LEVEL 6 - UNIT 12 – PUBLIC LAW
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

SECTION A

Question 1

(a) Separation of powers

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

- The legislative, or law-making branch. This often 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 about the law. There is typically an independent court system.

Montesquieu considered that the separation of powers was essential to guarantee liberty and to prevent tyranny. A system of 'checks and balances' was essential to prevent any branch from accumulating excessive power.

(b) Separation in the UK

In the UK the traditional argument is that there is some separation of powers, but it remains mainly informal due to the 'unwritten' or uncodified nature of the UK constitution. This is in marked contrast with the USA where the constitution provides for strict separation. To evaluate the validity of Benwell and Gay's statement, the relationship between each of the branches should be examined in turn.

(i) Executive and legislature

Section 2 of the House of Commons Disqualification Act 1975 restricts the number of government ministers who can sit in the Commons to 95, so there is some separation between Parliament (the legislature) and the executive. However, those ministers must support the government to keep their posts.

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

Conversely, there are significant areas of overlap between the executive and legislature. Government ministers (executive) are members of the House of Commons or Lords (legislature) as by convention the government must be drawn from Parliament. As the executive (i.e. a government with a majority) dominates the legislature, law-making powers and policy formation/implementation are largely in the same hands. This arguably constitutes a significant breach of the doctrine.

The executive moreover has significant legislative power of its own. Statute frequently grants ministers the power to make delegated legislation, including 'Henry VIII' powers which enable them to repeal and amend even primary legislation.

This level of executive dominance has been termed an '*elective dictatorship*' by commentators such as the late Lord Hailsham; once a government has been elected, it can effectively do as it pleases until the next general election.

(ii) Executive and judiciary

Traditionally the separation between the executive and judiciary has been regarded as mainly informal, but the Constitutional Reform Act 2005 ('CRA') has formalised the separation between them significantly. For example the creation of the independent Judicial Appointments Commission has limited the role of the Prime Minister and Lord Chancellor in judicial appointments. Ministers are barred from trying to influence judicial decisions through special access to judges and the Lord Chancellor has an explicit statutory obligation to uphold judicial independence.

Long-standing rules and conventions safeguarding judicial independence supplement these provisions:

- Judges have security of tenure and cannot be dismissed by executive diktat. 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, ministers - members of the executive - do not criticise judges, although there have been some breaches of this convention. In particular ministers have sometimes criticised judicial decisions concerning human rights. In return, the judiciary do not engage in party political matters.

- Judicial review enables the judiciary to exercise a check on the actions of the executive.

Nonetheless, some areas exist where separation may be blurred. The Human Rights Act 1998 has given rise to the judiciary appearing politicised, as illustrated by A v Home Secretary (2005) ('*Belmarsh*'), where the House of Lords made a declaration of incompatibility concerning anti-terrorism legislation.

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

(ii) 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 creating the Supreme Court, removed the UK's highest court from the House of Lords, thereby ending the legislative role of the Law Lords.

The UK judiciary (unlike the US judiciary) has no power to declare statutes unconstitutional. While the UK judiciary may make a declaration of incompatibility under the Human Rights Act, this does not invalidate the incompatible statute. However, Lord Steyn suggested *obiter* in Jackson (2005) that judges might strike down legislation contrary to the rule of law; e.g. legislation precluding judicial review.

The *sub-judice* rule provides that Parliament should not discuss cases currently before the courts, and by convention MPs should not criticise judicial decisions in Parliament.

Conversely the judiciary plays a quasi-legislative role through developing the common law and statutory interpretation (the legislative theory). Parliament may, however, always enact further legislation overruling developments in case law of which it disapproves (Burmah Oil v Lord Advocate (1965)). Moreover, the judiciary exercises restraint in its law-making role.

Conclusion

There is limited separation between the legislature and executive, and the extensive overlap between them suggests that Benwell and Gay's view that Parliament and the government are closely intertwined is correct. Conversely, particularly after the changes introduced by the CRA 2005, there is a considerable degree of separation between the judiciary and the other branches so that it is arguable that the judiciary is not closely intertwined with the other branches.

Question 2

The objective of the Human Rights Act 1998's ('HRA') was to incorporate the rights and freedoms contained in the European Convention on Human Rights ('ECHR') 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 most ECHR rights before UK courts.

AV Dicey provided the classic definition of the rule of law in *Introduction to the Study of the Law of the Constitution* (1885). His definition has three fundamental features:

(i) There should be no arbitrary power. All government actions must have legal authorisation. Citizens should not be punished or have their assets confiscated unless the law authorised it.

(ii) There should be equality before the law. The government and its officials should not have any special legal immunities, unlike in France where special administrative courts favoured the government over citizens.

(iii) The English courts protect personal freedom through judicial decisions. Dicey believed the courts were the most effective guarantor of personal freedom as through their decisions they developed the common law to uphold individual liberty. Bills of rights were meaningless without effective judicial enforcement.

Arguably Dicey's view of the rule of law is outmoded. In particular it does not cater for parliamentary sovereignty. If Parliament legislates contrary to the rule of law, the courts can do nothing.

There have been many attempts to update the concept. For example Raz has underlined that laws should be clear, stable and accessible to enable people to obey them. Also, judicial independence is vital to enable judges to decide cases free from external pressures.

Lord Bingham provided a highly authoritative formulation in *The Rule of Law* (2010). Significantly, he goes beyond Dicey, stressing the importance of protecting human rights and obeying international law.

Section 1 and Schedule 1 of the HRA incorporate the bulk of the rights granted by the ECHR ('Convention rights') into our legal system.

Section 2 requires UK courts to 'take into account' decisions of the ECtHR. However, they do not bind UK courts and so are merely persuasive. Nonetheless, the House of Lords has stated that UK courts should, unless special circumstances exist, follow any clear and constant jurisprudence of the ECtHR (R v Special Adjudicator (Respondent) ex p. Ullah (2004)). UK courts do not, however, slavishly adopt ECtHR case law. Thus, in R v Horncastle (2009) the Supreme Court refused to follow a chamber ruling in Al-Khawaja and Tahery v UK (2009) that the way hearsay evidence was used in criminal prosecutions infringed Article 6 (right to a fair trial), as the chamber did not adequately understand the UK trial process. The Grand Chamber subsequently reversed the chamber ruling.

Section 3 provides that courts must interpret legislation to give effect to Convention rights, 'so far as it is possible to do so'. The courts have therefore interpreted statutes very flexibly. For example, under the Rent Act 1977 the surviving spouse of a tenant was eligible to succeed to a tenancy. The House of Lords interpreted this to include the tenant's surviving same-sex partner (Ghaidan v Godin-Mendoza (2004)), with Lord Steyn stating that s.3 requires a broad purposive approach concentrating on the importance of the fundamental right involved.

Section 4 provides that, where a compatible interpretation is impossible, the higher courts have the power to declare that a statute is incompatible with Convention rights (a 'declaration of incompatibility'). Accordingly, in Bellinger v Bellinger (2003) the House of Lords declared that legislation, which stipulated that a marriage was void unless between a 'male' and 'female', was incompatible with the Convention rights of a woman who had undergone gender reassignment, as it meant that legally she remained a man and so was not validly married to her husband. Further, in A v Home Secretary (2005) the House of Lords declared that legislation allowing the indefinite detention of foreign suspected terrorists without trial was incompatible with Article 5 (the right to liberty). However, such declarations do not invalidate the incompatible legislation; unlike the US Supreme Court, UK courts cannot invalidate statutes.

Section 6 provides it is unlawful for public authorities to act incompatibly with Convention rights. If they do so, victims of their unlawful conduct may challenge the action in the courts (e.g. through judicial review) (s.7) and claim damages if necessary to afford them just satisfaction (s.8).

Section 10 provides that where a declaration of incompatibility has been made, the government may amend the incompatible legislation by using a 'fast-track' procedure, rather than primary legislation, by making a 'remedial order' where 'compelling reasons' exist. However, the HRA does not oblige the government to do so.

Section 19 requires ministers introducing a Bill into Parliament to make a statement that the Bill is compatible with Convention rights or that, despite not being able to make a statement of compatibility, the government nevertheless wishes to proceed with the Bill.

Conversely, although the HRA does not prohibit Parliament from enacting legislation which breaches the rule of law, there is strong political pressure to respond to a declaration of incompatibility, and following Bellinger and A the government amended the incompatible legislation. This supports the argument that the HRA is effective in safeguarding the rule of law, although the incompatible legislation is not always amended.

The incorporation of the ECHR into UK law via the HRA has done much to enhance the rule of law. Whilst parliamentary supremacy means the government of the day may be able to persuade Parliament to enact legislation infringing the rule of law, the HRA does act as an important check on the government's ability to do so.

Question 3

(a) Conventions and the royal prerogative

Constitutional conventions are a non-legal source of the constitution. They play a key role in the UK as the UK, unlike most states, has an 'unwritten' or 'uncodified' constitution. Thus there is no single constitutional document which governs the relationship between the various organs of the state. Along with constitutional conventions, the main sources of the UK constitution are statutes, common law, rules and procedure of Parliament, and constitutional conventions.

Various writers have described constitutional conventions in different ways. According to Marshall and Moodie, they are 'rules of constitutional behaviour… considered to be binding by and upon those who operate the constitution but

which are not enforced by the law courts', while Jennings described them as the 'flesh that clothe the dry bones of the law'. Basically they are rules of constitutional behaviour which are regarded as binding upon those operating the constitution but which are not enforced by the courts (Re Amendment of the Constitution of Canada (1982)).

Constitutional conventions play a vital part in ensuring the smooth running of government and supplement the legal sources of the constitution, particularly where the royal prerogative is concerned. The royal prerogative are those powers once exercised by the monarch which are now 'legally' left in the hands of the Crown. The extent of the prerogative may be limited by statute. For example, the Fixed-term Parliaments Act 2011 removed the monarch's power to dissolve Parliament.

Through regulating the exercise of the royal prerogative, conventions have contributed significantly to maintaining the constitutional balance between the monarch on the one hand and Parliament and the government on the other. The royal prerogative covers some crucial areas of government. Many aspects of foreign policy are governed by the royal prerogative, including declarations of war, deployment of the armed forces and signing international treaties. At domestic level, there are significant prerogative powers, such as the giving of royal assent to Bills, the appointment of the Prime Minister and ministers, and the prerogative of mercy. It is for example by convention that the monarch does not withhold her assent from Bills presented to her. Similarly convention dictates that the monarch appoints ministers on the Prime Minister's advice.

Legally the unelected monarch retains enormous power. This would be unacceptable in a modern democracy, but conventions modify the strict legal position by ensuring that the bulk of the monarch's powers are actually exercised by the democratically-elected government. Constitutional conventions mean that the monarch only acts on the advice of the Prime Minister and other ministers. Indeed, most decisions are taken by the government directly, without any involvement of the monarch. The value of conventions is illustrated by considering the position should the monarch breach convention and refuse royal assent to a Bill. This would provoke a major constitutional crisis.

Conventions also contribute to holding ministers to account concerning how they exercise prerogative powers in the monarch's name. A notable example is the emergence of a convention that the government should seek parliamentary approval before deploying the armed forces, except in an emergency. After the government was defeated on a motion to deploy military forces in Syria in 2013, the Prime Minister stated that the government would respect the will of the Commons. Subsequently, in September 2014 the government, following the new convention, successfully sought parliamentary approval for military action against ISIS in Iraq.

The manner in which conventions and the royal prerogative interact therefore contributes significantly to the operation of government in the UK by enhancing the democratic oversight of the exercise of prerogative powers.

(b) The scope of the prerogative

Historically the courts have been willing to adjudicate upon the scope of prerogative powers, although until CCSU v Minister for Civil Service (1984) they were unwilling to review how they were exercised. Judicial oversight concerning their scope goes back to the Case of Proclamations (1611) when Lord Coke held that the King had no prerogative power to change the common law or statute,

nor to create any new offences. He furthermore stated that the King only had those prerogatives that the law allowed him.

A landmark case concerning the scope of prerogative powers is A-G v De Keyser's Royal Hotel (1920). Statute conferred rights of compensation following requisition of property for government purposes. The government purported to use prerogative powers to requisition property without paying compensation. The House of Lords held that where statute and the royal prerogative covered the same ground, the statute prevailed and the prerogative powers were curtailed.

The courts have also held that no new prerogative powers can be created, nor can the scope of existing ones be extended (BBC v Johns (1964)).

Recently the Supreme Court reviewed the scope of prerogative powers in R (Miller) v Secretary of State for Exiting the EU (2017). Following the vote to leave the EU in the 2016 referendum, the government argued that it could use its prerogative powers to withdraw from international treaties to serve the notice under Article 50 of the Treaty on European Union triggering the UK's withdrawal. However, the Supreme Court held that the European Communities Act 1972, the statute that paved the way for the UK's accession to the EU, created rights arising under EU law that could only be removed by statute, not by the exercise of the prerogative. When Parliament passed the 1972 Act, it showed its intention that the UK should be part of the EU. The 1972 Act created a route whereby EU law constituted a new, independent and overriding source of domestic law. The executive cannot change the law or remove rights granted to individuals without parliamentary approval; the prerogative could therefore not be used to serve the Article 50 notice.

The Miller case forms part of a consistent line of cases going back to 1611 in which the courts have been willing to rule on the extent of prerogative powers. While the issues it raised were politically controversial, the judgment relied on established constitutional principles.

Question 4

Historically, a right of privacy did not exist in English law. However, the enactment of the Human Rights Act 1998 ('HRA') has fundamentally altered the position. Moreover, the rise of the 'celebrity culture' has resulted in considerable litigation concerning how far an individual's right to privacy under Article 8 of the European Convention on Human Rights should be protected. The right to privacy has often conflicted with the press's right to freedom of expression under Article 10. Such cases require the courts to conduct a balancing exercise to resolve a potential conflict between competing Convention rights.

While the House of Lords affirmed in Wainwright v Home Office (2003) that English law does not recognise a tort of invasion of privacy, claimants have nonetheless been able to bring claims against newspapers under the 'horizontal effect' principle developed in cases such as Venables and Thompson v NGN (2001) and Douglas v Hello! Ltd (2005). Initially claimants had to show that publication of the information amounted to a breach of confidence at common law (i.e. the misuse of information obtained in confidence). The rationale for this approach was that courts, as public authorities themselves (s.6 HRA), had to develop the law on breach of confidence in a manner compatible with Convention rights. Accordingly they were required to consider Articles 8 and 10 in cases between individuals as well as in disputes between individuals and public authorities. Recently the Court of Appeal held that a new tort had been

developed, misuse of private information (Vidal-Hall v Google Inc. (2014)), which is no longer dependent on a confidential relationship.

A claimant must first show that their Article 8 rights are engaged before the courts will consider the possibility of conflict between Articles 8 and 10 (Campbell v MGN (2004)). The first step therefore is to ask whether the claimant has a 'reasonable expectation of privacy' concerning the information published. This is an objective question and has regard to all the circumstances of the case, including the attributes of the claimant, the nature of the activity being engaged in and where it happened. The Court of Appeal in Murray backed the argument that everyday acts such as a visit to the shops could still attract a reasonable expectation of privacy, particularly where children were involved.

Once the claimant has established that Article 8 is engaged, the court must then balance the claimant's Article 8 rights against the newspaper's right to freedom of expression under Article 10. The newspaper will have to justify its interference with the claimant's right to privacy by arguing that it is exercising its right to freedom of expression (Article 10) and the information published constitutes a legitimate interference with the claimant's Article 8(1) rights. The newspaper will specifically rely on Article 8(2) which permits interferences with Article 8(1) rights to protect the rights and freedoms of others – here the newspaper's own freedom of expression under Article 10(1).

The court should then use the three-part 'balancing test' set out by Baroness Hale in Campbell for use in cases where qualified rights conflict. 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. As Baroness Hale commented in Campbell, applying the proportionality test is fairly straightforward when only one Convention right is involved, but it is much less straightforward when two Convention rights are involved.

In Campbell, while in an ordinary case all the information revealed about Campbell would have been private, the newspaper was entitled to publish that Campbell had been addicted to drugs to 'set the record straight', i.e. to correct her previous claim that she was not addicted. However, the majority of the House in Campbell held that the photograph of Campbell near her rehab clinic went too far in 'setting the record straight' and could jeopardise her recovery. The privacy of a medical condition outweighed the newspaper's Article 10 rights which were weak; publishing the intimate details of a model's private life is not usually an especially important manifestation of freedom of expression, compared to information about the political and social life of the community.

In A v B (a Company) (2002), where 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, in particular 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 afforded to a permanent relationship was much greater than that afforded to a fleeting one. Conversely, the courts proved more willing to protect privacy in Mosley v News Group Newspapers (2008). Max Mosley, a well-known figure, had participated in a sado-masochistic orgy with prostitutes. His claim succeeded because there was insufficient public interest to justify publishing details of his conduct.

PJS v News Group Newspapers Ltd (2016) concerned a newspaper's plans to publish the story of a married couple's three-way sexual encounters. PJS was granted an injunction by the Supreme Court, even though details of the story had been published in other countries and on numerous websites. The majority of the Supreme Court took the view that should the injunction be refused there would be a 'media storm' in England and so an injunction was necessary to protect PJS, his partner and especially their children.

Following PJS there are concerns 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 that freedom of expression is a fundamental right and they do strive to balance the public interest in knowing information with an individual's privacy. They do, however, have particular concern to protect children's interests.

SECTION B

Question 1

Graham, as presiding officer of the Assembly of the North, would need to argue that the DEA 2016 remains a valid Act. He has two main arguments:

(i) It was 'unconstitutional' to use the Parliament Acts 1911 and 1949 to pass legislation that fundamentally altered the devolution settlement – a change of constitutional significance; and

(ii) The contradictory provisions in the PPA 2018 did not impliedly repeal the voting provisions in the DEA 2016.

Both arguments strike at the root of parliamentary sovereignty. According to AV Dicey's classic definition of the doctrine:

(a) There is no legal restraint upon Parliament's law-making powers, and

(b) No other person or body (i.e. the judiciary) within the constitution is able to question the validity of primary legislation.

As part of the continuing nature of sovereignty, the courts apply the doctrine of implied repeal, i.e. a later statute the content of which is inconsistent with an earlier statute will impliedly repeal the earlier statute to the extent of the inconsistency (Ellen Street Estates v Minister of Health (1934)).

Parliamentary sovereignty distinguishes the UK constitution from those in countries where a written constitution limits the legislature's powers and enables the courts to declare legislation 'unconstitutional'. A major problem for Graham in challenging the PPA 2018 is the 'enrolled Act rule' (Edinburgh & Dalkeith Railway v Wauchope (1842)), namely that the courts will not challenge the validity of legislation which appears on the statute book as properly enacted. The courts will thus not normally review primary legislation. However, in R (Jackson) v Attorney General (2005) the House of Lords (in its judicial capacity) was prepared to consider a challenge to the Hunting Act 2004 on the basis that it had been passed without the consent of the House of Lords under the Parliament Act 1911, as amended by the 1949 Act.

Lord Steyn did suggest *obiter* in Jackson that in exceptional circumstances, such as involving an attempt to abolish judicial review or the ordinary role of the courts, the Supreme Court might have to consider whether these were constitutional fundamentals that not even a sovereign Parliament could abolish. However, the PPA 2018 does not go this far.

Graham's first argument is based on the unconstitutionality of using the Parliament Acts to make a significant constitutional change. The Parliament Act 1911 removed the House of Lords' power to veto Public Bills, except one extending the lifetime of a Parliament. Instead, the Lords could delay a Public Bill by up to two years. The Parliament Act 1949 further reduced the Lords' delaying powers to one year.

It was argued in Jackson that the 1949 Act was an invalid Act as it had been passed under the 1911 Act circumventing the Lords, and Parliament had not intended that the 1911 Act should be used in this way; i.e. to further reduce the delaying power of the Lords. Hence, as the Hunting Act was passed under the 1949 Act, it also was not a valid Act. The House of Lords rejected this argument, as the 1911 Act clearly states that measures passed under its procedures are 'Acts', and so there were no grounds for arguing that measures passed under its procedures were merely delegated legislation. Nonetheless, the majority of the Lords accepted the Parliament Act procedure could not be used to pass a Bill extending the life of a Parliament beyond five years. Such Bills are expressly excluded from the Parliament Acts procedure.

However, the Lords were unwilling to accept any other limitations on using the Parliament Acts and the Commons could employ them to make major constitutional changes. Graham's first argument will therefore fail.

The main problem with Graham's second argument is the 'continuing' nature of parliamentary sovereignty: a later Parliament may, if it so chooses, impliedly or expressly repeal the Acts of previous Parliaments. Accordingly, it is argued that 'Parliament cannot bind its successors'.

The judiciary has modified the doctrine of implied repeal. Laws LJ, in Thoburn v Sunderland City Council (2002), distinguished 'ordinary' statutes, which may be impliedly repealed, from 'constitutional' statutes, which can only be repealed by clear unambiguous words contained in a later statute. He defined a constitutional statute as one that governed the legal relationship between citizen and state in some general, overarching manner, or changed the scope of fundamental constitutional rights. Examples included the Bill of Rights 1689, the Human Rights Act 1998 and the Scotland Act 1998. Subsequently, the Supreme Court in H v Lord Advocate (2012) provided backing for Thoburn, as Lord Hope *obiter* stated that the Scotland Act could not be impliedly repealed due to its 'fundamental constitutional nature'.

Applying Laws LJ's definition, the DEA 2016, governing the tax-raising powers of a devolved assembly, is a constitutional statute. This question, however, involves two constitutional statutes, since the PPA 2018 also falls within Laws LJ's definition. In R (HS2 Action Alliance Ltd) v Secretary of State for Transport (2014) the Supreme Court considered *obiter* the possibility of a conflict between two constitutional statutes, the Bill of Rights 1689 and the European Communities Act 1972. While there was no conflict on the facts, the Supreme Court suggested that there are some fundamental constitutional principles which will not be overridden even by subsequent constitutional statutes unless there is unmistakeable evidence of parliamentary intention to amend or repeal them.

Unfortunately for Graham, while the PPA 2018 does not expressly repeal the DEA 2016, its provisions removing the power to levy different rates of SDLT demonstrate unequivocal parliamentary intention to repeal the Assembly's tax-raising powers. Graham's second argument is accordingly unlikely to succeed.

Graham will therefore probably fail in arguing that the PPA 2018 is invalid. However, Graham's legal action could cause the government political embarrassment as it would highlight the constitutionally controversial use of the Parliament Acts.

Question 2

Amenability/ Eligibility

The Secretary of State is a public law body as she is exercising statutory functions under the Renewable Energy Act 2107 ('the Act') by designating land for use as wind-farms. She is also thereby exercising a public function, so her decision is amenable to judicial review (O'Reilly v Mackman (1983)).

As the NAPB is not directly affected by the decision, the issue arises whether it, as a pressure group, has 'sufficient interest' in the decision to apply for judicial review (s.31(3) SCA 1981). The factors the courts consider in determining whether pressure groups have standing were outlined in R v SoS for Foreign Affairs ex p. World Development Movement Ltd (1995)

- The importance of the matter
- The need to uphold the rule of law
- Whether any other body was likely to launch a challenge
- The role of the pressure group involved

The issue of renewable energy is an important one, as is the need to protect birdlife. The NAPB is well placed to bring the claim due to its expertise and its role in protecting birds. As one of the possible grounds of review is bias, the rule of law is relevant; decisions should be taken impartially. The NAPB is likely to have sufficient interest under the WDM criteria.

Timing

The claimant should apply for permission for judicial review promptly, without undue delay and in any event within three months of the date of the decision to designate the land (SCA s.31(6), CPR 54.5). As long as the NAPB applies promptly, timing should not be a problem.

Ouster clause

There is a full ouster clause which purports to prevent challenges to the Secretary of State's decision. The courts have found ways of bypassing legislative attempts to exclude judicial review. The House of Lords' decision in Anisminic v FCC (1969) made it clear that complete ouster clauses will not protect decisions that were never valid ('nullities') and thus it is for the courts to determine the validity of a decision. The ouster clause is highly unlikely to prevent the NAPB from bringing judicial review proceedings.

Grounds

The grounds for judicial review were authoritatively clarified by Lord Diplock in CCSU v Minister for Civil Service (1984). They are illegality, irrationality and procedural impropriety'.

Illegality

Ulterior purpose

Public bodies will be acting illegally if they use their powers for an improper or unauthorised purpose (Congreve v Home Office (1976)). The Act's purpose is the promotion of renewable energy.

The reason given by the Secretary of State indicates that the decision had as its purpose the economic regeneration of Kenton-on-Sea; this seems irrelevant to the Act's purpose. The Secretary of State seems to have had an ulterior motive (Sydney Municipal Council v Campbell (1925)). Alternatively, she may have taken into account an irrelevant consideration by considering the town's economic regeneration (Padfield v Minister of Agriculture (1968)).

Relevant Considerations

The Secretary of State has failed to take into account that the wind farm is on the route flown by an endangered species of migrating birds and its proximity to the Wildlife Conservation Area (Roberts v Hopwood (1925)).

Irrationality

The Secretary of State's decision can be challenged if, having regard to relevant considerations only, it is so unreasonable that no reasonable body could have reached it (Associated Provincial Picture Houses v Wednesbury Corporation (1948)). Although the threshold is high, it could arguably be reached, given the proximity of the wildlife conservation area and the decision not to hold a public inquiry. This is particularly so given the importance of the area to migrating birds. The decision might accordingly be regarded as outrageous in its defiance of logic (CCSU).

Breach of natural justice: procedural ultra vires

Express procedural requirements

Section 27 of the Act provides that the Minister '*shall'* hold a public inquiry before making a final decision. This, clearly, was not adhered to. The court must therefore decide whether this was a 'mandatory' or 'directory' requirement. Mandatory requirements must be complied with and, if they are not, the decision will be void. Breach of directory requirements may be waived. In Howard v Boddington (1877), Lord Penzance indicated that the whole scope and purpose of the procedural requirement must be taken into account, as well as the importance of the provision disregarded and its relation to the general object to be secured by the Act.

Courts have also moved away from focussing exclusively on the wording of the provision, but will also consider the overall context of the procedural safeguard (London and Clydeside Estates v Aberdeen District Council (1979)). In R v Secretary of State for the Home Department, ex p. Jayeanthan (2000) Lord Woolf MR stated that the court should put itself in the position of Parliament, as

the body which enacted the legislation: the question for the court is whether it had been Parliament's intention that failure to comply with the procedural requirement would render the decision unlawful. On this basis, the NAPB has strong grounds for arguing that Parliament could not have intended for decisions made under such circumstances to be considered lawful. The public inquiry is an important procedural safeguard, and the Secretary of State has made no attempt to comply with it.

Bias

The Secretary of State's son is a shareholder in International Turbines plc, which will be constructing the wind farm. The Secretary of State may not have a direct interest in the matter; the facts do not suggest any connection with the company, so there will not be an automatic presumption of bias (Dimes v Grand Junction Canal Proprietors (1852)).

However, even if her interest falls short of a direct one, the NAPB could argue that it was still sufficient to lead 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)).

Remedies

The NAPB should seek a quashing order setting aside the decision and a mandatory order requiring the Secretary of State to hold an inquiry.

Question 3

(a) Advise the Chief Constable

The March

The march will be a public procession as it is taking place on the highway which is a public place under s.16 Public Order Act 1986 ('POA'). The Chief Constable, as the Chief Officer of Police, will be able to place conditions on the march if he reasonably believes that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community or the organisers have intimidatory purpose (s.12 POA). He fears that there may be some disturbance caused by the march, but it is unlikely to amount to 'serious public disorder'. Similarly, he is concerned that there will be traffic jams and shoppers may be inconvenienced, but this is also unlikely to amount to 'serious disruption…'

However, if the Chief Constable does have a reasonable belief to this effect, he can impose such conditions as appear necessary to him to prevent the disorder or disruption. For example, he could re-route the march so that it avoids the town centre.

If the Chief Constable reasonably believes his powers to impose conditions would be insufficient to prevent serious public disorder, he may seek an order from the local authority banning all processions or a class of processions, subject to obtaining the Home Secretary's consent. This would cover Marcus's march. However, his concerns about traffic jams and inconveniencing shoppers (disruption to the life of the community) would not be sufficient grounds to impose a ban.

The meeting

The meeting is likely to be a 'public assembly' as it will consist of 'an assembly of two or more persons in a public place which is wholly or partly open to the air' (s.16 POA). Under s.14 POA the Chief Constable may impose conditions on the meeting under the same circumstances that he could impose conditions on the march (summarised above). As the meeting is in the cinema car park, it is unlikely to cause serious disruption to the life of the community (though possibly some inconvenience to members of the public trying to find somewhere to park). As with the march, it is unlikely that the Chief Constable's fears about the results of the 'considerable local feeling' against the refugees would give him reasonable grounds to believe that the meeting would result in serious public disorder.

The Chief Constable would not have power to ban the meeting unless it constituted a 'trespassory assembly'. The meeting would need to:

- Consist of 20 or more people – Marcus expects 50+ people to attend;
- Be on land in the open air to which the public has no right of access or only a limited right of access – the public would have only a limited right of access to the cinema car park;
- Take place without the permission of the occupier or exceed the limits of the occupier's permission or the public's right of access. The facts state the cinema's owner's object to Marcus's plan.

The Chief Constable would then be able to ban the assembly if he reasonably believes that it may result in:

- Serious disruption to the life of the community. This seems unlikely on the facts (see above);

- Significant damage to the land or building on it, where the land or building is of, among other things, historical or architectural importance. The facts state the cinema is 'newly built' and so this condition is unlikely to apply. Besides, it is unclear whether the Chief Constable reasonably believes that the meeting may result in serious damage to the building or car park.

(b) Police conduct

Lawfulness of arrest

For the arrest to be lawful, PC Chambers must have the power to arrest Amanda, the arrest must be necessary and carried out correctly.

Power of arrest? Section 24(2) PACE provides that where a constable has reasonable grounds for suspecting that an offence has been committed, he 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 Amanda has been arrested for committing an offence under s.4 POA, so the issue is whether PC Chambers has reasonable grounds for suspecting she committed this offence.

Section 4(1) provides that it is an offence if a person uses towards another person threatening, abusive or insulting words with the intention to cause that person to believe immediate unlawful violence would be used against him or to provoke the use of immediate violence by him. While Amanda may be abusing PC Chambers, it is unlikely that she had any intent to cause him to believe that unlawful violence would be used against him or to provoke violence on his part. Accordingly, Amanda does not have the requisite intent.

Arrest necessary? Are any of the reasons in s.24(5) met? PC Chambers could claim that the arrest is necessary to allow the prompt and effective investigation of the offence or the conduct of the person (s.24(5)(e)). However, on the facts this seems tenuous.

Manner of arrest Section 28 - PC Chambers must inform Amanda that she is under arrest and provide the grounds for the arrest, even if obvious (s.28(2) and (4)). PC Chambers has told Amanda the fact of arrest as required by s.28(1), but the grounds should also be given at the time of the arrest or as soon as practicable thereafter (s.28(3)). The police do not have to use precise, technical language, provided the person knows in plain terms why they are being arrested (Abbassy v MPC (1990) and Taylor v CC of Thames Valley (2004)). However, PC Chambers has failed even to do this. There is no reason why PC Chambers could not have provided the grounds of arrest immediately; he has therefore breached s.28 and so the arrest is unlawful. Amanda is told the ground of arrest on arrival at the police station, so the arrest would then have become lawful if PC Chambers had had a power of arrest and the arrest had been necessary.

Question 4

There are two forms of defamation. Libel is defamation in a permanent form, whereas slander is defamation in a temporary form. Rufus would therefore be bringing 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 claimant in the eyes of right-thinking members of society generally and/or they expose the claimant to hatred, contempt or ridicule.

Rufus will have little difficulty in proving the above elements regarding Shireen's article and the subsequent editorial. The burden of proof will then pass to the Sunday Tribune to establish a defence.

At common law there were several defences the Sunday Tribune could have relied on. 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 particularly relevant for the Sunday Tribune are truth, honest opinion and publication on a matter of public interest.

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 the money had been paid to Rufus in The Tennessee Spur rather than The Vineyard would therefore not invalidate this defence.

The defence of honest opinion, set out in s.3 of the 2013 Act, is relevant to the editorial. This defence is available 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. The statement that Rufus

is parliamentary vermin who had undermined trust in democracy is clearly an expression of opinion rather than of fact. Also, the editorial indicates the factual basis for that opinion, Rufus's acceptance of bribes. However, Rufus could defeat the defence by showing that the Sunday Tribune did not hold the opinion.

This defence does not apply to matters of fact rather than opinion, so the Sunday Tribune cannot rely on it regarding Shireen's article. Either it must prove that Rufus accepted bribes, or it will need to invoke 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. Pursuant to s.4 the court must have regard to all the circumstances of the case when determining these points. Further, in deciding whether the defendant's belief was reasonable, the court must make appropriate allowance for editorial judgment. This defence applies to 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 (although not binding) guide to interpreting the new statutory defence. Analysing the case law on the Reynolds defence will therefore be useful in determining whether the Sunday Tribune can rely on the public interest defence.

Reynolds v Times Newspapers Ltd (1999) involved a libel claim by Albert Reynolds, the former Taoiseach of Ireland, 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 stressed the importance of freedom of expression and recognised that newspapers should be protected by privilege if they satisfied a test of public right to know and responsible journalism. The aim of the defence was to protect serious investigative journalism. Accordingly, even where allegations (such as those made against Rufus) were false and hugely damaging to the claimant, newspapers could invoke it. Their Lordships developed 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) to which the court should have regard 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 contained 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 assist The Sunday Tribune, assuming it cannot rely on the defence of truth. While the allegations are very serious, the subject-matter is

clearly of public concern, the source of the information appears reliable and Shireen did ask Rufus to comment and reported his response.

As stated 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 taking accepting bribes to give information to Russian oligarchs. 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 its aim was to promote greater freedom for the press to publish stories of genuine public interest within the bounds of journalistic responsibility. Thus, there is a realistic possibility that the Sunday Tribune will successfully invoke the public interest defence.