

ANGUILLA CONSTITUTIONAL REVIEW

Chapter 1: Protection of Fundamental Rights and Freedoms

1. The United Kingdom Government will require the following changes to Chapter 1 of the draft Constitution of Anguilla set out in the Report of the Anguilla Constitutional and Electoral Reform Committee of 31 March 2017. Many of these changes are substantive, and are required in order to bring the provisions into conformity with the European Convention on Human Rights (ECHR). This is important because the United Kingdom is responsible for compliance with the Convention by Anguilla before the European Court of Human Rights. These changes will also bring this Chapter into line with the revised Fundamental Rights Chapters in the new constitutions of other British overseas territories. It will be noted that a number of the changes listed below are of a drafting or editorial nature rather than being substantive.

Section 2: Fundamental rights and freedoms of the individual

2. The list of grounds of discrimination in lines 2-3 is outdated and inconsistent with obligations under the ECHR, which extends to Anguilla. The words “whatever his race, place of origin, political opinions, colour, creed or sex” should be replaced by the following words:

“without distinction of any kind, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, or other status”.
3. In line 11, the words “and to related rights and freedoms,” should be inserted after “aforesaid rights and freedoms,” because the rest of the Chapter deals with rights and freedoms going beyond, but related to, those summarised in section 2(a), (b) and (c).

Section 3: Protection of right to life

4. For subsection (3) to be compatible with the ECHR, these changes need to be made –
 - (a) in line 3, replace the words “such force as is reasonably justifiable” with the words “force which is no more than absolutely necessary”;
 - (b) in paragraph (a), delete the words “or for the defence of property”;
 - (c) in paragraph (d), delete the words “in order lawfully to prevent the commission by that person of a criminal offence, or”.

Section 4: Protection of right to personal liberty

5. In the chapeau to subsection (2), after “as may be authorised” add “and in accordance with a procedure prescribed by”.
6. In subsection (2)(c), substitute “a court” for “the High Court or the Court of Appeal or such other court as may be prescribed by the Assembly”.
7. In subsection (2)(f), substitute “under any law” for “under the law of Anguilla”, to allow an arrest at the request of another country for an offence committed against its law.
8. There must be a question whether subsection (2)(k) is still needed in current circumstances, and it should therefore be deleted.
9. To ensure compatibility with ECHR obligations, in subsection (3) the words “as soon as reasonably practicable” should be replaced with “promptly”. The reference in subsection (5) to “subsection (5)” should be to “subsection (4)”.
10. In subsection (4) after the words “and at his own expense” add “or, when the interests of justice so require, by a legal representative at the public expense”. The European Court of Human Rights has held that in order for a fair trial to remain sufficiently practical and effective, Article 6(1) of the ECHR requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. We therefore propose the additional language to comply with these findings.
11. In relation to subsection (9), we would like to understand whether the word “insane” is still the correct terminology to use under Anguillian law.

Section 6: Protection from slavery and forced labour

12. To better reflect the ECHR, this provision should refer to “forced or compulsory labour” rather than simply “forced labour”. This captures the notion in the ECHR that there are two issues – whether work is exacted under menace of a penalty and whether the work has been entered into voluntarily.

Section 7: Protection of freedom of movement

13. There must be a question whether subsections (3)(a), (4) and (5) are still needed in current circumstances. They do not appear in other British overseas territory constitutions and should be deleted.
14. In subsections (3)(b) and (g), the words “reasonably justifiable” should be replaced by “necessary” in order to more closely track the ICCPR and relevant provisions of Protocol 4

to the ECHR. Although these instruments do not currently extend to Anguilla, this would more readily enable the extension of those instruments to Anguilla at the appropriate time.

15. Subsection (3)(c) needs to be qualified in the same way that the equivalent provisions in the recent BVI, TCI, Montserrat and Cayman Islands Constitutions are qualified. This would deal with criticisms made by the Human Rights Committee established by the International Covenant on Civil and Political Rights. This involves adding to subsection (3)(c) the following words –

“but –

(i) no restriction may be imposed by virtue only of this paragraph on the right of any such person, so long as he or she is lawfully present in Anguilla, to move freely throughout Anguilla and to reside anywhere in Anguilla;

(ii) no restriction may be imposed by virtue only of this paragraph on the right of any such person to leave Anguilla; and

(iii) no such person shall be liable, by virtue only of this paragraph, to be expelled from Anguilla unless the requirements specified in subsection (6) are satisfied.”

- A new subsection (6) would also be added in the following terms –

“(6) The requirements to be satisfied for the purposes of subsection (3)(c)(iii) (that is to say, before a person who does not belong to Anguilla may be expelled from Anguilla) are as follows –

(a) the decision to expel that person is taken by an authority, in a manner and on grounds prescribed by law;

(b) that person has the right, save where the interests of defence, public safety or public order otherwise require, to submit reasons against his or her expulsion to a competent authority prescribed by law;

(c) that person has the right, save as aforesaid, to have his or her case reviewed by a competent authority prescribed by law; and

(d) that person has the right, save as aforesaid, to be represented for the purposes of paragraphs (b) and (c) before the competent authority or some other person or authority designated by the competent authority.”

16. The exception in subsection (3)(e) is too extreme. There should be added at the end the words “, that are reasonably required for the proper performance of their functions”.

17. In subsection (3)(f), line 3, after the words “imprisonment in” the words “that other country” should be replaced with “some other country”. This would correct what appears to be a mistake in the present Constitution.

Section 8: Protection from inhuman treatment

18. In order to properly label this provision, we would suggest amending its title to: “Protection from torture and inhuman treatment”.

Section 9: Protection from deprivation of property

19. In subsection (4) the word “Legislature” should be substituted for “Assembly”.

Section 10: Protection from arbitrary search or entry

20. The title of this section would be better rendered as “Protection of private and family life and privacy of home and other property” (cf. BVI Constitution section 19).
21. In order to comply with the ECHR, subsection 2 should be amended so that the chapeau reads: “... to the extent that it is necessary in a democratic society:”. Each subsection should be reworded accordingly to fit with this new chapeau.
22. In subsection (2)(a), the words “, internal security” should be added after “defence” or the term “defence” should be amended to “national security” to more closely reflect the ECHR.
23. In subsection (2)(e), all the words after “such order” should be deleted in light of the addition to the chapeau suggested above..

Section 11: Provision to secure protection of law

24. To comply with ECHR obligations –
- (a) in subsection (6)(a), the phrase “as soon as reasonably practicable” should be replaced with “promptly”, and in line 2 the words “and in detail” should be inserted after “understands”;
 - (b) in subsection (6)(c), there should be added at the end the words “or, when the interests of justice so require, by a legal representative at the public expense”;
 - (c) in subsection (6)(e), the words “or speak” should be inserted after “understand”.
25. In subsection (6)(d), line 5, “condition” should be replaced with “conditions”.
26. Subsection (6)(f) would introduce for the first time a constitutional right to trial by jury. The UK has opposed this in other constitutions. This paragraph should therefore be deleted. An alternative, as a compromise, would be a provision such section 6(2)(g) of the Montserrat Constitution: “shall, when tried before the High Court, have the right to trial by jury except as otherwise provided for by Act of the Legislature”.

Section 12: Protection of freedom of conscience

27. For labelling purposes, we suggest amending the title of this provision to “Protection of freedom of thought, conscience and religion”.
28. In subsection (5), in order to comply with the ECHR, the chapeau should read “... to the extent that it is necessary in a democratic society:”.
29. In subsection (5)(a), the words “, internal security” should be added after “defence” or the term “defence” should be amended to “national security” to more closely reflect the ECHR.
30. In subsection (5)(c), all the words after “instruction in them” should be deleted given the addition to the chapeau of subsection (5) suggested above. .

Section 13: Protection of freedom of expression

31. To comply with the ECHR, the chapeau of subsection 3(a) should be amended to read “that is necessary in a democratic society:”.
32. In subsection (3)(a)(i), the words “, internal security” should be added after “defence” or the term “defence” should be amended to “national security” to more closely reflect the ECHR.

Section 14: Protection of freedom of assembly and association

33. To comply with the ECHR, the chapeau of subsection 3(a) should be amended to read “that is necessary in a democratic society:”.
34. In subsection (3)(a)(i), the words “, internal security” should be added after “defence” or the term “defence” should be amended to “national security” to more closely reflect the ECHR.
35. Subsection (3)(b) is too extreme. There should be added to the end the words “that are reasonably required for the proper performance of their functions”. In addition, subsection (3)(b)(ii) should be amended to read “... is shown to be necessary in a democratic society.”

Section 15: Protection from discrimination on grounds of race, etc

36. To comply with ECHR obligations, in subsection (3) the phrase “by race, place of origin, political opinions, colour, creed or sex” should be replaced by “such as by sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, or other status”. Similarly, we propose that the title of this provision be amended to read “Prohibition of discrimination”.
37. The exception in subsection (4)(a) is too broad. It should be amended to read –

“with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Anguilla of persons who do not belong to Anguilla” (cf. Montserrat Constitution section 16(5)(b)).

38. Subsection (4)(d) seems excessive in allowing discrimination in the provision of services in favour of Anguillians. This should be deleted.
39. In subsection (5), line 3, after “qualifications” there should be inserted the words “(not being qualifications specifically relating to any such description as is mentioned in subsection (3))”.

Section 16: Protection of the environment

40. The two references to the “Assembly” should be replaced by “Legislature”. It is the Legislature which will have the power to make laws, not the Assembly.

Section 17: Protection of children

41. The reference to “Assembly” should, for the same reason, be replaced by “Legislature”.

Section 19: Protection of persons detained under emergency laws

42. The reference in line 1 of subsection (1) to section 7 is obviously a mistake. The reference should be to section 18.

Section 20: Enforcement of protective provisions

43. At the end of subsection (4), add “or the High Court, Court of Appeal or Her Majesty in Council have already determined the question”.
44. In subsection (5), the reference in line 1 to subsection (3) should be a reference to subsection (4).
45. In subsection (7), the reference to “Assembly” should be replaced by “Legislature”.
46. In subsection (8), add “, subject to any law passed by the Legislature,” after the words “The Chief Justice may”.
47. We would suggest adding a new subsection (9) as follows. The Judicial Committee of the Privy Council has already held that it is appropriate to take into account, when interpreting constitutional fundamental rights provisions, the interpretation given to the corresponding rights in the ECHR. The following provision, drawn from the TCI and Falkland Island Constitutions, puts this on a constitutional footing, which has the benefit of being clear to all:

“(9) In determining any question which has arisen in connection with the interpretation or application of any of the foregoing provisions of this Part, every court shall take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights;

(b) decision of the European Commission of Human Rights (“the Commission”) given in a report adopted under Article 31 of the Convention;

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention;

(d) decision of the Committee of Ministers of the Council of Europe (“the Committee of Ministers”) taken under Article 46 of the Convention;

(e) judgment, decision or declaration of a superior court in the United Kingdom on the interpretation or application of the Convention, whenever made or given, so far as, in the opinion of the court, it is relevant to the proceedings in which that question has arisen.

(10) In subsection (8), references to the Convention are references to it as it has effect for the time being, except that—

(a) the references in subsection (8)(b) and (c) to Articles 31, 26 and 27(2) are references to those Articles as they respectively had effect immediately before the coming into force of the Eleventh Protocol;

(b) the reference in subsection (8)(d) to Article 46 includes a reference to Articles 32 and 54 as they had effect immediately before the coming into force of the Eleventh Protocol; and

(c) the references in subsection (8) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

(11) In subsections (9) and (10) —

“the Convention” means the European Convention on Human Rights;

“the Eleventh Protocol” means the protocol to the Convention (restructuring the control machinery established by it) agreed at Strasbourg on 11 May 1994; and

“a superior court in the United Kingdom” means any of the following—

(a) the High Court or the Court of Appeal in England;

(b) the High Court of Justiciary or the Court of Session in Scotland;

- (c) the High Court or the Court of Appeal in Northern Ireland;
- (d) the House of Lords or the Supreme Court; and
- (e) the Judicial Committee of the Privy Council.”

Section 21: Declaration of emergency

48. This section is incompatible with the Emergency Powers (Overseas Territories) Order 2017 (S.I. 2017/181), which applies to Anguilla. This section should therefore be deleted.

Missing provisions

49. Before receiving the draft proposals from the Government of Anguilla, we had noticed a couple of omissions from the proposed Chapter 1 on Fundamental Rights and Freedoms. The most obvious is a section on the right to marry, a right which is expressly protected by the ECHR (which extends to Anguilla). A section on the right to marry, along the lines of those included in the other recent Overseas Territory constitutions, should be included. Another omission is a section on the right to education, which should be included along the lines of other constitutions.

50. New sections should therefore be included in Chapter 1 along the following lines, based on sections 20 and 22 of the BVI Constitution.

Right to marry

11A.-(1) Every man and woman of marriageable age (as determined by or under any law) has a right to marry and to found a family in accordance with laws enacted by the Legislature.

(2) No person shall be compelled to marry without his or her free and full consent.

(3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that it is necessary in a democratic society –

(a) in the interests of public order, public morality or public health;

(b) for regulating, in the public interest, the procedures and modalities of marriage; or

(c) for protecting the rights and freedoms of other persons.

(4) Spouses shall be entitled to equal rights and shall be subject to equal responsibilities-

(a) as between themselves, both during marriage and, if the marriage is dissolved, at its dissolution; and

(b) as regards their children, where there are any, both during the marriage and, if the marriage is dissolved, at and after its dissolution,

but this equality of rights and responsibilities shall be subject to such arrangements or measures as may be agreed or as may be ordered by a court, in the interests of the spouses and their children.

Right to education

12A.-(1) This section is without prejudice to section 12.

(2) Every child of the appropriate age, as provided by law, shall be entitled to receive primary education which shall, subject to subsection (4), be free.

(3) Except with his or her own consent (or, in the case of a minor, the consent of his or her parent or legal guardian), no person attending a public educational institution shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance.

(4) Every person who is the parent or legal guardian of a child shall be entitled to have his or her child (of whatever age) educated, at his or her own expense unless a law otherwise provides, in a private school (that is to say, a school other than one established by a public authority) and, in such a school, to ensure the religious and moral education of his or her child in accordance with his or her own convictions.

(5) Nothing in any law or done under its authority shall be held to contravene subsection (4) to the extent that it is reasonably justifiable in a democratic society and to the extent that the law makes provision requiring private schools, as a condition of their being allowed to operate and on terms that are no more onerous than are applicable to schools established by a public authority, to satisfy –

(a) such minimum educational standards (including standards relating to the qualifications of teaching staff and other staff) as may be prescribed by or under that or any other law; and

(b) such minimum standards imposed in the interests of public order, public morality or public health as may be so prescribed.