

## A LEVEL

*Candidate Style Answers*

# LAW

**H418**

For first teaching in 2020

# **H418/01 The legal system and criminal law – Section A: The legal system**

Version 1

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# Introduction

Please note that this resource is provided for advice and guidance only and does not in any way constitute an indication of grade boundaries or endorsed answers. Whilst a senior examiner has provided a possible level for each response, in a live series the mark a response would get depends on the whole process of standardisation, which considers the big picture of the year's scripts. Therefore the level awarded here should be considered to be only an estimation of what would be awarded. How levels and marks correspond to grade boundaries depends on the Awarding process that happens after all/most of the scripts are marked and depends on a number of factors, including candidate performance across the board. Details of this process can be found here: <http://ocr.org.uk/Images/142042-marking-and-grading-assuring-ocr-s-accuracy.pdf>

The sample assessment material used in this resource is here: <https://www.ocr.org.uk/Images/587463-the-legal-system-and-criminal-law.pdf>

# Section A Question 1

Explain arbitration as a form of Alternative Dispute Resolution.

[8]

## Level 4 answer

Arbitration is where two parties voluntarily agree to have their dispute decided by an arbitrator or a panel of arbitrators. The decision to use arbitration will be in writing and can be taken before or after a dispute arises.

Many commercial contracts have a clause stating that if a dispute arises the parties will settle their dispute by arbitration. This clause is called a Scott v Avery clause.

Arbitration is governed by the Arbitration Act 1996. The aim of the Act is to obtain a fair and impartial resolution without unnecessary delay and cost. The date and time of the hearing will be agreed by the parties in consultation with the arbitrator. The parties in dispute are free to agree the number of arbitrators, this can range from a sole arbitrator to a panel of two or three. The parties can name the arbitrator or, if necessary, the court will appoint one.

Arbitration hearings can be formal or informal. The parties will agree the most suitable procedure for their case. This may be in the form of a paper arbitration where the arbitrator receives the arguments in paper form and no hearing takes place or the parties might decide that a more formal hearing is needed. In the first instance they will submit all the relevant documentation to the arbitrator. The arbitrator will later hear any oral submissions. This type of hearing will be like a court hearing and can include the calling of witnesses. The same court procedures as are available in legal proceedings can be used to ensure witnesses attend.

At the end, the arbitrator will come to a binding decision called an award. The arbitration award can be enforced in the same manner as a court judgement. This arbitration decision is final; however, it is open to challenge on the grounds of serious irregularity in proceedings or on a point of law. A good example of when arbitration is used is in holiday cases. The Association of British Travel Agents is a trade body offering arbitration services to those who have experienced problems with holidays booked through ABTA members.

## Examiner commentary

The answer is well-written and shows excellent knowledge and understanding of all aspects of the arbitration procedure and criteria. It contains a good range of points relevant to the question. There is accurate reference to the Arbitration Act demonstrating wide ranging knowledge. This is a succinct, accurate and fully developed response.

# Section A Question 1

Explain arbitration as a form of Alternative Dispute Resolution.

[8]

## Level 2 answer

Arbitration is very formal and at the end there will be a decision. Parties choose to use arbitration. They will not be forced into it. There is a law that states the rules of arbitration. Arbitration is better than court because the parties can choose where and when they would like the hearing to take place. This is better for both parties than being told by a court exactly when to turn up. Also the people using arbitration can pick the judge. This is good as they can pick a person who knows about their type of case although this is risky as they might not know the law. Some businesses put clauses in contracts which say that if there is a problem they must use arbitration. If they try to take the case to court the judge will say no. Nowadays there are trained arbitrators but they can cost a lot of money. At the end of the hearing, the arbitrator will make a decision. The parties will have to follow the decision. There is not really any way of appealing the decision unless something has gone wrong with the law.

## Examiner commentary

This candidate demonstrates basic knowledge of arbitration. The candidate recognises that there are key elements and begins to explain some of the points; for example, where they state that 'there is a law that states the rules of arbitration'. This point is only partially developed and shows a lack of knowledge of an important element, the Arbitration Act. Credit cannot be given for the AO3 points made throughout the response. This response could have been improved by the use of a greater range of relevant and specific detail. Detail would include, for example, using the word 'award' or naming the term *Scott v Avery* clause. To move up the levels this response needed to be more developed and for there to be greater use of key terminology as mentioned above.

## Section A Question 2

Describe the different forms of legal advice and assistance offered by the Legal Aid Agency to individuals in custody. [8]

### Level 4 answer

Advice and assistance offered to an individual in custody comes under the Legal Aid Agency in the Ministry of Justice. S13 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) addresses advice and assistance for individuals in custody. The Act states that initial advice and assistance are to be available to an individual who is arrested and held in custody at a police station. The Director of Legal Aid Casework supervises criminal legal aid and must have regard to the interests of justice in determining the nature of assistance given.

The Legal Aid Agency makes contracts with law firms to provide legal services to people charged with offences, these are called franchised firms. These firms will have a duty solicitor or Police Station Representative available, at any time, to give advice and assistance. This advice and assistance is available to everyone and it is free. No means or merits tests are required.

In the first instance advice will most likely be given over the telephone rather than by a solicitor attending the police station. If the solicitor is to attend the police station to give advice and assistance they will have to show that their attendance is necessary to materially progress the case or that the suspect is in some way vulnerable. In the absence of one of these factors, advice will only be given over the telephone, as the solicitor will be unable to claim for his or her time.

A person charged and still in custody may require advice and assistance with preparatory work for their case and help with their application for representation. This is available but limited to one hour's work.

### Examiner commentary

The candidate focuses on the question from start to finish and demonstrates excellent knowledge and understanding of the different forms of legal advice and assistance available to those in custody. The response is succinct but covers a wide range of relevant information, including up to date legislation. The candidate makes good use of LASPO to develop key points.

## Section A Question 2

Describe the different forms of legal advice and assistance offered by the Legal Aid Agency to individuals in custody. [8]

### Level 2 answer

The way legal aid is given to a person in custody at the police station changed a couple of years ago when a new act was passed. There is now less money given to legal aid. The rules of who can have legal aid and who cannot are made by the Legal Aid Agency. The Government gives the Legal Aid Agency money and they give some money to criminal lawyers.

A person detained at the police station can always get legal aid from a solicitor and they will not have to pay for it as it is free. The solicitor does not have to check how much a person earns first they can just have it. The police must tell the person they can have a free solicitor when they are arrested. Because the Legal Aid Agency doesn't get enough money they have stopped solicitors from going to the police station. The solicitor will only be able to speak to the suspect on the telephone. Sometimes it is not even a solicitor who speaks to the suspect and it might be someone who has no legal qualification who has passed a course. The only time a solicitor can go to the police station to sit in on an interview is if the person really needs help.

It is not all solicitors that can help at the police station. It is only the solicitors in firms that have special contracts to go the police station.

### Examiner commentary

The candidate is aware of the restrictions on funding and legal representatives attending and shows basic understanding. The candidate is aware that money is a problem but the detail in key points is missing. The points made lack development. There is no legal terminology or statutory reference and all the points made are vague. This response could have been improved by greater detail throughout.

# Section A Question 3

Discuss the advantages of using arbitration as a way of dealing with a civil dispute.

[12]

## Level 4 answer

One of the main advantages of arbitration is its flexibility. This is the opposite to civil courts where there are strict procedures and timetables.

Arbitration is good as parties are free to choose a formal or informal hearing, or even if they have a hearing at all. Unlike court, parties can choose a paper hearing. The paper hearing is an advantage as the parties can carry on with work and life and simply await the decision of the arbitrator in the post. If there is a formal hearing the parties can select a time and place convenient to them both. This is an advantage as the hearings are not dictated by set opening hours or strict court procedures. However, if witnesses and lawyers are involved this can make the procedure expensive.

Another advantage of arbitration is that it is carried out in private and away from the public eye. Businesses would much rather nobody knew if someone had taken legal action against them and what they were ordered to pay in compensation. However, some may say this is a disadvantage as businesses should not be allowed to hide their faults behind arbitration.

Unlike court, arbitration allows the parties to pick their own arbitrator. This is an advantage as the parties can pick someone who has specialist technical knowledge of the issue at the centre of the dispute. For example, in a dispute involving a construction company the chosen arbitrator might have previously worked in that field. In the civil courts, the judge will be a legal expert which is good if a point of law arises but not so good if a technical point comes to light. By having a technical expert, it often eliminates the need for expert witnesses saving time and costs, another advantage.

Arbitration hearings tend to be quicker than court hearings and as a result they are also cheaper. Courts often have a backlog of cases and there is a lot of waiting time. This is not usually the case in arbitration. Anything that makes a case quicker will make it cheaper for both parties. However, arbitration is becoming more and more popular and as a result there can be a wait for the chosen arbitrator to be available as they are quite busy.

## Examiner commentary

This response demonstrates a sustained focus on the question from start to finish. A wide range of issues are evaluated in order to illustrate the advantages of arbitration. There is a clear chain of discussion with one issue linking to another. The candidate recognises there are some negative aspects and these assist in fully developing discussion points. Overall an excellent evaluation of the advantages of using arbitration as a way of dealing with a civil dispute.

# Section A Question 3

Discuss the advantages of using arbitration as a way of dealing with a civil dispute.

[12]

## Level 2 answer

An advantage of arbitration is that it is cheaper as no solicitors are needed. An advantage of arbitration is that if you don't win you do not have to pay the other sides' costs. Another advantage of arbitration is that the parties can pick when and where they want to have their case heard. This is good for both parties as it is up to them. Arbitration is good because there will be a binding decision made at the end. The losing party must do as the court says and if they don't they will be in trouble. An advantage of arbitration is that it is private and not open to the public to view. An advantage of arbitration is that the parties agree to it. This should mean that they are happier at the end as they have not been forced into it. An advantage of arbitration is that there should be no bad feeling at the end as they agreed to use arbitration. An advantage of arbitration is that it is quicker than court. An advantage of arbitration is that the arbitrator is an expert in the case not just a legal expert.

## Examiner commentary

The response demonstrates an ability to reference the key advantages of using arbitration but the evaluation is basic. The points discussed are only partially developed. The response reads as a list of advantages rather than a discussion. This response could have been improved by further developing the points stated beyond a list and using evidence to support them. The candidate might use a counter argument to develop points; for example, when addressing the advantage that arbitration is quicker than court it might have added that as arbitration has become more popular, the waiting times for a hearing have become longer. All this would add to the development of the discussion.

# Section A Question 4

Discuss the problems with government funding for criminal cases.

[12]

## Level 4 answer

Everybody is entitled to publicly funded advice and assistance when arrested and held in custody. There are no means or merits tests. This might suggest that there is no problem with funding, however this is not so. Due to a lack of money most suspects are now limited to a phone call from a lawyer rather than physical attendance during the interview.

In times of budget cuts and austerity there is not enough money being allocated to the Ministry of Justice for legal aid. This means there is a constant balancing act between giving people funding for criminal cases and the limits on the amount of money that can be allocated to legal funding.

A further problem is that fewer lawyers are taking on publicly funded criminal work. There has been a significant drop in law firms applying to do criminal legal aid work. In 2015 some criminal barristers refused to take on Crown Court cases as a show of support for criminal defence solicitors facing a huge cut in their fees. For lawyers to take such a stand suggests there is a real problem in government funding of criminal cases.

To obtain funding for criminal cases the defendant must go through two tests – the interests of justice test and the means test. The interests of justice test can cause offenders problems, particularly first-time offenders who are more likely to fail than repeat offenders. Unlike repeat offenders, first-time offenders are unlikely to receive a custodial sentence and as a result will have to represent themselves. This is a problem as repeat offenders should not be given an unfair advantage because they have committed crimes before.

In both the Magistrates' and Crown Court the defendant must pass a means test. Both courts have strict tests but the Magistrates' Court test is the strictest, leaving many suspects unrepresented. Approximately three quarters of adults applying for legal aid in the Magistrates' Court are denied funding. This indicates a huge problem when so many fail to qualify. Unless the defendant is on benefits or a very low income they will not pass the means test and will be denied financial assistance. Like the interests of justice test this again appears to favour repeat offenders as they are less likely to be employed. The Crown Court means test is slightly fairer and less problematic in so much as most defendants will be given legal aid; however, at the end of the case many will find themselves having to pay a contribution unless they are found not guilty.

The main problem with funding is the lack of money being allocated to the legal aid pot each year.

## Examiner commentary

This response demonstrates sustained discussion throughout with constant reference to the issue in the question – the problems with funding. This candidate introduces information not mentioned in the mark scheme and illustrates the point that mark schemes are a guide and should not be treated as prescriptive. There is discussion of a wide range of valid points and these points are fully developed and supported. The response is logically set out beginning in paragraph one by acknowledging that at first glance it might appear there is no problem but then moves on to discuss what problems there are and why. The information discussed is both relevant and current.

# Section A Question 4

Discuss the problems with government funding for criminal cases.

[12]

## Level 2 answer

The biggest problem with funding is that there is not enough money to go round. It means people who really need help might have to pay for legal costs themselves and represent themselves which is not fair.

Another problem is that there are too many tests a person must go through. It is really only people who have committed crimes before or have no money and are likely to go to jail that are going to get free help. If a person wants help they must show they have no money. This is the same for civil cases. The suspect might have to find other places to get help. There are CABs, Law Centres and Trade Unions. They might give advice. Unless a person is on the minimum wage or benefits they will not qualify for free advice.

Because the Government is not giving out so much money there are lots of firms who no longer want to do legal aid work as they cannot earn as much money. Solicitors and barristers have done a lot of training and they want to earn lots of money. To get money they are better off working for a business as that way they earn lots of money.

Even at the police station where suspects can have free advice they are now usually only allowed this by telephone. It is only special cases that can have a solicitor at the station with them.

There are lots of problems with government funding for criminal cases.

## Examiner commentary

The points made in this response are relevant but mostly underdeveloped. There is a partial focus on the question but the candidate starts to discuss areas that are not relevant. This can be seen in paragraph two where the candidate starts to look at other advice agencies rather than concentrating on government funding. This is also seen in the third paragraph where the candidate again moves away from the theme. Credit can only be given for relevant information. However, this candidate does recognise that lack of money is a key problem. The response could have been improved by the inclusion of a greater range of more specific and developed discussion relating to the problems. In paragraph two the candidate fails to name and distinguish between the two tests and as a result the discussion is only partially developed. Although the evaluation is basic the candidate does mention key problems.

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