. This could be counteracted if the UK were to withdraw from the ECHR. The UK would then no longer under international law be bound by unpopular ECtHR judgments, such as Hirst v UK (2005) where the ECtHR ruled a blanket ban on prisoners' voting rights violated Article 3 Protocol 1 (the right to vote).

Withdrawal would also be the only effective way of escaping the ECtHR's activist jurisprudence which allegedly disregards national sovereignty and contracting states' margin of appreciation. See, for example, Al Skeini v UK (2011) where the ECtHR held the UK had breached Article 2 by failing to

adequately investigate the deaths of five Iraqi civilians killed in 2003 during British military operations around Basrah.

Those opposed to replacing the HRA argue that the current system works well. It represents a British solution to the problem of how to protect human rights, as it respects parliamentary supremacy and does not give the courts the power to strike down legislation. The HRA is in effect already a British Bill of Rights. It enables British courts to apply the ECHR, reducing the number of successful claims against the UK before the Strasbourg court.

There is also no consensus about the content of a British Bill of Rights. There are those who want to go beyond the ECHR, e.g. by including economic and social rights, and others who want to water it down; e.g. by giving foreign nationals less extensive rights than British citizens. The devolved administrations in Scotland and Wales may well object to a British Bill of Rights, while the ECHR is a cornerstone of the 'Good Friday' Agreement in Northern Ireland.

As regards interpreting the Convention, British courts have generally followed the Ullah principle (R (Ullah) v Special Adjudicator (2004)), namely that domestic human rights law should in content and scope mirror Strasbourg jurisprudence. However, they do not slavishly follow the ECtHR. Thus, in R v Horncastle (2009) the Supreme Court did not follow an ECtHR judgment (Al-Khawaja v UK (2009)) regarding hearsay evidence and the compatibility of UK hearsay law with the right to a fair trial under Article 6 ECHR. The ECtHR subsequently accepted the Supreme Court's views.

Renouncing the ECHR would weaken human rights protection. Under the rule of law, unpopular minorities need safeguards to protect them from the will of the majority. It would also weaken the UK's international standing if it joined Belarus as the sole European non-signatory to the ECHR.

Ultimately, whether to replace the HRA with a British Bill of Rights is a political value judgment rather than a legal one. Supporters of the HRA are likely to favour the role of the judiciary in safeguarding fundamental rights; supporters of a British Bill often believe the judiciary have interfered excessively in the politics.

Question 3

Introduction

The UK, along with countries such as India, the USA and Canada, currently uses the first-past-the-post ('FPTP') electoral system for parliamentary elections. The country is divided into 650 constituencies and voters in each constituency vote for the candidate they support. The candidate who receives the most votes wins, even if they did not obtain a majority of votes. Electoral reform has often been debated, and indeed other systems are used for the Scottish Parliament, the Welsh and Northern Irish Assemblies and mayoral elections.

FPTP

FTPT creates strong links between constituents and their MPs and also generally produces majority governments. The UK has therefore mostly avoided weak governments and coalitions that have characterised countries

like Belgium and Israel. An arguable exception to this was between the June 2017 and December 2019 general elections when a minority Conservative government failed to obtain parliamentary approval for its policies on Brexit.

It is also straightforward to operate as voters merely place one 'X' against their chosen candidate, and constituency and national results are quickly ascertained. Accordingly, a new government can usually take office speedily without lengthy negotiations. Even after the 2010 general election produced a 'hung' parliament where no party had an overall majority, the Conservative Party reached a coalition agreement with the Liberal Democrat Party within five days, and this resulted in a stable government which lasted a full parliamentary term.

The main criticism of FPTP is the lack of proportionality between votes cast for the parties and the number of seats obtained. Thus in the 2019 general election the Conservatives, with 43.6% of the votes, won 365 out of 650 seats (56.2%). The Scottish National Party, with 45% of the votes in Scotland, won 48 out of 59 seats (81%). The system disadvantages smaller parties illustrated by the Liberal Democrats only winning 11 (1.7%) seats with 11.6% of the votes. In 2015 UKIP, with 12.6% of the votes, only won one seat.

It is even possible for the winning party to poll fewer votes than the party coming second, as occurred in the 1951 and October 1974 general elections. In individual constituencies it is not uncommon for the winning candidate only to obtain about a third of the votes cast. Voters in safe seats, where the same party is virtually guaranteed re-election, may be neglected in favour of those in a relatively small number of marginal seats which will decide the election.

Critics of FPTP have argued for alternatives, often based on proportional representation ('PR'), to address these problems.

Alternative Vote

Under this system used in Australia, voters rank candidates in order of preference (1, 2, 3 etc.). After marking their first preference, voters may then express further preferences for other candidates. If no candidate has an absolute majority (over 50% of first preference votes), then the bottom candidate is eliminated and their votes are reallocated according to the next highest preference. This process continues until a candidate has an absolute majority and is elected.

This system is not proportional, but does prevent a candidate being elected on a minority of the votes. The Parliamentary Voting System and Constituencies Act 2011 provided for a referendum on whether the UK should adopt this system for general elections, but the ensuing referendum decisively rejected this change.

Single Transferable Vote ('STV')

This system is currently used for national elections in the Republic of Ireland and Malta and local elections in Scotland and Northern Ireland.

Relatively small single-member constituencies are replaced by larger multi-member constituencies with typically between three and six members. Voters place each candidate in order of preference. To be elected, a candidate needs

a set amount of votes, known as a quota. The quota is based on the number of vacancies and the number of votes cast.

First preferences are counted first and any candidate who has reached the quota is elected. Their surplus votes then move to each voter's second preference candidates. This process continues until every vacancy is filled.

STV enables votes to be cast for individual candidates rather than for parties and party lists (a disadvantage of some other forms of PR), and compared to FPTP reduces 'wasted' votes (votes for losing candidates and votes for winning candidates exceeding the number required to win).

STV also provides approximately proportional representation, depending on the size of constituencies. The more representatives a constituency elects, the more proportional will be the result. These representatives should also reflect the diversity of opinions in the area. However, critics claim its complexity outweighs its benefits.

Party List Proportional Representation

This is the arguably the most proportional system. Voters vote for a party, not a candidate, and each party is allocated seats in proportion to the votes received. The parties submit a list of candidates in a given constituency, so if in a 10-member constituency a party receives 30% of the votes, its top three candidates will be elected. This system was used in Great Britain for European elections, and is also used in South Africa, Israel and some European countries.

Its supporters argue that it is fairer than FPTP as the number of seats each party wins reflects their share of the vote. However, it gives considerable power to political parties as they select the candidates, though variations on the system allow voter preferences for individuals to be considered. It also removes the link between MPs and constituents and can lead to fragmentation as illustrated by the recent inconclusive elections in Israel which failed to produce a stable government.

Conclusion

The strongest arguments in favour of FPTP are the constituency link and that it leads to stable majority governments. However, this is achieved at the expense of proportionality and a government with a comfortable majority may be able to pursue policies which a majority of voters oppose. PR systems rarely result in one party winning an absolute majority and promote governments that need to compromise and build consensus. Which system is preferable depends on one's views of their respective strengths and weaknesses.

Note to candidates: The question paper asked you to consider no more than three alternatives to FTPT. Instead of the alternatives considered above, you could have legitimately covered the following possibilities.

Additional Member System

This system uses a mix of first-past-the-post constituencies and party lists. It is currently used to elect the Scottish Parliament, the Welsh and London Assemblies and the German Parliament.

Each voter casts two votes: a vote for a candidate standing in their constituency and a vote for a party list standing in a larger region comprising multiple constituencies. The constituency vote is used to elect a single representative in the voter's constituency using FPTP. The regional vote is used to elect representatives from party lists, using a system of PR that takes into account the number of seats won by that party in the constituency vote: the number of seats a party wins will approximate its percentage of the vote.

The goal is to provide a proportional legislature but also retain a link with a constituency MP.

Supplementary Vote

The Supplementary Vote system is currently used for electing mayors and Police Commissioners in the UK. Voters express first and second ranked choices of candidate only, and if no candidate receives over 50% of first-choice votes, the top two candidates continue to a run-off round and all other candidates are eliminated. The votes of those eliminated are redistributed according to their second-choice votes to determine the winner.

Question 4

Historically, English law did not recognise a right of privacy. However, the Human Rights Act 1998 ('HRA') changed the position fundamentally. Additionally, the rise of the 'celebrity culture' triggered an increasing number of cases involving the extent to which an individual's rights under Article 8 of the European Convention on Human Rights ('ECHR') should be protected. These cases involve conflicts between the right to privacy (often that of a well-known personality) with another party's (often a newspaper's) right to freedom of expression under Article 10 ECHR.

The House of Lords affirmed in Wainwright v Home Office (2003) that English law does not recognise a tort of invasion of privacy. Nevertheless, claimants have succeeded in claims against newspapers using the 'horizontal effect' principle (Venables and Thompson v NGN (2001) and Douglas v Hello! Ltd (2005)). Originally claimants had to demonstrate that publication of the information constituted a breach of confidence (i.e. misuse of information obtained in confidence). The reasoning behind this approach was that courts, as public authorities themselves (s.6 HRA), had to develop the law on confidence compatibly with Convention rights. Accordingly, they had to consider Articles 8 and 10 not only in litigation between individuals and public authorities but also between individuals. Subsequently, the Court of Appeal held that a new tort, misuse of private information, had arisen (Vidal-Hall v Google Inc. (2014)). This tort does not require a confidential relationship.

Campbell v MGN (2004) is a leading case on privacy. The Mirror newspaper published that Naomi Campbell was a drug addict, she was receiving treatment for her addiction and covert photographs of her leaving a Narcotics Anonymous meeting. The newspaper invoked Article 10 to defend Campbell's breach of confidence claim based on Article 8.

The House of Lords first considered whether Article 8 was engaged. This depends on whether the claimant has a 'reasonable expectation of privacy' regarding the relevant information. Some information is private by its nature, such as medical records or someone's sex life. Whether other information is

private depends on the facts. The majority held the information was private and Article 8 was engaged.

The Court of Appeal also considered this issue in Murray v Express Newspapers plc (2008), holding that JK Rowling's son had a reasonable expectation of privacy regarding photographs taken on a public street, as the law should protect children from intrusive media attention. A child has a reasonable expectation not to be photographed for publication in a public place where this would be objected to on their behalf.

In Campbell their Lordships then considered whether the interference with Campbell's Article 8 rights was lawful. Both Articles 8 and 10 grant qualified rights which can be restricted in defined circumstances. The newspaper justified its interference with Campbell's privacy by arguing it was exercising its right to freedom of expression (Article 10(1)) and the information published constituted a legitimate interference with Campbell's Article 8(1) rights. Article 8(2) permits interferences with Article 8(1) rights to protect the rights and freedoms of others – here the newspaper's own freedom of expression.

The court then considered the question of proportionality. Baroness Hale considered this was not straightforward when two qualified Convention rights conflicted. The court had to balance Campbell's Article 8 rights against the Mirror's Article 10 rights. Baroness Hale adopted a three-part 'balancing test' for this purpose. The relative importance of each right claimed should be considered, then the justification for interfering with or restricting each of those rights. The proportionality test should then be applied to the interference with each of those rights. Finally, the proportionalities should be balanced to reach a conclusion. Neither Article 8 nor Article 10 had precedence over the other.

The majority held that Campbell's Article 8 rights had been breached. While ordinarily all the information revealed about Campbell would have been private, the newspaper could disclose her addiction to drugs to 'set the record straight', i.e. to correct her previous claim that she was not addicted. However, the majority held that the photograph of Campbell leaving the meeting went too far and could jeopardise her recovery. The privacy of a medical condition outweighed the newspaper's Article 10 rights; publishing intimate details of a model's private life was not an important manifestation of freedom of expression compared to information about the political and social life of the community. Nonetheless, the close 3-2 majority illustrates it is not always easy to predict where the balance will lie.

In A v B (a Company) (2002) publication of a Premier League footballer's extra-marital affairs was permitted. The Court of Appeal held whether a duty of confidence existed depended on the nature of the relationship, particularly whether the intrusion concerned a situation where a person could reasonably expect respect for their privacy. The more stable the relationship the greater the significance the courts would attach to it. The confidentiality offered to a permanent relationship was much greater than that offered to a fleeting one. Conversely, the courts were more prepared to protect privacy in Mosley v NGN (2008). Max Mosley, a well-known personality, had participated in a sado-masochistic orgy with prostitutes. His claim succeeded as there was insufficient public interest to warrant publishing details of his behaviour.

PJS v News Group Newspapers Ltd (2016) concerned a newspaper's intention to publish the story of a married couple's three-way sexual encounters. The

Supreme Court granted PJS an injunction, even though details had been published in other countries and on numerous websites. The majority of the Supreme Court stated that, if the injunction were refused, a 'media storm' would ensue in England and an injunction was accordingly essential to protect PJS, his partner and particularly their children.

Following PJS concerns were expressed that the courts have tilted the balance too far in favour of privacy. However, judgments such as A v B show that the courts recognise the importance of freedom of expression and they do seek to balance the public interest in receiving information with an individual's privacy. They are, however, especially concerned to safeguard children's interests.

SECTION B

Question 1

Amenability/ Eligibility

The GWGA is a public law body as it is exercising statutory functions under the Climate Change (Research Collaboration) Act 2020 ('the Act') by awarding government grants to climate change scientists to promote collaboration on scientific research into global warming and the steps to combat it. It is also thereby exercising a public function, so its decision is amenable to judicial review (O'Reilly v Mackman (1983)).

The KU and QIT scientists have standing to make the challenge under JR because their applications for grants have been rejected. Both are directly affected by the decision, and so have 'sufficient interest' in the decisions to bring a claim for judicial review (s.31(3) SCA 1981).

However, the issue arises whether Focus has 'sufficient interest' to bring a judicial review claim. The factors the court considers were outlined in R v SoS for Foreign Affairs ex parte World Development Movement Ltd (1995), namely

- the need to uphold the rule of law;
- the importance of the issues raised;
- the likely absence of any other responsible challenger;
- the nature of the alleged breach of duty, and
- the role of the pressure group.

On balance, Focus probably has standing, considering that standing is closely linked to the merits of the claims; Focus is arguably seeking to uphold the rule of law by bringing a challenge based on bias. The spending of public money is also an important issue. Focus, as a well-known nationwide pressure group, is not a 'busy-body' and the court is unlikely to reject an otherwise valid claim merely on the grounds of standing.

Timing

Claimants must make the application for permission for judicial review promptly, without undue delay and in any event within three months of the dates of the decisions they want to challenge (SCA s.31(6), CPR 54.5). The decisions in question were all made in the past week.

Grounds?

Applying (as relevant) the grounds of review identified by Lord Diplock in CCSU v Minister for the Civil Service (1984) as illegality, irrationality and procedural impropriety:

(i) KU

Illegality

Ulterior motive/Irrelevant considerations

Public bodies will be acting illegally if they use their powers for an improper or unauthorised purpose (Congreve v Home Office (1976))**.** The purpose of the Act is to promote collaboration on scientific research into global warming and the steps that can be taken to combat it. GWGA''s letter of rejection indicates that the decision had the purpose of showing disapproval of the oil industry. GWGA had an ulterior motive**.**

Taking into account the NU scientists' involvement in the oil industry is also an irrelevant consideration not countenanced by the Act (Padfield v Minister of Agriculture (1968)).

(ii) Green Focus

Jurisdictional challenge

If it makes the grant to the Conservation College scientists, GWGA will be exceeding its powers under the Act and acting without legal authority (A-G v Fulham Corporation (1921)). It only has the power under the Act to give grants to allow climate scientists to collaborate with scientists from other countries which have ratified and remain committed to the Paris Agreement. The USA has withdrawn from the Paris Agreement.

Procedural impropriety

Rule against bias

A decision can be challenged if taken by a person who is biased. In this case, the President of the GWGA is the mother of the CC scientist who is organising the expedition. It is likely that her interest in the matter falls short of a direct interest which would automatically disqualify her (Dimes v Grand Junction Canal Proprietors (1852)). If her interest falls short of a direct interest, Focus would argue that it was still enough to cause a fair-minded and impartial observer to conclude that there was a 'real possibility' that the decision-maker had been biased (Porter v Magill (2001)).

(iii) Queenstown Institute of Technology

Illegality

Failure to exercise discretion: wrongful delegation

The GWGA states that it is rejecting QIT's application because the Environmental Association objected. It seems that the GWGA has handed over its decision-making powers to the Environmental Association and this

constitutes unlawful delegation (Lavender v MHLG (1970)). The power was not granted to the Environmental Association so it should not dictate GWGA's decisions.

Ulterior motive/irrelevant consideration

In refusing a grant due to criticism of an article in the EA's professional journal, the decision seems to be based on an ulterior motive and/or an irrelevant consideration. See cases discussed above.

Irrationality

To succeed on this ground Focus would have to prove that the decision is one which is so unreasonable that no reasonable decision-maker would come to it ((Associated Provincial Picture Houses v Wednesbury Corporation (1948)) or is outrageous in its defiance of logic (CCSU). Although the threshold is high, QIT could argue it is irrational to refuse a grant on the grounds that its scientists had criticised an article in the EA's professional journal that had cast doubt on the need to reduce carbon emissions. It is therefore possible that the decision is irrational, though illegality remains the stronger ground.

Remedies

All three claimants should seek quashing orders setting aside the decision and, in KU's and QIT's cases, accompanied with a direction to reconsider the decision.

Question 2

[Unless otherwise indicated, statutory references below are to **PACE 1984**.]

Have the police acted lawfully?

Tuesday 15 December: 00.15 am

The first issue to consider is whether there has been a valid and lawful arrest. In order for the arrest to be recognised as valid, a power of arrest must exist and this must be carried out in the proper manner. Section 24(3) PACE provides that where an offence has been committed, a constable may arrest anyone whom he has 'reasonable grounds' for suspecting to be guilty of it. It emerges on her arrival at the police station that Emily has been arrested for committing assault occasioning actual bodily harm, so the issue is whether PC Rhodes has reasonable grounds for suspecting she committed this offence. PC Rhodes saw Emily kicking and punching the man, so it seems certain an offence has been committed and that he has reasonable grounds for suspicion.

The arrest must also be necessary (s.24(4)); at least one of the reasons in s.24(5) must met. PC Rhodes could claim that the arrest is necessary to prevent Emily causing physical injury to another person (s.24(5)(c)(i)) and allow the prompt and effective investigation of the offence or the conduct of the person (s.24(5)(e)).

However, it would appear that the arrest has not been carried out in the proper manner. Although the custody officer tells her on her arrival at the police station that she has been arrested, she should have been informed of this, together with the grounds for this arrest, by PC Rhodes at the time of

the arrest, or at least as soon as was practicable after the arrest (s.28). While there is a strong argument that it was not practicable to notify her immediately at the scene of the disturbance, there does not appear to be any reason why PC Rhodes could not have given her this information during the journey to the police station. The arrest, therefore, was not properly carried out and is not lawful from when compliance became practicable until Sergeant Ladipo gives Emily this information when it becomes lawful (Lewis v CC of South Wales (1991)).

The police are entitled to use reasonable force to carry out an arrest, provided that the arrest is itself lawful (s.117.) It would appear that PC Rhodes dragging Emily by the hair is excessive and unreasonable.

Tuesday 15 December: 01.00

Once at the police station, the custody officer, Sergeant Ladipo, tells Emily that she is under arrest and gives the grounds, as required by s.28. The arrest is now lawful.

Emily's detention for questioning may, however, be challenged, unless the criteria laid down in s.37 are satisfied. If there is not sufficient evidence to charge Emily, she should be released, unless the detention is necessary to preserve or secure evidence or to obtain it by questioning. Given that PC Rhodes saw Emily kick and punch the man, there seems to be sufficient evidence to charge her.

Once arrested, Emily has had her request to speak to her solicitor refused, breaching her rights under s.58. This right may only be delayed (up to a maximum 36 hours) if Emily has been arrested for an indictable and such delay is authorised by an officer of the rank of superintendent or above (s.58(6)(b)). For the purposes of PACE, indictable offences are those that are triable at the Crown Court, including those triable either way such as assault occasioning actual bodily harm. Although Emily has been arrested for an indictable offence, the refusal has not been correctly authorised. Moreover, the authority to delay only arises where statutory grounds exist (s.58(8)(a-c)). The reason given is within s.58(8)(a) (that the exercise of the right will lead to interference with or harm to evidence connected with an indictable offence), but it is inconceivable that the solicitor would actually interfere with witnesses. In R v Samuel (1988) the Court of Appeal held that the police must have reasonable grounds for believing that allowing access to a particular solicitor would (not just might) have the adverse consequence claimed. Even if the police had reasonable grounds for delaying access to Emily's usual solicitor, they should offer an alternative, e.g. the duty solicitor.

Refusal to allow Emily access to a solicitor may also violate her right to a fair trial under Article 6 ECHR. In Averill v UK (2000) and Magee v UK (2000) the ECtHR held that it was incompatible with Article 6 ECHR to deny a detained person access to a solicitor, save where good grounds existed.

Tuesday 15 December: 11.00 am

Over 10 hours have passed since Emily's detention. Section 40 requires a review by an officer of at least the rank of inspector who is not connected with the enquiry not later than six hours after Emily was first detained. Nothing in the facts suggests that this has occurred.

The search of Seth's and Emily's house seems unlawful. While the police do have the power to search without warrant (under ss. 17, 18 and 32), there is nothing in the facts to suggest that these sections are relevant. Section 17 allows the police to enter premises to arrest a person for an indictable offence, but the officers knew Emily was not on the premises. Section 18 allows the police to enter and search premises occupied by a person arrested to search for items that relate to that offence or similar or connected indictable offence. However, they had no grounds for reasonably suspecting there was any evidence at her house relating to the fight, nor did an inspector or above authorise the search in writing (s.18). Section 32 gives the police power to search premises occupied by an arrested person immediately before her arrest, but it is inapplicable on the facts.

Seth's refusal to allow the police to search their home is therefore lawful and, without authority, the police cannot use any force (in pushing past him) or arrest him for obstruction in the course of duty under s.89(2) Police Act 1996. It follows that the police cannot be acting in the course of their duty without lawful authority to search. Seth's arrest by PCs Shore and Wright is therefore unlawful.

Question 3

(a) The conduct of the police

(i) The March

The Public Order Act 1986 ('POA') gives the police the power to impose conditions on public processions, defined in s.16 POA as 'a procession in a public place'; 'public place' includes 'any highway'. The march by the members of STB is clearly a public procession and so falls within the scope of the POA.

Section 11(1) POA requires the organisers of a public procession intended to demonstrate opposition to the views or actions of any person to give the police six clear days' notice, unless it is not reasonably practicable to do so. Here no notice has been given, but the organisers would contend that notice was not reasonably practicable given that the march was an immediate response to Donna's announcement that construction of the bypass would start forthwith. PC Lynam was therefore probably acting unlawfully when he stopped the march.

Section 12 POA does, however, empower the police to impose conditions on public processions. If the 'senior police officer' reasonably believes serious public disorder, damage or disruption to the life of the community may result or the organisers have intimidatory purpose, he may make directions imposing conditions necessary to prevent such adverse consequences occurring. The conditions may relate to the route of the procession or prohibit it from entering specified public places. For conditions imposed during the procession, the senior police officer is the most senior officer present which would be PC Lynam. Marching through a busy shopping area might cause serious disruption to the life of the community, so PC Lynam may have given lawful directions.

(ii) Stop and Search

PC Lynam has the power to stop Toby and search him for prohibited articles (Police and Criminal Evidence Act 1984 ('PACE'), s.1(2)). The definition of

prohibited articles includes offensive weapons (s.1(7)). PC Lynam must have 'reasonable grounds' for suspecting that he will find prohibited articles (s 1(3)). The fact that Toby was wearing an anarchist T-shirt and had a lot of tattoos seems unlikely to provide him with sufficient grounds. PC Lynam's suspicion is therefore not based on an objective assessment of the circumstances (Code A).

Besides, PC Lynam does not carry out the stop and search correctly. He must comply with the safeguards set out in s.2 by taking reasonable steps before searching Toby to inform him of his identity and the reasons for the search. In Osman v DPP (1999) the court applied s.2 strictly, so PC Lynam has infringed s.2, as what he said fell short of the requisite standard.

(iii) The Gathering outside FreeWay England's premises

Section 14 POA permits the senior police officer to impose conditions on a public assembly if the appropriate reasonable belief exists (based on essentially the same grounds as provided for by s.12). A public assembly is one where two or more persons gather in a public place that is wholly or partly in the open air (s.16). The site of the meeting, the square, falls within this definition.

Conditions may be imposed concerning the place of the meeting, its maximum duration and the maximum number of persons who may attend. During the meeting, the senior police officer is the most senior in rank of the police officers present, probably Sergeant Moss.

It seems unlikely that these conditions are be satisfied, as the chanting, even if hostile towards FreeWay England, is unlikely to go beyond what might reasonably be expected in a demonstration of this type. Moreover, the conditions should be imposed by Sergeant Moss and not by PC Lynam.

The police also possess a range of common law powers to deal with breach of the peace (i.e. where there is violence, or a person has a reasonable fear of violence (R v Howell (1982)), including the power to disperse a meeting and to enter private premises to police a public meeting, but only if a breach of the peace is imminent (R (*Laporte)* v CC of Gloucestershire Constabulary (2006)). This seems doubtful on the facts.

3(b) Toby's conduct

The scenario suggests the possibility of violent disorder (s.2 POA). The essence of that offence is that three or more persons used or threatened to use violence and the conduct of them (taken together) is such as to cause a person of reasonable firmness, if present, to fear for his safety. Such a person does not actually need to be present and a police officer is regarded as a person of 'reasonable firmness'. Accordingly, even though Donna appears to have been unworried, the offence has been committed.

The offence of riot (s.1 POA) has not been committed, as no actual violence has been used. Conversely, the offence of affray (s.3 POA) may have been committed. The threat of violence must be directed towards another person actually present at the scene (I v DPP (2001)); clearly, Donna is present at the scene. Section 3 provides that where the violent conduct consists of threats, it must go beyond the use of words; here, the shaking of fists by the protestors go beyond words, so Toby has probably committed affray.

If the prosecution were unable to prove violent disorder or affray, under s.4(1) POA an offence is committed if a person uses towards another person threatening words with intention to cause that person to believe immediate unlawful violence would be used against him. Toby could therefore have committed an offence under s.4(1). Failing that, Toby could have committed an offence under s.4A(1) as he uses threatening words with intent to cause Donna harassment, alarm or distress.

Question 4

There are two types of defamation. Libel is defamation in a permanent form, while slander is defamation in a temporary form. Cornelius would therefore bring a libel action.

To establish defamation the claimant must prove that the defendant's statement:

- is defamatory;
- refers to the claimant;
- has been published; and
- its publication has caused or is likely to cause serious harm to the claimant's reputation (introduced by s.1 Defamation Act 2013).

Words are defamatory if they lower the regard in which the claimant is held by right thinking or reasonable members of society and/or they expose the claimant to hatred, contempt or ridicule.

Cornelius will have little difficulty in proving the above elements regarding the article in the Daily Message and Kendra's Facebook post. The burden of proof will then pass to the Daily Message and Kendra to establish a defence.

Common law provided several defences that the Daily Message and Kendra could have invoked. However, the Defamation Act 2013 significantly reformed the law in this area, replacing many of the common law defences with statutory ones. The defences which are especially applicable for the Daily Message are truth and publication on a matter of public interest, while Kendra would invoke honest opinion.

The defence of truth applies if the defendant is able to 'show that the imputation conveyed by the statement complained of is substantially true' (s.2(1) 2013 Act). The fact that assault on the actress actually took place in a different hotel in Torquay would accordingly not preclude this defence.

Kendra would use the defence of honest opinion, set out in s.3 of the 2013 Act, to defend her Facebook post. If the defamatory statement is one of opinion, the statement indicates, whether generally or specifically, the basis of the opinion, and an honest person could have held that opinion on the basis of any fact existing at the time the statement was published, then the defence will succeed. The statement that Cornelius is a monster who has disgraced the British film industry is clearly an expression of opinion rather than of fact. Also, the post indicates the factual basis for that opinion, the details published in the Daily Message. However, Cornelius could defeat the defence by showing that Kendra did not hold the opinion.

This defence does not apply to matters of fact rather than opinion, so the Daily Message cannot rely on it to defend its article. Either it must prove that

Cornelius committed sexual assault, or it will need to use the public interest defence.

Section 4 of the 2013 Act provides a defence if the defendant shows that the statement was on a matter of public interest and the defendant reasonably believed that publishing the statement was in the public interest. Also, s.4 requires the court to have regard to all the circumstances of the case when deciding these points. Additionally, in deciding the reasonableness of the defendant's belief, the court must make appropriate allowance for editorial judgment. This defence covers both statements of fact and statements of opinion.

The defence is based on the common law Reynolds defence. Although the 2013 Act abolished the Reynolds defence, the explanatory notes accompanying it state that the case law on the Reynolds defence provides a helpful (albeit not binding) guide to interpreting the new statutory defence. Analysing the case law on the Reynolds defence will therefore be helpful in determining whether the public interest defence will succeed.

In Reynolds v Times Newspapers Ltd (1999) Albert Reynolds, the former Taoiseach of Ireland, brought a libel claim against The Times for publishing an article alleging he had misled the Irish Parliament. The article did not attempt to give his version of the story. The House of Lords emphasised the importance of freedom of expression and acknowledged that newspapers should be protected by privilege if they fulfilled a test of public right to know and responsible journalism. The purpose of the defence was to protect serious investigative journalism. Accordingly, even where allegations (such as those made against Cornelius) were false and highly damaging to the claimant, newspapers could invoke it. Their Lordships formulated the 'duty-interest' test to determine whether such publication would be privileged; i.e. whether there was a legal, moral or social duty on the publisher's part to inform those to whom the material was published (which could include the general public) and a legitimate interest on the part of the recipients to receive that information.

Lord Nicholls identified ten factors (non-exhaustive) which the court should consider when applying the duty-interest test, including:

- The seriousness of the allegation. The graver the allegation, the more the public is misinformed and the individual harmed if the allegation is untrue
- The nature of the information, and the extent to which the subject-matter is one of public concern
- The source of the information
- Steps taken to verify the information
- Whether comment was sought from the claimant
- Whether the article included the gist of the claimant's side of the story
- The circumstances of publication, including the timing.

Although on the facts the defence failed, the availability of the public interest defence should help the Daily Message, assuming the defence of truth fails. While the allegations are very serious, the subject-matter is clearly of public concern, the source of the information appears reliable and then newspaper did ask Cornelius to comment and reported his rebuttal.

As identified above, the court must make appropriate allowance for editorial judgment. The importance of editorial judgment was recognised in Flood v Times Newspapers Ltd (2012). The Times alleged that Sergeant Flood, a

Metropolitan Police officer, had been accused of accepting bribes to provide Russian oligarchs with information. An investigation subsequently found no evidence to support the allegations. The Supreme Court held The Times was able to rely on the Reynolds defence, stating it aimed to promote greater freedom for the press to publish stories of genuine public interest within the bounds of journalistic responsibility. Hence there is a genuine prospect that the public interest defence will succeed.