LEVEL 6 - UNIT 12 – PUBLIC LAW
SUGGESTED ANSWERS - JUNE 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the June 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1

The rule of law

AV Dicey supplied the classic definition of the rule of law in *Introduction to the Study of the Law of the Constitution* (1885). There are three elements to his definition:

(i) There should be an absence of arbitrary power; i.e. regular law should be supreme.

Citizens should not be punished or have their assets confiscated unless clearly authorised by the law ('due process' in contemporary terminology).

(ii) There should be equality before the law.

The government and its officials should not have any special exemptions or protections from the law, unlike in France where special administrative courts favoured the government over citizens.

(iii) The fundamental constitutional rights of individuals flow from judicial decisions of the English courts.

Dicey also considered that the courts were the most effective guarantor of personal freedom as through their decisions they developed the common law in a manner that upheld individual liberty. Bills of rights were therefore unnecessary.

Arguably Dicey's view of the rule of law is now outdated. In a modern economy public bodies require wide-ranging discretionary powers, but this has been accompanied by a significant growth in judicial review which has acted as an

effective check on the abuse of power by public bodies. Moreover, the courts have not always succeeded in guaranteeing personal freedoms, as shown by Hardman v MPC (1979) where it was held that, as there was no law against it, the police were free at common law to tap phones.

There have therefore been numerous attempts to update the concept. For example Raz has emphasised that laws should be clear, stable and accessible to enable people to understand and comply with them. Also, judicial independence must be guaranteed to ensure that judges are free to decide cases according to the law free from external pressures.

Lord Bingham provided a highly authoritative formulation in *The Rule of Law* (2010). Both Lord Bingham and Dicey uphold equality before the law and the need for clear and predictable laws. However, Lord Bingham goes further, for example by emphasising the importance of protecting human rights and conforming to international law.

Separation of powers

The doctrine's modern form was developed by Montesquieu, the French philosopher, in his influential work, L'esprit des Lois (1748). The doctrine identifies three branches of government:

- The legislative branch, which makes the law.
- The executive, which applies and administers the law. This includes central and local government, police, armed forces, etc.;
- The judiciary, which decides disputes about the law.

The doctrine states that these three functions should be carried out by separate organs of state and that each organ should only carry out its own function with its own personnel. Montesquieu considered that there could be no liberty without a separation of powers. A system of 'checks and balances', enabling each branch to control the abuse use of power by another branch, was essential. An independent judiciary is therefore crucial in securing the rule of law by preventing arbitrary or oppressive government.

Judicial Separation from the other branches of state

(i) The Executive

The Constitutional Reform Act 2005 ('CRA') has considerably strengthened the separation between the executive and the judiciary. For example:

- The Lord Chancellor and other cabinet ministers must uphold judicial independence (s.3 CRA).

- Judges are now selected by a Judicial Appointments Commission, rather than by the Prime Minister or Lord Chancellor. This clearly limits the scope for political interference.

Even before the CRA numerous rules and conventions existed to secure judicial independence:

- Judges of the High Court and above hold office 'during good behaviour' and may only be removed on a vote by both Houses of Parliament. Judges enjoy security of tenure and cannot be dismissed simply because politicians dislike their judgments (s.11 Senior Courts Act 1981, s.33 CRA).

- Convention requires ministers to refrain from criticising judges although the extent to which this is still adhered to is debatable; for example, ministers have on occasion strongly criticised judgments, chiefly in human rights cases.

- The judiciary exercises a check on the executive through judicial review of how the executive exercises its powers.

Nevertheless, there are some areas where separation may be lacking. There is possibly a risk of the judiciary appearing to be politicised, as the Human Rights Act 1998 ('HRA') sometimes requires them to consider politically sensitive issues, as exemplified by A v Home Secretary (2005) ('*Belmarsh*') on the detention of suspected terrorists.

The quasi-judicial responsibilities of ministers can be difficult to reconcile with their political roles. However, after the ECtHR decision in Stafford v UK (2002) the Home Secretary lost the power to set the tariff of prisoners sentenced to life imprisonment.

(ii) Legislature

There is also significant judicial separation from the legislature. Judges cannot be MPs (s.1 House of Commons Disqualification Act 1975). Also the CRA ended the House of Lords' judicial function, creating a new, separate UK Supreme Court in 2009. This removed the anomaly of the Law Lords sitting as members of the legislature.

The UK judiciary accepts parliamentary sovereignty, so (unlike the US judiciary) it cannot declare statutes unconstitutional. Instead, the UK judiciary is limited to making declarations of incompatibility under the HRA which do not invalidate the statute concerned. Nonetheless, in Jackson (2005) Lord Steyn suggested *obiter* that judges might strike down legislation that infringed the rule of law, for example by abolishing judicial review.

By convention, MPs do not criticise judges and judges avoid party politics. Also, the sub-judice rule prevents MPs from discussing current courts cases.

In contrast the judiciary plays a quasi-legislative role in interpreting statute and developing the common law (the legislative theory). However, Parliament may always pass legislation overriding judgments it dislikes (Burmah Oil v Lord Advocate (1965)). Further, the judiciary exercises restraint in its law-making role.

Conclusion

An independent judiciary is an integral aspect of the rule of law. The CRA 2005 has bolstered the mixture of law and convention that previously existed to ensure judicial independence. Consequently, the UK judiciary is sufficiently separate from the other branches of government.

Question 2(a)

Scottish devolution

The Scotland Act 1998 established a Scottish Parliament and granted it significant legislative powers in relation to 'devolved matters'. Devolved matters comprise all issues apart from those specifically reserved to the UK Parliament ('reserved matters'). Devolved matters include responsibility for health and social services, education, local government, and civil and criminal law. The Scotland Acts 2012 and 2016 extended these powers. Reserved matters include responsibility for the constitution, foreign policy and defence; reserved matters are largely those having a UK-wide or international impact.

However, the UK Parliament legally retains the power to legislate on devolved matters even if the Scottish Parliament opposes it (s.28(7) Scotland Act 1998). Nevertheless, under the Sewel Convention the Westminster Parliament will not normally legislate on devolved matters without the Scottish Parliament's consent.

The Scotland Act 2012 gave the Scottish Parliament the power to set a Scottish rate of income tax and to levy certain other taxes. In 2011 the Scottish Nationalist Party gained power in Scotland and a referendum was held in 2014 on whether should become independent. Although the electorate voted 'No', in response to the campaign, the UK government agreed to grant Scotland further powers. Accordingly, the Scotland Act 2016 grants the Scottish Parliament further powers over taxation, welfare and oil and gas. It also codifies the Sewel Convention and declares that a Scottish Parliament and Government are permanent parts of the UK's constitutional arrangements, and consequently provides that they are not to be abolished unless approved by the Scottish people in a referendum.

There are, however, limits on the Scottish Parliament's legislative powers. It is not a sovereign legislature in the sense of the Westminster Parliament. It cannot legislate on reserved matters or contrary to EU Law or Convention rights as defined in the Human Rights Act 1998. The courts have the power to strike down legislation outside the Scottish Parliament's competence.

(b) Impact on parliamentary sovereignty

Meaning of parliamentary sovereignty

AV Dicey provided the classic definition of parliamentary sovereignty:

(i) Parliament can make or unmake any law whatever;
(ii) No person or body (including the judiciary) is able to override or set aside an Act of Parliament.

Parliamentary sovereignty is a common law doctrine recognised developed by the judiciary. The modern concept has its origins in the 17th century struggle between the Crown and Parliament for supremacy, culminating in the Bill of Rights 1689.

Supremacy asserts itself via the will of Parliament as expressed in Acts of Parliament. The courts have developed the 'enrolled Act rule', whereby they will not consider challenges to the validity of an Act of Parliament which has received Royal Assent (Edinburgh & Dalkeith Railways v Wauchope (1842); Pickin v British Railways Board (1974)).

Supremacy is stated to be 'continuing' in nature: a later Parliament may, if it so chooses, expressly repeal any or all the Acts of previous Parliaments. The courts also 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 they are inconsistent (Ellen Street Estates v Minister of Health (1934)). This means that the one thing even a sovereign Parliament cannot do is to bind its successors.

However, in Thoburn v Sunderland City Council (2002) Laws LJ *obiter* modified the traditional doctrine by suggesting there was a hierarchy of statutes. There are 'ordinary' statutes and 'constitutional' statutes; i.e. statutes that condition the legal relationship between citizen and state in some general, overarching manner, or change the scope of fundamental constitutional rights. Examples include the European Communities Act 1972, the Human Rights Act and the Scotland Act 1998. According to Laws LJ, constitutional statutes cannot be impliedly repealed, but only by express words.

His views found support in the Supreme Court case of H v Lord Advocate (2012), where Lord Hope indicated that the Scotland Act could not be impliedly repealed because of its 'fundamental constitutional nature'. R (HS2 Action Alliance Ltd) v Secretary of State for Transport (2014) provides further support, as the Supreme Court suggested obiter that there were certain fundamental constitutional principles, whether contained in statute or common law, to which implied repeal might not apply. As a constitutional statute, the Scotland Act (as amended by the 2012 and 2016 Acts) is protected from implied repeal.

A particularly interesting feature of the 2016 Act is the requirement for a referendum before the Scottish Government and Parliament can be abolished. This seems to be a 'manner and form' provision, an attempt to entrench an Act by imposing a procedural requirement which attempts to make it more difficult subsequently to amend or repeal that legislation. The Privy Council's decision in A-G for New South Wales ('NSW') v Trethowan (1932) upheld a requirement preventing the legislature of NSW from changing the NSW constitution without a referendum approving it. However, the legislature of NSW was not a sovereign legislature, but a subordinate one subject to a constitution. In contrast the Westminster Parliament is a sovereign legislature. It is therefore doubtful whether an earlier Parliament can bind a future Parliament as to future procedures. Conversely, it is arguable that as the Parliament Acts 1911/49 made it 'easier' in certain circumstances for legislation to be enacted, Parliament could make it 'harder' to legislate in future.

The devolution legislation does generally seek to preserve the sovereignty of the Westminster Parliament as, despite the Sewel Convention, it can still legislate on devolved matters for Scotland even if the Scottish Parliament opposes such legislation. However, the requirement for a referendum to be held before the Scottish Parliament and Government could be abolished does appear to be an attempt legally to fetter the sovereignty of the Westminster Parliament. Also, an attempt by the UK Parliament to legislate contrary to the wishes of the Scottish Parliament on a devolved matter would be very likely to provoke a constitutional crisis, and so there are also considerable political and practical limitations on the Westminster Parliament's supremacy.

Question 3

The tort of defamation aims to protect a person's reputation. It involves making a statement which is likely to lower the claimant in the eyes of right-thinking members of society generally and/or exposes the claimant to hatred, contempt or ridicule. There are two forms of defamation, slander and libel. Slander refers to defamation through speech, while libel refers to defamation thorough the publication of defamatory comments in a permanent form. For the press, libel is the most important form of defamation, as it restricts its freedom of expression, a right enshrined in Article 10 of the European Convention on Human Rights. The courts must therefore balance a person's reputation on the one hand with the press's freedom of expression on the other.

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

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

The issue this question raises is the extent to which defamation impacts adversely on the press's freedom of speech. The possibility of defamation claims may arguably have a 'chilling' effect on the press. However, the judiciary has shown that it is alert to this danger. Local authorities and political parties cannot bring defamation actions (Derbyshire County Council v Times Newspapers Ltd (1993); Goldsmith v Bhoyrul (1997)), as the public interest requires that they should be subject to public criticism.

The Defamation Act 2013 provides five defences to defamation claims that the press can rely on. These statutory defences replaced the defences that existed at common law. The defences which are especially significant in protecting press freedom are truth, honest opinion and publication on a matter of public interest.

Truth, set out in s.2 of the 2013 Act, provides a complete defence to a defamation claim if the defendant can show that the statement complained of is substantially true.

The defence of honest opinion, set out in s.3 of the 2013 Act, provides a defence if the defendant satisfies three conditions:

- The statement complained of must be an expression of opinion;
- The statement complained of must indicate the basis of the opinion;
- The opinion must be one that an honest person could have held on a factual basis.

Accordingly, if the defendant is clearly expressing an opinion rather than stating a fact and shows the factual basis for that opinion, it is up to the readers to decide if they agree with the opinion based on those facts. The claimant can defeat the defence by showing that the defendant did not hold the opinion. This defence, by permitting open debate, plays a key role in securing the freedom of the press. The introduction of the requirement for serious harm by s.1 of the 2013 Act has also reinforced the press's protection.

However, the press cannot rely on this defence where they are reporting an issue of fact rather than stating an opinion. Either they must prove the truth of the

facts reported, or they will have to invoke the defence of publication on a matter of public interest (below).

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

It is also helpful to analyse the case law on the common law Reynolds defence in considering the extent to which s.4 protects the press's freedom of expression. Although s.4 abolished the Reynolds defence, the explanatory notes accompanying the Act state that the case law on it constitutes a helpful (though not binding) guide to interpreting the new statutory defence.

In Reynolds v Times Newspapers Ltd (1999), the House of Lords recognised the high importance of freedom of expression and accepted that newspapers should be protected by privilege if they satisfied a test of public right to know and responsible journalism. The press could rely on this defence even if allegations were false and extremely damaging to the claimant. The defence sought to protect serious investigative journalism. Whether the defence applied depended on the 'duty-interest' test; i.e. whether the publisher had a legal, moral or social duty to publish the material, and the recipients (which could include the general public) had a genuine interest in receiving the material.

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

- The seriousness of the allegation
- The source of the information
- Steps taken to verify the information
- The urgency of the matter
- Whether comment was sought from the claimant
- Whether the article contained the gist of the claimant's side of the story
- The tone of the article
- The circumstances of publication, including the timing.

The Court of Appeal applied the duty-interest test in Loutchansky v Times Newspapers (2002), stating that the interest was that of the public in a modern democracy in free expression and a free and vigorous press. The corresponding duty on the journalist was to discharge that function by behaving as a responsible journalist.

Another significant reform introduced by the 2013 Act is to limit the award of damages, limiting the ability of juries to award claimants excessively high damages.

The purpose of the reforms in the Defamation Act 2013 is to strike a fair balance between the rights of individuals to protect their reputation and the press's freedom of expression. Cases such as Reynolds show that the judiciary share that aim, so legislation and case law are moving in the same direction.

Question 4

Police powers to control protesters

Freedom of expression under Article 10 of the European Convention on Human Rights ('ECHR') and freedom of assembly under Article 11 ECHR are key freedoms guaranteed by the Convention and incorporated into UK law via the Human Rights Act 1998 ('HRA'). Prior to the HRA, freedom of association and expression in the UK were residual freedoms which those taking part in public protests could rely on. People were free to associate with each other so long as they did not break the law. The HRA, has, however, converted these residual freedoms into positive rights. When the police exercise their common law and statutory powers to control the conduct of protesters, they must take into account Articles 10 and 11 ECHR.

Statutory powers include powers of arrest (under s. 24 Police and Criminal Evidence Act 1984) for criminal offence, including public order offences such as using threatening words or behaviour contrary to s.4 Public Order Act 1986 ('POA'), and inciting racial hatred contrary to s.18 POA.

Additionally, the police have statutory powers to control public order short of arrest, particularly those granted to them by the POA. The POA includes the following key provisions:

- Section 11 – the organisers of any procession must usually give the police six clear days' notice

- Section 12 – imposing conditions on public processions

  Conditions can be imposed by the senior police officer in advance of the procession and even while the procession is underway. The senior police officer is given a broad discretion to give such directions as appear necessary to prevent serious public disorder, damage, disruption or intimidation. Where conditions are imposed in advance, the senior police officer is the Chief Police Officer. Once the procession has started, the senior police officer is the most senior officer present on the scene. The conditions may relate to the route of the procession or forbid it from entering specified public places.

- Section 13 - ban on processions

  If the Chief Police Officer believes the s.12 powers are insufficient, he may apply in advance to the district council for an order banning public processions. The Council may then, subject to the Home Secretary's consent, make an order banning processions for up to three months.

- Section 14 – public assemblies

  If the senior police officer reasonably believes that serious public disorder etc or intimidation may occur, he may make directions imposing conditions necessary to prevent such disorder etc occurring. The conditions may only relate to the place at which the assembly is held, its maximum duration and the maximum number of people present. The conditions may be imposed in advance of or during the assembly.

Additionally s.14A POA gives the police the power to apply for bans on trespassory assemblies; i.e. assemblies taking place on private land without the

owner's consent and which are likely result in serious disruption to the community or damage to sites or buildings of historical or scientific interest.

Where a march takes place on a public highway, protesters may commit an offence if they obstruct the highway (s.137 Highways Act 1980). However, the House of Lords held in DPP v Jones (1999) that peaceful assembly on a highway, which did not unreasonably interfere with or obstruct the highway, was lawful.

At common law the police retain the power to deal with an actual or imminent breach of the peace. In R v Howell (1982) the Court of Appeal defined a breach of the peace as occurring whenever harm is done or likely to be done to a person or, in his presence, to his property or a person fears being harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.

The police may act to prevent an actual or reasonably apprehended breach of the peace. However, in the latter case it must be imminent (R (Laporte) v CC of Gloucestershire (2006)). This may encompass arrest or other action such as dispersing a meeting or ordering protesters not to go to a meeting.

Impact on police powers

Section 6 HRA provides that it is unlawful for a public authority to act incompatibly with Convention Rights. Section 3 HRA requires English courts to interpret legislation consistently with Convention rights as far as possible. The courts will consequently interpret public order legislation consistently with Articles 10 and 11 ECHR whenever possible. This may indirectly limit police powers.

However, Articles 10 and 11 are qualified rights, not absolute rights. Articles 10(2) and 11(2) enable the police to justify their actions as being 'necessary in a democratic society', e.g. for the prevention of disorder or crime. They must be able to show that any action taken is

- prescribed by law
- necessary in a democratic society, e.g. for the prevention of disorder
- proportionate to achieving that aim.

In assessing proportionality, the courts apply the fourfold approach put forward in Bank Mellat v HM Treasury (No 2) (2013):

The test asks whether:

- the objective of the measure complained of is sufficiently important to justify limiting a fundamental right;

- the measure is rationally connected to the objective; i.e. is the action taken by the public authority going to help to achieve the objective?

- a less intrusive measure could have been used; i.e. could the same objective have been achieved without interfering with the Convention right?

- having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

Laporte also shows how the police are bound by both the common law and Convention Rights. Police action in turning back protesters travelling to a demonstration was held to be unlawful because the police did not reasonably apprehend an 'imminent' breach of the peace. Accordingly, their action was premature and disproportionate in interfering with the claimant's Article 10 and 11 rights.

Clearly Articles 10 and 11, mainly through the HRA 1998, require the police to act proportionately when exercising their statutory and common law powers to control protestors.

SECTION B

Question 1

(i) Stop and Search

PC Ross has the power to stop Mike and search him for prohibited articles (PACE, s.1(2)). PC Ross must have 'reasonable grounds' for suspecting that he will find prohibited articles (s 1(3)). The definition of 'prohibited article' includes offensive weapons (s.1(7)). He has reasonable grounds, as Harvey was stabbed with a knife nearby and Mike has a blood-stained shirt. Thus, PC Ross's reasonable suspicion is grounded on an objective assessment of the circumstances, despite finding nothing (Code A).

PC Ross must also fulfil the safeguards contained in s.2 by taking reasonable steps to bring to Mike's attention his identity and the object of and the grounds for the search. The courts interpret s.2 strictly (Osman v DPP (1999)), so PC Ross has breached s.2 as he has made no attempt to satisfy the safeguards.

(ii) Arrest

The arrest will only be lawful if PC Ross has the power to arrest Mike, the arrest is necessary and is carried out correctly.

Power of arrest*?* The offence of assault with intent to cause grievous bodily harm ('GBH') has been committed, and PC Ross has the power under s.24(3) to arrest anyone whom he has 'reasonable grounds' for suspecting to be guilty of it. PC Ross has reasonable grounds – Mike is near the scene of the crime and has a blood-stained shirt. Alternatively, as at the very least PC Ross has reasonable grounds for suspecting that an offence has been committed, he could rely on s.24(2).

Arrest necessary*?* PC Ross must show that one of the grounds in s.24(5) exist. Here, Mike gives his name as 'Michael Mouse'. This is unlikely to be his real name and so PC Ross has reasonable grounds under s.24(5)(a) for believing that it is necessary to arrest Mike to enable his name to be ascertained. Also, PC Ross can claim that the arrest is necessary to permit the prompt and effective investigation of the offence (s.24(5)(e)) and to prevent Mike's disappearance (s.24(5)(f)).

Manner of arrest*?* Pursuant to s.28 PC Ross must tell Mike that he is under arrest and give the grounds for the arrest, even if obvious (s.28(2) and (4)). PC Ross has informed Mike of the fact of the arrest, but has not informed him of the grounds; this information should be given at the time of or as soon as practicable after the arrest (s.28(3)). The police do not have to use precise legal terms, provided they use simple, non-technical language that the arrested person can

understand (Abbassy v MPC (1990), Taylor v CC of Thames Valley (2004)). However, Mike will not know what it is that he is suspected of doing from PC Ross's words. As there is no reason why PC Ross could not have given this information immediately, he has breached s.28 and so Mike's arrest is unlawful.

(iii) Detention at the police station

PC Ross complies with s.30 by taking Mike to the police station as soon as practicable after the arrest. Sergeant Hardman belatedly complies with s.28(4) by giving the grounds for arrest, so the arrest now becomes lawful.

Sergeant Hardman must also abide by s.37 in authorising Mike's continued detention. There is probably insufficient evidence to charge Mike and he needs to be able to put forward his version of events. Accordingly, Sergeant Hardman probably has reasonable grounds for believing that detention without charge is necessary to obtain evidence by questioning (s.37(2)).

(iv) Refusal to allow Mike access to a solicitor

Mike has the right to consult a solicitor (s.58(1)), although legal advice may be lawfully delayed for up to 36 hours where a person has been arrested for an indictable offence. Section 58(8) sets out the grounds for delaying access, and one of them is to prevent 'physical injury to other persons', but reasonable grounds for believing this to be the case must exist. It seems improbable that Harvey would be put at risk of injury if Mike consults a solicitor. In 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 merely might) have the adverse consequence claimed. Even if reasonable grounds exist for delaying access to Mike's usual solicitor, the police should offer an alternative, e.g. the duty solicitor.

Refusal to allow Mike to see a solicitor may also violate his right to fair trial under Article 6 ECHR (the right to a fair trial). In Averill v UK (2000) and Magee v UK (2000) the ECtHR ruled that it was incompatible with Article 6 ECHR to deny a detained person access to a solicitor, except where good grounds existed for doing so.

(v) Search of flat

Section 18 gives the police the authority to enter premises occupied or controlled by a person arrested for an indictable offence. The police must have reasonable grounds for suspecting that there is evidence in those premises relating to that offence or to a connected or similar indictable offence. An inspector or above must authorise the search in writing (s.18(4)).

Mike is under been arrest for an indictable offence, assault with intent to cause GBH. Based on the information supplied by Harvey, PC Cahill may well have grounds for reasonably suspecting that there is evidence on the premises relating to the stabbing. However, there is no indication that she has obtained written authorisation. If she has not, her search is illegal.

(v) Seizure of cocaine

Pursuant to s.19 PC Cahill may seize anything in the house if she has reasonable grounds for believing that it has been obtained in consequence of the commission of an offence and that it is necessary to seize it to prevent it being

concealed, lost, damaged, altered or destroyed. She may well have reasonable grounds as Harvey told her that Mike had stolen his watch. However, the power under s.19 only arises if she is lawfully on the premises. In the absence of written authorisation, her search is unlawful.

Question 2(a)

Minal's Article 11 rights

The right to freedom of assembly which Minal is asserting derives from Article 11 of the Convention which gives a right of peaceful assembly. The effective exercise of this freedom is of crucial importance for free expression.

However, Article 11 provides for a qualified right and permits restrictions on freedom of assembly pursuant to Article 11(2). The court will firstly ask whether Minal's Article 11 rights are engaged at all, and then if they are, whether the infringement of them complies with Article 11(2).

Are Minal's Article 11 rights engaged?

In Tabernacle v Secretary of State for Defence (2009) the Court of Appeal ruled in favour of protestors camping outside the Atomic Weapons Establishment at Aldermaston, upholding their argument that the Ministry of Defence's byelaws banning the camp violated their rights to freedom of expression, assembly and association rights.

Accordingly her Article 11 rights are engaged as she is entitled to organise a demonstration against the LPG facility. She is being criminalised for doing so.

To what extent can Minal's rights be limited under Article 11(2)?

Article 11(2) permits limitations to be imposed on freedom of assembly if they are:

- prescribed by law;
- imposed on a limited number of grounds as outlined in the Article; and
- 'necessary in a democratic society' (i.e. proportionate)

The term 'prescribed by law' means that any public interest limitation must have a legal basis (whether in common law or statute). It must be accessible (in published form) and sufficiently clear to enable the citizen to regulate his or her conduct (Hardman v UK (1984)). The restriction is accessible and has a legal basis, deriving from the Energy Protection Act 2017 ('EPA'), although its potentially arbitrary application may mean it does not satisfy this condition.

The government would argue that it was necessary in the interests of national security and/or for the prevention of disorder, two of the grounds set out in Article 11(2). This is not an easy burden to discharge, as in Tabernacle the Court of Appeal held that the MoD's objections to the camp did not constitute a pressing social need, sufficient to justify an interference with Article 11(2).

The restriction must also be reasonable and proportionate and the court must apply the test of proportionality adopted in Bank Mellat v HM Treasury (No 2) (2013): This involves a four-stage approach:

- Is the objective of the measure complained of is sufficiently important to justify limiting a fundamental right*?*
  Yes, ensuring energy security is a vital national interest.

- Is the measure is rationally connected to the objective*?*
  Probably yes, the measure (i.e. banning protests in a five mile radius of a designated facility) is connected in that it is possible that protests near an important facility could disrupt energy supplies, and therefore the measure is arguably rational.

- Could a less intrusive measure have been used*?*
  The blanket nature of the ban on demonstrations within a five mile radius of a designated facility goes much further than necessary; Minal is only taking part in a small demonstration which is unlikely to pose a threat to energy security.

- Having regard to these matters and the severity of the consequences, has a fair balance has been struck between the rights of the individual and the interests of the community?

  This involves balancing Minal's freedom of assembly with the community's interest in a secure energy supply, an issue of fundamental importance. Freedom of assembly is also a fundamental human right and where a demonstration is unlikely to jeopardise energy security significantly, it should prevail.

States do also have a 'margin of appreciation' (a level of discretion) in judging necessity (Handyside v UK (1976)), though it is limited where there is a broad consensus amongst contracting States concerning permissible levels of interference (Marper v UK (2008)).

(b) The Court of Appeal's approach

The Court of Appeal will be under a duty pursuant to s.3 Human Rights Act 1998 ('HRA') to read and give effect to the ESA in a way which is compatible with the Convention rights incorporated by the HRA. The Court of Appeal would also be a 'public authority' (s.6(3) HRA) and therefore under a duty not to act incompatibly with Convention rights. Accordingly it would be under a duty to protect any right to freedom of assembly which Minal might have under the Convention.

Further, a person who wants to rely on Convention rights in any legal proceedings needs to satisfy the definition of 'victim' in s.7 HRA 1998, namely a person directly and adversely affected by the interference with a Convention right. Minal satisfies the definition due to the potential loss of her liberty.

Consequently the Court of Appeal should try to interpret s.2(2) of the EPA so as to avoid imposing criminal liability on Minal. In Ghaidan v Godin-Mendoza (2002) Lord Steyn stated that a literalistic approach was highly inappropriate when considering whether a breach of a Convention right might be removed by interpretation under s.3. Section 3 required a broad approach concentrating in a purposive way on the importance of the fundamental right involved. Adopting this approach, 'in a public place' could be narrowly construed to exclude privately owned property, even if the public has access to it.

If the court were to decide that it was unable to interpret s.2(2) of the EPA compatibly with Article 11, s.4 HRA empowers the High Court and higher courts to make a declaration of incompatibility. The Court of Appeal could therefore make such a declaration. Nevertheless s.4(6) requires the court to apply the

incompatible UK legislation, so Minal would still be convicted. She would then be able to take proceedings against the UK before the European Court of Human Rights which could award her compensation.

Question 3

Amenability/ Eligibility

Kirkwood District Council's ('KDC') decisions are clearly susceptible to judicial review. As a local authority, it is a public body exercising statutory functions derived from the Dry Cleaners (Licensing) Act 2010 ('the Act'). Awarding licences pursuant to statute is a public rather than private law matter, so judicial review is the appropriate procedure (O'Reilly v Mackman (1983)).

Grahamstown Cleaners Ltd ('GCL') and Bathurst Garment Care Ltd have standing to apply for judicial review because their applications for licences have been rejected. Both are directly affected by the decision, and so have 'sufficient interest' in the decisions (s.31(3) Senior Courts Act 1981 ('SCA')). Kirkwood Society's standing needs further analysis.

Cases such as R v Foreign Secretary, ex p. World Development Movement Ltd (1995) provide guidelines the courts need to consider, including -

- The need to uphold the rule of law
- Whether there was any other likely challenger
- The role of the pressure group involved.

It is likely that the Society will have standing, as standing is closely linked to the merits of the claim and the Society has strong grounds (discussed below). The Society, as a local amenity group, is not a 'busy-body' and the court would be unlikely to reject its claim simply on the grounds of standing where it has an otherwise valid claim.

Ouster clause

There is, however, an ouster clause which purports to prevent KDC's decision being challenged. The courts have found ways of counter-acting legislative attempts to exclude their jurisdiction. 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 so it is for the courts to rule on a decision's validity. The ouster clause is highly unlikely to prevent the potential claimants from bringing proceedings.

Timing

The claimants must make their claims promptly and in any event within three months (s.31 SCA 1981 and CPR r 54.5).

Grounds

Illegality, irrationality and procedural impropriety, the grounds of review identified by Lord Diplock in CCSU v Minister for the Civil Service (1985), will be applied as relevant:

(i) GCL

Illegality

Fettering of discretion

A decision-maker which exercises a statutory discretion may adopt a policy if it is consistent with the purpose of the enabling legislation. KDC's policy appears to be lawful as arguably it does provide an appropriate means of ensuring that KDC grants licences to applicants who will not use hazardous chemicals.

However, while KDC may adopt a policy, it must not apply it over-rigidly and should be willing to listen to anyone who has something new to say (British Oxygen v Minister of Technology (1970)). GCL can argue that KDC has fettered its discretion, as not only has GCL operated two dry cleaners for the period specified in the guidelines, it can also produce a very positive report from environmental health consultants.

Also, in ignoring these points, the KDC has also failed to take into account relevant considerations (Roberts v Hopwood (1925)).

Irrationality

To succeed on this ground GCL would have to prove that the decision (the refusal of the licence) 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). As the threshold is high, GCL is better off relying on illegality.

(ii) Bathurst

The rules of natural justice

An individual is entitled to fair hearing before a decision affecting their interests is made. Lord Denning in Schmidt v Home Secretary (1969) stated that the application of the rules of natural justice depended on whether it would be unfair to deprive the applicant of a legitimate expectation without giving them a hearing. A legitimate expectation is unlikely to arise where the applicant is seeking a benefit which they have not previously enjoyed (R (Khatun) v Newham LBC (2004)), but Bathurst is seeking the renewal of a licence and so could reasonably expect that the licence would be renewed unless circumstances had changed since it was originally granted. Bathurst should be notified of the case against it and be given the opportunity to reply (Fairmount Investments Ltd v Environment Secretary (1976)).

Entitlement to reasons

Bathurst has also not been given to reasons for the decision. At common law, decision-makers are not obliged to give reasons (Cannock Chase DC v Kelly (1978)). However, an absence of reasons may give the appearance that a decision is irrational. In R v Civil Service Board, ex p. Cunningham (1991), it was held that a decision-maker should give reasons for a decision that appears to be erroneous to enable the claimant to have an effective right to challenge it. As Bathurst's dry cleaners have passed all their inspections, it appears that the decision may be wrong and so Bathurst should receive reasons. In the absence of any reasons, the rejection of its application seems irrational.

(iii) The Kirkwood Society

Illegality

Unauthorised delegation

KDC states that it granted the licence on the instructions of the local MP. This seems to be the failure to exercise a discretion (Lavender v MHLG (1970)). The power was not granted to the MP so he should not dictate KDC's decisions.

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 purpose of the Act is preventing the use of hazardous chemicals.

The chief executive's response indicates that the decision had the purpose of boosting local employment; this seems outside the purpose of the Act. KDC seems therefore to have had an ulterior motive (Sydney Municipal Council v Campbell (1925)). Alternatively, KDC may have taken into account an irrelevant consideration by considering local employment (Padfield v Minister of Agriculture (1968)).

Irrationality

It is likely that the high thresholds set out in Wednesbury and CCSU are met, as giving a licence to such an egregiously unsuitable applicant seems perverse.

Remedy

Each claimant should apply for a quashing order.

Question 4(a)

The by-election

The Representation of the People Act 1983 ('RPA 83') gives Danny, as a defeated candidate, the right to lodge a petition against the validity of the by-election. Section 106 RPA 83 provides that it is an illegal election practice to make a false statement of fact regarding a candidate's personal character or conduct with the purpose of affecting the return of any candidate at the election. There is no doubt that Zoe's claims do relate to Danny's character and conduct. Moreover, bearing in mind the context, it seems very probable that Zoe was intending to affect the return of a candidate. Her allegations were very damaging and could well have dissuaded voters from voting for Danny.

Zoe does, however, have a defence if she can show that she had reasonable grounds for believing, and did believe, her statement to be true. Unless she can prove this, her conduct will constitute an illegal electoral practice, contrary to s. 106 RPA 83, and the court will declare the by-election result void.

The key issue therefore is whether Zoe can establish that she had reasonable grounds for believing her claims to be true and that she actually believed them to be true. In this regard, Zoe has indicated that her allegations were based on information supplied to her by an investigative journalist.

This case is comparable to Watkins v Woolas (2010) where Mr Woolas, the victorious Labour candidate, had published some false statements about the Liberal Democrat candidate, falsely alleging that he had sought the electoral support of Muslims who advocated violence and had failed to condemn extremists who advocated violence against Mr Woolas. The election court decided that Mr Woolas was guilty of an illegal election practice.

There are concerns that the court's approach potentially threatens freedom of speech, but nonetheless the court held that the relevant provisions of RPA 83 are compatible with Article 10 ECHR (freedom of expression). Although Article 10 was engaged, the restrictions and penalties contained in the Act were prescribed by law and had the legitimate aim of protecting the reputation and rights of others.

If, as seems probable, Zoe's statements about Danny are untrue, then it is likely that the election court will declare the by-election result void and disqualify Zoe from standing for the House of Commons for three years (s.136 Political Parties, Elections and Referendum Act 2000). Zoe will have to vacate the seat within three months of her conviction or, if earlier, at the end of the time for lodging an appeal.

A further by-election will be called and Danny will be able to stand again. There is no guarantee, though, that he will be elected.

(b) The Daily Mercury - contempt of court

Section 1 Contempt of Court Act 1981 creates strict liability for criminal contempt of court. However, to assess whether 'the strict liability rule' applies, it is necessary apply the various elements set out in s.2.

Firstly, the strict liability rule applies only to 'publications' (s.2(1)). The editorial in the Daily Mercury is plainly a 'publication'

Secondly, the publication will only engage the strict liability rule if it falls within s.2(2); i.e. if it creates a 'substantial risk' that the course of justice in the proceedings will be 'seriously impeded or prejudiced'. In Re Lonrho plc (1989) the House of Lords stated that where a trial is to be heard by a jury, the possibility of prejudice by advance publicity concerning an issue which the jury will have to decide is obvious.

Thirdly, the relevant proceedings (i.e. Danny's defamation claim) must be active (s.2(3)). The trial is due to start in three days. Accordingly they must be active as defined by s2(4) and Schedule 1 as the date for the trial has been fixed.

The publication is a national newspaper and Danny's claim will be heard by a jury who may be influenced by newspaper coverage. Accordingly, the editorial may well fall within s.2(2). The proceedings are active. It is therefore necessary to consider if the Daily Mercury has any defence.

Section 3 provides a defence of innocent publication, and would apply if the Daily Mercury had no knowledge of or reason to suspect that the proceedings were active. This seems improbable. Had the newspaper had taken reasonable care, it would surely have discovered that the proceedings were active as Danny's claim is likely to have received extensive publicity.

Section 4 provides a defence for contemporaneous and good faith reports of legal proceedings, but clearly the editorial does not come within its scope.

Additionally, s.5 – discussion of public affairs - provides that a publication which is made as part of a discussion in good faith of public affairs does not constitute contempt if the risk of prejudice is merely incidental to the discussion. In A-G v English (1983), it was relevant that the article in question made no reference to specific proceedings; the House of Lords stressed that s.5 was not intended to prevent bona fide public debate merely because there were legal proceedings going on in which some aspect of the matters under debate might be in issue. As the Daily Mercury explicitly referred to Danny's claim, it is unlikely to be able to rely on s.5.

The Daily Mercury is therefore likely to be liable for contempt under the strict liability rule in s.1.

Common law contempt targets action which is intended to interfere with the administration of justice, including interfering with imminent court proceedings. If there is any intent on the Daily Mercury's part to influence the jury against Danny, it could also be liable for criminal contempt at common law (A-G v Hislop (1991)).