

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021  
LEVEL 6 – UNIT 12 - PUBLIC LAW

### Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

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

### CHIEF EXAMINER COMMENTS

In the essay questions in Section A, the better candidates analysed many of the key issues well, analysing and evaluating the topics in a systematic manner rather than simply writing out what they knew. The weaker candidates, even where they had some knowledge of the relevant constitutional principles, struggled to evaluate them effectively.

In the problem questions in Section B, the better candidates were generally able to identify the issues raised by the question and applied the law to the facts systematically, reaching well-reasoned conclusions. The weaker candidates often found it difficult to identify the issues and, even when they did, found it difficult to apply the law to the facts consistently and accurately; their answers also tended to be disorganised. A systematic and structured approach to answering problem questions is essential.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

This was a popular question. The stronger answers systematically analysed the impact of the Human Rights Act 1998 on parliamentary sovereignty, defining parliamentary sovereignty effectively and critically analysing the key sections of the 1998 Act with reference to case law. In contrast weaker candidates tended to make generalisations about human rights and parliamentary sovereignty and were not able to explain the impact of the 1998 Act.

#### Question 2

This was answered by two candidates with overall marks of 16 and 19 for the two parts of the question. Both were able to define constitutional conventions accurately, set out the sources of the constitution and critically analyse the functions of the constitutional conventions. The stronger of the candidates was also able to analyse lucidly how conventions related to the other sources of the constitution.

#### Question 3

This was a popular question. The question required candidates to critically evaluate whether the law on defamation struck an effective balance between an individual's reputation and the freedom of the press. The best answers analysed the issues effectively, showing sound knowledge of the relevant defences in the Defamation Act 2013 and case law. They also addressed the extent to which the law on defamation struck a fair balance between the competing interests or whether it had a 'chilling effect' on press freedom; they then reached well-reasoned conclusions. The weaker answers tended to be unstructured and lacked detail on the defences and case law, and also failed to reach a conclusion.

#### Question 4

Only one candidate answered this question and obtained a low mark. This question required a critical evaluation of the Freedom of Information Act 2000. The candidate made some general comments about the act but was unable to go beyond generalisations. There was very little legal detail in their answer.

## SECTION B

### Question 1

This question was attempted by all the candidates. The bulk of the facts related to police powers of arrest and search, and many candidates made good use of their statute books and were able to identify the sections in PACE that related to the police powers that were being exercised. Generally, candidates used case law well and applied the law to the facts effectively, reaching sound conclusions in relation to the police conduct described. In contrast the answers to the latter part of the question covering the admissibility of a confession were for the most part not of the same high standard. It seems that most candidates simply failed to revise the topic in sufficient depth and were unable to cite relevant case law.

### Question 2

This was a typical question on judicial review. It required the candidates to approach the issues in an organised and systematic manner, firstly addressing the preliminaries (including an ouster clause) and then analysing the grounds of review for potential claimants. The better candidates structured their answers logically, dealing with the preliminaries first and then covering the potential grounds of review for the prospective claimants; they also identified the main grounds of review effectively. The weaker candidates were disorganised in their answers and struggled to identify which grounds of review were relevant on the facts.

### Question 3

In part (a) the stronger candidate approached the issues in a structured fashion, analysing case law well in balancing privacy with freedom of expression. However, the other candidates' answers lacked a clear structure, and they tended to make generalisations about privacy without being able to apply the legal principles to the facts. Moreover, they seemed confused about the difference between defamation and privacy and cited case law on defamation which was not relevant to this question. An error that candidates made in part (b) is that they focused on strict liability contempt rather than civil contempt of court (breaking an injunction).

### Question 4

No candidates answered this question.

**SUGGESTED POINTS FOR RESPONSES  
LEVEL 6 – UNIT 12 -PUBLIC LAW**

The purpose of this document is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The Suggested Points for Responses 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. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

**Section A**

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer which consists of reasoned analysis, offering opinion which is supported with evidence.</p> <ul style="list-style-type: none"> <li>• Definition of parliamentary sovereignty</li> <li>• Definition of implied repeal (max 4 marks)</li> <li>• Discussion of the above with reference to authorities</li> <li>• Incorporation of ECHR: relevant provisions of the HRA</li> <li>• Impact of the HRA on parliamentary sovereignty (5 marks)</li> </ul> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Dicey's definition of parliamentary sovereignty, including               <ul style="list-style-type: none"> <li>○ Parliament's unlimited legislative competence</li> <li>○ No person/body can question an Act of Parliament</li> </ul> </li> <li>• Express/implied repeal</li> <li>• Definition of implied repeal (<u>Ellen Street Estates v Minister of Health</u> (1934))               <ul style="list-style-type: none"> <li>○ Qualification of doctrine in relation to 'constitutional statutes' (<u>Thoburn v Sunderland City Council</u> (2002))</li> <li>○ Definition of constitutional statutes</li> </ul> </li> <li>• Background to the HRA: incorporates key Convention rights into UK law               <ul style="list-style-type: none"> <li>○ Section 2: duty to 'take into account' decisions of the European Court of Human Rights</li> <li>○ Section 3: interpretative obligation on the courts; e.g. <u>Ghaidan v Godin-Mendoza</u> (2004)</li> <li>○ Section 4: declarations of incompatibility; e.g. <u>Bellinger v Bellinger</u> (2003)</li> </ul> </li> <li>• Evaluation of impact of HRA on parliamentary sovereignty;</li> </ul>	25

	<ul style="list-style-type: none"> <li>○ Does not prevent Parliament enacting incompatible legislation</li> <li>○ Declaration of incompatibility does not invalidate offending Act</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>● ‘Enrolled Act’ rule: Courts cannot scrutinise parliamentary procedure</li> <li>● Acts of Parliament override international law</li> <li>● Section 10: power to make remedial order where declaration of incompatibility issued</li> <li>● Section 19: duty on government minister to make statement of compatibility or that government nonetheless wishes to proceed</li> <li>● Strong pressure on government to respond to declaration of incompatibility, but no legal duty to do so</li> <li>● Political constraints on HRA’s repeal; Conservative Party proposals to replace it with a British Bill of Rights</li> <li>● Principle of legality: Lord Hoffmann (<u>R v Secretary of State for the Home Department, ex p. Simms</u> (2000))</li> </ul>	
<b>Total</b>		<b>25 marks</b>
<b>Question Number</b>	<b>Suggested points for responses</b>	<b>Max Marks</b>
Q2(a)	<p>A description which provides an account and how things are linked.</p> <ul style="list-style-type: none"> <li>● Definition of constitutional conventions</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>● Non-legal source of the constitution</li> <li>● Not legally binding but observed in practice</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>● Unwritten nature of the UK constitution – background/overview</li> </ul>	5
Q2(b)	<p>An answer which consists of reasoned analysis, offering opinion which is supported with evidence.</p> <ul style="list-style-type: none"> <li>● Overview of sources of the UK constitution</li> <li>● Examples of conventions</li> <li>● Relationship between conventions and other sources</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>● Statute: Examples of constitutional statutes</li> <li>● Case law: Examples of constitutional case law</li> </ul>	20

	<ul style="list-style-type: none"> <li>• Royal prerogative: residue of the monarch’s historical powers</li> <li>• Conventions and statute; e.g. Meeting of Parliament Act 1694, <u>Madzimbamuto v Lardner-Burke</u> (1968), (<u>Miller v Sec of State for Exiting EU</u> (2017)) <ul style="list-style-type: none"> <li>○ Convention fills gaps, but statute will prevail over conventions</li> </ul> </li> <li>• Conventions and case law; conventions not legally enforceable</li> <li>• Case law as source of the constitution</li> <li>• Examples of conventions; e.g. ministerial responsibility</li> <li>• Prerogative powers vested in monarch, but in practice exercised by the government</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Common law; e.g. development of civil liberties/natural justice (<u>Entick v Carrington</u> (1765))</li> <li>• Statutory interpretation (<u>R (Miller) v Secretary of State for Exiting the EU</u> (2017))</li> <li>• ‘Carltona’ principle – courts taking conventions into account</li> </ul>	
<b>Total</b>		<b>25 marks</b>

<b>Question Number</b>	<b>Suggested points for responses</b>	<b>Max Marks</b>
Q3	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <ul style="list-style-type: none"> <li>• Definition of defamation</li> <li>• Balance between protection of reputation and freedom of expression</li> <li>• Defences (in Defamation Act 2013)</li> <li>• <u>Reynolds</u> defence as guide to interpretation of s.4 (publication on matter of public interest)</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Truth (s.2)</li> <li>• Honest opinion (s.3)</li> <li>• Publication on matter of public interest (s.4)</li> <li>• Aim to protect serious investigatory journalism</li> <li>• Duty-interest test; factors to be considered and analysis</li> <li>• Other relevant case law, e.g. <u>Flood v Times</u> (2012)</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Protections in statute and case law; e.g. limitation on damages</li> </ul>	25
<b>Total</b>		<b>25 marks</b>

Question Number	Suggested points for responses	Max Marks
Q4	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <ul style="list-style-type: none"> <li>• Aim of Freedom of Information Act 2000 ('FOIA') and application to public authorities</li> <li>• Effect of FOI request</li> <li>• Relevant exemptions</li> <li>• Role of Information Commissioner</li> <li>• Ministerial veto</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Aim of FOIA to provide public access to information held by public bodies</li> <li>• Definition/examples of public authorities</li> <li>• Duty of public body to respond to FOI request unless exempt</li> <li>• 'Class' or absolute exemptions</li> <li>• 'Qualified' exemptions – public authority must apply public interest test</li> <li>• Information Commissioner - Enforcement notice</li> <li>• Ministerial veto <ul style="list-style-type: none"> <li>○ May override Information Commissioner</li> <li>○ Subject to judicial review (<u>Evans v Attorney-General (2015)</u>)</li> </ul> </li> <li>• Critique of FOIA; e.g. <ul style="list-style-type: none"> <li>○ Scope of exemptions</li> <li>○ Effect of ministerial veto</li> </ul> </li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Certain bodies only covered for some information; e.g. public service broadcasters (<u>BBC v Silver (2012)</u>)</li> <li>• Appeals process</li> </ul>	25
<b>Total</b>		<b>25 marks</b>

## Section B

Question Number	Suggested points for responses	Max Marks
1	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <ul style="list-style-type: none"> <li>• Arrest - lawfulness of arrest</li> <li>• Search of pub and flat – lawfulness of search</li> <li>• Seizure of smartphones – lawfulness of seizure</li> <li>• Detention at police station</li> <li>• Refusal of access to solicitor</li> <li>• Section 76 – confession inadmissible obtained by oppression or in circumstances which make it unreliable</li> <li>• Section 78 – discretion to exclude evidence if its admission would have adverse effect on fairness of proceedings</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Arrest <ul style="list-style-type: none"> <li>○ Power of arrest – s.24(3) PACE: reasonable grounds for suspecting an offence has been committed</li> <li>○ Arrest necessary – s.24(5) PACE - to allow prompt and effective investigation of the offence (s.24(5)(e))</li> <li>○ Manner of arrest – fact of arrest and grounds, even if obvious (s.28)</li> <li>○ PC McKenzie does not state grounds of arrest adequately</li> </ul> </li> <li>• Search of pub and flat <ul style="list-style-type: none"> <li>○ Power to search any premises that an arrested person was in immediately before the arrest for evidence relating to an indictable offence (s.32)</li> <li>○ Reasonable grounds for belief that there is evidence in premises relating to that offence</li> <li>○ Power to seize knife as lawfully on premises, reasonable grounds for belief it is evidence and seizure necessary (s.19)</li> <li>○ Search of flat unlawful: Flat not somewhere that arrested person was 'immediately before the arrest'</li> </ul> </li> <li>• Seizure of smartphones <ul style="list-style-type: none"> <li>○ Power of seizure if lawfully in the flat (s.19)</li> <li>○ Reasonable grounds for believing items obtained in consequence of commission of an offence</li> <li>○ Seizure necessary to prevent loss etc of item</li> <li>○ Reasonable grounds may exist, but search was unlawful</li> </ul> </li> <li>• Detention at police station <ul style="list-style-type: none"> <li>○ Arrest lawful once s.28(4) complied with</li> </ul> </li> <li>• Refusal of access to solicitor <ul style="list-style-type: none"> <li>○ Right to consult a solicitor (s.58)</li> </ul> </li> </ul>	25

	<ul style="list-style-type: none"> <li>○ May be delayed to prevent 'physical injury to other persons</li> <li>○ Samuel (1988) – police objections have to relate to specific solicitor</li> <li>● Analysis of ss.76 and 78 and relevant case law</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>● Section 117: Search of flat unlawful, so police cannot use reasonable force.</li> <li>● Custody officer must comply with s.37</li> </ul>	
<b>Total</b>		<b>25 marks</b>
Question Number	Suggested points for responses	Max Marks
Q2	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <ul style="list-style-type: none"> <li>● Amenability of decision for review/Eligibility to bring claim</li> <li>● Effect of ouster</li> <li>● Grounds: Lord Diplock's categorisation</li> <li>● Legitimate expectation</li> <li>● Procedural impropriety: the giving of reasons</li> <li>● Procedural impropriety: Rule against bias</li> <li>● Irrationality – <u>Wednesbury</u> (1948) unreasonableness</li> <li>● Illegality: Ulterior purpose/ irrelevant consideration</li> <li>● Other reasonable arguments (discretion)</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>● Amenability/ Eligibility <ul style="list-style-type: none"> <li>● NNA is a public body</li> <li>● Public law matter</li> <li>● Standing</li> <li>● Timing</li> <li>● Remedies – see below</li> </ul> </li> <li>● Complete ouster clauses do not protect 'nullities' (<u>Anisminic</u> (1969))</li> <li>● Celia - Legitimate expectation – extent to which LRA should be bound by its guidelines,</li> <li>● Celia - Procedural impropriety <ul style="list-style-type: none"> <li>– the giving of reasons. No common law duty to give reasons, but if a decision appears irrational, decision-maker will be required to give reasons; otherwise decision will be <i>ultra vires</i> (<u>R v Civil Service Board, ex parte Cunningham</u> (1991))</li> <li>– Rule against bias: Likely to be indirect interest – 'real possibility of bias' (<u>Porter v Magill</u> (2002))</li> </ul> </li> </ul>	25

	<ul style="list-style-type: none"> <li>• Irrationality – definition of <u>Wednesbury</u> (1948) unreasonableness</li> <li>• Buttershaw: Illegality <ul style="list-style-type: none"> <li>- Ulterior purpose: boosting employment opportunities is an improper purpose (<u>Congreve v HO</u> (1976) and/or irrelevant consideration (<u>Padfield v Minister of Agriculture</u> (1968)))</li> </ul> </li> </ul> <p>Responses could include</p> <ul style="list-style-type: none"> <li>• Nature of legitimate expectation, Lord Woolf’s categories, whether substantive or procedural (<u>ex p. Coughlan</u> (2001))</li> <li>• Bias: whether there is a direct interest (<u>Dimes v Grad Junction Canal</u> (1852), but</li> </ul> <p>This question should be marked flexibly; e.g. candidates who cover illegality or legitimate expectation well even if they omit irrationality should gain credit.</p>	
<b>Total</b>		<b>25 marks</b>
<b>Question Number</b>	<b>Suggested points for responses</b>	<b>Max Marks</b>
Q3(a)	<p>An answer which consists of reasoned analysis, offering opinion which is supported with evidence. An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justification.</p> <ul style="list-style-type: none"> <li>• How claimants enforce privacy in English law</li> <li>• Whether there is a reasonable expectation of privacy</li> <li>• Balance between Article 8 and Article 10 rights with detailed arguments</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• No right to privacy in English law (<u>Wainwright v Home Office</u> (2006))</li> <li>• Human Rights Act 1998: Horizontal effect of Convention rights (<u>Douglas v Hello! Ltd</u> (2005))</li> <li>• Analysis of newspaper article: whether newspaper entitled to publish it</li> <li>• The ‘setting the record’ straight argument (<u>Campbell v MGN</u> (2005))</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Development of tort of misuse of private information</li> <li>• Analysis of case law such as <u>Murray v Express Newspapers Ltd</u> (2007) regarding circumstances leading to a reasonable expectation of privacy</li> </ul>	20

3(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justification.</p> <ul style="list-style-type: none"> <li>• Identifying breach of injunction is a civil contempt</li> <li>• Third party liable if knowingly interferes with the administration of justice (<u>Attorney-General v Punch Ltd</u> (2003))</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explanation of above points and application to the facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discussion of criminal contempt of court (strict liability offence) for limited credit</li> </ul>	5
<b>Total</b>		<b>25 marks</b>
<b>Question Number</b>	<b>Suggested points for responses</b>	<b>Max Marks</b>
Q4(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <ul style="list-style-type: none"> <li>• Election petition based on illegal election practice (The Representation of the People Act 1983 ('RPA 83'))</li> <li>• Defence if defendant had reasonable grounds for believing, and did believe, statement to be true</li> <li>• Consequences</li> </ul> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Illegal election practice <ul style="list-style-type: none"> <li>• to make a false statement of fact regarding a candidate's personal character or conduct</li> <li>• with the purpose of affecting the return of any candidate at the election</li> </ul> </li> <li>• Whether defendant had reasonable grounds for believing, and did believe, statement to be true</li> <li>• Conclusion <ul style="list-style-type: none"> <li>▪ Likely the election court will declare the by-election result void</li> <li>▪ Vacate the seat/disqualify Ryan from standing.</li> </ul> </li> </ul>	12
Q4(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p>	13

	<ul style="list-style-type: none"> <li>• Definition of ‘public interest immunity’ (‘PII’)</li> <li>• Analysis of the approach of the courts</li> <li>• Class and contents claims (<u>Conway v Rimmer</u> (1968))</li> <li>• Scott Report – circumstances in which government will now claim PII</li> </ul> <p>Responses should include</p> <ul style="list-style-type: none"> <li>• Explanation of PII and its development through case law – courts moving away from original deferential approach</li> <li>• Distinction between class claims and contents claims: <ul style="list-style-type: none"> <li>• Class claims where disclosure would normally not be ordered because of the category to which the document belonged;</li> <li>• Contents claims where disclosure should not be ordered because the document’s contents should remain confidential</li> </ul> </li> <li>• Background to and discussion of Scott Report</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Courts less likely to order disclosure in class claims than contents claims</li> <li>• Discussion of recent case law</li> </ul>	
<b>Total</b>	<b>25 marks</b>	