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# **GCE AS MARKING SCHEME**

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**SUMMER 2023**

**AS  
LAW - COMPONENT 2  
UNDERSTANDING SUBSTANTIVE LAW  
B150U20-1**

## **INTRODUCTION**

This marking scheme was used by WJEC for the 2023 examination. It was finalised after detailed discussion at examiners' conferences by all the examiners involved in the assessment. The conference was held shortly after the paper was taken so that reference could be made to the full range of candidates' responses, with photocopied scripts forming the basis of discussion. The aim of the conference was to ensure that the marking scheme was interpreted and applied in the same way by all examiners.

It is hoped that this information will be of assistance to centres but it is recognised at the same time that, without the benefit of participation in the examiners' conference, teachers may have different views on certain matters of detail or interpretation.

WJEC regrets that it cannot enter into any discussion or correspondence about this marking scheme.

# EDUQAS GCE AS LAW

## COMPONENT 2: UNDERSTANDING SUBSTANTIVE LAW

### SUMMER 2023 MARK SCHEME

#### Marking guidance for examiners

#### Summary of assessment objectives for Component 2

All the questions in this component assess assessment objectives AO1, AO2 and AO3. AO1 focuses on the ability to demonstrate knowledge and understanding of legal rules and principles. AO2 focuses on the ability to apply legal rules and principles to given scenarios in order to present a legal argument using appropriate terminology, and AO3 focuses on the ability to analyse and evaluate legal rules, principles and concepts.

#### The structure of the mark scheme

The mark scheme for Section A and Section B has two parts:

- Indicative content which can be used to assess the quality of the specific response. The content is not prescriptive and candidates are not expected to mention all the material referred to. Examiners should seek to credit any further admissible evidence offered by the candidates.
- An assessment grid advising bands and associated marks that should be allocated to responses which demonstrate the characteristics needed in AO1, AO2 and AO3.

#### Stage 1 – Deciding on the band

Beginning at the lowest band, examiners should look at the learner's answer and check whether it matches the descriptor for that band. If the descriptor at the lowest band is satisfied, examiners should move up to the next band and repeat this process for each band until the descriptor matches the answer.

If an answer covers different aspects of different bands within the mark scheme, a "best fit" approach should be adopted to decide on the band and then the learner's response should be used to decide on the mark within the band. For instance, if a response is mainly in band 2 but with a limited amount of band 3 content, the answer would be placed in band 2 but the mark awarded would be close to the top of band 2 as a result of the band 3 content.

Examiners should not seek to mark candidates down as a result of small omissions in minor areas of an answer.

- The first stage for an examiner is to use both the indicative content and the assessment grid to decide the overall band.
- The second stage is to decide how firmly the characteristics expected for that band are displayed.
- Thirdly, a mark for the question is awarded.

## **Stage 2 – Deciding on the mark**

During standardising (marking conference), detailed advice from the Principal Examiner on the qualities of each mark band will be given. Examiners will then receive examples of answers in each mark band that have been awarded a mark by the Principal Examiner. Examiners should mark the examples and compare their marks with those of the Principal Examiner.

When marking, examiners can use these examples to decide whether a learner's response is of a superior, inferior or comparable standard to the example. Examiners are reminded of the need to revisit the answer as they apply the mark scheme in order to confirm that the band and the mark allocated is appropriate to the response provided.

Indicative content is also provided for banded mark schemes. Indicative content is not exhaustive and any other valid points must be credited. In order to reach the highest mark bands of the mark scheme a learner need not cover all of the points mentioned in the indicative content but must meet the requirements of the highest mark band. Where a response is not creditworthy, that is contains nothing of any significance to the mark scheme, or where no response has been provided, no marks should be awarded.

## Section A: Private Law

### Question 1: Law of Contract

- (a) Explain the elements of a valid offer. [6]

#### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining the elements of a valid offer, candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles underlying this essential element. It is anticipated that all candidates will be able to *identify* the key elements of an offer but the degree of detail noted below is not necessary to gain full marks.

The response might consider the following factors:

- The process of negotiating a valid contract begins with an offer.
- An offer in contract law is a proposition put by one person to another and made with the intention to enter into a legally binding contract based on the terms of the offer.
- It is distinguished from an invitation to treat which indicates a willingness to deal but lacks the intention to be legally binding (*Fisher v Bell 1961*).
- An offer is commonly made by one person to another but can also be made to the world at large and, as long as they have knowledge of it, anyone can accept it (*Carlill v Carbolic Smoke Ball company 1893*).
- There can be no agreement without knowledge and therefore the offer must be communicated in clear, unambiguous terms. (*Taylor v Laird 1856*).
- The offer can be withdrawn at any time before acceptance (*Routledge v Grant 1828*).
- Withdrawal of the offer must be clearly communicated by the offeror (*Byrne v Van Tienhoven 1880*) or a reliable third party (*Dickinson v Dodds 1876*) provided that the withdrawal is properly communicated.
- The offer must be accepted unconditionally. A counter offer (*Hyde v Wrench 1840*) is where an offeree responds to the offer by making an offer on different terms. This destroys the original offer so that it is not then open to the offeree to accept.
- The offer will also be terminated by acceptance, rejection, revocation (see above), lapse of time (*Ramsgate Victoria Hotel v Montefiore 1866*), failure of conditions (*Financings Ltd v Stimson 1962*) or death, provided the offeree is aware of the offeror's death (*Bradbury v Morgan 1862*).

### Assessment grid for Q1(a)

| <b>Band</b> | <b>Marks</b> | <b>AO1: Demonstrate knowledge and understanding of the English Legal System and legal rules and principles</b>   |
|-------------|--------------|--|
| <b>3</b>    | <b>5-6</b>   | Excellent knowledge and understanding of the English Legal System and legal rules and principles relating to the law governing the elements of a valid offer. Response is clear, detailed and fully developed. |
| <b>2</b>    | <b>3-4</b>   | Good knowledge and understanding of the English Legal System and legal rules and principles relating to the law governing the elements of a valid offer. Response is generally clear, detailed and developed.  |
| <b>1</b>    | <b>1-2</b>   | Basic knowledge and understanding of the English Legal System and legal rules and principles relating to the law governing the elements of a valid offer. Response includes minimal detail.                    |
|             | <b>0</b>     | Response not credit worthy or not attempted.   |

(b) Explain what is meant by an invitation to treat.

[6]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining what is meant by an invitation to treat, candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles underlying the essential elements of a contract. In demonstrating this knowledge and understanding, candidates are required to focus on the specific nature of the question set and not simply give an answer on the general rules relating to an offer.

The response might consider the following issues:

- Invitation to treat is a preliminary stage where one party invites the other to make an offer or to start negotiations. It indicates a willingness to deal but not an intention to be legally bound. An invitation to treat does not constitute an offer; an offer is capable of being accepted and leading to a valid contract.
- Confusion can arise when what would appear, in the everyday sense of the word, to be an offer is held by the law to be only an invitation to treat.
- The following instances could be used as examples. Advertisements for bilateral contracts – advertisements of specified goods at a certain price - are usually regarded as invitations to treat on the grounds that they may lead to further bargaining – e.g. lots at an auction (*British Car Auctions v Wright (1972)*) or a request for tenders (*Harvela Investments v Royal Trust of Canada (1986)*). Price-marked goods on display on the shelves or in the windows of shops are generally regarded as invitations to treat, rather than offers to sell goods at that price – *Fisher v Bell (1960)*; goods on supermarket shelves are an invitation to treat, the offer is only made when customer offers to buy them at the cash desk and the shopkeeper may accept or reject that offer – *Pharmaceutical Society of GB v Boots Cash Chemists Ltd (1953)*.

### Assessment grid for Q1(b)

| Band | Marks | AO1: Demonstrate knowledge and understanding of the English Legal System and legal rules and principles   |
|------|-------|---|
| 3    | 5-6   | Excellent knowledge and understanding of the English Legal System and legal rules and principles relating to the law governing invitations to treat in contract law. Response is clear, detailed and fully developed. |
| 2    | 3-4   | Good knowledge and understanding of the English Legal System and legal rules and principles relating to the law governing invitations to treat in contract law. Response is generally clear, detailed and developed.  |
| 1    | 1-2   | Basic knowledge and understanding of the English Legal System and legal rules and principles relating to the law governing invitations to treat in contract law. Response includes minimal detail.                    |
|      | 0     | Response not credit worthy or not attempted.  |

- (c) Assess the relevance of the postal rule in the formation of a valid contract. [9]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

Candidates are required to demonstrate the legal rules, principles and concepts relevant to the use of the postal rule in the formation of a contract. *Evaluation* of the rule is required in order to achieve the highest marks.

The following issues might be considered:

- The postal rule was developed to address issues of contractual timing when acceptance is made by post.
- Where the parties agree that acceptance is to be made by post, the postal rule applies. In these circumstances, providing the letter is properly addressed and stamped, acceptance will be complete when the letter is posted (*Adams v Lindsell 1818*). This is an exception to the general rule that acceptance is not completed until it is communicated to the offeror.
- The postal rule has been extended to cover situations where the letter is delayed or indeed never received (*Household Fire Insurance v Grant 1879*).
- The rule allows the parties to protect themselves by stating in the offer that there will be no binding contract until acceptance is received.
- It affords the advantage of certainty. Where it applies, the offeror knows that the contract will not be binding until acceptance has been received and, similarly, the acceptor is aware that there is a binding contract as soon as he posts the letter of acceptance.
- But there are limitations to the postal rule. The courts have refused to extend it to more modern methods of communication such as emails. It only applies to acceptance and not to other communication between the contracting parties. It only applies if the letter was not properly stamped, addressed and posted (*Re London & Northern Bank, ex p Jones 1900*). It can be displaced by the offeror (*Holwell Securities Ltd v Hughes 1974*).



### Assessment grid for Q1(c)

| Band | Marks | AO3: Analyse and evaluate legal rules, principles and concepts   |
|------|-------|--|
| 4    | 8-9   | <ul style="list-style-type: none"> <li>• Excellent analysis of legal rules, principles and concepts relevant to the use of the postal rule in the formation of a contract. Analysis is detailed with appropriate range of supporting evidence which draws together knowledge, skills and understanding.</li> <li>• Excellent evaluation of the relevance of the postal rule in contract law, including a valid and substantiated judgement.</li> <li>• Excellent citation of supporting case law and legal authorities.</li> </ul> |
| 3    | 6-7   | <ul style="list-style-type: none"> <li>• Good analysis of legal rules, principles and concepts relevant to the use of the postal rule in the formation of a contract. Analysis is generally detailed with appropriate range of supporting evidence.</li> <li>• Good evaluation of the relevance of the postal rule in contract law, including a valid judgement.</li> <li>• Good citation of supporting case law and legal authorities.</li> </ul>   |
| 2    | 3-5   | <ul style="list-style-type: none"> <li>• Adequate analysis of legal rules, principles and concepts relevant to the use of the postal rule in contract law. Analysis includes some detail with some supporting evidence.</li> <li>• Adequate evaluation of the relevance of the use of the postal rule in contract law, including reference to a valid judgement.</li> <li>• Adequate citation of supporting case law and legal authorities.</li> </ul>   |
| 1    | 1-2   | <ul style="list-style-type: none"> <li>• Basic analysis of legal rules, principles and concepts relevant to the use of the postal rule in contract law. Analysis includes minimal detail.</li> <li>• Basic evaluation of the use of the postal rule in contract law.</li> <li>• Basic citation of supporting case law and legal authorities.</li> </ul>  |
|      | 0     | Response not credit worthy or not attempted.   |

**The scenario below should be used when assessing part (d)**

Jim, Sam and Kate had inherited the family home when their parents both died in a tragic road traffic accident. The house was very run down and Jim, a builder, refurbished the house to a high specification with the intention of selling it when the market picked up. As the work had cost more than he had anticipated, Jim subsequently asked his brother and sister for a contribution of £5,000 each; they agreed to do so. It is now six months later. The house remains unsold and Sam and Kate are refusing to hand over any money to Jim.

(d) Advise Jim whether he has an enforceable contract against Sam and Kate. [9]

**Indicative content**

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In advising Jim candidates are expected to *apply* the full range of legal rules and principles relating to his agreement with Sam and Kate. They will need to use relevant case law to present a legal argument as to whether there is an intention to create legal relations and whether consideration is past.

The response might consider:

- Explanation and application of intention to create legal relations to the scenario – a basic requirement of a valid contract.
- In commercial agreements, courts will presume an intention to create legal relations (*Edwards v Skyways 1969*) unless there is evidence to the contrary (*Jones v Vernon's Pools 1938*). Application to the facts.
- With social and domestic agreements, including those between family members (as here), the courts will presume that legal relations do not exist (*Balfour v Balfour 1919*). This is, however, a rebuttable presumption as seen in *Merritt v Merritt (1970)* where there is evidence to the contrary. Application to the facts.
- Explanation and application of the need for consideration from each side if they wish to sue on the contract.
- Past consideration is, however, no consideration. Explanation and application of the decision of *Re McArdle (1951)* which is relevant to Jim's position in this case.

### Assessment grid for Q1(d)

| Band | Marks | <b>AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology</b>   |
|------|-------|--|
| 4    | 8-9   | <ul style="list-style-type: none"> <li>• Excellent application of legal rules and principles to Jim's situation.</li> <li>• Excellent presentation of a legal argument using appropriate legal terminology, case law and other legal authorities to demonstrate the need to show an intention to create legal relations and consideration to render a contract valid. The legal argument is detailed, fully developed and persuasive.</li> </ul>     |
| 3    | 6-7   | <ul style="list-style-type: none"> <li>• Good application of legal rules and principles to Jim's situation.</li> <li>• Good presentation of a legal argument using appropriate legal terminology, case law and other legal authorities to demonstrate the need to show an intention to create legal relations and consideration to render a contract valid. The legal argument is generally detailed, developed and persuasive.</li> </ul>           |
| 2    | 3-5   | <ul style="list-style-type: none"> <li>• Adequate application of legal rules and principles to Jim's situation.</li> <li>• Adequate presentation of a legal argument using appropriate legal terminology, case law and other legal authorities to demonstrate the need to show an intention to create legal relations and consideration to render a contract valid. The legal argument includes some detail which is developed in places.</li> </ul> |
| 1    | 1-2   | <ul style="list-style-type: none"> <li>• Basic application of legal rules and principles to Jim's situation.</li> <li>• Basic presentation of a legal argument using minimal legal terminology to demonstrate the need to show an intention to create legal relations and consideration to render a contract valid.</li> </ul>   |
|      | 0     | Response not credit worthy or not attempted.   |

## Question 2: Law of Tort

- (a) Explain the 'but for' test in the law of tort.

[6]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining the “but for” test in relation to the law of tort, candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles underlying the principles of the test. In demonstrating this knowledge and understanding, candidates are required to focus on the specific nature of the question set.

The response might consider issues such as:

- In order to prove negligence, a claimant needs to establish causation, i.e. that the damage (physical injury or damage to property) arose from the defendant’s negligence.
- Causation is decided using the “but for” test – if it wasn’t for the defendant’s actions, the injury would not have occurred.
- *Barnett v Chelsea & Kensington Hospital Management Committee (1968)* is relevant to this issue.

### Assessment grid for Q2(a)

| Band | Marks | AO1: Demonstrate knowledge and understanding of the English Legal System and legal rules and principles   |
|------|-------|---|
| 3    | 5-6   | Excellent knowledge and understanding of the English Legal System and legal rules and principles relating to the “but for” test in the law of tort. Response is clear, detailed and fully developed.      |
| 2    | 3-4   | Good knowledge and understanding of the English Legal System and legal rules and principles relating to the “but for” test in the law of tort. Response is generally clear, detailed and fully developed. |
| 1    | 1-2   | Basic knowledge and understanding of the English Legal System and legal rules and principles relating to the “but for” test in the law of tort. Response includes minimal detail.                         |
|      | 0     | Response not credit worthy or not attempted.  |

- (b) Explain the difference between special damages and general damages in the law of tort. [6]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining the difference between special damages and general damages, candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles underlying the remedy.

The response might consider issues such as:

- An award of damages is the main remedy in the law of tort and the aim is to put the injured party back in the same position they would have been in if the tort had not occurred.
- Although a claimant who succeeds in a negligence action is entitled to damages, he/she is expected to mitigate any losses.
- Special damages are available to compensate the claimant for losses incurred up to the date of trial. They are easily quantifiable as the claimant will be able to provide receipts etc to adduce evidence of financial loss up to trial through, for example, medical expenses, travel expenses and loss of earnings up to that point.
- General damages look to the future and include pecuniary and non-pecuniary damages. They are more complex and thus are calculated by the court at trial in accordance with judicial guidelines. The award will reflect, for example, loss of future earnings and for pain, suffering and loss of amenity.

### Assessment grid for Q2(b)

| Band | Marks | AO1: Demonstrate knowledge and understanding of the English Legal System and legal rules and principles   |
|------|-------|---|
| 3    | 5-6   | Excellent knowledge and understanding of the English Legal System and legal rules and principles relating to the difference between special damages and general damages in the law of tort. Response is clear, detailed and fully developed.      |
| 2    | 3-4   | Good knowledge and understanding of the English Legal System and legal rules and principles relating to the difference between special damages and general damages in the law of tort. Response is generally clear, detailed and fully developed. |
| 1    | 1-2   | Basic knowledge and understanding of the English Legal System and legal rules and principles relating to the difference between special damages and general damages in the law of tort. Response includes minimal detail.                         |
|      | 0     | Response not credit worthy or not attempted.  |

- (c) Assess the obligations imposed on occupiers of property by the Occupiers' Liability Act 1957. [9]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In order to achieve the highest marks, candidates must demonstrate their ability to draw together details of the protection afforded to lawful visitors under the 1957 Act and will evaluate the obligations which this places on occupiers of property.

The response might consider issues such as:

- Occupiers' liability refers to the duty owed by land owners to those who come onto their land. The Occupiers' Liability Act 1957 protects lawful visitors against death, personal injury and damage to property.
- However, the duty imposed on land owners can extend beyond simple land ownership and in some instances, the landowners may transfer the duty to others such as independent contractors (s2(4)(b)OLA 1957), hence the term occupier rather than owner. Arguably, the term occupier itself is misleading since physical occupation is not necessary for liability to arise.
- The question of whether a particular person is an occupier is a question of fact and depends on the degree of control exercised. The test applied is one of 'occupational control' and there may be more than one occupier of the same premises. *Wheat v E Lacon & Co Ltd (1966)* identified four categories of occupier.
- S1(3)(a), the Act has a wide ambit and applies not only to land and buildings but also extends to fixed and movable structures, including any vessel, vehicle or aircraft.
- The term "lawful visitors" covers a wide range of individuals. S1(2) protects both invitees and licensees (express or implied); s5(1) protects those who enter under contract, e.g. guests at a hotel; s2(6) protects those entering to exercise a right conferred by law – e.g. meter reader. Trespassers, invitees who exceed their permission and persons on the land exercising a public right of way are, however, not protected.
- S2 imposes a common duty of care on occupiers to take reasonable care to ensure that visitors are reasonably safe when using the premises for the purposes for which they have been invited.
- The Act lays down guidelines on the ambit of the duty: s2(3)(a)- occupiers must be prepared for children to be less careful than adults, taking into account the age and understanding of the child (*Jolley v Sutton (2000)*); s2(3)(b) - an occupier may expect that visitors should be expected to guard against special risks associated with the reason for their visit; s2(4)(a) – a warning may discharge the duty of care, e.g. through signage (*Tomlinson v Congleton Borough Council (2203)*); s2(4)(b) - an occupier is not liable for dangers created by independent contractors if the occupier acted reasonably in all the circumstances in entrusting the work to a competent contractor and took reasonable steps to satisfy himself that the work carried out was properly done.
- Defences: *volenti non fit injuria* - s.2(5) no duty of care is owed in respect of risks willingly accepted by the visitor - decided by common law principles; contributory negligence - damages may be reduced under the Law Reform (Contributory Negligence) Act 1945 where the visitor fails to take reasonable care for their own safety; s2(1)(a) allows the occupier to modify his duty to visitors in so far as he is free to do so but any such exclusions by a business are subject to the terms of UCTA 1977.

### Assessment grid for Q2(c)

| <b>Band</b> | <b>Marks</b> | <b>AO3: Analyse and evaluate legal rules, principles and concepts</b>  |
|-------------|--------------|--|
| <b>4</b>    | <b>8-9</b>   | <ul style="list-style-type: none"> <li>• Excellent analysis of legal rules, principles and concepts relevant to the Occupiers Liability Act 1957.</li> <li>• Analysis is detailed with appropriate range of supporting evidence which draws together knowledge, skills and understanding.</li> <li>• Excellent evaluation of the Occupiers Liability Act 1957, including a valid and substantiated judgement.</li> <li>• Excellent citation of supporting case law and legal authorities.</li> </ul> |
| <b>3</b>    | <b>6-7</b>   | <ul style="list-style-type: none"> <li>• Good analysis of legal rules, principles and concepts relevant to the Occupiers Liability Act 1957.</li> <li>• Analysis is generally detailed with appropriate range of supporting evidence.</li> <li>• Good evaluation of the Occupiers Liability Act 1957, including a valid judgement.</li> <li>• Good citation of supporting case law and legal authorities.</li> </ul>   |
| <b>2</b>    | <b>3-5</b>   | <ul style="list-style-type: none"> <li>• Adequate analysis of legal rules, principles and concepts relevant to the Occupiers Liability Act 1957.</li> <li>• Analysis includes some detail with some supporting evidence.</li> <li>• Adequate evaluation of the Occupiers Liability Act 1957, including reference to a judgement.</li> <li>• Adequate citation of supporting case law and legal authorities.</li> </ul>   |
| <b>1</b>    | <b>1-2</b>   | <ul style="list-style-type: none"> <li>• Basic analysis of legal rules, principles and concepts relevant to the Occupiers Liability Act 1957.</li> <li>• Analysis includes minimal detail.</li> <li>• Basic evaluation of the Occupiers Liability Act 1957.</li> <li>• Basic citation of supporting case law and legal authorities.</li> </ul>   |
|             | <b>0</b>     | <ul style="list-style-type: none"> <li>• Response not creditworthy or not attempted.</li> </ul>  |

**The scenario below should be used when assessing part (d)**

Tom, a retired schoolteacher, and his wife, Isabelle, were driving home after visiting their local garden centre. As they made their way around the narrow lanes, they were suddenly hit by huge hay bale which fell off a tractor driven at high speed by Daniel, a local farmer. Other than suffering some bruising, Isabelle was not injured. Tom, however, suffered from epilepsy. He started to fit, was air lifted to hospital and died later that night.

- (d) Advise Isabelle whether she is likely to be successful if she sues Daniel for negligence in respect of Tom's death. [9]

**Indicative content**

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In advising Isabelle, candidates will provide an assessment of the legal rules and principles relating to the situation. In this case, candidates should consider the requirements of duty of care in negligence and, using relevant case law, *apply* these principles to the accident.

The response might consider:

- Duty of care needs to be established – see *Caparo (1990)* test as modified by *Robinson v CC West Yorkshire (2018)*
- Factors to be taken into account include: foreseeability (*Kent v Griffiths 2000*), proximity (*Bourhill v Young 1943*) and whether it is just, fair and reasonable to impose a duty of care (*Mulcahy v Ministry of Defence 1996*)
- Likely to be able to show that Daniel owes a duty of care to Isabelle and Tom, as road users.
- Will need to show that a breach of that duty has occurred. Factors to be taken into account include: whether Daniel's conduct falls below that of a reasonable tractor driver *Nettleship v Weston (1971)*; the probability of harm (*Bolton v Stone 1951*); the magnitude of likely harm (*Paris v Stepney Borough Council 1951*) and cost and practicality of preventing the risk (*Latimer v AEC Ltd 1953*).
- Likely that, in failing to properly secure the hay bales properly, Daniel breached his duty of care
- Daniel must be a factual cause (*Barnett v Chelsea & Kensington Hospital Management Committee 1968*) of the claimant's loss. "But for" Daniel's actions, the accident would not have happened.
- It must also be established that the damage suffered was a reasonably foreseeable consequence of the breach (*Wagon Mound No 1 1961*) which is evident here.
- Even if Tom's prior condition (epilepsy) adversely affected his chances of survival, the "thin skull" rule applies and Daniel must "take his victim as he finds him" (*Smith v Leech Brain & Co 1962*).



### Assessment grid for Q2(d)

| <b>Band</b> | <b>Marks</b> | <b>AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology</b>   |
|-------------|--------------|--|
| <b>4</b>    | <b>8-9</b>   | <ul style="list-style-type: none"> <li>• Excellent application of legal rules and principles to Isabelle and Tom’s situation.</li> <li>• Excellent presentation of a legal argument using appropriate legal terminology, case law and other legal authorities regarding whether Isabelle is likely to succeed in a claim for negligence against Daniel. The legal argument is detailed, fully developed and persuasive.</li> </ul> |
| <b>3</b>    | <b>6-7</b>   | <ul style="list-style-type: none"> <li>• Good application of legal rules and principles to Isabelle and Tom’s situation.</li> <li>• Good presentation of a legal argument using appropriate legal terminology, case law and other legal authorities regarding whether Isabelle is likely to succeed in a claim for negligence against Daniel. The legal argument is generally detailed, developed and persuasive.</li> </ul>       |
| <b>2</b>    | <b>3-5</b>   | <ul style="list-style-type: none"> <li>• Adequate application of legal rules and principles to Isabelle and Tom’s situation.</li> <li>• Adequate presentation of a legal argument using some appropriate legal terminology regarding whether Isabelle is likely to succeed in a claim for negligence against Daniel. The legal argument includes some detail which is developed in places.</li> </ul>                              |
| <b>1</b>    | <b>1-2</b>   | <ul style="list-style-type: none"> <li>• Basic application of legal rules and principles to Isabelle and Tom’s situation.</li> <li>• Basic presentation of a legal argument using minimal legal terminology regarding whether Isabelle is likely to succeed in a claim for negligence against Daniel. The legal argument includes minimal detail.</li> </ul>   |
|             | <b>0</b>     | Response not credit worthy or not attempted  |

## Section B: Public Law

### Question 3: Criminal Law

- (a) Explain the burden of proof in criminal law. [6]

#### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining what is meant by the burden of proof in criminal law, candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles underlying the concept.

The response might consider issues such as:

- In a criminal case, the burden of proving guilt is on the prosecution. This “golden thread” runs through the English legal system and supports the fact that a person is presumed innocent until proven guilty (Art 6 ECHR).
- *Woolmington v DPP (1935)* confirms that the prosecution must prove the case “beyond reasonable doubt” in a criminal trial. This is a very high burden of proof and, in order to convict, the judge/jury must be left with hardly a shadow of doubt in their minds that the defendant committed the crime. If this is not the case, they must bring back a “not guilty” verdict. This will be outlined to the jury by the judge before they retire to deliberate.
- The requirement for such a high burden of proof reflects the potential impact of a conviction on a defendant.
- The high standard of proof required for a criminal case can be contrasted with the lower burden (on a balance of probabilities) demanded in civil trials where generally damages or injunctions are the remedy rather than potential loss of liberty.

#### Assessment grid for Q3(a)

| Band | Marks | AO1: Demonstrate knowledge and understanding of the English Legal System and legal rules and principles   |
|------|-------|---|
| 3    | 5-6   | Excellent knowledge and understanding of the English Legal System and legal rules and principles relating to the burden of proof in criminal law. Response is clear, detailed and fully developed.      |
| 2    | 3-4   | Good knowledge and understanding of the English Legal System and legal rules and principles relating to the burden of proof in criminal law. Response is generally clear, detailed and fully developed. |
| 1    | 1-2   | Basic knowledge and understanding of the English Legal System and legal rules and principles relating to the burden of proof in criminal law. Response includes minimal detail.                         |
|      | 0     | Response not credit worthy or not attempted.  |

- (b) Explain the actus reus and mens rea of S20 Offences Against the Person Act 1861. [6]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining the actus reus and mens rea of s20 OAPA 1861, candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles underlying the offence. In demonstrating this knowledge and understanding, candidates are required to focus on the specific nature of the question set and not simply give a general answer.

The response might consider such issues as:

- Statutory offence under the OAPA 1861
- Actus Reus:
  - Can be committed in one of two ways: wounding or inflicting GBH.
  - A wound must break the inner and outer skin – *Eisenhower 1984*. Even a broken bone does not constitute a wound unless it penetrates through the skin (*Wood 1830*).
  - GBH = means “really serious harm” (*Smith 1961*) but it does not have to be life threatening (*Saunders 1985*). The severity of the injuries will be assessed according to the victim’s age and health (*Bollom 2004*). Can include psychiatric injury such as severe depression (*Burstow 1997*) and can be based on infecting another with HIV (*Dica 2004*).
- Mens Rea:
  - Intention or subjective (*Cunningham 1957*) recklessness as to whether another person suffered *some* harm. No need to prove that the defendant foresaw the actual degree of harm caused (*Mowatt 1967*)

### Assessment grid for Q3(b)

| Band | Marks | AO1: Demonstrate knowledge and understanding of the English Legal System and legal rules and principles  |
|------|-------|--|
| 3    | 5-6   | Excellent knowledge and understanding of the English Legal System and legal rules and principles relating to the actus reus and mens rea of s20 OAPA 1861. Response is clear, detailed and fully developed.      |
| 2    | 3-4   | Good knowledge and understanding of the English Legal System and legal rules and principles relating to the actus reus and mens rea of s20 OAPA 1861. Response is generally clear, detailed and fully developed. |
| 1    | 1-2   | Basic knowledge and understanding of the English Legal System and legal rules and principles relating to the actus reus and mens rea of s20 OAPA 1861. Response includes minimal detail.                         |
|      | 0     | Response not credit worthy or not attempted.   |

- (c) Assess the advantages and disadvantages of strict liability offences.

[9]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In order to achieve the highest marks, candidates must demonstrate their ability to draw together details and cases from areas to *evaluate* the advantages and disadvantages of strict liability offences.

Candidates will offer an assessment of the legal rules, principles and concepts relevant to the question and will use case law to illustrate and evaluate this category of offences.

The response might consider issues such as:

- Definition of a strict liability offence – goes against Lord Coke’s legal principle *actus reus non facit reum nisi mens sit rea*. The prosecution need only prove that the defendant committed the actus reus, there is no mens rea element in the offence, guilt simply follows completion of the prohibited actus reus.

Advantages might include:

- SL offences promote social utility by regulating activities that cause harm to the public and promoting higher standards of care. Could lead to, for example, safer food and hygiene standards (*Callow 1900*), less pollution (*Alphacell 1972*), safer buildings (*Gammon 1984*). SL is accepted on the basis that the greater good outweighs the occasional injustice.
- Difficulties and expense of establishing mens rea in such cases removed, making the law easier to enforce. This may have a deterrent effect and may lead to more guilty pleas as defendant knows that conviction is more likely in these circumstances.
- Tend to carry small penalties. Lack of blameworthiness can be taken into account when sentencing, e.g. £20 in *Alphacell 1972* (cf fine of £20.3 million faced by Thames Water in 2017 for discharging untreated sewage into the Thames).
- Where approved by Parliament, due diligence defence may be available to soften the harshness of such offences.

Disadvantages might include:

- Too easy to obtain convictions, arguably law enforcement should not take priority over doing justice. Apart from being morally wrong, it could be argued that SL offences go against the principle that criminal law punishes fault when a defendant has taken all reasonable steps to avoid committing an offence but is still convicted (*Callow 1900*). In addition, conviction of small businesses is likely to attract social stigma and subsequent potential ruin for these firms. Similarly, criminal convictions need to be declared for employment purposes and therefore proof of fault should be a requirement in establishing criminal liability.
- Judges tend to be reluctant to impose strict liability (*Sweet v Parsley 1970*) but where Parliament has failed to clarify whether an offence is one of strict liability, it is left to the discretion of the courts to make that decision. Despite the Gammon guidelines, there can be inconsistency in the imposition of strict liability. Evident in the different approach to sexual offences seen in *B v DPP (2000)* and *R v Kumar (2004)* on the one hand and *R v G (2008)* on the other. Courts have never laid down a list of offences they consider to be “true crimes” rather than “regulatory offences”. Judicial activism could involve potential breach of the doctrine of separation of powers.

- Questionable whether SL is a true deterrent and/or leads to higher standards. Generally fines tend to be small and larger companies may find it cheaper to pay the fine rather than deal with the cost of necessary adjustments in the workplace.
- Lack of mens rea evidence may also make sentencing more difficult as the court may struggle to distinguish between the deliberate and accidental offender.
- Could consider reform: Law Commission Draft Criminal Liability (Mental Element) Bill 1977 required an Act should specifically state if it is creating a SL offence. Where this is not expressly stated, then mens rea should be required. Such an approach would avoid the litigation and unfairness noted above. Development of criminal responsibility based on negligence would convict those who were thoughtless or inefficient but would not punish the blameless, thereby addressing the moral issue. Alternatively, a defence of “due diligence” (as in Australia) could be allowed for all strict liability offences.

### Assessment grid for Q3(c)

| Band | Marks | AO3: Analyse and evaluate legal rules, principles and concepts   |
|------|-------|--|
| 4    | 8-9   | <ul style="list-style-type: none"> <li>• Excellent analysis of legal rules, principles and concepts relevant to the imposition of strict liability in criminal law.</li> <li>• Analysis is detailed with appropriate range of supporting evidence which draws together knowledge, skills and understanding.</li> <li>• Excellent evaluation of when liability can be imposed in criminal law on the basis of strict liability, including a valid and substantiated judgement.</li> <li>• Excellent citation of supporting case law and legal authorities.</li> </ul> |
| 3    | 6-7   | <ul style="list-style-type: none"> <li>• Good analysis of legal rules, principles and concepts relevant to the imposition of strict liability in criminal law.</li> <li>• Analysis is generally detailed with appropriate range of supporting evidence which draws together knowledge, skills and understanding.</li> <li>• Good evaluation of when liability can be imposed in criminal law on the basis of strict liability, including a valid judgement.</li> <li>• Good citation of supporting case law and legal authorities.</li> </ul>                        |
| 2    | 3-5   | <ul style="list-style-type: none"> <li>• Adequate analysis of legal rules, principles and concepts relevant to the imposition of strict liability in criminal law.</li> <li>• Analysis includes some detail with appropriate range of supporting evidence which draws together knowledge, skills and understanding.</li> <li>• Adequate evaluation of when liability can be imposed in criminal law on the basis of strict liability, including reference to a judgement.</li> <li>• Adequate citation of supporting case law and legal authorities.</li> </ul>      |
| 1    | 1-2   | <ul style="list-style-type: none"> <li>• Basic analysis of legal rules, principles and concepts relevant to the imposition of strict liability in criminal law. Analysis includes minimal detail.</li> <li>• Basic evaluation of when liability can be imposed in criminal law on the basis of strict liability.</li> <li>• Basic citation of supporting case law and legal authorities.</li> </ul>  |
|      | 0     | <ul style="list-style-type: none"> <li>• Response not creditworthy or not attempted.</li> </ul>  |

**The scenario below should be used when assessing part (d)**

Megan moved in to look after her aged aunt, Deborah, who had recently suffered a stroke and was struggling to manage by herself. Although things worked well initially, Megan subsequently failed to properly care for her aunt. The lack of personal hygiene led to Deborah developing sores on her body and the absence of proper food caused her physical condition to deteriorate. Unfortunately, Megan did not call a doctor until it was too late and her aunt died.

- (d) Advise Megan whether she would be liable for failure to act on these facts. [9]

**Indicative content**

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In advising Megan, candidates are expected to apply the full range of legal rules and principles relating to her situation. In this case, candidates may discuss the actus reus and omissions and *apply* relevant case law to the given scenario to present a legal argument.

The response might consider issues such as:

- Definition and importance of actus reus – physical element of a crime; it can be an act, a failure to act or a state of affairs.
- Normally an omission cannot make a person guilty of an offence.
- Advise Megan that liability can only be based on an omission when there is a duty to act.
- Outline the situations where a person is under a duty to act. May be imposed: by statute – e.g. s6 RTA 1988 but usually by the courts: by contract – *Pittwood (1902)*; due to a special relationship – *Stone & Dobinson (1977)*; arising from assumption of responsibility – *Instan (1893)*; misfeasance in public office – *Dytham (1979)*; the defendant inadvertently creates a dangerous situation, becomes aware of it but does nothing to rectify it - *Miller (1983)*, *Evans (2009)*.
- Discussion of exceptions and cases noted above, in particular special relationship and voluntary assumption of responsibility.
- Application to the facts of the scenario to decide whether a duty to act did exist.

### Assessment grid for Q3(d)

| Band | Marks | <b>AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology</b>   |
|------|-------|--|
| 4    | 8-9   | <ul style="list-style-type: none"> <li>• Excellent application of legal rules and principles to Megan's situation.</li> <li>• Excellent presentation of a legal argument using appropriate legal terminology, case law and other legal authorities regarding whether Megan may be liable for failing to act. The legal argument is detailed, fully developed and persuasive.</li> </ul>          |
| 3    | 6-7   | <ul style="list-style-type: none"> <li>• Good application of legal rules and principles to Megan's situation.</li> <li>• Good presentation of a legal argument using appropriate legal terminology, case law and other legal authorities regarding whether Megan may be liable for failing to act. The legal argument is generally detailed, developed and persuasive.</li> </ul>                |
| 2    | 3-5   | <ul style="list-style-type: none"> <li>• Adequate application of legal rules and principles to Megan's situation.</li> <li>• Adequate presentation of a legal argument using some appropriate legal terminology, case law and other legal authorities regarding whether Megan may be liable for failing to act. The legal argument includes some detail which is developed in places.</li> </ul> |
| 1    | 1-2   | <ul style="list-style-type: none"> <li>• Basic application of legal rules and principles to Megan's situation.</li> <li>• Basic presentation of a legal argument using minimal legal terminology, case law and other legal authorities regarding whether Megan may be liable for failing to act. The legal argument includes minimal detail.</li> </ul>  |
|      | 0     | Response not creditworthy nor attempted.   |

#### Question 4: Human Rights Law

- (a) Explain the role of the European Court of Human Rights. [6]

##### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining the role of the European Court of Human Rights, candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles relevant to the functioning of the Court. In demonstrating this knowledge and understanding, candidates are required to focus on the specific nature of the question set and not simply give a general answer.

The response might consider issues such as:

- The European Court of Human Rights was set up in 1959 and is based in Strasbourg.
- The court's 47 full time judges deliberate on potential breaches of Convention rights and oversees whether governments are meeting their obligations under the Convention.
- It deals with complaints from an individual against a member state as well as complaints of one member state against another.
- In order to be able to get the case heard, certain conditions must be met: the person referring must have locus standi; all domestic remedies must have already been exhausted and the application must be heard within 6 months of the final decision of a domestic court; the individual must have suffered a serious disadvantage.
- The court is not bound by previous precedent, allowing it to develop the protection of human rights in line with changes in society (*Goodwin 2002*).
- The court's decision is final.
- The Committee of Ministers oversees the execution of Strasbourg judgements but its powers are limited to simply urging a government to comply. There is no mechanism for forcing the member state to comply with the ruling but most tend to accept it to avoid being in breach of international law. Occasionally, however, a member state might ignore the judgement as seen in the UK's refusal to give prisoners the vote despite the ECtHR upholding their right under Act 3 First Protocol - in *Hirst v UK 2005*.



### Assessment grid for Q4(a)

| <b>Band</b> | <b>Marks</b> | <b>AO1: Demonstrate knowledge and understanding of the English Legal System and legal rules and principles</b>   |
|-------------|--------------|--|
| <b>3</b>    | <b>5-6</b>   | Excellent knowledge and understanding of the English Legal System and legal rules and principles relating to the role of the European Court of Human Rights. Response is clear, detailed and fully developed.      |
| <b>2</b>    | <b>3-4</b>   | Good knowledge and understanding of the English Legal System and legal rules and principles relating to the role of the European Court of Human Rights. Response is generally clear, detailed and fully developed. |
| <b>1</b>    | <b>1-2</b>   | Basic knowledge and understanding of the English Legal System and legal rules and principles relating to the role of the European Court of Human Rights. Response includes minimal detail.                         |
|             | <b>0</b>     | Response not credit worthy or not attempted.   |

- (b) Explain the rights of a suspect who is arrested by the police without a warrant. [6]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In explaining the rights of a defendant arrested by the police without a warrant, candidates are expected to demonstrate knowledge and understanding of the English legal system and legal rules and principles underlying this power. In demonstrating this knowledge and understanding, candidates are required to focus on the specific nature of the question set and not simply give a general answer.

The response might consider such issues as:

- Arrest provisions are covered by *S24 PACE 1984 (as amended by SOCPA 2005)* and *Code of Practice G*. *Code G* confirms that the power must be used fairly, responsibly, with respect for people suspected of committing offences and without unlawful discrimination. The use of the power must be justified and, in order to avoid challenge, the officers must consider whether the objectives can be met by other, less intrusive means.
- A defendant can now be arrested without a warrant for *any* kind of offence provided the police can justify the arrest (*O'Hara v UK 2002*) by showing that
  - they reasonably believe that D is committing, has committed or is about to commit an offence and
  - have reasonable grounds for suspecting that it is *necessary* to arrest as soon as practicable the suspect for one of the reasons in *S24(5)*. Reasons cited could include any of the following: where the suspect's name and address cannot be readily ascertained or no satisfactory address has been given; where it is necessary to prevent the suspect causing injury to himself or another, or suffering physical injury, or causing loss or damage to property; to allow the prompt and effective investigation of the offence or the conduct of the suspect; to prevent the investigation being hindered by the disappearance of the suspect.
- Under *s28 PACE 1984* the defendant must be informed of the fact of his arrest in clear language (*Alderson v Booth 1969*) and provided with the police officer's grounds for doing so as soon as possible.
- Defendant must be cautioned (*s34 CJPOA 1994*).
- If the above are not complied with, the arrest is unlawful.
- *S30 PACE 1984* - defendant must be taken to a designated police station as soon as practicable but *Criminal Justice Act 2003* allows the police to grant "street bail" which may avoid the need to take the suspect to a designated police station forthwith.

### Assessment grid for Q4(b)

| <b>Band</b> | <b>Marks</b> | <b>AO1: Demonstrate knowledge and understanding of the English Legal System and legal rules and principles</b>   |
|-------------|--------------|--|
| <b>3</b>    | <b>5-6</b>   | Excellent knowledge and understanding of the English Legal System and legal rules and principles relating to the arrest provisions under PACE 1984. Response is clear, detailed and fully developed. |
| <b>2</b>    | <b>3-4</b>   | Good knowledge and understanding of the English Legal System and legal rules and principles relating to the arrest provisions under PACE 1984. Response is generally clear, detailed and developed.  |
| <b>1</b>    | <b>1-2</b>   | Basic knowledge and understanding of the English Legal System and legal rules and principles relating to the arrest provisions under PACE 1984. Response includes minimal detail.                    |
|             | <b>0</b>     | Response not credit worthy or not attempted.   |

- (c) Assess whether the law provides sufficient protection for individuals detained at the police station. [9]

### Indicative content

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In order to achieve the highest marks, candidates must demonstrate their ability to draw together details and cases from areas to *evaluate* the protection afforded for individuals detained at the police station.

Candidates will offer an assessment of the legal rules, principles and concepts in order to assess the effectiveness of the provisions.

The response might consider issues including:

- Appointment of custody officer is the responsibility of the Chief Constable of the area and there should be one in each designated police station.
- Role of **custody officer** – judicial and administrative. Independent of the investigating team, he should provide an objective oversight. Has responsibility for the defendant's treatment at the station and for maintaining the custody record.
- Following arrest, under s36, the custody officer must consider whether there is sufficient evidence to charge and, if he does not reasonably believe further information can be acquired through questioning, must bail the suspect (s37).
- Where the suspect is detained, under s39 he must give the suspect written notice of his rights along with a written notice of entitlement to visits and meals, and the conduct of interviews.
- **Detention periods** without charge: s41 – suspect can be detained for up to 24 hours. Where detention is to exceed 24 hours, further authorisation is needed: s42 – detention can be extended to 36 hours if indictable offence and superintendent or above has reasonable grounds to believe that continued detention is necessary to secure or preserve evidence and that investigation is being carried out diligently; s44 – detention for up to 96 hours but requires warrant of further detention from magistrates' court, providing element of independent oversight.
- **Reviews** – s40 – to be carried out by senior officer not involved with the case initially after 6 hours and subsequently every 9 hours. If not adhered to, defendant may sue for false imprisonment (*Roberts 1999*)
- **Right to telephone call** (s56) and **right to legal advice** (s58) in private (*Brennan 2001*) should be upheld. Suspect entitled (irrespective of means) to advice under duty solicitor scheme. However, if the offence is indictable, these rights can be delayed for up to 36 hours on the authorisation of superintendent or above who reasonably believes that the person contacted could alert others or lead to evidence being lost.
- **Fingerprinting** (s61) - suspect's consent requested but, if not forthcoming, refusal can be overridden and reasonable force can be used (s117). Since the CJA 2003, the taking of fingerprints now seems to be a matter of routine and not linked to any specific evidence that they are necessary to prove / disprove involvement.

- **Non intimate sampling** can be carried out under s63 and suspect's consent is normally sought. It must be given in writing. However, if not forthcoming, can be authorised by inspector or above who has reasonable grounds for believing the sample to be necessary to confirm / disprove involvement in a recordable offence.
- **Intimate sampling** (s62) can **only** be taken with D's written consent and written authorisation of inspector or above who has reasonable grounds for believing the sample to be necessary to confirm / disprove involvement in a recordable offence. Greater caution in view of intrusive nature of the procedure. If it involves anything other than urine, it must be taken by a doctor, otherwise it is unlawful. If the defendant refuses, however, he will be warned that it may lead to the drawing of adverse inferences at trial.
- Under S64, **DNA data** could be extracted from the samples taken and placed indefinitely on the national DNA database. But ECtHR ruled in *S & Marper (2008)* that this practice was disproportionate to Art 8 rights. Now where a defendant is convicted of an imprisonable offence, DNA data can be placed indefinitely on a national database for purposes of investigation of crime under the *Protection of Freedoms Act 2012*.
- **Interviews** must be recorded (s60 and Code E), guarding against falsification of evidence and aggressive behaviour. The suspect must be cautioned before the interview begins and the caution repeated if interview is suspended and subsequently recommenced (Code C). Breaks must be given every 2 hours and vulnerable suspects must have an appropriate adult with them during questioning (s57); the absence of an appropriate adult may render any confession inadmissible.
- Whilst at the police station, the suspect is entitled to a single cell, blankets, mattresses, pillows; toilet/ washing facilities (*Price v UK 2001*); at least two light meals and one main meal in 24 hours; at least 8 hours sleep in any 24 hours (preferably at night).

### Assessment grid for Q4(c)

| Band | Marks | AO3: Analyse and evaluate legal rules, principles and concepts   |
|------|-------|--|
| 4    | 8-9   | <ul style="list-style-type: none"> <li>• Excellent analysis of legal rules, principles and concepts relevant to the protection afforded to defendants detained at the police station.</li> <li>• Analysis is detailed with appropriate range of supporting evidence which draws together knowledge, skills and understanding.</li> <li>• Excellent evaluation of the protection afforded to defendants detained at the police station, including a valid and substantiated judgement.</li> <li>• Excellent citation of supporting case law and legal authorities.</li> </ul> |
| 3    | 6-7   | <ul style="list-style-type: none"> <li>• Good analysis of legal rules, principles and concepts relevant to the protection afforded to defendants detained at the police station.</li> <li>• Analysis is generally detailed with appropriate range of supporting evidence which draws together knowledge, skills and understanding.</li> <li>• Good evaluation of the protection afforded to defendants detained at the police station, including a valid judgement.</li> <li>• Good citation of supporting case law and legal authorities.</li> </ul>                        |
| 2    | 3-5   | <ul style="list-style-type: none"> <li>• Adequate analysis of legal rules, principles and concepts relevant to the protection afforded to defendants detained at the police station.</li> <li>• Analysis includes some detail with some supporting evidence.</li> <li>• Adequate evaluation of the protection afforded to defendants detained at the police station, including reference to a judgement.</li> <li>• Adequate citation of supporting case law and legal authorities.</li> </ul>   |
| 1    | 1-2   | <ul style="list-style-type: none"> <li>• Basic analysis of legal rules, principles and concepts relevant to the protection afforded to defendants detained at the police station.</li> <li>• Analysis includes minimal detail.</li> <li>• Basic evaluation of the protection afforded to defendants detained at the police station.</li> <li>• Basic citation of supporting case law and legal authorities.</li> </ul>   |
|      | 0     | <ul style="list-style-type: none"> <li>• Response not creditworthy or not attempted.</li> </ul>  |

**The scenario below should be used when assessing part (d)**

Kathryn works as a secretary for the Ministry of Defence. In the course of her work, she came across a report of an investigation into the death of an RAF helicopter pilot following a crash during a rescue mission. The report made it clear that the cause of the crash was a design fault which made this particular type of helicopter unstable at low altitudes. On the final page of the report, it was stated that, as it would cost too much to withdraw this type of helicopter from service, the report should be kept secret and the official reason for the crash given as “pilot error”. Kathryn secretly photocopied this page and sent it to Mike, the father of the dead pilot. Outraged at the cover up and the slur on his son’s name, Mike sent the photocopy to Darren, the editor of the Daily Slur, who is considering whether to publish the story.

- (d) Advise Kathryn, Mike and Darren whether they may have committed an offence. [9]

**Indicative content**

NOTE: *The content is not prescriptive and candidates are not expected to mention all the material mentioned below. Each answer will be assessed on its merits according to the assessment grid and the indicative content. Examiners should seek to credit any further admissible evidence offered by candidates.*

In advising Kathryn, Mike and Darren, candidates are expected to *apply* the full range of legal rules and principles relating to her situation. In this case, candidates will need to consider the potential liability of these individuals under the Official Secrets Act 1989. They are required to advise Kathryn, Mike and Darren in turn of their specific position under the “defence” provisions of the aforementioned Act.

The response might consider issues such as:

- Falls under s2 (Defence) Official Secrets Act 1989. Prosecutions require the consent of the Attorney General.
- Disclosure may be “damaging disclosure” under S2 as it can be argued that it is likely to have the effect of damaging the capability of the Armed Forces to carry out their work.

**Kathryn:**

Crown Servant – will have committed the offence under s2 by making an unauthorised disclosure of information which she has access to by virtue of being a Crown Servant. She secretly passed the information to Mike, indicating that the disclosure was made without authorisation. A disclosure by a Crown Servant will only be lawful if made in accordance with her official duty (s7) which is clearly not the case here.

**Mike:**

He is a private citizen and therefore falls under s5(1)(a)(i) – making a damaging disclosure of information resulting from an unauthorised disclosure by a Crown Servant. For Mike to be found guilty, the prosecution must prove beyond reasonable doubt that he had the requisite mens rea, i.e. he knew or had reasonable cause to believe that the information is protected under the OSA 1989 and that the disclosure would be damaging.

**Darren:**

Commits no offence so long as he does not publish the story. He is not a Crown Servant, so if he does disclose the information, he will be in the same position as Mike. There is no public interest defence available under the OSA (*Shayler 2003*) for him to take advantage of.

### Assessment grid for Q4(d)

| <b>Band</b> | <b>Marks</b> | <b>AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology</b>   |
|-------------|--------------|--|
| <b>4</b>    | <b>8-9</b>   | <ul style="list-style-type: none"> <li>• Excellent application of legal rules and principles to the situation faced by Kathryn, Mike and Darren.</li> <li>• Excellent presentation of a legal argument using appropriate legal terminology, case law and other legal authorities regarding the situation faced by Kathryn, Mike and Darren. The legal argument is detailed, fully developed and persuasive.</li> </ul>     |
| <b>3</b>    | <b>6-7</b>   | <ul style="list-style-type: none"> <li>• Good application of legal rules and principles to the situation faced by Kathryn, Mike and Darren.</li> <li>• Good presentation of a legal argument using appropriate legal terminology, case law and other legal authorities regarding the situation faced by Kathryn, Mike and Darren. The legal argument is generally detailed, developed and persuasive.</li> </ul>           |
| <b>2</b>    | <b>3-5</b>   | <ul style="list-style-type: none"> <li>• Adequate application of legal rules and principles to the situation faced by Kathryn, Mike and Darren.</li> <li>• Adequate presentation of a legal argument using appropriate legal terminology, case law and other legal authorities regarding the situation faced by Kathryn, Mike and Darren. The legal argument includes some detail which is developed in places.</li> </ul> |
| <b>1</b>    | <b>1-2</b>   | <ul style="list-style-type: none"> <li>• Basic application of legal rules and principles to the situation faced by Kathryn, Mike and Darren.</li> <li>• Basic presentation of a legal argument using minimal legal terminology regarding the situation faced by Kathryn, Mike and Darren. The legal argument includes minimal detail.</li> </ul>   |
|             | <b>0</b>     | Response not creditworthy nor attempted.   |