

## Chapter 5

# Good and bad essays

### ■ Introduction

The purpose of this chapter is to examine good and bad techniques in writing law essays using two essay titles – one on contract law and the other on the legal system and constitutional law. For each title, the chapter first provides a poor and flawed answer to the question and then a much improved and acceptable answer to the question.

Thus, for Question 1, in Section A, we examine a very poor answer to a question on offers and invitations to treat. The errors in this essay are exaggerated in order to identify the whole range of mistakes that can be made through poor research and presentation. The poor essay appears without any corrections, and the reader is asked to identify all that is wrong with it – the spelling, grammatical and typographical errors; the poor use of legal sources; the poor and unclear writing style; the inability to answer the question; plagiarism and poor referencing and citation skills – and to highlight any errors in the essay. To conduct this exercise, you will need to refer to Chapters 1–4 and to measure the essay against the advice and the skills identified in those chapters. You will then be provided with a marked version of the essay – highlighting all the deficiencies and allowing you to compare notes with the author. In Section B the student revisits the question and studies a good answer to that question. The text highlights all the qualities of the answer, together with the author’s advice on how to improve the answer further.

This exercise is then repeated with respect to Question 2 – a question on the Human Rights Act 1998, which tests the student’s knowledge and appreciation of both constitutional law and the English legal system. This question is used primarily to illustrate the relevant techniques in how to address and answer the question that has been set by the module leader. Section A contains a poor answer to the question, although the mistakes and style will not be as abject as that employed in Question 1. Again, you are invited to identify any shortcomings and mark them in the essay before consulting the author’s criticisms and recommendations. A much improved answer is then provided in Section B, together with observations and recommendations for further improvement.

It is hoped that at the end of this chapter, students will have a clear idea of how – and how not – to write an essay and what qualities are needed for a sound answer. The student should then be able to employ those skills in his or her law

assessments for the remainder of the course, although it may take some time before many of these skills are perfected.

## Practice 1: Contract law essay

### Example question

*By the use of case law explain the distinction between an offer and an invitation to treat. Why is the distinction so important?*

This question could appear on a variety of undergraduate and sub-degree courses, although some undergraduate institutions might not offer such a basic question. The area should be familiar to most law students, and the question is a relatively straightforward one, although it does require the student to grasp the rationale of the legal area as well as the substantive rules. The word limit given for the question was 2,000 words (with a 10 per cent leeway and excluding the front page, all references and citations and the bibliography), but such questions may be given a lesser word limit depending on the level of the course and the particular institution.

The student is on the first year of his LLB degree and is submitting this work as part of a module entitled 100 LAW – Law of Obligations (Contract). The module leader is Maureen Williams, and his personal tutor is Janice Johnson.

The following guidance was given to all students.

Students are expected to display the legal and other study skills outlined in their student handbook. In relation to the particular question, the student must:

- Show an appreciation of the distinction made in the law of contract between offers and invitations to treat.
- Use case examples to illustrate how the courts make that distinction.
- Explain and appreciate the factors that are considered by the courts in distinguishing between offers and invitations to treat.
- Explain why the distinction is important in relation to that legal area.

### A: A poor essay

This essay highlights bad practice in writing legal essays. We then suggest how that practice might be improved so as to reflect the standard of skills and knowledge one is expected to display at undergraduate level.

What is wrong with the following essay? To what extent has the author addressed the question? Point out any irrelevant information and indicate where he has failed to clearly explain cases or concepts. Circle and correct any spelling and typographical mistakes, plagiarism and poor referencing and citation skills. With regard to any poor grammar, clumsy presentation and so on, suggest ways in which the work could have been presented in a more coherent and clearer fashion.

Explain briefly what you believe the question was asking and how you would have planned and approached the question.

First, here is the front sheet attached to the answer. How many errors can you spot?

### The front sheet



#### CoNtract ESSAY

Submitted by Steve Foster

Year One law degree

Personal Tuter: Jane Jackson

Model Leader: Maxine Williamson

*'By the use of a case law explain the differnce between offers and invitations. Is the distinction important?*

Word count 2000 words

October 21, 20008

### The answer



#### *Offers and invitations: A conceptual illusion?*

Before answering the specific question asked by this question it is vital to outline the characteristics of a contract. All contracts don't have to be in writing but can be made not in writing, although some have to be in writing. They must all have consideration and if they are broken then the plaintiff (or as he is now known the complainer) can sue for damages or get monetary awards. A contract can come to an end by breach, frustration or agreement.

With that sorted out, there is a difference between an offer and an invitation to treat and it is a very important one. The courts employ a variety of conceptual tools to make this distinction, although at times they adopt a more elaborate conceptual structure.

Examples of invitations to treat are the advertising of goods for sale in a paper (SEE the case of Prtridge and Crittenden (1968] 1wlr 1204), goods being sold by tender (see the case of Garinger and SON VERSUS Gough (1896), or by an auction, the display of goods in a shop window Fisher -v- Bell (1961) 1qb' and a bus company advertising the times of their buses. →



It is sometimes difficult to distinguish between an offer and an invitation to treat and the courts have had a lot of trouble doing it. As the classification of any act or statement as being either an offer or an invitation to treat depends on intention to be bound rather than upon any a priori principle of law it is not easy to reconcile all the cases or their reasoning.

What needs to be done now is to look at some of the cases where the court have made the distinction between an offer and an invitation to treat. We will then be able to see how they make the distinction and how important it is to make a distinction between an invitation and an offer. As I have said before it is difficult to make a distinction and the courts find it very difficult as well, even though they do this sort of thing for a living.

Let us look at the case of *Fisher and Bell* (1961). Here a flickknife was displayed in a window and the shopkeeper was done under the Flickknife Act for trying to sell a flickknife without a licence. In court he was found not guilty because he hadn't offered the flickknife but merely invited a man (or woman) to buy it. Similarly in *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd* (1952 QB 765) goods were displayed on a supermarket shelf and the customer picked them up and took them to the cash desk. The Boots company were charged with selling drugs under the drugs law but again they were not convicted because they had never offered them for sale, only invited them to be sold.

So in cases of adverts there can never be an offer, only an invitation to treat. However the case of *Carlill* (1983] 1KB at page 256 is different. (See also the very important case of *Bowerman versus ABTA* [1995] 145 NLJR 1815.) In that case a woman smoked a smokeball and still caught the flu, even though the Carbolic Smoke Ball Company said she would not. When she sued for the £100 the company said she had never accepted the offer because they had only invited her to smoke the ball and not offered her to smoke the ball. The judge held that there was an offer and she had accepted it by smoking the ball. The company had deposited money in the bank and so they had made an offer to smoke balls.

From this case we can see that the distinction between an offer and an invitation to treat is a very difficult one to make, but nevertheless it is an important one. But why should the courts have to make a distinction and does it matter if they don't make a distinction between an offer and an invitation to treat? In answering this we may wish to look at the case of *Gibson v Manchester Council* (1979) 1 All ER. In this case it was held that the Council had not made an offer, but only an invitation to treat therefore the council were not bound. Another illustrative case was that of *Harvella Investments v Royal Trust of Canada* 1985 2 All ER 966. In this case the vendors of a plot of land sought a single offer for the whole plot from each of the two interested parties, promising to accept the highest offer provided it made other conditions stipulated. Both parties submitted bids complying with the conditions, but while one merely stated a price it was prepared to pay, the other stated both a concrete sum and a referential bid. The court held that the referential bid broke an implied condition of the offer and thus there was no contract. So we can see from this case that sometimes a request for a tender can be held to be an offer: see also the case of *Spencer v Harding* (1870] LR5CP561 which tells us that adverts for tenders are not offers.





So where does that leave us with the question of whether there is a difference between an offer and an invitation to treat? It is quite clear that there is a difference, and that the courts have adopted a variety of conceptual tools in order to assist them in their enquiry. However space precludes a full explanation.

Why then is the distinction important? An offer is an expression of willingness to be bound by contractual relations if the offeree (the one who the offer is made towards) is willing to accept the essential conditions laid down in the offer (made by the offeror who makes the offer). An invitation to treat (made by an invitor to the invited) however is not an offer and can never form the basis of contractual relations because it is only an invitation to treat. It is merely inviting people to enter into a contract and cannot be an offer, the cases above clearly show this. Thus it is very important to make the distinction and that is why the courts want to make the distinction.

Obviously on many occasions offers and invitations to treat are easy to distinguish, like in the case of *Carlill* which was obviously an offer because the woman smoked the smoke ball. On the other hand, the distinction is a very fine one and whilst some commentators prefer to speak in terms of rules, the courts tend to look at the individual facts of each case. In conclusion therefore it is probably safer to proceed on the basis of the single principle that an offer must be sufficiently specific and comprehensive to be capable of immediate acceptance and also as well made with an intention to be bound by the mere fact of acceptance.

If all things were offers then there would be absolute chaos, so the courts have to make a distinction. This is shown in the case of *Crainger v Gough* (see the page before) where the court held that it was only an invitation to treat and never an offer, otherwise the wineseller would have run out of wine. And in *Gibson* the council would have run out of houses. So adverts can never be invitations, but in *Carlill* it was different because they had made an offer.

Again in conclusion a hidden element of discretion permits the courts to label the facts with the terminology of offer and acceptance, whenever they believe it is fair and reasonable to impose contractual liability. Consider for example the purchase of goods in a self service store. At what point is an agreement completed. Does the customer accept the offer when he or she places the goods in the wire basket? Or does acceptance take place when the customer presents the goods in the wire basket, or when they present the goods to the assistant, or when the assistant accepts the offer by ringing up the price? Or is that merely the offer? Each interpretation is plausible and thus we can see the distinction clearly.

In this essay I have told you how the courts make the distinction between offers and invitations to treat and why they want to make the distinction. In conclusion then an offer is an offer which can be accepted, like in *Mrs Carlill's* case, whereas an invitation to treat does exactly that – it invites and it is not an offer. The difference is negligible and easy to make in every case apart from some difficult cases like in *Gibson*. An offer cannot be revoked after it has been accepted, see the very important case of *Dikensian v Dodo* (1840). An invitation can be revoked because it is not an offer, but merely an invitation. There would be commercial chaos if it was not so. An offer can crystallise into a contract without further ado, but an invitation can't because it isn't an offer, although sometimes adverts can be offers as illustrated in *Carlill*.





To conclude therefore there is a clear difference, and indeed distinction between an offer and an invitation to treat and the courts have shown this to be true on a number of occasions. A contract needs an offer, an acceptance, consideration and an intention to create legal relations. Invitations don't need any of these as they are not offers. Terms can be implied into offers, but not invitations and Carlill displays this perfectly.

#### Autobibliography

Lecture notes from Maxine Williamson  
The Law of Contract by Hugh Collins  
Textbook on Contract by Terry Downs  
The Transformation Thesis and the Ascription of Contractual Responsibility by Collins  
Hanson's Law of Contract, BY Hanson  
Various articles in the New Law Journal, the Oxford and Cambridge Law Journal and International and Comparative Law Quarterly.

Now let us examine what was wrong with that essay, beginning with the front page.

#### Front sheet with commentary



#### CoNtract ESSAY

**(Not the module title, no module number and a mixture of lower and upper case)**

Submitted by Steve Foster

Year One law degree

**No degree title identified.**

Personal Tutor: Jayne Jackson

**(Wrong name for the tutor and tutor spelt incorrectly)**

Model Leader: Maxine Williamson

**(Model instead of module and wrong name of module leader)**

*'By the use of a case law explain the differnce between offers and invitations. Is the distinction important?*

**(Apart from the spelling/typographical error, this is not the question that was asked; he has rejigged the question and thus has little chance of answering the question properly)**

Word count 2000 words

**(This is incorrect – his essay is about 1,300 words – and his count merely tallies with the word limit)**

October 21, 20006

**(Italicised O and an extra 0 in the date)**

There are a dozen or so mistakes on this front page, and we haven't started the essay yet! The student has created a poor impression, showing carelessness, lying about the word count (risking a penalty) and displaying a lack of knowledge of the module, his course and the law staff.

### Note

At this stage, the marker is already expecting a sloppy, badly written piece of work.

Now let us examine the essay answer in some detail.

### Answer with commentary

#### *Offers and invitations: A conceptual illusion?*

- 1 Before answering the specific question asked by this question (**poor grammar – 'in order to address this question'**) it is vital to outline the characteristics of a contract. (**it is not, because the question is only about formation of a contract**) All contracts don't have to be in writing but can be made not in writing, although some have to be in writing. (**poor and muddled grammar and in any case irrelevant to the question**) They must all have consideration (**wrong and, in any case, irrelevant**) and if they are broken (**again irrelevant**) then the plaintiff (or as he is now known the complainer) (**I think he means complainant**) can sue for damages or get monetary awards. (**damages and monetary awards are the same thing, and in any case, this is irrelevant**) A contract can come to an end by breach, frustration or agreement. (**irrelevant to the question**)
- 2 With that sorted out, (**nothing has been sorted out**) there is a difference between an offer and an invitation to treat and it is a very important one. (**stating the obvious without saying anything of relevance**) The courts employ a variety of conceptual tools to make this distinction, although at times they adopt a more elaborate conceptual structure. (**obvious plagiarism – he begins to write clear English after employing poor grammar. He also fails to explain what the author (Hugh Collins) means and has used a book and an idea that he clearly does not understand**)
- 3 Examples of invitations to treat are the advertising of goods for sale in a paper (SEE (**incorrect use of upper case**) the case of Prtridge (**typo**) and Crittenden (1968] 1wlr 1204) (**should be [1968] 1 WLR 1204**), goods being sold by tender (see the case of Garinger (**incorrect spelling**) and SON (**sudden use of upper case**) VERSUS (**should be v**) Gough (1896) (**no proper reference – although note that the year of the case is probably adequate in sub-degree courses and, of course, in exams**), or by an auction, the display (**incorrect spelling**) of goods in a shop window Fisher – v- Bell (1961) 1qb' (**Fisher v Bell [1961] 1 QB and page number**) and a bus company advertising the times of their buses. (**incorrect spelling**)
- 4 It is sometimes difficult to distinguish between an offer and an invitation to treat and (**typo**) the courts have had a lot of trouble doing it. (**casual phrase that explains nothing – 'the courts have experienced some difficulty in making the distinction'**). As the classification of any act or statement as being either an offer →



or an invitation to treat depends on intention to be bound rather than upon any a priori (**Latin expression – should be in italics**) principle of law it is not easy to reconcile all the cases or there (**should be *their***) reasoning. (**clear plagiarism from a source the student does not understand – no effort to explain what the words mean**)

- 5 What needs to be done now (**clumsy – ‘we can now consider’**) is to look at some of the cases where the court (**courts**) have made the distinction between an offer and an invitation to treat. (**should be *treat***) We will then be able to see how they make the distinction and how important it is to make a distinction between an invitation and an offer. (**repetitive – ‘to make such a distinction’**) As I have said before (**clumsy – ‘as mentioned earlier/above’**) it is difficult to make a distinction and the courts find it very difficult as well, even though they do this sort of thing for a living. (**an immature and inappropriate remark. Some students believe they are being witty, but such comments are likely to irritate the marker – rather like saying, ‘All judges are old and out of touch with real life’**)
- 6 Let us look at (**clumsy – ‘Now let us examine’**) the case of Fisher and (**v not and**) Bell (1961). (**full reference needed**) Here a flickknife (‘flick knife’) was displayed in a window and the shopkeeper was done (**‘prosecuted/charged’**) under the Flickknife Act (**wrong legislation – he has made it up**) for trying to sell a flickknife without a licence. (**not correct – he was charged with offering for sale**) In court (**clumsy – if you are going to mention the court, state which court it was and which judge passed judgment**) he was found (**typo**) not guilty because he hadn’t offered (**what is an offer?**) a man (or woman) (**awkward – ‘customers’**) to buy it. Similarly in Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd (1952 QB 765) (**[1952] QB 765**) goods were displayed (**typo**) on a supermarket shelf and the customer picked them up and (**‘up and’**) took them to the cash desk. The Boots company (**the company**) were charged with selling drugs under the drugs law (**name the act and offence**) but again they were not convicted because they had never offered them for sale, only invited them to be sold. (**that merely tells us what was decided; it does not tell us why it wasn’t an offer and why it was an invitation**)
- 7 So in cases of adverts (**non sequitur – he has been talking about shops**) there can never be an offer, only an invitation to treat. (**this is wrong, as we will soon find out**) However the case of Carlill (1983] 1kb at page 256 (**Carlill v Carbolic Smoke Ball Co [1893] 1 KB 256**) is different. (**he has contradicted himself because he said adverts can never be (as opposed to are usually not construed as) offers**) (See also the very important case of Bowerman versus (**v**) ABTA [1995] 145 NLJR 1815.) (**he does not explain why we should see it or given any impression that he has read it**) In that case (**which, Carlill or Bowerman?**) a woman smoked a smokeball (**smoke ball – what is that?**) and still caught the flu, even though the Carbolic Smoke Ball Company said she would not. (**poor explanation of the facts**) When she sued for the £100 (**what £100?**) the company said she had never accepted the offer (**they firstly pleaded that it was not an offer**) because they had only invited her to smoke the ball and not offered her to smoke the ball. (**confusing – what is the difference?**) The judge (**Bowen LJ**) held that there was an offer (**why, and what is an offer?**) and she had accepted it by





→ smoking the ball. The company had deposited money in the bank (**first mention of this**) and sothey ('**so they**') hade (**typo**) made an offer to smoke balls.

- 8 From this case we can see (**not from his explanation of the case**) that the distinction between an offer and an invitation to treat is a very difficult one to make, (**it wasn't that difficult in that case**) but nevertheless it is an important one. (**A pointless statement – why was it, and why is it, generally, important?**) But why should the courts have to make a distinction and does it matter if they don't (**clumsy English – 'But why is it important for the courts to make this distinction?'**) make a distinction (**typo**) between an offer and an invitation to treat? In answering this we may wish to look at the case of Gibson V (**v**) Manchester Council(1979) 1aLLer. (**[1979] 1 All ER, page number**) In this case it was held that the Council had not made an offer, but only an invitation to treat therefore the council were (**was**) not bound. (**confusing and incomplete account of the facts and decision – what had the Council done or said?**) Another illustrative (**his account of Gibson was not illustrative**) case was that of Harvella Investments v (**v**) Royal Trust of Canada 1985 2 all ER 966. (**[1985] 2 All ER 966**) In this case the vendors of a plot of land sought a single offer for the whole plot from each of the two interested parties, promising to accept the highest offer provided it made other conditions stipulated. Both parties submitted bids complying with the conditions, but while one merely stated a price it was prepared to pay, the other stated both a concrete (**typo**) sum and a referential bid. The court held that the referential bid broke an implied condition of the offer and thus there was no contract. So we can see from this case that sometimes a request for a tender (**what is a request for a tender? In any case the account of the case does not address this issue. The student has explained another aspect of the case which is not relevant to our present discussion**) can be held to be an offer: see also the case of Spencer v Harding (1870] LR5CP561 (**LR 5 CP 561**) which tells us that averts (**advertis**) for tenders are not offers. (**the student should have looked at this case first as a simple illustration of invitations for tender**)
- 9 So where does that leave us with the question of whether there is a difference (**typo**) between an offer and an invitation (**typo**) to treat? It is quite clear that there is a difference, (**typo**) and that the courts have adopted a variety of conceptual tools in order to assist them in their enquiry. (**that same plagiarism from Collins again**) However space precludes a full explanation. (**incorrect spelling, and space does not preclude a full explanation. He has seen the phrase used in academic journals when an author is writing on a specific issue, but has not the time to cover some aspect of the basic law. He falls short of the word limit by 700 words so he had plenty of space to explain it**)
- 10 Why then is the distinction important? An offer is an expression of willingness to be bound by contractual relations if the offeree (the one who the offer is made towards) (**clumsy – 'to whom the offer is addressed'**) is willing to accept the essential conditions laid down in the offer (made by the offeror who makes the offer). (**he asks the second question in the essay and then gives us the answer to the first question. He has in fact given us a decent definition of an offer here, but this is more than halfway through the essay – this should have appeared in the first paragraph**) An invitation to treat (made by an invitor to the invited) (**inappropriate words**) however is not an offer and can never form the basis of contractual relations because it is only an invitation to treat. (**why** →



can't it? – he must define an invitation and explain what it is, not just say it is not an offer) It is merely (incorrect spelling) inviting people to enter into a contract (that is quite a decent point, but it needs expanding) and cannot be an offer, the cases above clearly show this. (the cases might, but his account of them does not) Thus it is very important to make the distinction and that is why the courts want to make the distinction. (again, this does not explain how and why the courts make the distinction)

- 11 Obviously on many occasions (incorrect spelling) offers and invitations to treat are easy to distinguish, (clumsy – 'it is relatively simple to make the distinction') like in ('as in') the case of (delete the words 'the case of') *Carlill* (*Carlill*) which was obviously an offer because the woman smoked the smoke ball. (a confusing explanation of the ratio of that case – does this mean to say that there can only be an offer when someone smokes a smoke ball? Anyway, the smoking of the ball was the acceptance) On the other hand, the distinction is (can be?) a very fine one (he has contradicted his first sentence – is it easy or is the distinction fine?) and whilst some commentators (which? – cite particular authors) prefer to speak in terms of rules, the courts tend to look at the individual facts of each case. (quite a good point, but plagiarised – it needs crediting and explaining) In conclusion therefore it is probably safer to proceed on the basis of the single principle that an offer must be sufficiently specific and comprehensive to be capable of immediate acceptance and also as well (repetitive – delete 'as well') made with an intention to be bound by the mere fact of acceptance. (another good point, but plagiarised and not expanded)
- 12 If all things were offers then there would be absolute chaos, (inappropriate expression – 'there would be a good deal of disruption in the commercial world') so the courts have to make a distinction. (an obvious point that adds nothing) This is shown in the case of *Crainger* (*Grainger*) v *Gough* (see the page before) ('see above', or if using footnotes, 'supra note x'. In fact, when we do 'see the page before', it tells us nothing about the case so he never explains the significance of that case) where the court (which court?) held that it (what is 'it'?) was only an invitation to treat and never (not) an offer, otherwise the wineseller would have run out of wine. (what wine seller, and what wine?) And in *Gibson* the council would have run out of houses. (what houses?) So (consequently) adverts (non sequitur) can never be invitations, (in fact they are normally invitations so of course they can be) but in *Carlill* it was different (contradiction because he used the word *never*) because they had made an offer. (he is confused – he should have said adverts are normally invitations but in *Carlill* it was an offer, then explained why the advert in that case was an offer)
- 13 Again in conclusion (another conclusion) a hidden element of discretion permits the courts to label the facts with the terminology of offer and acceptance, whenever they believe it is fair and reasonable to impose contractual liability. (clear plagiarism and a failure to explain what this sentence means) Consider for example the purchase of goods in a self service (should be hyphenated) store. At what point is an agreement completed. (?) Does the customer accept the offer when he or she places the goods in the wire basket? Or does acceptance take place when the customer presents the goods in the wire basket, or when they present the goods to the assistant, or when the assistant accepts the



→ offer by ringing up the price? Or is that merely (spelling) the offer? Each interpretation is plausible and thus we can see the distinction clearly. (because each interpretation is plausible does not mean that we can see the distinction clearly, particularly if he has not explained it to us. What he has done is pose a number of (relevant) questions, but then failed to provide the answers)

- 14 In this essay (typo) I have told you how (clumsy – ‘I have attempted to explain how’) the courts make the distinction between offers and invitations to treat and why they want to (they need to/it is necessary to do so – in fact he has not explained this) make the (such a) distinction. In conclusion (yet another conclusion) then an offer is an offer (that does not tell us what it is) which can be accepted (that tells us the consequence of it being an offer, but does not tell us what it is), like (as) in Mrs Carlill’s case (Carlill), whereas (incorrect spelling) an invitation to treat does exactly that – it invites (invites what? – explain) and it is not an offer. (but why? – explain) The difference is negligible and easy to make in every case apart from (contradiction because he has used the word every) some difficult cases like in (such as) Gibson. (he does not explain why Gibson was a case where the distinction was difficult) An offer cannot be revoked after it has been accepted, (this is a consequence of a proposition being an offer and in any case revocation is irrelevant to the question) (see the very important case of *Dikensian v Dodo* (1840). (*Dickinson v Dodds*, full reference) An invitation can be revoked (one does not revoke invitations; offers can be revoked) because it is not an offer, (why?) but merely (incorrect spelling) an invitation. (why?) There would be commercial chaos if it was not so. (explain what his means) An offer can crystallise into (into) a contract without further ado, (casual phrase) but an invitation can’t because it isn’t an offer, (what is it then?) although sometimes adverts (non sequitur) can be offers as illustrated in Carlill. (because . . .?)
- 15 To conclude (another conclusion) therefore (incorrect spelling) there is a clear difference, and indeed distinction (there is no difference between difference and distinction) between an offer and an invitation to treat and the courts have shown this to be true (clumsy – ‘have been called upon to make that distinction’) on a number of occasions. (spelling – the courts might have, but he hasn’t told us how, or why, they did it) A contract needs an offer, an acceptance, consideration and an intention to create legal relations. (this is not relevant to the question and is merely taking up a few more words) Invitations don’t need any of these as they are not offers. (he is confused as to the context of making the distinction between offers and invitations) Terms can be implied into offers, (irrelevant) but not invitations and Carlill displays this perfectly. (that case does not illustrate anything of the sort)

#### Autobibliography (Bibliography)

Lecture notes from Maxine Williamson (never quote lecture notes during the essay or in your bibliography. Also the lecturer’s name is wrong)

The Law of Contract by Hugh Collins (wrong citation – author, title of the text, publisher, year, edition. Also, he should never have used this text when he has not yet grasped the basics of the subject)

Textbook on Contract by Terry Downs (ditto regarding citation, the book is now written by Jill Poole)

→



The Transformation Thesis and the Ascription of Contractual Responsibility by Collins (wrong citation – author, title of article, year, issue and title of the article (Law Quarterly Review, LQR) and page number)

Hanson's Law of Contract, BY Hanson (it is Anson, not Hanson – in fact it is now written by Jack Beatson. There is also no proper citation)

Various articles in the New Law Journal, the Oxford and Cambridge Law Journal and International and Comparative Law Quarterly. (all articles must be specifically and separately cited – he is trying to give the impression that he has read so many that it would be futile to cite them all. In addition, some of these journals are not relevant to the legal area and the 'Oxford and Cambridge Law Journal' does not exist – does he mean the Oxford Journal of Legal Studies and the Cambridge Law Journal?)

### Summary of errors

- The student does not appear to have any knowledge of the subject matter, of what has been taught during the academic session or of the module itself and the people who teach it.
- The piece lacks any of the legal skills necessary to tackle a law essay.
- The introduction is irrelevant and garbled.
- The writing style is too casual and the grammar is very poor.
- The piece is repetitive and unstructured (caused mainly by ignorance of the subject matter).
- The essay is full of typographical and spelling mistakes.
- The student is careless with his choice of words and, as a consequence, confuses the reader and contradicts himself.
- The student does not know how to cite and refer to legal authorities and shows inconsistency in style.
- The student does not know how to use cases and other legal materials to support his answer; he never explains the significance or ratio of the case and gives a confused account of the facts and decision. Instead of enhancing his answer, his use of cases makes the essay worse.
- He is guilty of plagiarism on several occasions and tries to use words and ideas that he simply does not understand.
- He makes about four attempts to conclude, and his conclusion(s) contains new information.
- His bibliography is not properly cited and contains lecture notes as a source; furthermore, he attempts to mislead the marker into believing that he has actually read a number of sources.

This is an essay written by a student who lacks strong academic skills and who has an insufficient grasp of the demands of undergraduate study in law. He clearly has not (for one reason or another) engaged with the module and the subject and has not in any sense acquired any of the necessary legal and academic skills to write law essays or survive on the course.

### *What is it worth?*

The piece would struggle to pass at sub-degree level, but is clearly a very bad fail at undergraduate level. The student would lose substantial marks for the poor grammar and the typographical and spelling mistakes, but essentially it is muddled and unstructured – because he is completely confused on (or indifferent to) the relevant law. A mark of between 10 per cent and 20 per cent could be suggested, but certain lecturers would give even less.

### *What could be done to improve it?*

- The student needs to go back to the textbooks and learn the basics of the subject.
- He needs to learn how to cite and refer to legal materials and how to compile a bibliography.
- He needs to plan the answer and to know exactly what he is going to say before he puts pen to paper.
- He needs to read the cases properly and use them to illustrate the answer.
- He needs to learn how to write in a clear and formal style – reading texts, law reports and articles and listening to how the lecturer talks will be of the greatest assistance in this respect.
- The piece should be checked for typographical, spelling and grammatical errors.
- The conclusion needs rewriting so that it excludes irrelevant information and relates to the relevant legal area.
- He needs to begin engaging with the module and his law studies and to realise that he simply has not got the ability to write an essay without first learning the subject matter.

## **B: A sound essay**

Below is a reworking of the poor essay. Examine this essay and consider the remarks made at the end of each paragraph and at the conclusion of the essay itself.

**Front sheet with commentary**

**100 LAW – Law of Obligations (Contract)**

Assessment One

*By the use of case law explain the distinction between an offer and an invitation to treat. Why is the distinction so important?*

Submitted by Steve Foster

Course: LLB, Year One

Module Leader: Maureen Williams

Personal Tutor: Janice Johnson

Word Count: 2,089 (excluding all references and citations, front page and the bibliography)

Submitted on 10 October 2006

**(The student has placed the question at the top of the sheet, which acts as a guide for when he starts his introduction. He should check whether this could count towards the word count before including it)**

**Answer with commentary**

*By the use of case law explain the distinction between an offer and an invitation to treat. Why is the distinction so important?*

1 To answer this question one has to appreciate the basic rules relating to the formation of a contract. A contract is a legally binding agreement<sup>1</sup> and in most cases results from the agreement of the parties.<sup>2</sup> This agreement usually takes the form of a specific offer made by one person (the offeror) to another (the offeree), which that other person accepts. An offer has been defined as an expression of willingness to be bound, made with the intention that it shall become binding as soon as it is accepted.<sup>3</sup> To constitute an offer, therefore, the proposition needs to be firm enough to be capable of acceptance, and there needs to be sufficient evidence that the offeror is ready, at that stage, to accept liability should the other accept his proposition.

**(In paragraph 1 the student has made a good start, first by identifying what area of law the question is concerned with, and second by giving the reader a clear and useful definition of an offer. As the question directs the student to make a distinction between an offer and an invitation to treat, his definition provides him with a reference point whenever he has to make the distinction or explain why a particular case was decided as it was. The student also makes good use of secondary sources and footnotes and writes in a clear, uncomplicated and appropriate way. He shows quite clearly that he has read and understood the texts and appreciates what the question is asking.)**



- 2 In this area the courts attempt to draw a distinction between an offer, which is capable of creating a contract on its acceptance, and an invitation to treat, which merely invites the other person (or persons in general) to make an offer, and which in turn can be accepted or rejected by the other party. This essay will seek to illustrate how the courts make this distinction, identifying some guiding principles that they use in making the distinction. It will then explore *why* such a distinction is important, although, as we shall see, the two questions may be linked as the importance of the distinction will often be relevant to the actual outcome of a particular case.

**(The second paragraph is useful for two reasons: first, it explains what the legal dilemma is all about and what effect the distinction between offers and invitations means in contractual practice; and, second, it informs us what he is going to tell us in the essay – how he is going to approach it and in particular how he is going to split and interrelate the two parts of the question.)**

- 3 As mentioned above, an offer has two characteristics: it is capable of acceptance; and the offeror's intention is that he or she should be bound at the point of acceptance by the person to whom the offer was addressed. Thus, Poole states that an offer must be (i) sufficiently specific and comprehensive to be capable of immediate acceptance; and (ii) made with an intention to be bound by the mere fact of acceptance.<sup>4</sup> If the court is not satisfied that the proposition in question has these characteristics then it will decide that there exists no offer capable of being transformed into a contract.

**(There is some repetition in paragraph 3, and had he not been given 2,000 words as a limit, this paragraph might have had to be deleted. In any case, some of the material could have been merged within the second paragraph. However, he does stress the essential issues, and this paves the way for a discussion on the cases.)**

- 4 To assist the courts in this function the law may presume that certain actions are not to be treated as formal offers. This presumption may be made on the basis that the proposition simply lacks the certainty so as to constitute an offer. Thus, in *Harvey v Facey*,<sup>5</sup> in reply to a question whether the defendant was willing to sell certain property and a request to telegram his lowest price, the defendant replied that the lowest price would be £900. It was held that the defendant had not made an offer. He had responded to the plaintiff's question, but showed no willingness to be bound should the plaintiff find the price acceptable. Presumably, he was saying that that was the price with which he would begin negotiations, *should* he wish to sell the property.

**(In paragraph 4, the student begins by making a good and relevant point that goes a long way to explaining how the courts make the distinction in practice (which is the whole point of the question). He also makes very good use of the case – by making a relevant point to introduce the case, by giving the briefest account of facts and the decision and, finally, by concluding on its relevance and its ratio. In particular, he uses italics to stress the real rationale of the case, giving the strong impression that he understands the case and the way it was decided.)**

- 5 Applying this principle, the courts may in similar cases conclude that the person making the initial proposal was looking for a more concrete proposition from the other party. This can be seen in the area of tenders. A company, or local →



→ authority, might wish certain work to be done, or goods delivered. They will invite people to make offers (tenders) and then accept only the tender that they find most attractive. In most cases this invitation for tenders is considered as just that. Thus, in *Spencer v Harding*<sup>6</sup> it was held that a circular distributed to potential customers offering the defendant's stock for sale was not in fact an offer, but merely an invitation to buyers in general to make their offers, which could then be accepted or rejected by the defendant. This was despite the defendant using the word offer in the circular. However, certain requests for tenders may be regarded as offers. In *Harvella Investments Ltd v Royal Trust Co of Canada (CI) Ltd*<sup>7</sup> the defendants had invited two persons to make a bid for a certain plot of land. They had instructed them to make a sealed bid and had intimated that the highest offer would secure the shares. It was held that the invitation to apply for the shares was an offer capable of acceptance. Here the defendants had *clearly indicated* that they were prepared to accept the highest bid and the general rule was thus displaced.

**(Paragraph 5 follows on neatly from the preceding one and provides a good, clear illustration of the principle in action. He uses the area of tenders to explain the rationale of the law and how the courts approach the problems in hand, giving us just enough detail on the facts and the decision of each case. The use of *Harvella* as an exception to the rule clearly shows his understanding, and he stresses the *real ratio* by putting the relevant words in italics.)**

- 6 A similar rationale is used in the case of auctions. The seller of the goods, via the auctioneer, does not, by putting the goods in an auction, offer to sell the goods to the highest bidder, and can normally withdraw the goods before the bidder's firm offer is accepted by the auctioneer.<sup>8</sup> The courts have thus concluded that the offer is made by the bidder, and can be accepted or rejected by the auctioneer.<sup>8A</sup> This type of case, and others such as those involving bus and train timetables,<sup>9</sup> can be explained either on the basis that the placing of goods in an auction is too vague an act to constitute a firm offer – in other words, the terms of the contract are, as yet, too vague – or that the vendor does not *at that stage* wish to commit him/herself to selling the goods at an unknown price. This presumption, however, can be rebutted by a clear indication that the auctioneer will accept the highest bid.<sup>10</sup>

**(In paragraph 6, the student gives the reader further illustrations of the principle, drawing on examples that he has found in textbooks and in lectures. He gives us a number of illustrations and makes good use of authority and his footnotes to give the impression that he could have provided much more detail had time allowed. Equally importantly, he tells us the rationale of this general principle and uses italics to stress that he fully understands the cases and the rules. Note that he does not have the space to devote an equal amount of time to all these examples, instead using tenders as his main example. He could as easily have chosen auctions as the main vehicle, but chose tenders – this generally will be a matter of personal choice and the student should choose an example that he or she understands and can explain simply and fully.)**

- 7 In making the distinction the courts may presume that a person wishes to avoid the harsh or absurd consequences of his or her proposition being held to be an offer. Thus, in the following cases there is a presumption that the proposition →



→ is not an offer, but simply an invitation for offers. This is the case even though the proposition is, theoretically, capable of immediate acceptance. One example is the advertising of goods for sale in a newspaper or catalogue. Thus, in *Partridge v Crittenden*<sup>11</sup> it was held that a notice placed in a periodical that a person had Bramblefinch cocks and hens for sale at 25 shillings each was not an offer so as to constitute an offence of offering for sale a wild live bird under the Protection of Birds Act 1954. Explaining the decision Lord Parker said:

‘I think that when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers.’<sup>12</sup>

**(In paragraph 7, the student moves the essay on by looking at how commercial sense might dictate the outcome of the law and the cases. This explains the second requirement of an offer – that the offeror wishes to be bound at that stage if the other party accepts. He makes good use of the decision in *Partridge* and uses a quotation from the case to illustrate its ratio. This quotation shows that he has read the case properly, perhaps in a law report (or at least in a good textbook or cases and materials book). The quotation is relevant and neatly explains the principle in question. It is also properly referenced, displaying good referencing and citation skills.)**

- 8 In this type of case, the proposition might have one of the characteristics of an offer – certainty of terms – yet not possess the other characteristic: a willingness to be bound once someone accepts the proposition. For instance, an advert in the newspaper that I wish to sell my specific car for a specific price and on specific terms might have the characteristics of a firm offer, yet still be classed as an invitation to treat because, presumably, I do not intend to be bound by every person who purports to accept that proposition. If I were to be so bound, I would be bound to *everyone* who accepted that proposition, and would, somehow, have to notify all the other interested parties of the concluded contract.

**(Paragraph 8 follows neatly on from the last, pursuing the relevant argument. More importantly, the author uses a hypothetical example in illustration. This displays his understanding by proving that he is confident enough to use his own examples to explain the law and its rationale. Note that if the student has seen this specific example in a textbook, he should credit the author with the idea by citing and referencing the source. Alternatively, as in this case, if the example is the student’s own, he or she can use it as such even though it has been inspired by one noticed in lectures or texts. In such a case, the student may wish to create a footnote and say something like ‘Treitel gives a similar example’, citing the text and the page number.)**

- 9 Another example is the display of goods in a shop window. Here the courts have concluded that (generally) the display of goods is merely inviting offers, and is not an offer in itself. For example, in *Fisher v Bell*,<sup>13</sup> when a flick-knife was displayed in a shop window and the shopkeeper was charged with offering for sale an offensive weapon, it was held that the defendant had not *offered* the flick-knife for sale as required by the statute. The display merely invited the potential customer to make an offer to the shopkeeper, who could then accept or reject it. Otherwise, the shopkeeper would be bound to sell the goods even though, for example, the display item had already been sold, or had been
-

→ incorrectly priced. This principle was applied to self-service supermarkets in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd.*<sup>14</sup> Here goods were displayed on a supermarket shelf, and the customer was invited to pick them up and take them to the cash desk. A registered pharmacist had been placed at the cash desk, but not at the shelf where the customers were able to help themselves to the goods. The company was charged with selling listed drugs without the supervision of such a pharmacist. It was held that the point of sale was the cash desk. The display of goods on the shelf was not an offer capable of acceptance and merely invited the customer to place the goods in their basket and make an offer at the cash desk. The court reasoned that to hold otherwise would prevent the customer from changing their mind after they had taken the step of placing goods in the basket.

(In paragraph 9, the student works through other, well-known examples in which the law presumes that certain actions are merely invitations. He makes good use of this well-established case law and is careful to explain the rationale of each case rather than merely reciting the facts and decision. Note that, had he been given a shorter word limit, he would have to provide this information in brief and in footnotes, although he has the choice of which illustrations to use and could have spent more time on circulars and adverts.)

- 10 In the above cases, therefore, the courts seem to be ruled by some form of commercial sense and presume, generally, that the person making the proposal did not intend to be bound at that point in time. This presumption can, of course, be rebutted. As a consequence it is wrong to conclude that adverts or circulars (or indeed shop window or supermarket displays) can *never* be offers. The famous case of *Carlill v Carbolic Smoke Ball Co*<sup>15</sup> illustrates this in the area of advertisements. In this case the company placed an advert in a newspaper stating that they were prepared to pay £100 to any person who used their product (a smoke ball) and yet still contracted influenza. The company stated that they had deposited £1,000 in their bank as a mark of their sincerity. The plaintiff tried the product yet still contracted influenza and sued the company for the promised £100. In rejecting the company's claim that their advert was a mere invitation to treat, and not intended to be legally binding, the court held that the advert was clearly an offer. It was couched in clear terms, was capable of acceptance, and the company had shown its intention to be bound by depositing the money in its bank account. Thus there is no rule of law that adverts, invitations for tenders or shop (window) displays are merely invitations to treat. Provided they are certain enough, and there is a clear intention to be bound at the point of acceptance, then the courts will declare that the (advert) was in deed an offer.

(The student begins paragraph 10 by stressing the importance of commercial sense in this area and then makes it clear that this presumption is only that, and not a hard and fast rule. He has allowed himself to do this and to bring in exceptions to the general rule because he has been careful in the words that he has employed and has never presented this presumption as a rule without exception (as the bad essay writer often did). He then makes extensive use of the decision in *Carlill* to make his point. This case is always a good one to use, as almost every student knows the facts and decision and, more importantly, understands the ratio. It makes much more sense to use examples that one understands – only use more complicated ones if the nature of the question →



asks for it (for example, 'Explain how the traditional rules of agreement have been modified to meet complex and modern commercial relationships') or if it is necessary (because of the level at which you are studying or to ensure a higher grade) to show more than a basic understanding of the traditional cases.)

- 11 With regard to the question *why* such a distinction is important, it will have become clear that the finding of the court in each of the above cases was significant to the parties involved in the legal action. In cases such as *Fisher v Bell*, the court had to decide whether an offer had been made for the purposes of determining criminal liability for making an offer to sell certain prohibited products. Here the defendant was found not guilty because the offence was to make an *offer*, and *inviting* persons to offer did not, therefore, attract liability.<sup>16</sup> In the context of contractual liability, the court's decision will be important in establishing the point, if any, at which the contract came into existence. Thus in cases such as *Harvey v Facey*, above, the court will have to decide whether one party had made an offer to another, or whether the parties were still at the stage of preliminary negotiations. If the court concludes that an offer exists, then the other party may accept the offer at that juncture; if not, then that other party needs to put forward a firm proposition which in turn is then capable of acceptance. The finding that the proposition is an offer means that the offer can be accepted immediately, whereas a finding that the act was merely inviting offers will at the very least delay liability until the time when the firm offer is accepted. We have also seen that the court's decision *whether* an offer has been made is also tied to the *consequences* of them holding such. In other words, the courts presume that a person does not wish to suffer the harsh consequences of his or her actions, unless they have made it clear by specific words or actions.

(In paragraph 11 the student begins to tackle the second part of the question and appears to have left himself little time to do it. However, he explains that the two questions are interrelated and that in fact by answering the first part he has been addressing the issues raised by the second part. This is an acceptable tactic provided the student gives advanced warning of this (which he does in the second paragraph of the essay) and the two parts are indeed interrelated (which in this case they are). He then proceeds to illustrate why the distinction is important by referring to case examples employed in the first part of the question, making some good observations about how the courts use the reason for the distinction as the basis of their decision.)

- 12 In conclusion, the courts appear to make the distinction between an offer and an invitation to treat by looking at the essential elements of an offer and considering whether the parties' actions are consistent with such a definition. Thus, in those cases where it has been held that the proposition was not in fact an offer but only an invitation to treat, it is apparent that the proposition either lacked the certainty of an offer, or failed to display a sufficient intention to be bound at that stage of negotiations. Although the courts may presume that certain acts are invitations, their minds are not closed on this issue; adverts and invitations for tenders, for example, may be construed as offers provided there is sufficient evidence of the party's intention. The contractual or criminal consequences of the court's finding make the distinction between an offer and an invitation important, and in general the courts have devised guidelines in order to make that distinction sufficiently clear and predictable.



→ (The student's conclusion is neat and relevant. It recaps the main points made during the main body of the essay. It does not introduce any fresh information (as the bad essay attempts to do) and concludes with a suitably intelligent and open-ended comment with respect to the current state of the law.)

### Bibliography

Adams, J. and Brownsword, R. *Understanding Contract Law* (Sweet & Maxwell, 2007, 5th edition)

Beaton, J. *Anson's Law of Contract* (Oxford, 2002, 28th edition)

Furmston, MP. *Cheshire, Fifoot and Furmstone's Law of Contract* (OUP, 15th edition)

Poole, J. *Textbook on Contract* (Blackstone Press/OUP, 2008, 9th edition)

Treitel, GH. *The Law of Contract* (Sweet & Maxwell, 2008, 12th edition)

(The bibliography is properly cited and there is evidence throughout the essay that he has actually read and understood some of the texts. However, he has not used all the texts cited in the bibliography and could have shown off his reading to better effect in this respect. The bibliography is also missing one or two good academic articles and could have referred to a more theoretical textbook such as Hugh Collins' *Law of Contract* (a book that the bad essay writer plagiarised from).)

<sup>1</sup> See Treitel, G. *The Law of Contract* (Sweet & Maxwell, 2008, 12th edition) page 1: an agreement giving rise to obligations which are enforced or recognised by law.

<sup>2</sup> Some contracts are explainable on a basis other than pure agreement. See *Clarke v Earl of Dunraven and Mount Earl; The Satania* [1897] AC 59, where a contract came into existence by implication – a person entering his ship for a race impliedly entered into a contract to be bound by the rules.

<sup>3</sup> Treitel, G. *The Law of Contract* (Sweet & Maxwell, 12th edition) at page 8.

<sup>4</sup> Poole, J. *A Textbook on Contract* (Blackstone Press/OUP, 2008, 9th edition), at page 64.

<sup>5</sup> [1893] AC 552. See also *Gibson v Manchester City Council* [1979] 1 All ER 972. Here the council's invitation to local people to buy their council houses by completing an application form was held not to be an offer.

<sup>6</sup> (1870) LR 5 CP 561. See also *Grainger and Sons v Gough* [1896] AC 325: a wine merchant's catalogue with price list held to be an invitation to treat, inviting offers via customer orders.

<sup>7</sup> [1985] 2 All ER 966. However, it was held on the facts that the offer had been improperly accepted.

<sup>8</sup> See *Harris v Nickerson* (1873) LR 8 QB 286: an advertisement that an auction was to take place was not an offer to hold the auction and to sell to highest bidder.

<sup>8A</sup> *Payne v Cave* (1789) 3 Term Rep 148.

<sup>9</sup> *Wilkie v London Passenger and Transport Board* [0947] 1 ALL ER 258.

<sup>10</sup> See *Warlow v Harrison* (1859) 1 E and E 309, where it was held (obiter) that an auction advertised 'without reserve' imposes an obligation to sell to the highest bidder once the auction begins. See also the more recent case of *Barry v Davis (Heathcote Ball Co)* [2001] 1 WLR 1962, which upholds this principle.

<sup>11</sup> [1968] 2 All ER 421.

<sup>12</sup> *ibid.*, at page 424.

<sup>13</sup> [1961] 1QB 394

<sup>14</sup> [1953] 1 QB 401.

<sup>15</sup> [1893] 1 QB 256.

<sup>16</sup> The particular legislation had to be amended so as to make it an offence to *display* offensive weapons; see now s. 1 Restriction of Offensive Weapons Act 1961.

### Summary of good points

- It was clearly written, employing a simple yet legal style that one would find in most good textbooks.
- His introduction was direct and to the point and contained useful legal definitions of relevant legal concepts.
- The author made it clear what the question was about and how he was going to tackle it, and having done that he followed that format.
- It was clear that he had researched the area and had planned the answer to the question *before* he set pen to paper.
- The author made good use of case authority, always introducing the reader to the relevance of the case, its facts and decision (where relevant), and always displaying his appreciation of the case and its rationale.
- The piece was professionally constructed, contained good reference and citation skills and made good use of footnotes.
- The conclusion was direct and related to the most salient points he had made in the main body of the answer.
- The bibliography displayed reasonably wide research and was properly cited.

In general, it was a very competent piece of work written by a student who has paid attention to the lectures, has attended seminars, has read the books and cases and has ensured that he understood the area before attempting to write the answer.

### What is the essay worth?

Given that the essay was directed at a first-year law student and that the area of law and the title was fairly basic, we might consider that he has done as well as he possibly could in providing this answer. Consequently, *some* markers might regard this as a first-class answer, albeit with some reservations. This might be the case particularly if the course is sub-degree. Other teachers might regard the answer as lacking academic rigour and any theoretical analysis – it lacks one or two meaty articles and does not make use of the more theoretical texts such as Collins' *Law of Contract*; in which case a mark of between 60 and 68 might be more appropriate. It is a very competent, although rather functional, piece, and the mark might depend on what particular contract lecturers are looking for from the student.

### How could the essay have been improved?

- For a degree-level student, the piece might be regarded as a little pedestrian and functional, and some teachers might see it as lacking real academic rigour.
- In some teachers' view, the author could have employed a more theoretical approach, looking at authors such as Hugh Collins.

- There was some repetition, particularly early on in the essay.
- The essay did not refer to some of the sources quoted in the bibliography.

## Practice 2: Legal system and constitutional law essay

### Example question

*The passing of the Human Rights Act 1998 has had a profound effect on both the British Constitution and the English legal system. Discuss.*

This question is likely to appear in one form or another on most undergraduate courses, either on a public (constitutional and administrative law) course, or one on legal system or legal process. The question is a relatively straightforward one and requires the student to possess a sound knowledge of the Act and its central provisions as well as an appreciation of the impact of the Act on both the constitutional system and certain aspects of the English legal system.

The main difficulty with the question is that it requires a lot of issues to be raised and for the student to have a very broad knowledge of the Act, its provisions and any relevant case law. The student must focus on the actual question and find room to include a lot of information in the answer without omitting relevant points. The answer requires very careful planning.

The word limit given for the question was 2,000 words (with a 10 per cent leeway and excluding the front page, all references and citations and the bibliography), but other word limits are possible, depending on the particular institution.

The student is on the first year of her LLB degree and is submitting this work as part of a module entitled Legal and Constitutional System.

The following guidance was given to all students:

Students are expected to display the legal and other study skills outlined in their student handbook. In relation to the particular question, the student must:

- Display a sound knowledge of the provisions of the 1998 Act as they affect both the British Constitution and the English legal system.
- Appreciate the potential impact of those provisions on the central features of both the British Constitution and the English legal system.
- Analyse the truth of that statement by reference to relevant case law or other evidence.

### A: A poor essay

Below is a poor answer to the question. It does not suffer from the very poor grammar and style witnessed in the bad essay in Question 1; most of the defects are related to the problem of not answering the question. For this reason, there is no detailed marked-up essay to examine as with the preceding question. Read through the essay and make criticisms as you are doing so. Then you can compare your notes with the appraisal at the end.

## The answer

***The passing of the Human Rights Act 1998 has had a profound effect on both the British Constitution and the English legal system. Discuss.***

- 1 The Human Rights Act 1998 was passed to incorporate the European Convention on Human Rights into domestic law. Before the Act was passed the European Convention had no role to play in domestic law and if an individual's human rights were violated the only redress was to take the case to the European Court of Human Rights in Strasbourg. Since October 2000<sup>1</sup> an individual may bring a claim for breach of their human rights in the domestic courts and thus they do not have to take the long journey to Strasbourg.
- 2 The European Convention contains a list of human rights which can be described as civil and political rights, and these rights are incorporated into domestic law by the Human Rights Act 1998.<sup>2</sup> These rights include the right to life (Article 2), freedom from torture (Article 3), liberty and security of the person (Article 5), the right to a fair trial (Article 6), the right to private and family life (Article 8), freedom of expression (Article 10), freedom of peaceful assembly (Article 11) and the right to marry (Article 12). We can see, therefore, that these rights are civil and political rights and that the Convention does not include any social, economic and cultural rights. This has been criticised and it has been proposed that the Human Rights Act be expanded to include such rights.<sup>3</sup>
- 3 These rights are enforced by the European Court of Human Rights who hear cases of human rights violations by member states to the Convention. Thus under Article 34 to the Convention it may hear applications from individuals claiming to be a victim of a violation of the Convention and may award just satisfaction to that person under Article 41 of the Convention. Many cases have been brought under this process against the United Kingdom and the Court has ruled in favour of individuals with respect to matters such as censorship of prisoners' correspondence (*Golder v United Kingdom*),<sup>4</sup> freedom of expression (*Sunday Times v United Kingdom*),<sup>5</sup> corporal punishment (*Tyrer v United Kingdom*)<sup>6</sup> and the right of peaceful assembly (*Steel v United Kingdom*).<sup>7</sup>
- 4 The rights are either conditional, in which case they can be violated if there is a legitimate reason for their interference, or absolute, in which case there can be no justification for their violation. For example, freedom of expression (under Article 10) can be compromised provided the restriction is prescribed by law, and necessary in a democratic society for the protection of things such as public safety, health or morals, or national security. Thus, in *R v Shayler*<sup>8</sup> it was held that a prosecution under the Official Secrets Act 1989 was not in violation of Article 10 of the Convention. On the other hand, in *Chahal v United Kingdom*,<sup>9</sup> the European Court held that Article 3 could not be violated whatever the circumstances and whatever risk the individual posed to society.
- 5 The passing of the Human Rights Act has been described as having great constitutional significance.<sup>10</sup> For the first time individuals will be able to seek a remedy for violation of their human rights before the domestic courts. Thus, if an individual is tortured by the police he or she will be able to bring an action before the domestic courts under the Human Rights Act and the courts can, under section 8 of the Act, provide just satisfaction for that breach. No longer →



→ will the individual have to take an action under the European Convention. Thus, in *Napier v Scottish Ministers*,<sup>11</sup> a prisoner brought a successful claim under Article 3 when he was subjected to ‘slopping out’ in prison. Also, in *Campbell v MGN*,<sup>12</sup> the House of Lords held that a model’s privacy had been invaded when the newspapers printed stories about her drug habit, and she was awarded compensation. More significantly, in *A v Home Secretary*<sup>13</sup> the House of Lords held that the power to detain persons suspected of terrorism under the Anti-Terrorism, Crime and Security Act 2001 was incompatible with Article 5 of the Convention and thus declared the Act incompatible under section 4 of the Human Rights Act 1998.

- 6 As we can see from the above cases, the Act has had a substantial effect on both the legal and constitutional system of the United Kingdom. Under section 2 of the Act the courts can now take into account the case law of the European Court and Commission of Human Rights when adjudicating upon human rights disputes in domestic law. In addition, they have the power to interpret legislation in line with the European Convention (under section 3 of the Act), and the power to declare both primary and secondary legislation as incompatible with the Convention (under section 4). Thus, in *R v A (Sexual History)*<sup>14</sup> the House of Lords held that the Youth Justice and Criminal Evidence Act 1999 could be interpreted so as to allow a defendant to cross-examine a rape victim wherever that was necessary to ensure the right to a fair trial under section 6 of the Act. The courts have also used their new power under section 4 of the Act to declare legislation incompatible with the European Convention. For example, in *A v Home Secretary* (above), section 26 of the Anti-Terrorism, Crime and Security Act 2001 was declared incompatible with Article 5 of the European Convention, which guarantees the right to liberty and security of the person.
- 7 Before the Act was passed domestic courts could not take the European Convention into account. For example, in *Malone v Metropolitan Police Commissioner*<sup>15</sup> it was held that the plaintiff could not rely on Article 8 of the European Convention when the police had tapped his telephone because it was pointed out that the Convention had not been incorporated into domestic law and that any remedy the plaintiff had under the Convention would have to be pursued before the European Court of Human Rights. In that case *Malone* took his case to Strasbourg (*Malone v United Kingdom*)<sup>16</sup> and the European Court held that the telephone tapping was in violation of his right to private life and correspondence. As a consequence Parliament enacted the Interception of Communications Act 1985, which put telephone tapping on a statutory footing, and this power is now contained in the Regulation of Investigatory Powers Act 2000. In another case, *R v Ministry of Defence, ex parte Smith*,<sup>17</sup> the Court of Appeal held that Article 8 of the Convention could not assist armed forces personnel who had been expelled from the armed forces because of their sexual orientation. On appeal, the European Court of Human Rights held that such expulsions were contrary to Articles 8 and 14 of the Convention and that the expulsions were disproportionate.<sup>18</sup> Following that decision the armed forces replaced the blanket ban with a conduct-based policy so as to comply with the judgment of the European Court.
- 8 Under the Act the courts have got the power to interpret legislation compatibly with the European Convention, although this does not mean that they can →



→ refuse to apply clear legislation that is in breach of the Convention. In *Mendoza v Ghaidan*<sup>19</sup> the House of Lords held that the words ‘living together as husband and wife’ could be interpreted as ‘as if they were living together as husband and wife’. Accordingly, same-sex partners were given equal treatment and this was re-enforced by the Civil Partnership Act 2004. On the other hand, in *Bellinger v Bellinger*<sup>20</sup> the House of Lords refused to interpret the words man and woman to include a person who had undergone gender reassignment. This was despite the European Court’s decision in *Goodwin v United Kingdom*<sup>21</sup> that discrimination against transsexuals was in violation of Articles 8 and 14 of the Convention. As a result of the decision in *Goodwin* Parliament has enacted the Gender Reassignment Act 2004, which recognises the rights of transsexuals to change their sexual identity and to marry a person of their choice.

9 The courts have also got the power under the Act (section 4) to declare primary and secondary legislation incompatible with the European Convention, although again this does not empower the courts to overrule legislation. For example, in *R (Anderson and Taylor) v Home Secretary*<sup>22</sup> the House of Lords held that the Home Secretary’s power to fix the minimum terms of life sentence prisoners was incompatible with Article 6 of the European Convention, which guarantees the right to a fair trial, including the right to a fair sentence. This decision followed the decision of the European Court of Human Rights in *Stafford v United Kingdom*,<sup>23</sup> where it was held that the Home Secretary’s powers were inconsistent with the rule of law and the separation of powers and thus in breach of the Convention. Interestingly, the Court of Appeal in *Anderson* refused to declare the power of the Home Secretary as incompatible until the European Court had made its decision in *Stafford*, because before that decision the European Court had held that such a power was lawful with respect to mandatory life sentence prisoners.<sup>24</sup>

10 The Human Rights Act 1998 may also have a horizontal effect and thus apply to disputes between private individuals. Normally the Act only applies between individual victims and public authorities (as defined in section 6 of the Act). However, because the courts are public authorities under section 6 they have the duty to safeguard and uphold Convention rights and as a consequence the Act has been applied horizontally in the law of confidentiality in cases such as *Campbell v MGN*<sup>25</sup> and *Douglas v Hello!*<sup>26</sup> However, the House of Lords has held recently that the Act cannot be used to create a separate law of privacy, and that the decision in *Hello!* was confined to the law of confidentiality. Nevertheless the courts have gained extensive powers under the Act and can now apply the principles of proportionality when adjudicating upon disputes that raise Convention rights. Thus, any interference with a Convention right must now be necessary in a democratic society and be proportionate to any legitimate aim being pursued (*R (Daly) v Home Secretary*).<sup>27</sup> Furthermore, this test of proportionality is stricter than the previous test of *Wednesbury*<sup>28</sup> unreasonableness and will require the courts to take a more active approach to defending civil liberties.

11 Since the Act came into force there have been a number of cases brought against public authorities claiming that Convention rights have been violated. For example, in *R v DPP, ex parte Pretty*<sup>29</sup> it was held that the European Convention was not violated when domestic law (the Suicide Act 1961)



→ outlawed assisted suicide. The House of Lords held that the right to life guaranteed by Article 2 of the Convention did not include the right to die with dignity. This decision was upheld by the European Court of Human Rights in *Pretty v United Kingdom*<sup>30</sup> where it was confirmed that Article 2 was principally concerned with preserving life. Another example of the Act's use was in *A v Home Secretary* (above) where the House of Lords held that the indefinite detention of a foreign person suspected of acts of terrorism was in breach of Article 5 of the European Convention. The House of Lords held that although there was an emergency threatening the life of the nation within Article 15 of the Convention, the measures within the Anti-Terrorism, Crime and Security Act 2001 were both discriminatory and disproportionate and thus incompatible with the Convention. As a result the government introduced the Terrorism Bill 2005 into Parliament.

**12** In conclusion, the Human Rights Act 1998 has had a profound effect on the protection of human rights and has thus impacted on both the legal and constitutional system in the United Kingdom. The courts can now take the Convention and its case law into account and thus must apply European principles to human rights cases. Further, the courts have new powers of interpretation under section 3 of the Act and under section 4 can declare legislation incompatible with the Convention. Since the implementation of the Act the courts can use the Convention in domestic law and the individual no longer has to make use of the procedure under the European Convention. This will save considerable time and expense, although it should be pointed out that the victim can still make use of that procedure if they are unsuccessful under the Human Rights Act. These new powers, therefore, have had a profound effect on the legal system and the constitution in the United Kingdom, bringing rights home to domestic law.

### Bibliography

Ewing, K. and Bradley, A. *Constitutional and Administrative Law* (Longman, 2007) 14th edition.

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<sup>1</sup> The Act's implementation was delayed to allow for fuller training of the judiciary and thus came into force on that date.

<sup>2</sup> See section 1 and Sched. 1 of the Human Rights Act 1998.

<sup>3</sup> Van Beuren, 'Including the excluded: the case for an economic, social and cultural Human Rights Act' [2002] PL 456.

<sup>4</sup> (1975) 1 EHRR 524.

<sup>5</sup> (1979) 2 EHRR 245.

<sup>6</sup> (1978) 2 EHRR 1.

<sup>7</sup> (1999) 28 EHRR 603.

<sup>8</sup> [2002] 2 WLR 754.

<sup>9</sup> (1997) 23 EHRR 413.

<sup>10</sup> See Ewing and Bradley, *Constitutional and Administrative Law* (Longman, 2007), at page 416.

<sup>11</sup> *The Times*, 13 May 2004.





<sup>12</sup> [2004] 2 AC 457.

<sup>13</sup> [2005] AC 68.

<sup>14</sup> [2002] 1 AC 1546.

<sup>15</sup> [1979] Ch 344.

<sup>16</sup> (1984) 7 EHRR 14.

<sup>17</sup> [1996] 1 All ER 257.

<sup>18</sup> *Smith and Grady v United Kingdom* (2000) 29 EHRR 493.

<sup>19</sup> [2004] 2 AC 557.

<sup>20</sup> [2003] 2 AC 467.

<sup>21</sup> (2002) 35 EHRR 18.

<sup>22</sup> [2002] 3 WLR 1800.

<sup>23</sup> (2002) 35 EHRR 32.

<sup>24</sup> *Wynne v United Kingdom* (1994) 19 EHRR 333.

<sup>25</sup> See above, note 12.

<sup>26</sup> [2001] 2 WLR 992.

<sup>27</sup> [2001] 2 WLR 1622.

<sup>28</sup> *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>29</sup> [2002] 1 AC 800.

<sup>30</sup> (2002) 35 EHRR 1.

### Answer with commentary



***The passing of the Human Rights Act 1998 has had a profound effect on both the British Constitution and the English legal system. Discuss.***

1 The Human Rights Act 1998 was passed to incorporate the European Convention on Human Rights into domestic law. Before the Act was passed the European Convention had no role to play in domestic law and if an individual's human rights were violated the only redress was to take the case to the European Court of Human Rights in Strasbourg. Since October 2000<sup>1</sup> an individual may bring a claim for breach of their human rights in the domestic courts and thus they do not have to take the long journey to Strasbourg.

**(In the introductory paragraph the student uses the word *incorporate* rather than the phrase 'give further effect to', which is technically correct. She makes an incorrect statement about human rights before the Act, suggesting that there were no remedies at all apart from the Convention machinery. The introduction does not refer to any of the constitutional and legal issues highlighted in the question.)**

2 The European Convention contains a list of human rights which can be described as civil and political rights, and these rights are incorporated into domestic law by the Human Rights Act 1998.<sup>2</sup> These rights include the right to life (Article 2), freedom from torture (Article 3), liberty and security of the person (Article 5), →



the right to a fair trial (Article 6), the right to private and family life (Article 8), freedom of expression (Article 10), freedom of peaceful assembly (Article 11) and the right to marry (Article 12). We can see, therefore, that these rights are civil and political rights and that the Convention does not include any social, economic and cultural rights. This has been criticised and it has been proposed that the Human Rights Act be expanded to include such rights.<sup>3</sup>

**(The second paragraph simply lists some of the Convention rights given effect to by the Act rather than addressing the Act's provisions. The student does not explain the difference between the two sets of rights or the consequence (if any) of that distinction on the impact of the Act.)**

- 3 These rights are enforced by the European Court of Human Rights who hear cases of human rights violations by member states to the Convention. Thus under Article 34 to the Convention it may hear applications from individuals claiming to be a victim of a violation of the Convention and may award just satisfaction to that person under Article 41 of the Convention. Many cases have been brought under this process against the United Kingdom and the Court has ruled in favour of individuals with respect to matters such as censorship of prisoners' correspondence (*Golder v United Kingdom*),<sup>4</sup> freedom of expression (*Sunday Times v United Kingdom*),<sup>5</sup> corporal punishment (*Tyrer v United Kingdom*)<sup>6</sup> and the right of peaceful assembly (*Steel v United Kingdom*).<sup>7</sup>

**(This information relates to the role of the European Court of Human Rights under the Convention, rather than to the terms and impact of the Human Rights Act 1998. The cases mentioned towards the end do not appear to be relevant in answering the question and thus can be regarded as background information at most.)**

- 4 The rights are either conditional, in which case they can be violated if there is a legitimate reason for their interference, or absolute, in which case there can be no justification for their violation. For example, freedom of expression (under Article 10) can be compromised provided the restriction is prescribed by law, and necessary in a democratic society for the protection of things such as public safety, health or morals, or national security. Thus, in *R v Shayler*<sup>8</sup> it was held that a prosecution under the Official Secrets Act 1989 was not in violation of Article 10 of the Convention. On the other hand, in *Chahal v United Kingdom*,<sup>9</sup> the European Court held that Article 3 could not be violated whatever the circumstances and whatever risk the individual posed to society.

**(The explanation that some rights are absolute and some conditional does not appear to be relevant to the question and the issues it raises. Thus, whilst the information is true, without some explanation of the provisions of the Act itself the content of the paragraph is largely irrelevant. The fact that some rights are conditional and some absolute will impact on the domestic court's role, but the student does not identify this.)**

- 5 The passing of the Human Rights Act has been described as having great constitutional significance.<sup>10</sup> For the first time individuals will be able to seek a remedy for violation of their human rights before the domestic courts. Thus, if an individual is tortured by the police he or she will be able to bring an action before the domestic courts under the Human Rights Act and the courts can,



→ under section 8 of the Act, provide just satisfaction for that breach. No longer will the individual have to take an action under the European Convention. Thus, in *Napier v Scottish Ministers*,<sup>11</sup> a prisoner brought a successful claim under Article 3 when he was subjected to ‘slopping out’ in prison. Also, in *Campbell v MGN*,<sup>12</sup> the House of Lords held that a model’s privacy had been invaded when the newspapers printed stories about her drug habit, and she was awarded compensation. More significantly, in *A v Home Secretary*<sup>13</sup> the House of Lords held that the power to detain persons suspected of terrorism under the Anti-Terrorism, Crime and Security Act 2001 was incompatible with Article 5 of the Convention and thus declared the Act incompatible under section 4 of the Human Rights Act 1998.

**(The student does not explain why the Act has been described as having great constitutional significance, or what that constitutional, rather than legal, significance might be. She repeats the error about the Act providing a remedy for the first time, ignoring the pre-Act position. She mentions section 8 but has not put that section into any context because she has not yet explained the central provisions of the Act (including sections 6 and 7, which allow Convention rights actions against public authorities to be brought in legal proceedings). The case examples she uses would then have been useful had they been placed in that context.)**

- 6 As we can see from the above cases, the Act has had a substantial effect on both the legal and constitutional system of the United Kingdom. Under section 2 of the Act the courts can now take into account the case law of the European Court and Commission of Human Rights when adjudicating upon human rights disputes in domestic law. In addition, they have the power to interpret legislation in line with the European Convention (under section 3 of the Act), and the power to declare both primary and secondary legislation as incompatible with the Convention (under section 4). Thus, in *R v A (Sexual History)*<sup>14</sup> the House of Lords held that the Youth Justice and Criminal Evidence Act 1999 could be interpreted so as to allow a defendant to cross-examine a rape victim wherever that was necessary to ensure the right to a fair trial under section 6 of the Act. The courts have also used their new power under section 4 of the Act to declare legislation incompatible with the European Convention. For example, in *A v Home Secretary* (above), section 26 of the Anti-Terrorism, Crime and Security Act 2001 was declared incompatible with Article 5 of the European Convention, which guarantees the right to liberty and security of the person.

**(The paragraph opens with a claim that the previous paragraphs have addressed and illustrated the relevant legal and constitutional issues, which they have not. The student then gives information relating to some provisions of the Act that do have such an impact, but she does not explain the significance of those sections vis à vis issues such as precedent, the separation of powers and parliamentary sovereignty. Consequently the information via the cases adds little to the debate and does not assist in answering the question.)**

- 7 Before the Act was passed domestic courts could not take the European Convention into account. For example, in *Malone v Metropolitan Police Commissioner*<sup>15</sup> it was held that the plaintiff could not rely on Article 8 of the European Convention when the police had tapped his telephone because it was →

→ pointed out that the Convention had not been incorporated into domestic law and that any remedy the plaintiff had under the Convention would have to be pursued before the European Court of Human Rights. In that case *Malone* took his case to Strasbourg (*Malone v United Kingdom*)<sup>16</sup> and the European Court held that the telephone tapping was in violation of his right to private life and correspondence. As a consequence Parliament enacted the Interception of Communications Act 1985, which put telephone tapping on a statutory footing, and this power is now contained in the Regulation of Investigatory Powers Act 2000. In another case, *R v Ministry of Defence, ex parte Smith*,<sup>17</sup> the Court of Appeal held that Article 8 of the Convention could not assist armed forces personnel who had been expelled from the armed forces because of their sexual orientation. On appeal, the European Court of Human Rights held that such expulsions were contrary to Articles 8 and 14 of the Convention and that the expulsions were disproportionate.<sup>18</sup> Following that decision the armed forces replaced the blanket ban with a conduct-based policy so as to comply with the judgment of the European Court.

**(This paragraph contains some useful content, but again it is not put into context. The case examples could have been used early on to illustrate how the Act now allows the Convention to be used directly in domestic law, thus illustrating the change brought about by the Act to the old system. Instead, the student concentrates on the facts and the measures taken by the domestic authorities in response to the judgments, failing to mention the significance of the absence in domestic law of substantive human rights and doctrines such as proportionality.)**

- 8 Under the Act the courts have got the power to interpret legislation compatibly with the European Convention, although this does not mean that they can refuse to apply clear legislation that is in breach of the Convention. In *Mendoza v Ghaidan*<sup>19</sup> the House of Lords held that the words ‘living together as husband and wife’ could be interpreted as ‘as if they were living together as husband and wife’. Accordingly, same-sex partners were given equal treatment and this was re-enforced by the Civil Partnership Act 2004. On the other hand, in *Bellinger v Bellinger*<sup>20</sup> the House of Lords refused to interpret the words man and woman to include a person who had undergone gender reassignment. This was despite the European Court’s decision in *Goodwin v United Kingdom*<sup>21</sup> that discrimination against transsexuals was in violation of Articles 8 and 14 of the Convention. As a result of the decision in *Goodwin* Parliament has enacted the Gender Reassignment Act 2004, which recognises the rights of transsexuals to change their sexual identity and to marry a person of their choice.

**(This is the first mention of section 3 and the courts’ new interpretative powers. The section and its scope and wording are not properly examined, and there is no real mention of the legal and constitutional issues that might arise from that provision – for example, whether it gives the courts the power to legislate. Thus, the cases, which are very relevant, are simply presented as bald examples and reference is made to the background and the follow-up to the cases without exploring the legal and constitutional impact of the cases.)**

- 9 The courts have also got the power under the Act (section 4) to declare primary and secondary legislation incompatible with the European Convention, although again this does not empower the courts to overrule legislation. For example, →

→ in *R (Anderson and Taylor) v Home Secretary*<sup>22</sup> the House of Lords held that the Home Secretary's power to fix the minimum terms of life sentence prisoners was incompatible with Article 6 of the European Convention, which guarantees the right to a fair trial, including the right to a fair sentence. This decision followed the decision of the European Court of Human Rights in *Stafford v United Kingdom*,<sup>23</sup> where it was held that the Home Secretary's powers were inconsistent with the rule of law and the separation of powers and thus in breach of the Convention. Interestingly, the Court of Appeal in *Anderson* refused to declare the power of the Home Secretary as incompatible until the European Court had made its decision in *Stafford*, because before that decision the European Court had held that such a power was lawful with respect to mandatory life sentence prisoners.<sup>24</sup>

(Section 4 is very relevant to the question, but the student does not highlight the relevant constitutional problems associated with it – for example, does it impact on parliamentary sovereignty? Instead, she provides a paraphrased account of the section's wording. This is followed by a rather long-winded account of the *Anderson* case, which does not really assist in addressing the relevant issue. The case is useful in illustrating parliamentary sovereignty and the status of European Court decisions, but the student doesn't really explain these points, providing instead some unnecessary detail about life sentences.)

- 10 The Human Rights Act 1998 may also have a horizontal effect and thus apply to disputes between private individuals. Normally the Act only applies between individual victims and public authorities (as defined in section 6 of the Act). However, because the courts are public authorities under section 6 they have the duty to safeguard and uphold Convention rights and as a consequence the Act has been applied horizontally in the law of confidentiality in cases such as *Campbell v MGN*<sup>25</sup> and *Douglas v Hello!*<sup>26</sup> However, the House of Lords has held recently that the Act cannot be used to create a separate law of privacy, and that the decision in *Hello!* was confined to the law of confidentiality. Nevertheless the courts have gained extensive powers under the Act and can now apply the principles of proportionality when adjudicating upon disputes that raise Convention rights. Thus, any interference with a Convention right must now be necessary in a democratic society and be proportionate to any legitimate aim being pursued (*R (Daly) v Home Secretary*)<sup>27</sup> Furthermore, this test of proportionality is stricter than the previous test of *Wednesbury*<sup>28</sup> unreasonableness and will require the courts to take a more active approach to defending civil liberties.

(The student mentions section 6 of the Act for the first time; this provision is absolutely central to the scope of the Act and the effect of the Act on the legal system! Because those issues are not properly explored, she loses the impact of mentioning some of the relevant cases under that heading. There is then a non sequitur when she moves on to the doctrine of proportionality (again mentioning it for the first time). She fails to define proportionality and explain its significance and also fails to distinguish it from the *Wednesbury* test. Consequently, she finishes the paragraph by making a general and unsupported statement about civil liberties protection.) →





11 Since the Act came into force there have been a number of cases brought against public authorities claiming that Convention rights have been violated. For example, in *R v DPP, ex parte Pretty*<sup>29</sup> it was held that the European Convention was not violated when domestic law (the Suicide Act 1961) outlawed assisted suicide. The House of Lords held that the right to life guaranteed by Article 2 of the Convention did not include the right to die with dignity. This decision was upheld by the European Court of Human Rights in *Pretty v United Kingdom*<sup>30</sup> where it was confirmed that Article 2 was principally concerned with preserving life. Another example of the Act's use was in *A v Home Secretary* (above) where the House of Lords held that the indefinite detention of a foreign person suspected of acts of terrorism was in breach of Article 5 of the European Convention. The House of Lords held that although there was an emergency threatening the life of the nation within Article 15 of the Convention, the measures within the Anti-Terrorism, Crime and Security Act 2001 were both discriminatory and disproportionate and thus incompatible with the Convention. As a result the government introduced the Terrorism Bill 2005 into Parliament.

**(This paragraph contains some useful cases, but the student wastes them by not explaining their significance and by failing earlier to explain the basic provisions of the Act and its constitutional and legal scope and impact. The decision in *A* has now been used three times, but the student doesn't really explore the significance of that decision with respect to the question.)**

12 In conclusion, the Human Rights Act 1998 has had a profound effect on the protection of human rights and has thus impacted on both the legal and constitutional system in the United Kingdom. The courts can now take the Convention and its case law into account and thus must apply European principles to human rights cases. Further, the courts have new powers of interpretation under section 3 of the Act and under section 4 can declare legislation incompatible with the Convention. Since the implementation of the Act the courts can use the Convention in domestic law and the individual no longer has to make use of the procedure under the European Convention. This will save considerable time and expense, although it should be pointed out that the victim can still make use of that procedure if they are unsuccessful under the Human Rights Act. These new powers, therefore, have had a profound effect on the legal system and the constitution in the United Kingdom, bringing rights home to domestic law.

**(The conclusion presumes that the student has covered the central issues raised by the question, which she has not. Thus, there is no firm basis for any of her conclusions, and she ends up summarising the provisions of the Act and making an unsupported and vague statement that the Act has had a profound effect in those areas.)**

### Bibliography

Ewing, K. and Bradley, A. *Constitutional and Administrative Law* (Longman, 2007) 14th edition.

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<sup>1</sup> The Act's implementation was delayed to allow for fuller training of the judiciary and thus came into force on that date.

<sup>2</sup> See section 1 and Sched. 1 of the Human Rights Act 1998.







- <sup>3</sup> Van Beuren, 'Including the excluded: the case for an economic, social and cultural Human Rights Act' [2002] PL 456.
- <sup>4</sup> (1975) 1 EHRR 524.
- <sup>5</sup> (1979) 2 EHRR 245.
- <sup>6</sup> (1978) 2EHRR 1.
- <sup>7</sup> (1999) 28 EHRR 603.
- <sup>8</sup> [2002] 2 WLR 754.
- <sup>9</sup> (1997) 23 EHRR 413.
- <sup>10</sup> See Ewing and Bradley, *Constitutional and Administrative Law* (Longman, 2007), at page 416.
- <sup>11</sup> *The Times*, 13 May 2004.
- <sup>12</sup> [2004] 2 AC 457.
- <sup>13</sup> [2005] AC 68.
- <sup>14</sup> [2002] 1 AC 1546.
- <sup>15</sup> [1979] Ch 344.
- <sup>16</sup> (1984) 7 EHRR 14.
- <sup>17</sup> [1996] 1 All ER 257.
- <sup>18</sup> *Smith and Grady v United Kingdom* (2000) 29 EHRR 493.
- <sup>19</sup> [2004] 2 AC 557.
- <sup>20</sup> [2003] 2 AC 467.
- <sup>21</sup> (2002) 35 EHRR 18.
- <sup>22</sup> [2002] 3 WLR 1800.
- <sup>23</sup> (2002) 35 EHRR 32.
- <sup>24</sup> *Wynne v United Kingdom* (1994) 19 EHRR 333.
- <sup>25</sup> See above, note 12.
- <sup>26</sup> [2001] 2 WLR 992.
- <sup>27</sup> [2001] 2 WLR 1622.
- <sup>28</sup> *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1KB 223.
- <sup>29</sup> [2002] 1 AC 800.
- <sup>30</sup> (2002) 35 EHRR 1.

### Summary of errors

- In general, the student did not address or answer the question, and the information that she did provide was sometimes irrelevant. Thus, although she includes some reasonable information on the Act, the European Convention and the protection of human rights, little of it addresses the issue of whether and to what extent the Act has impacted on the constitutional and legal system. In addition, when she does mention information that is relevant to those issues, she does not take the opportunity of highlighting the significance of that information, or case, to the question.
- She does not appear to have understood the question or the issues that it raises. She does not seem able to identify the potential impact of the Act on the legal system and the Constitution and perhaps is confused on how the two issues can be distinguished or might overlap.

- A lot of the information relates to the machinery and case law of the European Convention on Human Rights, rather than the provisions and effect of the Human Rights Act itself.
- She deals with some relevant cases but rarely makes the relevant point, failing to extract the real issue of the case and providing instead unnecessary detail on the facts of and decision in the case.
- She omits discussion of some provisions of the Act that are relevant to the question, such as the effect of the Act on the legislative process (sections 10 and 19 of the Act).
- Many of the points the student makes are repetitive, such as that there is no longer the need to go to Strasbourg.
- Most of the cases are not explained clearly, and some of her explanations of the Act's provisions are general and vague.
- The content (where relevant) would have been improved by a closer reading of the Act, the cases and the secondary sources.
- The bibliography was limited and did not contain any texts on legal system or recent articles on the relevant legal and constitutional issues.
- In the conclusion, the student professes to have covered the constitutional and legal issues raised by the question, but in truth she hasn't.

### **What is the essay worth?**

One would expect the marker to reply with comments such as the following.

#### **Marker's feedback**

*The essay is reasonably well written, although a little general at times. You have raised some relevant points about the Act and the Convention, but you do not address the question. What legal and constitutional issues **are** raised by the Act, and **how** has the Act impacted on those issues? You need to explore the scope of the Act's provisions and the powers of the courts under the Act, and then assess their impact on the legal and constitutional system. For example, how has the Act impacted on matters such as precedent, the public/private law divide, the separation of powers, the constitutional role of the courts, sovereignty of parliament and the provision of legal remedies for human rights violations? You do not really address any of these issues, but rather provide some unfocused information about the Convention, the Act and some case law under both. You have wasted a lot of your research and some very useful case law by not discussing the law in the context of the question. Read the question and address the issues raised by that question!! **34%***

### **How could this essay be improved?**

The student needs to look at the question carefully and to make a careful plan of her answer, identifying the central thrust of the question, the issues that she is going to raise and the specific provisions of the Act and any case law that she is going to use in support of her answer.

She should have identified the following:

- The question suggests that the Act has had a profound constitutional and legal effect; therefore, the answer should concentrate on either substantiating or refuting that suggestion.
- The question mentions the impact on both the British Constitution and the English legal system, so the answer must identify the potential and actual impact on both. To do this, the student must appreciate the difference between the legal system and the Constitution and be able to identify relevant statutory provisions and case law that may have, or have had, an impact on both.
- To examine whether the Act has had a profound effect, the student must examine the pre-Act as well as the post-Act situation and consider carefully the aims of the 1998 Act.

A plan for the answer would, therefore, look something like this:

- A general explanation of the role of human rights protection in a constitutional and legal system.
- An examination of the reasons why the Act was passed, including a summary of the pre-Act position and any defects of that system.
- An examination and explanation of the central provisions of the Act as they affect the British Constitution and any of its basic principles (e.g. the separation of powers, the rule of law, sovereignty of power and the constitutional role of the courts), along with an examination of any statutory or case developments to support the contention that the Act has had a profound impact.
- An examination of the same with respect to the impact of the Act on various aspects of the legal system (e.g. judicial precedent, judicial law-making, the parliamentary law process, statutory interpretation, the development of the common law).
- General conclusions as to the truth of the statement in the question.

## B: A sound essay

### Answer with commentary

*The passing of the Human Rights Act 1998 has had a profound effect on both the British Constitution and the English legal system. Discuss.*

- 1 The protection of human rights and civil liberties is a principal function of any state's legal system, providing as it does an effective method of redress when fundamental rights are transgressed. In addition, such protection will impact on the state's constitution, addressing questions such as the constitutional role of the courts, the separation of powers and, particularly within the British Constitution, the sovereignty of Parliament.<sup>1</sup> The passing of the Human Rights Act 1998 ('the Act'), under which rights are to be brought home, and the





European Convention on Human Rights is to be given further effect in domestic law,<sup>2</sup> appears to raise a number of legal and constitutional questions, some of which, as we shall see, overlap. This essay will examine the Act's content and operation in order to assess the impact of it on the United Kingdom's constitutional and legal system.

**(The student has identified the central thrust of the question and the relevant aspects of the 1998 Act that should be concentrated on. She has identified that the Act gives rise to issues with respect to both the constitutional and the legal system and tells the reader how she is to tackle those issues and the extent to which they might overlap.)**

- 2 According to the long title, the Act was passed to give further effect to the rights and freedoms guaranteed by the European Convention on Human Rights 1950. As this will involve the partial incorporation of the Convention into domestic law, the Act is bound to have some effect on the constitutional arrangements for the protection of human rights in domestic law, which in turn will impact on both the constitutional role of the courts as well as the sovereignty and autonomy of, respectively, Parliament and executive government.<sup>3</sup> The 'incorporation' of the Convention into domestic law questions whether the United Kingdom would follow many other states in establishing an entrenched and supreme bill of rights, which will protect fundamental rights from the general law. This would indeed fundamentally alter the traditional common law system of rights protection, favoured by writers such as Dicey, whereby such rights were protected within the traditional law.<sup>4</sup> Furthermore, the idea that these rights could be upheld by the courts despite conflicting legislation would be contrary to the doctrine of the sovereignty of Parliament, thereby clashing fundamentally with the central principle of the British Constitution.<sup>5</sup>

**(The student begins to identify and address the potential impact of the Act on the Constitution by explaining the traditional constitutional position and by identifying the potential constitutional changes brought about by the passing of the Act. There are also good references to secondary sources.)**

- 3 However, both of these fears remain largely unfounded. First, the Act does not create a domestic bill of rights as such, but instead allows the traditional domestic law to be informed by the rights contained in the Convention, and for the domestic courts to enforce the Convention in legal disputes which raise Convention rights. Second, the Act makes it quite clear that the new powers of the courts to enforce Convention rights do not disturb the validity and application of conflicting legislation, where such provisions are clearly in conflict with the Convention.<sup>6</sup> Thus, the sovereignty of legislation passed and authorised by Parliament is preserved under the Act and the domestic courts do not have the general power to overrule legislative and executive acts that violate human rights, as does, for example, the US Supreme Court.<sup>7</sup> This principle is also reflected with respect to the potential supremacy of the European Convention over domestic law. Whilst the European Communities Act 1972 incorporates relevant European Community law into domestic law and attempts to give supremacy of such law when it is in conflict with domestic law, the Human Rights Act does not create a direct conflict, and instead preserves parliamentary sovereignty when compatibility with the Convention cannot be achieved by



→ the domestic courts via interpretation.<sup>8</sup> Thus, the constitutional principle whereby international law does not override domestic law is maintained, despite the duty of the courts, under s. 2 of the Act, to take into account the case law of the European Court and Commission of Human Rights when adjudicating upon disputes that raise Convention rights.

**(The student display a keen awareness of the true nature of the Act and its potential impact on the Constitution, explaining very clearly the nature and scope of the Act and the cautious method of incorporation adopted by the Act. Relevant references are made to key provisions of the Act to illustrate these observations.)**

- 4 Despite the retention of parliamentary sovereignty, the Act does provide the courts with powers to enforce Convention rights, which might create a shift of power from the legislative and the executive to the courts. Thus, s. 3 of the Act empowers the courts, *so far as it is possible to do so*, to interpret both primary and secondary legislation in a manner which is compatible with the European Convention. This section allows the courts to find a Convention-friendly interpretation even where the legislation in question is not truly ambiguous.<sup>9</sup> Although the section makes it clear that this power does not affect the validity of legislation (primary or secondary) which is incompatible with the Convention,<sup>10</sup> this new power of interpretation, if abused by the courts, might lead them to giving a strained interpretation to clear legislative provisions and thus blur the distinction between interpretation and law-making. In the post-Act era, although the courts have stressed that their role is one of interpretation, and does not entitle them to legislate, there have been instances where the courts have taken a robust and inventive approach. For example in *R v A (Sexual History)*<sup>11</sup> the House of Lords held that the niceties of statutory language could be subordinated in the desire to achieve a Convention-compliant result, thus making it possible to read up or read down legislation which appeared on its face to be in conflict with the Convention. Similarly, in *Mendoza v Ghaidan*<sup>12</sup> the House of Lords held that it was possible to depart from the traditional meaning of the Act so as to make it compliant with Convention rights. On the other hand, the courts have been reluctant to reinterpret legislation when to do so would clearly conflict with the aims and policy of the Act, and where repeal or amendment of such legislation would be more appropriately carried out by Parliament.<sup>13</sup> Further, s. 3 cannot be used where that would amount to ‘judicial vandalism’ of clear legislative provisions.<sup>14</sup>

**(The student now balances the observations made in the previous paragraph with some discussion of the courts’ increased powers under the Act, as well as an appraisal of their likely and actual impact on issues such as the constitutional role of the courts. She uses several good case examples to illustrate the points she makes and provides a balanced account of the cases with respect to their constitutional impact.)**

- 5 Further, s. 4 of the Act allows the higher courts to issue a declaration of incompatibility with respect to both primary and secondary legislation that cannot be read consistently with Convention rights. Although this does not allow the courts to strike down or refuse to apply such legislation, it does allow them to pass judgment on the compatibility of legislation passed or authorised by →

→ Parliament.<sup>15</sup> For example, the courts have issued declarations of incompatibility with respect to legislation which imposed disproportionate criminal penalties,<sup>16</sup> which denied transsexuals the right to marry,<sup>17</sup> and which gave the Home Secretary the right to fix sentences for mandatory lifers.<sup>18</sup> It should be noted, however, that in such cases the relevant legislation remains in place and that Parliament is left with the power to amend or repeal such legislation,<sup>19</sup> or, indeed, to ignore the court's ruling altogether.

**(Again, the student explains a central provision of the Act in a manner that provides the basis for a balanced argument as to the likely effect of that provision on the Constitution. She offers a range of case examples, which illustrate their impact without giving unnecessary detail of their facts and decisions.)**

- 6 In particular, the Act, by allowing the domestic courts to take into account the jurisprudence and principles of the European Convention on Human Rights, has impacted on the separation of powers and the level of deference expected of the judiciary towards both the executive and Parliament.<sup>20</sup> Since the Act's coming into force the courts are free to apply the principle of proportionality when assessing the balance between the achievement of a legitimate aim (such as national security or public safety) and the protection of Convention rights. In *R (Daly) v Home Secretary*<sup>21</sup> Lord Steyn warned that proportionality allowed the courts to conduct a more intensive review of acts that infringe fundamental rights, going beyond the traditional *Wednesbury* unreasonableness test,<sup>22</sup> which only allowed the courts to interfere if there was strong evidence of irrationality. Although Lord Steyn stressed that this did not allow a merits-based review, subsequent case law shows that the courts will be prepared to take a robust approach in the defence of human rights. For example, in *A v Home Secretary*<sup>23</sup> the House of Lords declared detention powers under the Anti-Terrorism, Crime and Security Act 2001 incompatible with the right to liberty of the person, despite the powers being authorised by Parliament, and despite the government lodging a derogation under the Act to accommodate the threat of terrorism. Such an approach appears radically different from the traditional principles of judicial review, although, as Lord Bingham stated in that case, this approach has been sanctioned by Parliament itself, by passing the 1998 Act.

**(The student places greater emphasis on a central aspect of the courts' new powers – the use of proportionality. She is careful to explain the significance of this power and to contrast it with the traditional position before the Act. She also uses the 'Belmarsh' case as a stark example of the courts' new approach and justified the use of such power in the context of the aims of the Act itself.)**

- 7 In addition to the constitutional ramifications, the Act also impacts on the general legal system in areas such as precedent, legal process and remedies. For example, the court's duty to take into account the case law of the European Court and Commission of Human Rights (under s. 2), coupled with its new powers of statutory interpretation under s. 3 (above), affects the traditional principles of judicial precedent. Accordingly, if a previous decision of a higher court is now inconsistent with a ruling of the European Court of Human Rights, that decision can now be departed from, even by a lower court. This reflects Parliament's intention that the domestic courts should follow the Convention case law, although it has been held that unless the European decision deals →



specifically with the domestic law issue, the courts should wait until the House of Lords rules on that point before departing from earlier authority.<sup>24</sup> Similarly, with respect to s. 3 of the Act, domestic courts are now allowed to depart from previous interpretations of primary and secondary legislation. This again reflects Parliament's intention that statutory provisions are, wherever possible, to be compatible with the enjoyment of Convention rights.

**(The student now begins to address the effect of the Act on the legal system and identifies a number of aspects of the system that might be so affected. She then moves swiftly to the first aspect (judicial precedent), clearly and succinctly explaining the effect of ss. 2 and 3 on the traditional doctrine of precedent and providing clear general examples. She also makes an effort to explain the rationale of those provisions.)**

- 8 The Act also addresses the duty of the legal system to provide redress for violations of human rights. Formerly, the legal system provided redress through traditional private law remedies,<sup>25</sup> but the 'incorporation' of the Convention into domestic law means that specific procedures and redress will be available for human rights cases in addition to existing public and private law remedies. Under s. 6 of the Act it is now unlawful for a public authority to act in a way that is incompatible with a Convention right, and under s. 7 the victim of any violation may either bring proceedings for such under the Act or rely on the Convention rights in any legal proceedings. This will affect how the traditional criminal and civil courts deal with cases which raise Convention rights, because whether the Convention issue is raised in direct proceedings under the Act or in other public, criminal or civil proceedings, the court will need to consider its powers under the Human Rights Act. This will include its power under s. 8 of the Act to grant just and equitable orders for the commission of unlawful violations by public authorities, including the power to award just satisfaction in the form of compensation, and in this respect the courts must be informed by the case law of the European Court of Human Rights.<sup>26</sup>

**(The student now moves to the next issue, summarising the main effect of the Act on the provision of legal remedies for human rights violations, contrasting it with the previous position and explaining how such remedies will be addressed and provided in practice. Again, good use is made of references to either case examples or statutory provisions.)**

- 9 More specifically, the Act creates a further public/private law divide with respect to the bringing of legal actions against public bodies. In general, the Act only applies to violations committed by 'public authorities' (s. 6) and this has required the courts to apply the distinction previously employed in determining the availability of judicial review proceedings.<sup>27</sup> Thus, in the post-Act era, the courts have had to distinguish between pure public authorities, which are liable under the Act, and bodies which, despite carrying out functions affecting the public, are nevertheless essentially private.<sup>28</sup> However, as the courts are public authorities under the Act,<sup>29</sup> it is possible for the Act to have a 'horizontal' effect and thus inform disputes in the private law domain. Thus, the case law and principles of the Convention have been used to develop the law of confidentiality,<sup>30</sup> although the House of Lords has stressed that the Act largely applies to public authorities and that it is not necessary to develop a private common law action in privacy.<sup>31</sup>







(This aspect of the Act follows on neatly from the previous paragraph and deals with a more specific concern – the effect of the Act on the public/private law divide. Having identified the particular concern, the student then refers to relevant case law with respect to the definition of public authorities and then introduces the possibility of the Act applying in the private sphere, again referring to relevant authority. The paragraph provides a good and balanced account of the legal position in this area.)

- 10 Finally, the Act has impacted on the general legislative process.<sup>32</sup> For example, under s. 19 of the Act the relevant Minister must, before the Second Reading of any Bill, either make a statement of compatibility of the Bill with the Convention, or make a statement that the Bill is incompatible, but that nevertheless he wishes the House to proceed with the Bill.<sup>33</sup> This seeks to ensure that Parliament passes compatible legislation, although such a declaration of compatibility would not stop the courts using its powers under ss. 3 and 4 of the Act (above). In addition, s. 10 of the Act provides a fast track procedure for the amendment of incompatible legislation, thus reiterating that the ultimate power of legislative amendment lies with the government through Parliament.

(The student now winds up her discussion of the Act and the legal system by considering the impact on the legislative process, identifying two central provisions of the Act in this respect. The description of the provisions is coupled with a balanced and intelligent commentary on their rationale and potential impact.)

- 11 In conclusion, the Act has provided the courts with new powers of interpretation and review, and allows victims a more structured system for redressing human rights violations. The ‘incorporation’ of the European Convention allows European Convention case law and principles to inform domestic law and for individuals to seek redress more akin to the system applied by the European Court of Human Rights. However, the Act simply gives ‘further effect’ to the Convention, and retains the essential constitutional and legal structure of the United Kingdom, in particular the concept of the sovereignty of Parliament. Accordingly, given the method of incorporation adopted by the Act, together with the relatively cautious approach taken by the judiciary in enforcing the Act, it would be incorrect to suggest that the Act has had a *profound* effect on the constitutional and legal system.

(The conclusion reflects the approach taken by the student in the main body of the essay. Thus, it neatly summarises the central issues raised in the main text and contains a reasoned and balanced conclusion on the truth of the statement within the question. Note that she stresses the word *profound* to display the careful conclusion, illustrating that she is always addressing the question.)

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<sup>1</sup> See Foster, S. *Human Rights and Civil Liberties* (2008) 2nd edition, at pages 12–14.

<sup>2</sup> Home Office, *Rights Brought Home: The Human Rights Bill*, Cm 3782. See also Wadham and Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (OUP, 2007), pages 6–11.

<sup>3</sup> See Feldman, 'The Human Rights Act and Constitutional Principles' (1999) LS 195.

<sup>4</sup> Dicey, A.V. *Introduction to the Law of the Constitution* (Macmillan, 1965).

<sup>5</sup> For general discussion on the constitutional effect of the Act, see Bradley, A. and Ewing, K. *Constitutional and Administrative Law* (Longman, 2007), Chapter 19.

<sup>6</sup> See ss. 3 and 4 of the Act.

<sup>7</sup> See Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002), at page 60.

<sup>8</sup> See ss. 3 and 4 of the Act, discussed below.

<sup>9</sup> See Lester, A. 'The Act of the Possible: Interpreting Statutes under the Human Rights Act' [1998] EHRLR 665, and Stychin, C. and Mulcahy, D. *Legal Method: Text and Materials* (Sweet & Maxwell, 2007), pages 218–251.

<sup>10</sup> Section 3(2)(b) and (c) of the Act.

<sup>11</sup> [2002] 1 AC 1546.

<sup>12</sup> [2004] 2 AC 557.

<sup>13</sup> *Bellinger v Bellinger* [2003] 2 AC 467. See also Lord Millett in *Medoza* (above), who felt it was inappropriate to interpret a statute inconsistently with its original aim when its amendment was a matter for Parliament.

<sup>14</sup> *R (Anderson and Taylor) v Home Secretary* [2002] 3 WLR 1800.

<sup>15</sup> See, in particular, the decision of the House of Lords in *A v Home Secretary*, discussed below.

<sup>16</sup> *International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344.

<sup>17</sup> *Bellinger v Bellinger*, above, note 13.

<sup>18</sup> *R (Anderson and Taylor) v Home Secretary*, above note 14.

<sup>19</sup> The Minister will probably use the procedure under s. 10 of the Act, discussed later.

<sup>20</sup> See Edwards, R. 'Judicial deference under the Human Rights Act' (2002) MLR 859.

<sup>21</sup> [2001] 2 WLR 622.

<sup>22</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>23</sup> [2005] 2 AC 68.

<sup>24</sup> *Price v Leeds County Council* [2005] 1 WLR 1925.

<sup>25</sup> For example, in the law of trespass: see *Entick v Carrington* (1765) St Tr 1030.

<sup>26</sup> See section 8(4) of the 1998 Act and Article 41 of the European Convention on Human Rights (1950).

<sup>27</sup> *O'Reilly v Mackman* [1983] 2 AC 237.

<sup>28</sup> Contrast the decision in *Heather, Ward and Callin v Leonard Cheshire Foundation* [2002] 2 All ER 936 with *Poplar Housing Association v Donogue* [2001] 2 WLR 1546.

<sup>29</sup> See s. 6(3) of the Act.



→ <sup>30</sup> See *Douglas v Hello!* [2001] 2 WLR 992 and *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>31</sup> *Wainwright v Home Office* [2004] 2 AC 406.

<sup>32</sup> See, in particular, Nicol, D. 'The Human Rights Act and Politicians' (2004) LS 451.

<sup>33</sup> Thus far, the Communications Bill 2003 has been the only Bill stated to be incompatible with the European Convention, with respect to its ban on political advertising.

### Summary of good points

- The student has looked at the question very carefully and has decided which issues need to be raised with respect to the Act. The answer is well structured and appears to correspond to a clear plan.
- She has distinguished between issues relating to the constitution and those relating to the legal system, whilst identifying that the issues may well overlap.
- Given the word limit and the wide scope of the question, she covers a wide range of issues in the essay, choosing the most controversial and pressing concerns relating to the Act and its impact.
- She displays a sound understanding of the relevant law and a confidence with the various legal and constitutional issues raised by the question.
- She refers to a variety of statutory provisions and relevant case law, being careful to exclude unnecessary detail.
- Her consideration of each issue is reasoned and balanced, always addressing the question and making way for her conclusion.
- Her conclusion is neat and covers the salient points that she has made during the essay. It concludes with an intelligent and reasoned comment on the truth of the statement contained in the question, which is backed up by the content of the essay.
- Her bibliography contains a sound selection of texts and articles and displays wide reading in the area considering the level at which she is studying.

### What is it worth?

Given the broad range of the question and the amount of issues that needed to be raised and addressed by the student, the answer is a very good one. It shows evidence of a wide knowledge of, and wide reading in, the area and is well written and very well structured. In particular, it shows expertise in including so much information in the answer whilst retaining a critical and analytical approach. It could, perhaps, have been a little more critical, and the student could have made more use of some of the academic opinion contained in her bibliography, as well as some further extracts from judges. All in all, it is a very good essay and may be regarded as a 'bare first'.

## ■ Summary of good essay techniques

- Read the question thoroughly the moment you get it so that you can pick up on any clues in lectures and seminars and do your basic research and reading as soon as possible.
- Always ensure that you know the legal area thoroughly before attempting to write out your answer; this will help you understand the question and locate relevant sources. Read the set text very carefully and then advance to further and more specialist texts and articles.
- Never leave the research and planning of your answer until the last minute, even though you may write it up at the eleventh hour.
- Always plan your answer to ensure that you are answering the set question. Carefully plan what you are going to say and how it is to be structured in individual paragraphs.
- Always follow the three-stage pattern: say what the question is about and what you are going to say, say it and then conclude by saying what you have said.
- Follow the *academic style* (not the actual content) adopted in good textbooks and journals and adopt that style in your essays.
- Make sure that when you include legal authority in the form of statutes, cases and so on that they enhance your answer.
- Make the most of your research and ensure that you use the appropriate parts of books, articles, cases and statutes in your essay.
- Avoid plagiarism and ensure that you have displayed your own understanding.
- Always ensure that you read through your answer to check for typographical and spelling mistakes, to ensure that the essay makes sense and to confirm that you have answered the question.
- Remember, it is much easier to apply these skills if you engage with your law studies and with the individual modules. By undertaking regular and in-depth study you will witness and then acquire the necessary writing skills in addition to substantive legal knowledge.

You can test your skills by carrying out the relevant exercises on the companion website at [www.pearsoned.co.uk/foster](http://www.pearsoned.co.uk/foster).

