



THE ANGUILLA HOUSE OF ASSEMBLY

COMMITTEE OF THE WHOLE HOUSE

REVIEW OF THE REPORT OF THE ANGUILLA CONSTITUTIONAL AND ELECTORAL REFORM COMMITTEE PROPOSALS FOR CONSTITUTIONAL AND ELECTORAL REFORM

September 06, 2019

Introduction

A Committee of the Whole House of Assembly (the “Committee”), under the chairmanship of Hon. Jose Vanterpool MLA, met during the months of April and May 2019 to consider the 2017 Report of the Constitutional and Electoral Reform Committee (the “2017 Report”). Its objective was to try to achieve consensus on what position the House of Assembly would take in respect of the provisions of the draft constitution contained in the 2017 Report. (the “new Constitution”) The Committee is pleased to report that it has achieved its objective.

The Member for Island Harbour having had reservations about varying aspects of the constitutional and electoral process has undertaken with the endorsement of the committee to place those reservations in writing. When produced, the reservations held by the Member for Island are to be appended to and form part of this report and the report republished.

Provided that members of the public are satisfied with the Committee’s proposals for the new Constitution, and provided that the House of Assembly formally adopts this Report, we expect this Report to provide a basis for the preparation of drafting instructions for the new Constitution.

Members of the House intend to engage in widespread consultation with members of the public to ensure there is full understanding of any proposed changes to provisions of the new Constitution and that there is consensus as far as is possible on the contents of the new Constitution.

The Committee recommends to the people of Anguilla and to the House of Assembly the adoption in principle of the draft new Constitution, subject to the matters set out below.

Committee Findings

We accept the recommendations of the 2017 Constitutional and Electoral Reform Committee save as follows:

- [1] The new Constitution should incorporate any new and necessary provision, if any, introduced by the Anguilla Constitution (Amendment) Order 2019 in case it is not included in the 2017 Report and draft Constitution.
- [2] **Marriage:** Consideration should be given, in light of recent developments in other overseas territories to protecting “traditional marriage”. Note that section 10 of the Monserrat Constitution defines marriage as between a man and a woman.
- [3] **Provision to secure protection of law:** Section 11(12) of the draft Constitution introduces a limited right to compensation where a person has been convicted of a criminal offence and his conviction has been quashed or he has been pardoned on the ground that a newly-disclosed fact shows there has been a miscarriage of justice. Additionally, at common law, a person who has been wrongfully arrested without a warrant can sue for the tort of wrongful arrest. But where a person can prove that he was wrongfully arrested on a warrant, eg, because the Magistrate who issued the warrant did so on the basis of a false statement by the person laying the complaint, no compensation

is payable. The basis for this is that the arrest was effected by a judicial order and not by the arresting officer. The Committee feels that citizens ought to be entitled to compensation whenever they can prove they have been wrongfully arrested. This can be achieved by altering the commencement of subsection (12) to read, “When a person has been wrongfully arrested, or has by a final decision . . .”

- [4] **The Governor.** Section 29(5) provides that the Premier and the Leader of the Opposition shall be consulted before the appointment of any person to the office of Governor. The Committee considers that they should be more than consulted. Subsection (5) should say that “No person who is objected to by both the Premier and the Leader of the Opposition shall be appointed to the office of Governor.”
- [5] **Office of Deputy Governor:** Section 30(2) provides for the Premier and the Leader of the Opposition to propose three (3) names to the Secretary of State who shall choose one of them. The Committee feels that the forwarding of names should be directly to the Governor rather than to the Secretary of State in recognition that the Secretary of State may not be familiar with proceedings and persons in the Territory.
- [6] **Attorney-General:** Section 40(1) provides for the Governor to consult with the Premier and the Leader of the Opposition on an appointment. The Committee feels that there should be more than consultation. No person should be appointed if objected to by both the Premier and the Leader of the Opposition.
- [7] **Summoning of Cabinet and the transaction of business:** The Committee agreed that Section 45 (2) should be reviewed to ensure there is no conflict with the Anguilla Constitution (Amendment) Order 2019. The Committee further agreed that in any event 50% of the members of Cabinet should be present to constitute a quorum.
- [8] **Qualification of voters:** The Committee felt that further consultation should be undertaken to determine what is the intent and desired effect of the use of the term ‘ordinarily resident’.
- [9] **Standing Orders and committees:** The Committee opined that the financial independence of the House of Assembly should be established. The Committee felt that this could be achieved through the passage of ancillary legislation or by recognising the House of Assembly as an institution protecting good governance which would, therefore, be covered by Section 122.
- [10] **Electoral District Boundary Commission and Supervisor of Elections:** The Committee in reviewing Sections 86 and 109 considered the value of establishing an independent electoral commission to oversee the Electoral Office. The Committee considered the amalgamation of the Electoral and Anguillian Status Commission to promote greater transparency. The Committee noted the need to build institutional continuity in the Electoral Office but questioned whether an electoral commission was needed in light of Anguilla’s size.
- [11] **Anguillian Status Commission:** The Committee noted the need to ensure that the language utilised in the Anguilla Constitution (Amendment) Order 2019 was reflected in

Section 99. The Committee further noted that the final constitutional provisions needed to reflect the provisions and language of the Anguilla Constitution (Amendment) Order 2019.

- [12] **Advisory Commission on the Prerogative of Mercy:** The Committee felt that the reference to ‘Director of Health Services’ in Section 100 (1) should be to ‘Director of Medical Services’. The view was also expressed that the Leader of Opposition or his/her representative should be included in Section 100 (1) as a member of the Advisory Commission on the Prerogative of Mercy.
- [13] **Legislation regarding Commissions:** The Committee raised questions about the number of commissions referenced by the Constitution and how they would be populated. The Committee expressed the view that any amalgamation of commissions would have to be done based on practicality.
- [14] **General provisions relating to Commissioners:** The Committee considered the issue of compensation for commissioners. Some concern was expressed that commissioners would be unable to engage in any other occupation. The Committee noted that Section 110 (5) allows the Governor, acting in his discretion, to allow commissioners to engage in other occupations.
- [15] **Public Assets:** The committee felt that Section 111 should provide for any disposition of any significant public asset including land and any mineral and fishing rights to be authorised by resolution of the House of Assembly. The Committee also expressed the view that consultation should be undertaken so that the items considered significant assets could be identified and specified.
- [16] (i) **General principles:** In reviewing Section 112 and the other sections under Chapter 10 (Public Finance) the Committee expressed the view that the sections provided too much detail particularly in relation to the involvement of the UK Government. The Committee mandated a Sub-Committee comprising of Hon. Jose Vanterpool MLA, Clerk to the House of Assembly (Lenox Proctor) and former members of the Constitutional and Electoral Reform Committee (Mr. Don Mitchell, Miss Marie Horsford, Mrs. Kristy Richardson- Harrigan, and Mr. Stanley E. Reid) to engage with the Permanent Secretary Finance to review the Public Finance provisions set out in Chapter 10 of the new Constitution.
- (ii) The Sub-Committee, absent Mr. Mitchell who resigned from the Sub-Committee, having met with the Permanent Secretary Finance and having considered his comments and those of the Ministry of Finance Team (both attached) did not consider itself to be equipped to formulate a position in relation to their observations. The Sub-Committee, therefore, suggested that the Committee engage with the Permanent Secretary Finance to determine what changes, if any, it would advocate in relation to the Public Finance provisions set out in Chapter 10 of the new Constitution.
- (iii) The Permanent Secretary Finance met with the Committee as proposed by the Sub-Committee. The Committee determined that a retreat should be arranged to which Finance officials (elected and appointed) from the other Overseas Territories and officials

of Anguilla's Ministry of Finance would be invited, to engage with members of the Committee as they review Chapter 10 of the New Constitution, to determine what provisions should be set out in that chapter.

- [17] **Power of Government to borrow or lend:** In reviewing Section 119 (7) & (8) the Committee felt that the requirement for House of Assembly approval would cause some difficulty to the grant of government loans for medical emergencies. The Committee felt that provision should be made for exceptions to the requirement for the approval of the House of Assembly before granting such loans.
- [18] **Funding of institutions protecting good governance:** In reviewing Section 122 (5) (6) & (7) the Committee questioned how a deadlock would be broken if the House of Assembly rejected the budget.
- [19] **Implications for Civil Servants:** The Committee felt that further consultation should be undertaken in relation to sections that restricted the activities of civil servants.

Further Recommendations

In terms of the way forward the Committee recommended the following:-

- (i) The process for further consultation outlined by the Ministry of Home Affairs and Education should be followed, insofar as it does not limit any new issues raised during such consultations.
- (ii) The Committee further noted that the final constitutional provisions needed to reflect the provisions and language of the Anguilla Constitution (Amendment) Order 2019.
- (iii) The life of the Committee should be extended to facilitate the Committee conducting consultations with the public and negotiations with the UKG.
- (iv) The Committee would meet to review the revised Constitution which incorporates the provisions of the Anguilla Constitution (Amendment) Order 2019.
- (v) Consultations would be undertaken while awaiting the outcome of the retreat referenced in paragraph 16 (iii), to review Chapter 10 of the New Constitution.

Corrections

As it relates to "People-initiated referendums": The members of the Constitutional & Electoral Reform Committee confirmed that the reference to 25% in the Explanatory Memorandum was correct and should replace the reference to 33% in Section 62 (2) (a).

Comments: Dr. Aidan Harrigan, Permanent Secretary Finance on Chapter 10

Thanks for providing the BVI and TCI Constitutions. I am in Trinidad to attend the CDB June 2019 Board of Directors Meeting to be followed by the Annual Board of Governors Meetings. Consequently, I will be not able to attend the Committee Meeting proposed for tomorrow afternoon.

In addition to the BVI and TCI Constitutions which you forwarded, I was also able to access the Cayman and Monserrat Constitutions. Based on a review of the relevant sections of Constitutions and building on my comments of May 24, I offer the following.

BVI (2007), Cayman (2009), Monserrat (2010) and TCI (2011) Constitutions all have explicit sections relating to Public Finance whereas Anguilla's existing Constitution does not (unless I have missed it). For BVI and Cayman, as the older constitutions the section is rather cursory. Monserrat is more detailed. TCI's is the most detailed and prescriptive, at that. Further it would seem that the Draft Anguilla 2015 Order (not enacted), which forms much of the basis of what is being proposed for Anguilla's revised constitution is in fact modeled for the most part on the provisions in the TCI 2011 Constitution. As I would have indicated in my May 24 email, context is every thing. We would all recall that in 2009 (if my memory serves me correctly) the UKG suspended the TCI constitution and imposed direct rule citing among other things, wide spread and endemic corruption. What emerged as the TCI 2011 Constitution no doubt would have been informed by the direct rule experience, including views on public financial management.

One key question I have therefore is as follows: are the TCI 2011 Constitution provisions on Public Financial Management the new "gold standard" which all the UK Caribbean OTs will be compelled to enact?

BVI, Cayman and Anguilla all agreed Fiscal Frameworks with the UKG between 2012 and 2013. It would seem that TCI, emerging out of UK direct rule agreed to a Fiscal Framework earlier. I do not know what is in effect in Monserrat.

My general question of what is appropriate to be included in a Constitution versus particular Acts as regards Public Financial Management remains.

As I indicated, a Team from the Ministry (primarily Finance Division Officers) tabulated comments which I will forward under separate email cover.

Some additional points I would like to highlight as follows:

1. Fiscal Framework - clauses 3, 4,5 - Anguilla already has a Fiscal Framework which is titled "Framework for Fiscal Sustainability and Development" which is aligned with or perhaps it is better to say operationalized by the Fiscal Responsibility Act so I don't understand reference to repealing the FRA. Again this highlights the issue of what is appropriate for inclusion in a Constitution. If the desire is to have a commitment to multi-year Economic and Fiscal Planning as a principle that is not objectionable. However, to import en bloc the provisions of an Act which seeks to give life to that principle - eg. a Fiscal Responsibility Act or a Economic Development and a Fiscal Sustainability Act - is problematic as by their nature such acts need to

be periodically revised. And as I indicated previously, if in the Constitution does that mean the Constitution will have to be reviewed every 5 years?

2. Virement, Reallocation and Contingency Warrants - Clause 116, Section 2. Would suggest that appropriate place to deal with these concerns is to modernize the FAA Act. If there is no ability to do virements for example, or go to the Legislature to approve, the system will grind to a halt. If my recollection is correct at present the FAA requires the Minister of Finance to sign off on virement requests. I believe the point the External Auditors have been making is that the Minister of a Finance is not best placed to do such but this instead can be articulated in the responsibilities of Accounting Officers, subject to certain parameters. Reallocation and Contingency Warrants currently require House of Assembly Approval.

3. Appropriation Bill - Clause 118, Section 4 - cannot offer a view as do not have sight of Section 107 of the proposed revision of the constitution.

4. Borrowing - Clause 119: 5 - not sure about this as most borrowing is undertaken with the principle of “pari passu” ; 6 - what does this mean?

5. Functions of the Governor - Clause 120 - does not appear to be in the TCI Constitution (unless I missed it) - why this more stringent and explicit application of the powers of the Governor as proposed for Anguilla.

6. Appropriations Committee - in principle no objection to the concept but some questions on practical application as currently proposed - the Ministry Team comments speaks to this a bit more.

7. Funding of Institutions to Protect Good Governance - again in principle seems to be a good concept - how would it be practically applied?

8. Public Accounts Committee - Clause 123, 2 - is this in accordance with best practice?

9. Remuneration of Speaker and other Members of Assembly - recommendation seems sensible - needs to be objectivity in such a process.

10. Chief Auditor - Clause 126 - the importance of the Chief Auditor function is recognized - however should keep the option of outsourcing that function as currently is the case or territories sharing the costs as these are specialist services and not cheap.

On a personal note - I struggle with the concepts of Constitutional Reform vs Constitutional Advancement - should Anguilla be enacting changes which gives more authority to a UK Governor or the FCO or the Secretary of State, etc or should we be working on the basis of enshrining key principles and then giving effect through appropriate laws and institutions. The Rule of Laws should not be good because it gives the power to a British Governor, etc but because it is fair, it is equitable, it is just and protects fundamental values and rights. Openness, Transparency and Accountability are all “goods” and I would like to think that within the right system of checks and balances we as Anguillians are capable of living up to such.

Sincerely,
Aidan

Comments: Ministry of Finance on Chapter 10

Section in Chapter 10	Comments
General Principles 112.2	Should transparency not be specifically included
General Principles 112.7 and 112.8	The aim of achieving and maintaining a surplus and the whole section is fine. The question is whether or not a balanced budget should be regarded as a realistic breach of budgeting principles and be in the Constitution. Not a balanced budget partially financed by deficit financing but totally financed by revenue. In the case of a budget deficit and the need for deficit financing, then that would really need some explaining. Is it being suggested that a breach of the “surplus” requirement would trigger 8a and 8b? If so is that correct?
	Somewhere in Chapter 10, there needs to be included provisions for financial oversight of Statutory bodies and the regulation of procurement. The current act and regulations speak only to “generally guided” Given the importance of data for government functions, should the Constitution provide some authority for Department of Statistics to demand data from entities that need government approval for their operations.
Taxation 113	Should the Act not have regulations if necessary or the Act itself provide guidelines when it comes to section 113.2? In that way any subjectivity would be removed. A person or institution may exercise powers when it comes to settling outstanding taxes. Maybe the Constitution can say something about how outstanding taxes generally have to be dealt with.
Contingent Liabilities 114	How does that match up with the functions of the Chief Auditor? FFSD states 3 years and 3 months why change the time period?
Consolidated Fund 115	Is it being implied in this section that in order for there to be “ear marking” of finances, it must be done through an Act specifying such? Is there a need for such a provision to be included in the Constitution?
Financial Year Estimates 117	The question in this section is how robust multi-year budgeting and programme budgeting really are? How formal will 117 (b) be? This is important because a multiyear programme cannot be only robust in the current year because other aspects will be completed in subsequent years for it to be successful so how strong is the commitment now for future years. Can a new

	government or for whatever reason cause an ad hoc change of heart. How are multiple years locked in, not necessarily in stone in terms of the ability to make relevant variations but in terms of following through to completion.
Appropriation Bill 118.1	Have “heads of Expenditure” not been replaced with accounts?
Power of the Government to Borrow or lend 119 (2) b (4) a (5) (6)	The borrowing guidelines are already set out in the Fiscal Framework. Why “and any other borrowing guidelines” “Accumulated Interest” Is accumulated necessary? Once amortization starts can interest still accumulate or is it set in stone as long as payments are made on time. What about the terms and conditions of the loan agreement? Who defines “ as quick as possible” That is to be expected
Exercise of Functions by Governor	How would it be otherwise? Who is the governor representing in Anguilla?
Appropriation Committee 121.2	What will the “permanent staff” of the Appropriations Committee be doing all year.
Funding of Institutions Protecting Good Governance 122.3an 4	If 3 is used by the Governor why is it bypassing the normal budget process and being scrutinized by the Appropriations Committee directly rather than being presented to the Committee with rest of the Estimates. In fact 3 seems to be the only process for the establishment of the institution so what is the rationale for a different approach since the Consolidated Fund is the source of funds
Public Accounts Committee 123	Is it accurate to conclude that the only business the Committee would be interested in would involve the presence of the Chief Auditor? What about Internal audit in some circumstances? Does an advisory role require the Chief Auditors presence at all times or that advice can be sometimes done on request and in writing?
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<p>Public Accounts Committee 123</p>	<p>Is it accurate to conclude that the only business the Committee would be interested in would involve the presence of the Chief Auditor? What about Internal audit in some circumstances? Does an advisory role require the Chief Auditors presence at all times or that advice can be sometimes done on request and in writing?</p>