



A-LEVEL

Law

LAW04 Criminal Law (Offences against Property) *or* Tort,
AND Concepts of Law
Mark scheme

2160
June 2016

Version 1.0: Final Mark Scheme

Mark schemes are prepared by the Lead Assessment Writer and considered, together with the relevant questions, by a panel of subject teachers. This mark scheme includes any amendments made at the standardisation events which all associates participate in and is the scheme which was used by them in this examination. The standardisation process ensures that the mark scheme covers the students' responses to questions and that every associate understands and applies it in the same correct way. As preparation for standardisation each associate analyses a number of students' scripts. Alternative answers not already covered by the mark scheme are discussed and legislated for. If, after the standardisation process, associates encounter unusual answers which have not been raised they are required to refer these to the Lead Assessment Writer.

It must be stressed that a mark scheme is a working document, in many cases further developed and expanded on the basis of students' reactions to a particular paper. Assumptions about future mark schemes on the basis of one year's document should be avoided; whilst the guiding principles of assessment remain constant, details will change, depending on the content of a particular examination paper.

Further copies of this mark scheme are available from aqa.org.uk.

Assessment Objectives One and Two

General Marking Guidance

You should remember that your marking standards should reflect the levels of performance of students, mainly 18 years old, writing under examination conditions. The Potential Content given in each case is the most likely correct response to the question set. However, this material is neither exhaustive nor prescriptive and alternative, valid responses should be given credit within the framework of the mark bands.

Positive Marking

You should be positive in your marking, giving credit for what is there rather than being too conscious of what is not. Do not deduct marks for irrelevant or incorrect answers, as students penalise themselves in terms of the time they have spent.

Mark Range

You should use the whole mark range available in the mark scheme. Where the student's response to a question is such that the mark scheme permits full marks to be awarded, full marks must be given. A perfect answer is not required. Conversely, if the student's answer does not deserve credit, then no marks should be given.

Levels of Response for Essay Marking

When reading an essay, you must annotate your recognition of the achievement of a response level. This will help the Team Leader follow your thought processes. Levels of response marking relies on recognition of the highest level achieved by the student. When you have finished reading the essay, therefore, think top-down, rather than bottom-up. In other words, has the student's overall answer met the requirements for the top level? If not, the next level?

Citation of Authority

Students will have been urged to use cases and statutes whenever appropriate. Even where no specific reference is made to these in the mark scheme, please remember that their use considerably enhances the quality of an answer.

Assessment Objective Three

Quality of Written Communication

- Level 3** Moderately complex ideas are expressed clearly and reasonably fluently, through well linked sentences and paragraphs. Arguments are generally relevant and well structured. There may be occasional errors of grammar, punctuation and spelling.
4-5 marks
- Level 2** Straightforward ideas are expressed clearly, if not always fluently. Sentences and paragraphs may not always be well connected. Arguments may sometimes stray from the point or be weakly presented. There may be some errors of grammar, punctuation and spelling, but not such as to detract from communication of meaning.
2-3 marks
- Level 1** Simple ideas are expressed clearly, but arguments may be of doubtful relevance or be obscurely presented. Errors in grammar, punctuation and spelling may be noticeable and intrusive, sufficient to detract from communication of meaning.
1 mark
- Level 0** Ideas are expressed poorly and sentences and paragraphs are not connected. There are errors of grammar, punctuation and spelling, such as to severely impair communication of meaning.
0 marks

Mark bands (3 potential content) – list of maximum marks

25	two sound, one clear
23	two sound, one some or one sound, two clear
21	two sound or one sound, one clear, one some or three clear
19	one sound, one clear or one sound, two some or two clear, one some
17	one sound, one some or two clear or one clear, two some
14	one sound or one clear, one some or three some
13	two sound explanation only
11	one clear or two some
09	one sound explanation only or two clear explanation only or three some explanation only
07	one some or one clear explanation only or two some explanation only
05	one some explanation only
04	fragments or substantial error/incoherence
00	completely irrelevant

Mark bands (2 potential content) – list of maximum marks

25	two sound
23	one sound, one clear
20	one sound, one some or two clear
17	one sound or one clear, one some
13	one clear or two some or two sound explanation only
11	one sound explanation only or two clear explanation only
08	one some or one clear explanation only or two some explanation only
06	one some explanation only
05	fragments or substantial error/incoherence
00	completely irrelevant

Note:

In *substantive* law questions, the two components are explanation and application. In evaluative questions, the two components are explanation and evaluation. The references above to explanation only are to be understood as explanation without application for substantive law questions, and as explanation without evaluation for evaluative questions. The quality of treatment of these two components, in combination, determines whether the treatment overall for that Potential Content (PC) element is sound, clear or some. In determining the overall quality of treatment, descriptions of the quality of treatment of the individual components (whether explanation or application/evaluation) should be combined as follows:

sound/sound	- sound
sound/clear	- weak sound
sound/some	- clear
clear/clear	- clear
clear/some	- weak clear
some/some	- some

LAW04 Descriptors

Level	Description
Sound	Accurate and comprehensive explanation and application, so that the answer reveals strong knowledge and understanding of the correct (or sustainable) analysis, leading to satisfactory conclusions. There may be some omission, error, or confusion but it will be insufficient to undermine the basic characteristics of the answer.
Clear	<p>Broadly accurate and relatively comprehensive explanation and application, though a little superficial in either or both, and with some error and/or confusion that begins to affect the quality of the analysis.</p> <p>Or</p> <p>Accurate explanation and application over a narrower area, omitting some significant aspect(s) of the analysis, so that an answer emerges which reveals knowledge and understanding of the broad framework of the analysis, or of some of its detailed aspect(s).</p>
Some	<p>Explanation and/or application in relation to relevant aspects but characterised by significant omissions and/or errors and/or confusion.</p> <p>Or</p> <p>Explanation (including definitions of relevant offences/defences) and/or application which is generally accurate but confined to a limited aspect, so that, at best, a very superficial or partial analysis emerges.</p>
Fragments	<p>Isolated words or phrases, including case names and statutes, which have potential relevance but remain entirely undeveloped.</p> <p>Or</p> <p>Mere identification of relevant offences/defences.</p>

Use of case authority

1. It is usually sufficient to associate a relevant case with an explained/applied rule. Further explanation of cases is required only where necessary to elucidate the rule or its application.
2. An answer in relation to any PC should not be described as 'sound' unless some relevant authority appears, where appropriate. However, where there is appropriate use of authority in relation to the other PC in the mark scheme for the question, an answer in relation to a PC where no authority appears may be given a 'lower' sound (the student will have demonstrated ability to use appropriate authority at some point in the answer to the question, albeit not in the element in issue).

Section A Criminal Law (Offences against Property)

0 1	Discuss the possible criminal liability of Harry for property offences arising out of his activities in relation to Tom.	[25 marks]
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Potential Content

- (A) Discussion of blackmail issues – demand, menaces (importance of the objective test) with a view to gain or with intent to cause loss, the meaning of ‘gain’ and ‘loss’, unwarranted demand.

Sound requires, in relation to ‘unwarranted’, a generally accurate explanation of the meaning of the terms ‘reasonable grounds’ and ‘proper means’, together with arguable application.

- (B) Discussion of theft issues – appropriation, property (distinction between the confidential information and the papers themselves), belonging to another, intention permanently to deprive and dishonesty.

Note

Theft and robbery – **MAX SOUND** (allow for a less detailed coverage of theft than a response addressing theft only, provided the robbery offence is correctly concluded ie that the offence was not committed, given that the force was not used by Harry in order to steal as there is no evidence that he contemplated theft at that point.

- (C) Discussion of burglary issues – entry, building, trespass. Consideration of the possible application of s.9(1)(a) Theft Act (on the basis of Harry being ‘furious with Tom’/ intention to cause GBH?) and of s.9(1)(b) on the basis of theft and (possible) GBH.

Note – s.9(1)(b) only – **MAX WEAK SOUND**

s.9(1)(a) only – **MAX WEAK CLEAR**

(AO1 = 10; AO2 = 15)

0 2 Discuss the possible criminal liability of:

- Harry for any **property** offences arising out of his dealings with Anna
- Tom for any **property** offences arising out of his breaking the glass of Harry's window and setting fire to his furniture
- Dan for any **property** offence arising out of his putting the fire out with Harry's coat.

[25 marks]

Potential Content

- (A) In relation to Anna, discussion of fraud by false representation issues – representation, falsity, dishonesty (in relation to Harry's representation that the plans are his, possible argument that he is not dishonest since he considers that he is entitled to use them), intention to make a gain or cause a loss, the meaning of 'gain' and 'loss').

Discussion of the defence of intoxication – recognition of voluntary intoxication, distinction between crimes of specific and basic intent, explanation that fraud by false representation is an offence of specific intent (requires intention to cause gain/loss and knowledge of falsity), are the mental elements negated?

Note – a high mark in relation to fraud requires a generally accurate knowledge of the terminology of the Fraud Act 2006

Note – Harry makes a representation of fact (that the plans are his) and representations as to his state of mind/intention (that he intends to develop the software and that he intends to pay Anna £20 000). Candidates should be credited for a treatment of the requirements of fraud based on **any** of Harry's representations

Fraud only (no intoxication) – MAX CLEAR

- (B) In relation to Anna, discussion of theft of the £20,000 - appropriation (despite consent), property, belonging to another, intention to permanently deprive, dishonesty.

Answers can rely on explanations used in relation to PC(B) Question 01, but there must be application to the specific theft issues raised by the dealings between Anna and Harry.

- (C) Discussion of criminal damage issues:

In relation to Tom – basic criminal damage (with respect to the window/arson with respect to the furniture). Actus reus and mens rea issues. Aggravated criminal damage. Actus reus and mens rea issues.

Note In relation to aggravated criminal damage (where dealt with), the explanation and application should address the issue that there must be an intention or recklessness to endanger life by **any damage** which was intended by Tom or as to which he was reckless ie by the setting fire to the furniture and not the broken window.

In relation to Dan – basic criminal damage (students can rely on explanations in relation to Tom but must apply the rules in relation to Dan). Possible defence of lawful excuse under **either** s.5(2)(a) or s.5(2)(b) Criminal Damage Act, but credit a consideration of both aspects.

Note – as a full alternative to lawful excuse, allow a discussion of the defence of duress of circumstances – relevant circumstances (the perceived danger to a person (Harry) for whom Dan feels responsible), immediacy of the danger, the subjective and objective tests.

Max sound Basic and aggravated criminal damage by Tom + basic criminal damage by Dan + either lawful excuse or duress of circumstances

Max weak sound Basic and aggravated CD by Tom + basic CD by Dan

Max clear Basic + aggravated CD by Tom

Max clear Basic CD by Tom and Dan + either lawful excuse or duress of circumstances

Max weak clear Basic CD by Tom and Dan

(AO1 = 10; AO2 = 15)

0 3	Discuss the possible criminal liability of Serge for property offences arising out of his activities in Arfan's house.
	[25 marks]

Potential Content

- (A) Discussion of theft in relation to the money and the wallet – actus reus and mens rea issues. In relation to the money, issue of 'belonging to another'. In relation to the wallet, temporary possession sufficient for appropriation, but no theft because of conditional intent.
- Discussion of robbery – the meaning of force, was force used in order to steal (arguable) and at the time of the theft (arguable because of a continuing appropriation).
- Theft of the money (but not the wallet) + robbery – **MAX WEAK SOUND**
 Theft of the money and the wallet (no robbery) – **MAX CLEAR**
 Theft of the money only (no theft of the wallet and no robbery) – **MAX WEAK CLEAR**
- (B) Discussion of burglary – entry, building, trespass (no trespass on entering the house, but later trespass into part of a building/the 'private study'). Consideration of s.9(1)(a) Theft Act (conditional intention to commit theft). Consideration of s.9(1)(b) (actual theft).
- (C) Discussion of the defence of duress: the nature of the threat (death/serious personal injury?). Threat to Serge. The subjective element (threat of immediate harm/opportunity to avoid the harm, the importance of Dave's text). The objective element. The effect of Serge's voluntary association with criminals.

(AO1 = 10; AO2 = 15)

0 4	Discuss the possible criminal liability of Serge for property offences arising out of his taking and use of Ken's £50 and his club membership card.
	[25 marks]

Potential Content

- (A) Discussion of theft issues in relation to Serge with particular reference to analysis of mens rea issues of intention permanently to deprive (the principle of *Verlummyl* in relation to the money and the s.6 Theft Act notion of 'goodness and virtue' in relation to the card) and dishonesty (arguable that the reasonable man might not regard the 'borrowing' of the £50 as dishonest, whereas he might view the 'borrowing' of the card differently). Actus reus issues in outline

Answers can rely on explanations used in relation to PC(A) Question 03, but there must be application to the specific theft issues raised in relation to the £50 and the club membership card.

Note –

- dishonesty in relation to the £50
- dishonesty in relation to the membership card
- intention to permanently deprive in relation to the £50
- intention to permanently deprive in relation to the membership card (including a discussion of whether Serge knows that the card is about to expire)

Max sound – all 4 of the above

Max weak sound – 3 of the above

Max clear – 2 of the above

Max weak clear – 1 of the above

Note – theft and burglary - MAX SOUND (allow for a less detailed coverage of theft than a response addressing theft only, provided the student suggests that Serge became a trespasser when he entered the area in the shop where the cash till was - part of a building– with intention to steal from it, thereby knowingly exceeding his permission.

- (B) **Discussion of fraud by false representation issues** in relation to Serge's use of the club membership card - representation (implied representation as to the fact that the card belonged to Serge), falsity, dishonesty, intention to make a gain and/or cause a loss, the meaning of 'gain' and 'loss'..
Sound requires a generally accurate knowledge of the terminology of the Fraud Act 2006

- (C) **Discussion of obtaining services dishonestly issues** in relation to Serge –obtain, services (the 'concerts'), made available on the basis of payment, 'by' a dishonest act, failure to pay, knowledge at the time of obtaining that services are made available on the basis of payment, intention that payment will not be made.

Note – credit an argument that the wording of s.11 might suggest that the offence is not committed if D does not pay for the service, but fraudulently uses the card of another who **has already paid** (Ken) (the wording of s.11 requires that D obtains the service 'without any payment having been made...' rather than 'without any payment having been made by D'.

Sound requires a generally accurate knowledge of the terminology of s.11 Fraud Act 2006

Note - Discussion of making off without payment–

Where the candidate discusses either fraud or obtaining services, but not both, making off can be treated as an alternative PC to the area omitted

Where the candidate discusses both fraud and obtaining services, a discussion of making off can be used to compensate for any deficiencies in either fraud or obtaining discussions.

Making off (discussion as to whether Serge has 'made off' rather than being allowed to enter and freely leave the club over the weekend), the spot, service done, payment required or expected. Mens rea issues: intention to permanently avoid payment, knowledge that payment was required or expected, dishonesty.

Note – credit an argument that the offence might not be committed, even if D has not paid, so long as someone has.

Sound requires a generally accurate knowledge of the terminology of s.3 Theft Act 1978

(AO1 = 10; AO2 = 15)

Section B Tort

0 5	<p>Discuss the rights and remedies, if any, of:</p> <ul style="list-style-type: none"> • Jenny against Reesh • Carlos against Jenny • Lisa against Jenny.
[25 marks]	

Potential Content

- (A) In relation to Reesh's possible liability to Jenny, possible claim for negligent misstatement – the need for a special relationship/proximity, the issue of Reesh's expertise (should a surveyor know about contamination of land?), should he have foreseen reliance by Jenny and was that reliance reasonable (the answer is arguably yes, despite the fact that the parties are friends, given that Jenny asks for a written report, and given the purchase price involved)?

Breach of duty and standard of care (in outline), damage (in outline) and possible reference to damages.

Duty only (no breach) – MAX WEAK SOUND.

- (B) In relation to Jenny's possible liability to Carlos, possible claim in the tort of negligence – duty of care (in outline), breach of duty and consideration of factors determining the standard of care, (with particular reference to the high likelihood of serious harm), causation. Remoteness (with particular reference to the distinction between type of damage and the precise events which lead to damage). Possible reference to damages.

Credit a consideration of the different categories of damages, eg loss of future earnings, pain and suffering, etc.

- (C) In relation to Jenny's possible liability to Lisa, possible claim in the tort of negligence for psychiatric injury – need for a recognised psychiatric injury, explanation that Lisa is a secondary victim, explanation and application of the control factors to Lisa as a secondary victim, with particular reference to proximity of relationship, a traumatic event and the 'aftermath'. Possible reference to damages.

(AO1 = 10; AO2 = 15)

0 6	<p>Discuss the rights and remedies, if any, of:</p> <ul style="list-style-type: none"> • Hamid and his friend against Tina regarding the smell and the noise • Tina against Hamid regarding the loud music • Hamid against Tina regarding his poisoned fish. <p style="text-align: right;">[25 marks]</p>
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Potential Content

- (A) In relation to Tina's possible liability to Hamid, possible claim in the tort of private nuisance – the need for an unreasonable interference with enjoyment of land and a consideration of location and duration. The issue of possible 'public benefit' in producing 'health products' (not a defence to liability but might affect the remedy). Remedies, in particular injunction.

In relation to the claim by Hamid's friend regarding the nuisance – requirement of an interest in land not satisfied.

In relation to the nuisance claim by Tina against Hamid – claim likely to succeed because of malice, intent to annoy. Remedies, in particular injunction.

Note – Hamid and Hamid's friend against Tina only – MAX CLEAR

- (B) In relation to Tina's possible liability for the poisoned fish, possible claim under the Rule in Rylands v Fletcher – explanation and application of the elements, especially non-natural/extraordinary user (the amount of fertilizer stored will be particularly relevant), and foreseeability of harm. Strict liability. Remoteness. Reference to damages.

Possible alternative in negligence – explanation and application of duty, breach (eg should Tina have taken steps to prevent the escape?), remoteness. Reference to damages.

(AO1 = 10; AO2 = 15)

0 7	<p>Discuss the rights and remedies, if any, of</p> <ul style="list-style-type: none"> • Sam against Jack in respect of his injuries • Leo and Ruben against Jack in respect of their injuries. <p style="text-align: right;">[25 marks]</p>
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Potential Content

- (A) In relation to Jack's possible liability to Sam, possible claim under the Occupiers' Liability Act 1984 – is there a danger due to the state of the premises [s.1(1)] - requirements for the duty to arise [s.1 (3)]? The nature of the duty [s.1(4)]. Has Jack fulfilled the duty by the boarding up and/or the signs? Special issues relevant to children. Possible contributory negligence/volenti. Possible reference to damages.

Note Alternative claim under the OLA 1957 on the basis that an 'old uninhabited house' might constitute an allurement to a child and that Sam was thus an implied licensee and a visitor.

MAX WEAK SOUND (if combined with a detailed explanation and application of the OLA 57).

- (B) In relation to Jack's possible liability to Leo and Ruben - possible claim under the Occupiers' Liability Act 1957 – elements of the Act.
 In relation to Leo, consideration of s.2(3)(b) (what risks are 'ordinarily incident' to Leo's 'calling'?). Contributory negligence.
 In relation to Ruben, consideration of s.2(4)(b).
 Possible reference to damages (credit a consideration of the different categories of damages, eg loss of future earnings, pain and suffering, etc).

(AO1 = 10; AO2 = 15)

0 8	<p>Discuss the rights and remedies, if any, of:</p> <ul style="list-style-type: none"> • Jack against Glossy plc in respect of his breathing difficulties and the damage to his carpet • Jack against Dr Tan in respect of his stroke and partial paralysis • Jack against the hospital in respect of his stroke and partial paralysis <p style="text-align: right;">[25 marks]</p>
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Potential Content

- (A) In relation to Glossy plc's liability to Jack, possible claim under the Consumer Protection Act 1987 – (damage, defective product, producer, strict liability). Possible reference to damages.

Alternative claim in the tort of negligence – duty, breach, damage, remoteness. Reference to damages.

Note Either or both of the above approaches can achieve sound (with an obviously more limited treatment where both elements are considered).

- (B) In relation to Dr Tan's possible liability to Jack for the stroke and partial paralysis – elements of the tort of negligence, duty (in outline), breach of duty issues with particular reference to medical professionals – the standard of the ordinarily competent medical practitioner, possible relevance of Dr Atkins having recently qualified, the relevance of 'general and approved practice'. Causation (in outline). Remoteness and the 'thin skull' principle. Possible reference to damages (credit a consideration of the different categories of damages, eg loss of future earnings, pain and suffering, etc).
- (C) In relation to the hospital's possible liability to Jack, discussion of vicarious liability – brief explanation and application of the factors determining the existence of the employment relationship, a more detailed consideration of 'in the course of employment' (does a prohibition by the employer relate to the scope of the job or merely the way of doing it?).

(AO1 = 10; AO2 = 15)

Section C Concepts

Descriptors for Concepts of Law questions (Section C)

Level	Explanation	Analysis/Evaluation
sound	The answer presents a strong explanatory framework, correctly identifying and accurately and comprehensively explaining, say, relevant rules, procedures, institutions and theories in the central aspects of the potential content. Where appropriate, the explanations are supported by relevant examples and illustration (which is adequately developed where necessary to further elucidate the explanations). Where there are more marginal aspects of the potential content, there may be some minor omissions or inaccuracies in the explanation and/or in the treatment of the supporting examples and illustration.	Arguments are developed perceptively and coherently, making careful use of framework explanations, examples and illustration, and are directly related to the thrust of the question. Summaries and conclusions are sustainable, and demonstrably emerge from the supporting explanations and arguments.
clear	The answer presents an explanatory framework, correctly identifying and accurately explaining significant parts of, say, relevant rules, procedures, institutions, and theory in the central aspects of the potential content, though there are omissions in the explanations of some parts of the rules, procedures, institutions and theory or errors or some confusion in the explanation, in those central aspects. There may be a little overemphasis on marginal aspects at the expense of some of the more central aspects. In the higher part of the level, relevant examples and illustration are used but there may be a little confusion and error in selection and/or explanation or the explanation may be limited. At the lower end of the level, there may be little evidence of relevant examples and illustration or more evident inaccuracies.	Appropriate arguments are introduced but may not be fully developed, or may be restricted in range. Alternatively, the arguments suffer from a little inaccuracy or confusion. The arguments make use of framework explanations (including any relevant examples and illustration) but do not always succeed in incorporating them in a fully coherent way or in demonstrating their full relevance. Summaries and conclusions may be a little tentative and may not fully address the thrust of the question. Though broadly based on the supporting explanations and arguments, summaries and conclusions may not be closely and carefully related to them in the discussion.

<p>some</p>	<p>The answer presents an explanatory framework which correctly identifies and accurately explains a very limited part of, say, relevant rules, procedures, institutions, and theory in the central aspects of the potential content. There may be a very evident imbalance between explanation of central and of more marginal aspects of the potential content. Alternatively, the answer attempts explanation across a much broader range of relevant rules, procedures, institutions and theory in the central aspects of the potential content but the explanations suffer from significant omission, error or confusion. Explanations may emerge only out of attempts to introduce relevant examples and illustration. If introduced at all, examples and illustration may be of marginal relevance or their treatment may be highly superficial or subject to significant inaccuracies or not properly used to support the explanation of the relevant rules, procedures, institutions and theory.</p>	<p>There are relevant arguments but they are undeveloped and may tend to consist of simple assertions or assumptions. Alternatively, arguments may be characterised by evident confusion which significantly impedes coherence. Very limited use is made of framework explanations and any examples and illustration. Summaries and conclusions may be absent. Where present, they may barely address the thrust of the question, and be only imprecisely related to any supporting explanations and arguments.</p>
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Maxima for LAW04 Concepts essay questions

The student deals with (A) and (B) as follows:

Max 30: two sound

Max 27: one sound, one clear

Max 23: one sound, one some **or** two clear

Max 19: one sound **or** one clear, one some

Max 15: one clear **or** two some

Max 10: one some

Max 5: fragments **or** substantial error or incoherence

0: No relevant information

Section C Concepts of Law

0 9	Discuss the relationship between legal rules and moral principles. Analyse the extent, if at all, to which law should be based on moral principles.	[30 marks + 5 AO3 marks]
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REMEMBER TO AWARD MARKS FOR AO3 SEPARATELY

Potential Content

(A) Discussion of the relationship between law and morality

- **Explanation of the meaning of law and morality:** credit any arguable definitions of law (eg Salmond, Austin, Kelsen) and morality (eg customary practices, social manners, rules based on religion, what is ethically good, etc). Credit also an explanation which explains the meanings through highlighting the differences.
- **Discussion of the extent to which the law does seek to uphold moral principles:** use of appropriate case law/examples to illustrate areas of overlap and divergence.
- **Possible areas of overlap between law and morality:** examples from the substantive law (eg offences against the person and property, corruption of public morals, outraging public decency, consent and other defences to criminal liability, marital rape, the 'neighbour principle' in the tort of negligence, the duty to honour contracts, the contract rules which seek to protect the weaker party, etc). Examples of the way in which public morality may be influenced by law reform (eg discrimination, drink-driving, etc) and vice-versa (eg the campaign to abolish capital punishment).
- **Possible examples of divergence between law and morality:** speeding and parking offences, adultery, swearing, etc. Credit a consideration of the difficulty in taking a moral position which the law often faces owing to the existence of conflicting moral views in a pluralistic society. Possible examples of the above 'difficulty' include the Gillick principle, abortion, adult homosexuality, assisted reproduction and embryo research, assisted killing and withholding medical treatment, etc.

Sound Explanation of the meaning of law and morality + developed discussion of overlap and convergence

Weak sound Discussion of overlap and convergence – no explanation of 'meaning'

Clear Less developed discussion, with or without explanation of 'meaning'

Some Explanation of the meaning of law and morality only and/or very limited discussion of overlap/convergence

(B) Analysis of the extent to which law should be based on moral principles

- Students should consider the arguments for and against law being based on moral principles, and refer to relevant academic debates eg Hart-Devlin, Hart-Fuller. Possible arguments in favour of legal moralism are the importance of common values and the need for a cohesive society, and the natural law theories. Possible arguments against legal moralism are those in favour of libertarianism, eg the autonomy of the individual and the 'harm principle', and the various possible problems with legal moralism eg enforcing morality in a pluralistic society. Credit answers which recognise

that even libertarians acknowledge the need for some morality as the basis of law (eg Hart's 'minimum content of natural law'). Answers should also be given credit for linking the positivism/natural law debate to the relationship between law and morality.

- Students should also provide relevant examples which highlight the significance of the conflict between the above views. Possible examples include issues relating to conception, death, but any relevant example should be credited.

Sound	Consideration of relevant arguments for and against law being based on moral principles + developed illustrations.
Clear	Consideration of arguments with no, or limited, illustration
Weak Clear	Illustrations which are discussed and developed but set against a weaker framework of arguments
Some	Generally very limited in terms of either arguments and/or illustration

(AO1 = 15; AO2 = 15; AO3 = 5)

1 0	<p>Explain the meaning of ‘balancing conflicting interests’. Discuss the extent to which the law does balance conflicting interests and briefly consider why it should seek to do so.</p> <p style="text-align: right;">[30 marks + 5 AO3 marks]</p>
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REMEMBER TO AWARD MARKS FOR AO3 SEPARATELY

Potential Content

- (A)
- **Explanation of the meaning of ‘balancing conflicting interests’**
Explanation of the meaning of the different possible ‘interests’: (public/private/social, etc) and the process of ‘balancing’ (the distinction between a ‘compromise’ recognition of both interests and the recognition of one interest to the exclusion of the other). Credit a discussion of the balancing theorists eg Pound, Bentham, Jhering.
 - **Identification and explanation of relevant area(s) of substantive law / procedure/ institutions, etc: to explain and illustrate the precise interests which may allegedly be in conflict.**
Possible areas for discussion include tort (eg the use of judicial discretion in granting/refusing an injunction in relation to private nuisance, duty of care/ floodgates/ just and reasonableness, breach of duty issues, defamation, etc), crime (eg intoxication, consent), criminal process (eg bail, evidence, recognition of the interests of suspects/PACE), national security/terrorism issues, etc.

Note - take account of breadth and depth

Sound Explanation of ‘meaning’ + detailed and accurate illustrations of interests in conflict

Clear Explanation of ‘meaning’ + illustration of interests in conflict but with less detail and/or inaccuracy

Some Any of the above but very limited development and/or considerable inaccuracy

- (B)
- **Discussion of whether the law does balance conflicting interests**
Students should develop the examples used in PC(A) (to illustrate relevant conflicting interests) by explaining the precise balance of those interests which the law achieves – what is the precise rule which resolves the conflict, and what is the nature of the balance which it achieves? For example, the rule which resolved the conflict in **Miller v Jackson** was the discretion possessed by the court in deciding whether to grant an injunction to restrain a private nuisance, while the precise balance achieved was to refuse the injunction, thereby favouring the public interest.
 - **Discussion of why the law should seek to achieve this balance**
Consideration of possible explanations, eg the achievement of maximum happiness, the benefit of social engineering in building an efficient society, the achievement of a just society, etc. A discussion of ‘balancing theorists’ eg Bentham, Jhering, Pound in (A) will be likely to address these types of issues.

Sound Detailed and accurate discussion of the way in which the interests referred to in the student’s treatment of (A) are balanced + discussion of why it should seek to do so

Weak sound Detailed and accurate discussion of the way in which the interests referred to in the student’s treatment of (A) are balanced (no treatment of ‘why’)

Max clear Discussion of the way in which the interests referred to in (A) are balanced but with some inaccuracy and/or lack of detail. Any discussion of 'why' will be undermined by some inaccuracy and/or lack of detail

Some Relevant information undermined by very limited development and/or considerable inaccuracy

(AO1 = 15; AO2 = 15; AO3 = 5)

1 1	<p>Discuss how far judges are able to develop law through the operation of judicial precedent and in statutory interpretation. Discuss the arguments for and against whether judges should have this ability to develop the law.</p> <p style="text-align: right;">[30 marks + 5 AO3 marks]</p>
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Potential Content

- (A) • **Discussion of how far judges are able to develop the law through the operation of judicial precedent**

Framework explanation of the doctrine of precedent (the judicial hierarchy, the distinction between ratio and obiter, binding and persuasive precedents, etc).

Analysis of the characteristics of flexibility which provide the potential for legal development, eg distinguishing, flexibility available to the Supreme Court (House of Lords) due to the Practice Statement, flexibility available to the Court of Appeal (Civil Division) arising from the decision in **Young v Bristol Aeroplane Co**, additional flexibility available to the Court of Appeal (Criminal Division), vagueness of a ratio leading to different interpretations in later cases, overruling/not following, etc.

Identification and analysis of relevant examples and case law illustrating judicial creativity and development in practice. Possible examples include the development of the mens rea of murder, the duty of care in the tort of negligence, either in general and/or in specific contexts, eg misstatements, psychiatric harm, etc, judicial development of assault/ABH/GBH, aspects of formation of contracts, etc.

- **Discussion of arguments for and against whether judges should have this ability**

Possible arguments **in favour of** judicial development of law include the need for the courts to deal with omissions in the law, the fact that judges are not constrained by problems in the way of new legislation, eg party politics, time constraints, etc, the argument that new case law can be produced more speedily than legislation.

Possible arguments **against** judicial development of law include the haphazardness of the judicial process and the need for relevant cases and issues to arise, constitutional issues, eg judges are unelected, inappropriateness of the courts as a forum for law reform, eg lack of relevant research material available to judges, issues of justice, eg the problem of retroactivity of judicial decisions, the (declaratory) theory that judges merely state the law, etc.

Note Credit any relevant argument and any references to the views of writers and judges on the desirability or otherwise of judicial law-making.

Sound The three elements of a framework explanation of precedent/flexibility features + illustration of judicial development + discussion of the arguments **for and against** judicial development

Weak sound The above without arguments **for** judicial development

Weak sound The above without arguments **against** judicial development

Clear Any **two** of the above elements

Some Any **one** of the above elements

- (B) • **Discussion of how far judges are able to develop the law through the operation of statutory interpretation**

Explanation of the various approaches to statutory interpretation, eg the literal, golden and mischief ‘rules’, and the increasing importance of the purposive/contextual approach, etc.

Analysis of the flexibility available to judges in interpreting statutes with particular reference to a comparison of the relative rigidity of the literal and golden ‘rules’ of interpretation with the relative flexibility of the mischief ‘rule’ and the purposive approach. Flexibility also illustrated by a comparison of the constraints of the intrinsic aids and the relative flexibility of extrinsic aids to interpretation.

Identification and analysis of relevant examples/case law.

- **Discussion of arguments for and against whether judges should have this ability**

Many of the arguments identified above in relation to precedent can be validly used by students in the context of statutory interpretation, eg constitutional issues, the need to remedy omissions in the law, etc.

Note Credit any relevant argument and any references to the views of writers and judges on the desirability or otherwise of judicial law-making.

Sound The three elements of an explanation of the ‘rules’ of interpretation/flexibility available to judges + relevant illustration + discussion of the arguments **for and against** judicial development

Weak sound The above without arguments **for** judicial development

Weak sound The above without arguments **against** judicial development

Clear Any **two** of the above elements

Some Any **one** of the above elements

(AO1 = 15; AO2 = 15; AO3 = 5)

Assessment Objective coverage

LAW 04	AO1	AO2	AO3
Section A			
Question 01	10	15	
Question 02	10	15	
Question 03	10	15	
Question 04	10	15	
Section B			
Question 05	10	15	
Question 06	10	15	
Question 07	10	15	
Question 08	10	15	
Section C			
Question 09	15	15	5
Question 10	15	15	5
Question 11	15	15	5
Total marks	35	45	5