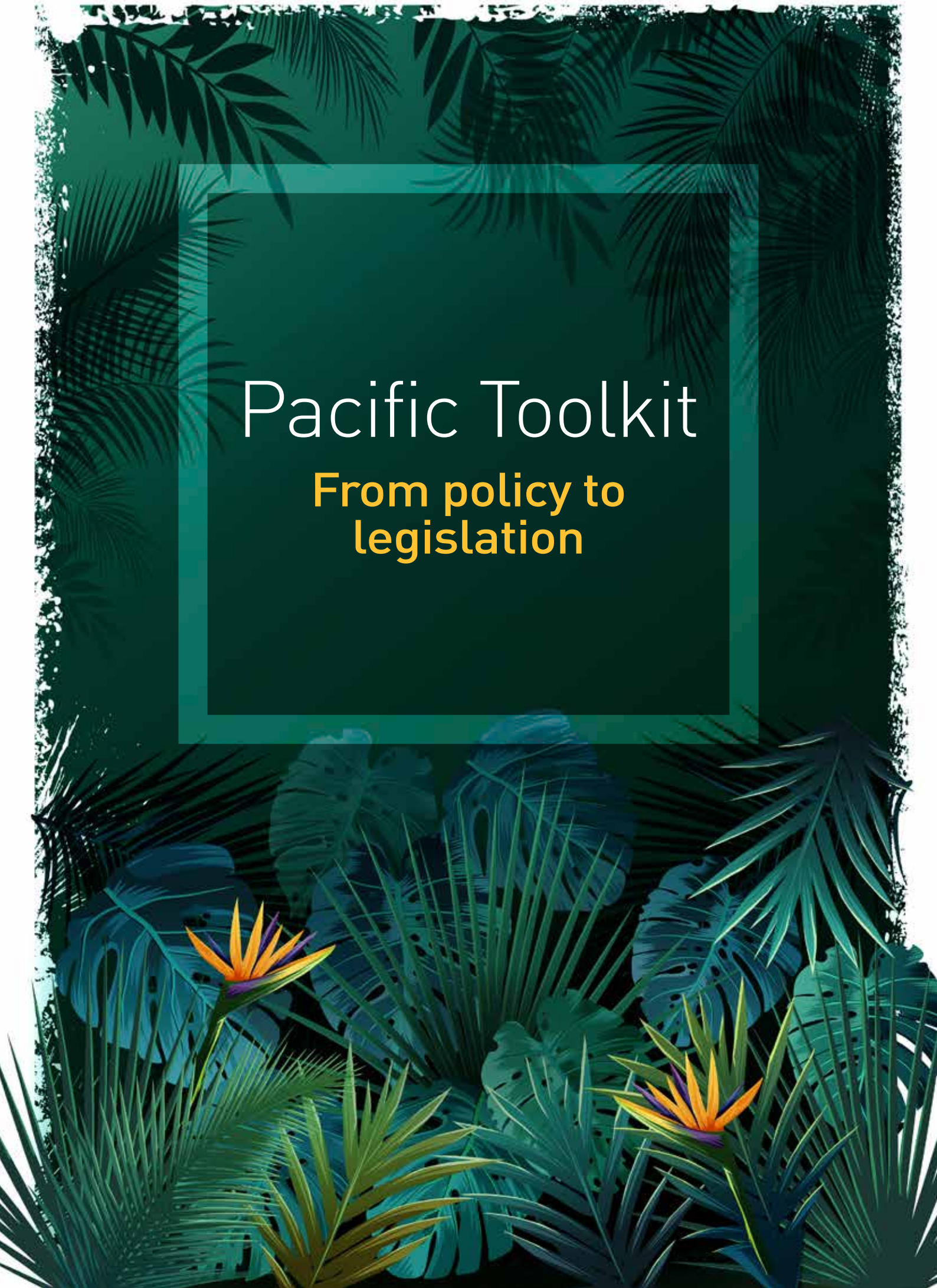
Pacific Toolkit

From policy to legislation



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Foreword

It is my pleasure to introduce *The Pacific Toolkit: From Policy to Legislation*, designed to better equip Pacific Island government officials to **chart a way through challenging policy issues** which their government seeks to address. It provides a step by step guide to analysing a policy issue, developing options, making recommendations to government and then going on to progress detailed law reform to address it.

Several years ago, Pacific Islands' legal leaders – through the Pacific Islands Law Officers' Network – asked the Australian Attorney-General's Department to build a Pacific policy development course, to strengthen Pacific Islands government officers' capacity to think through and develop proposals to deal with issues calling for government action. First delivered in 2013, the resulting Legal Policy Development Course was designed to address the tendency to leap straight to law reform without closely examining the problem and carefully thinking through how best to tackle it – which may or may not necessarily involve law reform.

The Australian Attorney-General's Department has now been running this course annually – since 2015 through our Pacific Policy Champions program – predominantly for law and justice agencies which are PILON members. The Pacific Policy Champions teaches policy development skills, and equips participants with the tools to run a similar policy development course for their Pacific Islands colleagues, thus having a multiplier effect.

As at the end of 2019, over 600 Pacific Island officials have completed the Legal Policy Development Course, with the majority of participation being through the Pacific Policy Champions program or policy training in officials own countries through this program.

This Toolkit, drawing on the Legal Policy Development course, sets outs a **policy development road map**, providing a 'how to develop policy' guide and practical tools that can be used by Pacific Island officials to nut through a tricky issue their government wants to address, and come up with a recommended way forward.

However, there is significant skill involved in then taking a high level policy proposal and turning that policy into detailed and technical law reforms. This requires policy officers to work with legislative drafters, by providing detailed legislative drafting instructions on the policy and then working closely in partnership with the legislative drafters to finalise draft legislation. Pacific Islands' legislative drafters have regularly indicated that this remains a significant capability gap in many Pacific Islands' agencies.

To help address this, the Toolkit also goes the next step of providing guidance to Pacific Island officers on how to develop the road map for turning the policy into a new law (assuming that law reform is the chosen solution). It provides guidance on identifying and resolving the variety of complex legal issues likely to arise in this journey, tools to help provide clear and detailed instructions to a legislative drafter to develop new laws, and tips on working with a legislative drafter.

However, given that legislative drafting is a specialist skill and that each Pacific Island country will have its own rules and ways of undertaking legislative drafting, the Toolkit does not cover how to undertake the actual drafting of legislation.

We do not assert the 'policy to law' journey is a uniform linear process, or that the Toolkit should be followed to the letter – each situation will be different, there are also other policy development tools out there that can be used, and each country will have its own way of doing things. But this Toolkit should provide a useful starting point in guiding Pacific Island officers in the policy development and law reform processes.

The Australian Attorney-General's Department thanks the many people who have contributed to this Toolkit, by providing guidance, feedback and suggestions during its development, to help to ensure that the Toolkit is tailored for its intended Pacific Islands audience. As well as members of PILON and the Pacific Legislative Drafters' Technical Forum, I would particularly like to thank Nola Faasau of Pacific Islands Forum Secretariat, and Fiona Leonard and Leigh Talamaivao of New Zealand's Parliamentary Counsel Office for their contributions.

The Toolkit will be an online resource hosted by the PILON website, so that it can be updated on a regular basis. As a shared Pacific resource, we encourage ongoing feedback to ensure it remains relevant and reflects the needs of the Pacific.

I hope this Toolkit, which has benefited from the perspectives and experience of the Pacific law and justice community, will stand as a useful resource to strengthen officers' skills to turn policy into legislation, and I once again acknowledge all those involved in its preparation for their valuable input.

Ms Karen Moore
Assistant Secretary
International Cooperation Unit
Australian Attorney-General's Department

Topic 1: Introduction

1.1 This toolkit

1.1.1 Purpose of this toolkit

A policy is a decision by government to use its resources, and take actions, to meet some objective, and typically to solve a problem. When developing policy, there are a range of 'solutions' which policy officers might pursue, one of which is law reform.

To a large extent, law reform should be considered a last resort in policy development. Law reform can be a long and difficult process and can have unintended outcomes. It can create a burden on those in the community who have to comply with it, and a lot of effort and resources need to be placed not only on the content of the law, but how the law will be implemented and enforced once it is operational. Access to justice can also be inhibited by adding to the size and complexity of the statute book. Policy, when implemented through legislation, can also become inflexible because further changes will require new legislation. Lastly, there are significant costs associated with creating legislation, including the costs of: preparing the legislation (i.e. drafting, consulting and reviewing); the Parliamentary process; publication; and, compliance (i.e. administration, implementation and enforcement).

Noting the above, it still may be that legislation is the most appropriate way to implement a new policy or solve a particular problem. If the decision to undertake law reform has been made, there are a range of other considerations that arise when turning that policy decision into law.

This toolkit walks policy officers through the general policy development process, provides guidance on specific issues to consider when turning policy into law and sets out a range of practical matters that should be considered during the reform process. This toolkit also provides policy officers with guidance on how to provide drafting instructions and work with a legislative drafter to develop legislation.

The diagram on the next page provides an overview of this toolkit and highlights that this is not a simple step by step process. Instead, there is a wide range of thinking and preparation that needs to be done ahead of working with a legislative drafter to prepare legislation.


Topic 1:
Introduction
Before starting a particular reform it is important to be aware of the key features of legislation and ensure policy officers have a clear understanding of these concepts.
Topic 2:
Developing your policy
It is critical to understand what the actual policy problem is you are trying to 'solve' and whether law reform is the best way to achieve this. It will be important to look at how the issue is currently addressed in your country and what has been tried before.
Topic 3:
Turning policy into law
This topic provides further guidance on factors to consider when addressing common law reform outcomes. Some issues should be considered during every law reform, such as the interaction with the Constitution. Others are relevant only some of the time, such as introducing a criminal penalty.
Topic 4:
Practical considerations
It is important to consider when your reform will be required and what needs to be done to achieve that. You will also need to to consider how the reform will be implemented. Planning should also be done on how the new legislative scheme will transition from any existing one.
Topic 5:
Working with the legislative drafter
Once your policy has been fully developed, you will need to instruct a legislative drafter to prepare a draft. It will be important to understand what the drafter's role is and what is expected of you as the instructor. Your instructions will need to be clear and sufficiently detailed so that the drafter can ensure your policy is accurately reflected in the draft bill.

1.1.2 How to use this toolkit

As the previous diagram illustrates, this toolkit walks policy officers through the policy development process, provides guidance on factors to consider when addressing frequently encounted law reform issues and discusses a range of practical matters which need to be considered to plan and manage the law reform process. Once all this thinking has been done, officers can proceed to work with the legislative drafter.

Not all parts of this toolkit will be relevant for every law reform. It is simply a guide to prompt you to think about various matters to ensure your reform can be achieved as efficiently and effectively as possible. There are flowcharts and checklists throughout the guide to help you navigate through, but you should feel free to move back and forth through the document as best suits you and your context.

1.1.3 What this toolkit does not include

This toolkit does not address the law making process, that is, the process of political consideration of the legislation. While an example of this process is provided in topic 1.2.3, this procedure varies widely between countries. You should take the time to ensure that you understand how this occurs in your country.

This toolkit also does not address the actual drafting of legislation. Also, while detailed guidance is provided around how to work with legislative drafters, including on preparing drafting instructions, the exact process for providing drafting instructions differs between countries. It is important to check if your country has any resources on how drafting instructions should be provided (for example, the Cook Islands guide to preparing instructions for the drafting of legislation).

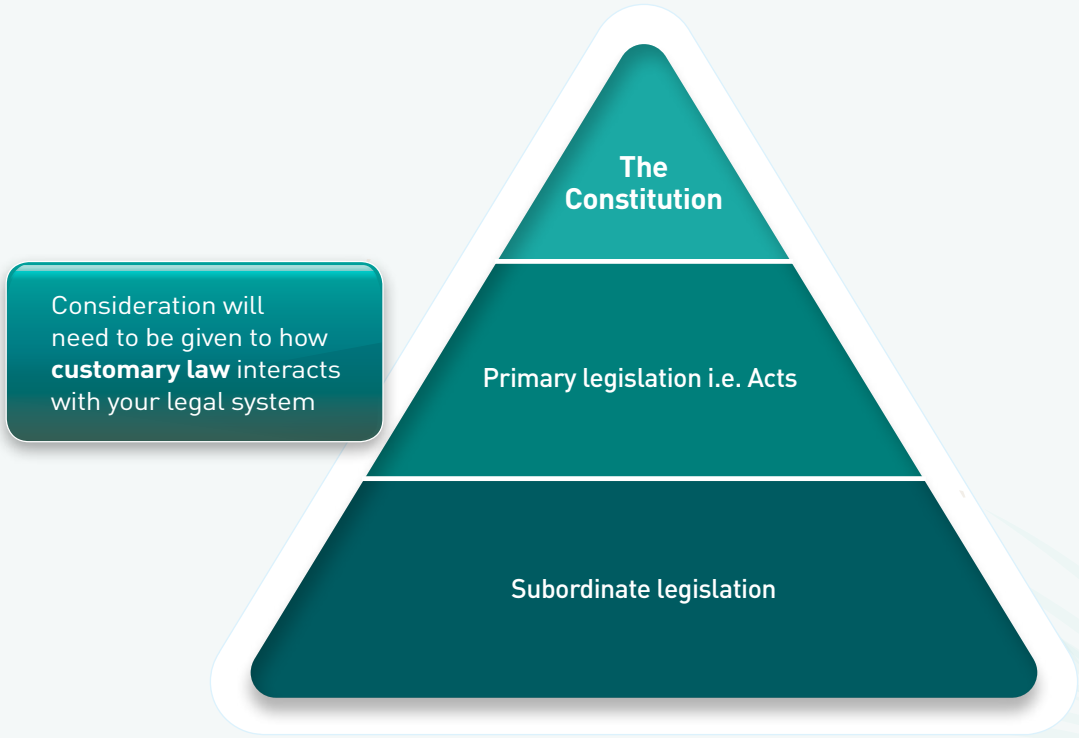
1.2 Before you start law reform – key concepts

Before undertaking law reform it is important that you have a clear understanding of the legislative hierarchy, the different types of legislation and their key characteristics. Experienced policy officers, or those who have studied law, will already know this and can skip to Topic 2. For others, topic 1.2 is critical to understanding this before starting any law reform process.

Checklist before moving on from this topic		
✓	I understand the legislative hierarchy in my country	1.2.1
✓	I understand what an Act, a bill and a legislative instrument are and the relationship between each of these	1.2.2 – 1.2.4
✓	I am familiar with the key features of legislation	1.2.5

1.2.1 Legislative Hierarchy

To understand the law reform process and develop drafting instructions you must first understand the legislative hierarchy and the different types of laws that exist in your country.



A Constitution is the supreme law of a country, to which all other laws are subject. In most Pacific Island countries, the Constitution is a written document adopted and identified as the Constitution. In other countries the Constitution is comprised of a mixture of statutory provisions in different Acts, rules set out in the common law and Constitutional conventions. Further information on Constitutions and how a proposed reform interacts with the Constitution is provided in topic 3.1. Further information on Acts and subordinate legislation is provided in topics 1.2.2 – 1.2.4.

1.2.2 An Act

An Act is a written law that has been approved by Parliament and officially enacted. An Act might be a new piece of legislation (for example, the *Crimes Act 2016* (Nauru)) or an amendment to an existing piece of legislation (for example, the *Criminal Procedure (Amendment) Act 2016* (Nauru)). Some Acts may even be a combination of both of these by establishing a new legislative scheme while at the same time making amendments to existing laws to allow the new scheme to operate.

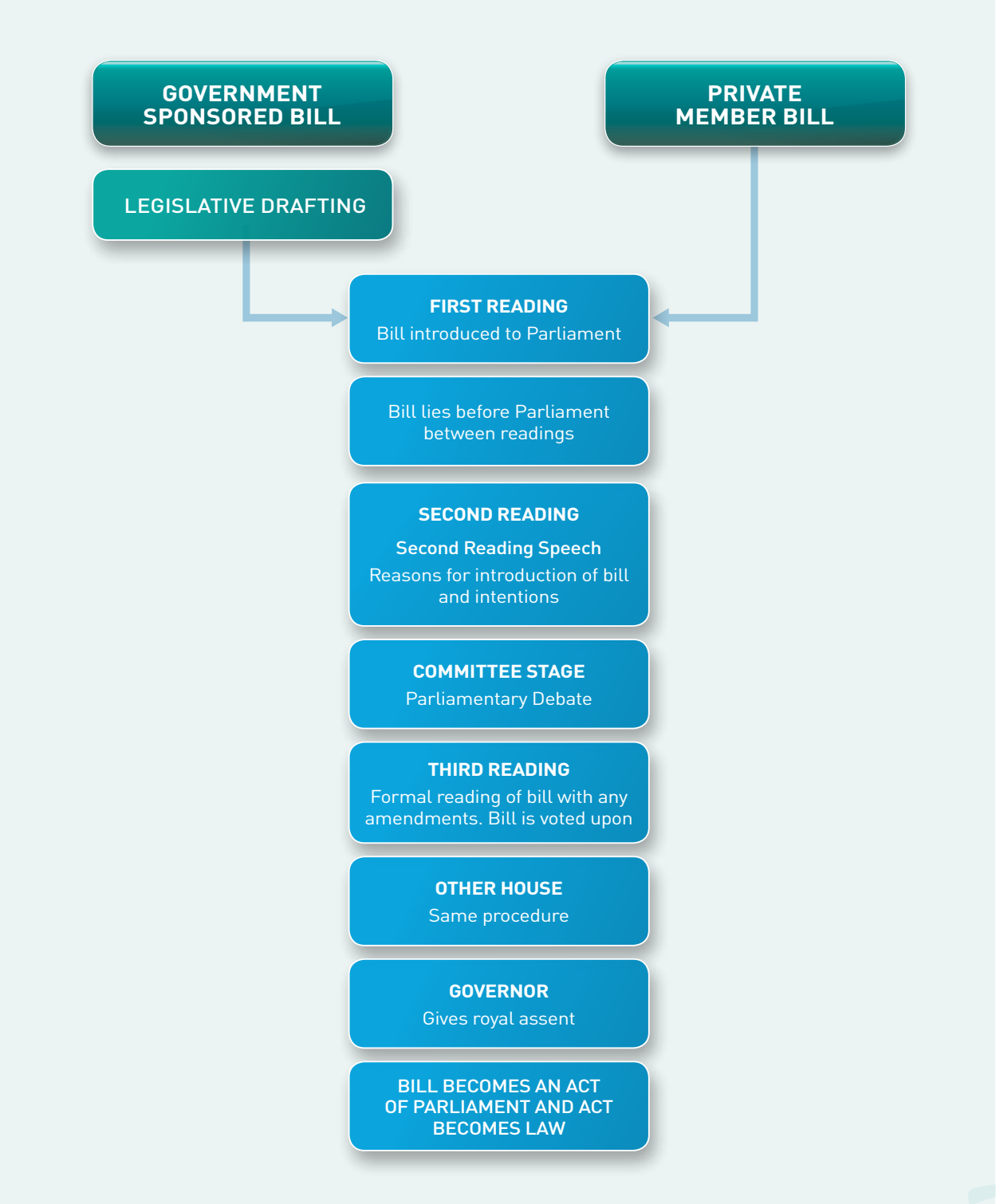
Legislation is 'enacted' in different ways depending upon your country's processes. In some countries it will be endorsed by the monarch, in others by the Governor-General or President. It may then need to be gazetted. A gazette is an official government publication that notifies the public of the actions and decisions of government. The Act may, however, commence (that is, start to have effect) at a later date (see topic 4.3)

1.2.3 A Bill

At any time before an Act is enacted (for example, while still being debated in Parliament or before receiving Royal Assent or other final approval) it is called a bill.

A bill does not become an Act until it has been agreed to by the Parliament and enacted. A bill is essentially a draft Act.

In Australia, the process of a bill becoming an Act is as follows, noting that most Pacific Island countries' Parliaments or Congress have similar processes:



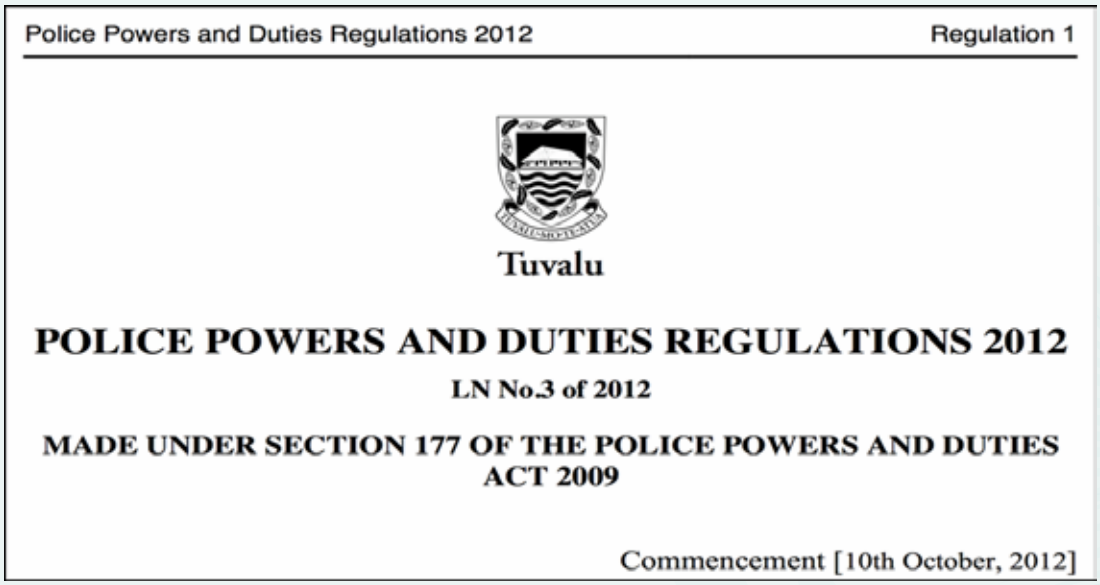
https://www.timebase.com.au/support/legalresources/What_is_a_bill_and_how_does_it_become_an_Act_.html

During these stages, the 'reading' of the bill does not generally refer to literally reading the bill aloud. The first reading is the bill's introduction to Parliament and generally involves reading the long title of the bill. The second reading usually involves an explanation of the bill and can include a debate over the principles, or even each clause, of the bill. There is then a delay between the second and third readings to allow time for review. Review may involve the referral of the bill to a Parliamentary committee for further scrutiny. The committee may invite submissions and hold public hearings before making recommendations to Parliament (if needed). The bill is then read for a third time, which is when it is voted on.

1.2.4 Subordinate legislation

Subordinate legislation is also referred to as legislative instruments, delegated legislation or subsidiary legislation. These are still laws but are made under the authority of an Act rather than through the approval of Parliament. In other words, they sit under (and are subordinate to) the Act.

For example, the Police Powers and Duties Regulations 2012 (Tuvalu) is made under section 177 of the *Police Powers and Duties Act 2009* (Tuvalu) as set out on the cover page of the Regulations:



Police Powers and Duties Regulations 2012 Regulation 1

Tuvalu

POLICE POWERS AND DUTIES REGULATIONS 2012

LN No.3 of 2012

MADE UNDER SECTION 177 OF THE POLICE POWERS AND DUTIES ACT 2009

Commencement [10th October, 2012]

The Act under which the instrument is made (the 'empowering Act') must provide a power for subordinate legislation to be made under it and set out who has the power to make such subordinate legislation. The wording of the empowering provision will determine the type of instrument that can be made. The empowering Act may also include restrictions or guidance on what may be in the subordinate legislation.

For example, sections 41 and 42 of the *Family Protection Act 2014* (Tonga) provides:

41. Power to makes rules

The **Lord Chief Justice** may from time to time make **rules** providing **for and in relation to procedures** to be followed in domestic violence cases and –

(a) **forms and the use of forms** as necessary for the purposes of this Act;

(b) **applications for protection orders made by telephone** and other similar facilities.

42. Power to make regulations

The **minister** may make **regulations** not inconsistent with this Act for **all matters required or necessary to give effect to this Act.**

When making subordinate legislation you must take care to ensure what you are proposing to do is permitted by the empowering Act. If there is any doubt, you can seek legal advice from your internal legal area, legal adviser or Attorney-General's Department/Department of Justice/Crown law office.

There are many kinds of subordinate legislation, examples include:

- *Financial Supervisory Commission (Remuneration and Allowances)* ***Order*** *2006* (Cook Islands), made under the *Financial Supervisory Commission Act 2003*
- *Magistrate's Court (Civil)* ***Rules*** *2007* (Tonga), made under the *Magistrate's Court Act*
- *Police Powers and Duties* ***Forms Approval*** *2012* (Tuvalu) made under the *Police Powers and Duties Act 2009*
- *Family Assistance (Immunisation and Vaccination) (Education)* ***Determination*** *2018* (Australia) made under the *A New Tax System (Family Assistance) Act 1999*

As regulations and other subordinate legislation do not undergo as much scrutiny as Acts, significant matters and issues of great public interest should only be in primary legislation. Regulations generally contain the detail surrounding the significant principles set out in an Act, as well as matters that are likely to change frequently, for example, forms and fees.

Further discussion to help you decide whether a proposed reform should be included in an Act or subordinate legislation is at 4.2.1.

1.2.5 Key features of legislation

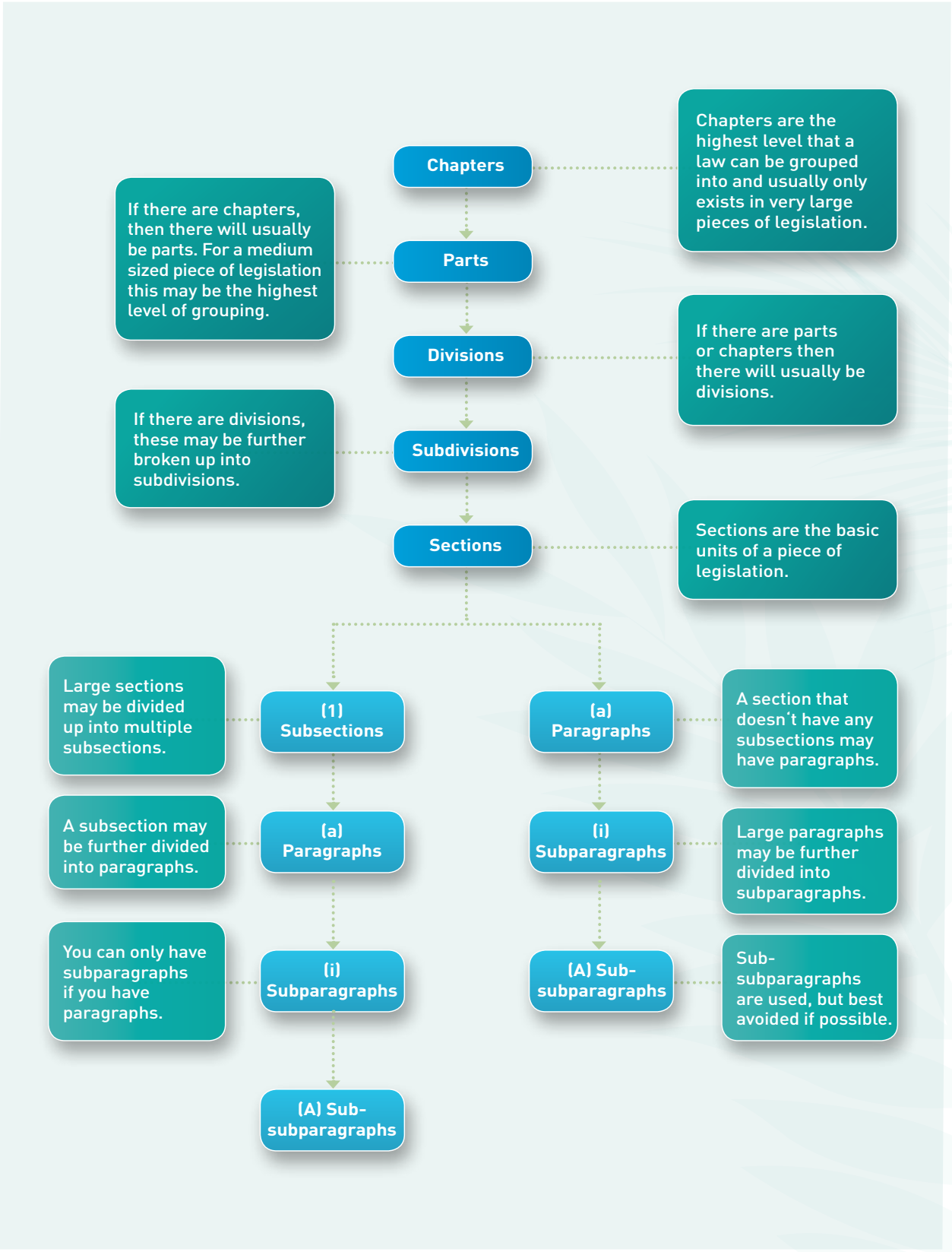
Acts, bills and legislative instruments usually have similar features:

- a cover page:

The **long title** describes the contents of the Act or bill and summarises its general purpose

The **short title** is the name used to refer to that Act or bill

- often (though not always) a table of contents
- the text of the Act/Instrument grouped in a certain way (depending on the length and the convention of a country as to how legislation is numbered):



- Definitions that apply to the whole piece of legislation are generally provided for either in an interpretation section at the front of the piece of legislation or at the end in a dictionary
- Notes can appear throughout legislation in smaller text underneath the section to which they relate. Notes explain connections between provisions, but do not create substantive law themselves. For example, section 20 of the *Crimes Act 2016* (Nauru) provides –

20. Reckless indifference to consent

(1) A person is ***'recklessly indifferent'*** to consent of another person if:

(a) the other person's consent is required in relation to an act; and

(b) 1 of the following applies:

(i) the person is aware of the possibility that the other person might not consent to the act but decides to act regardless of that possibility;

(ii) the person is aware of the possibility that the other person might not consent to the act but fails to take reasonable steps to ascertain whether the other person does in fact consent to the act;

(iii) the person does not give any thought as to whether or not the other person consents to the act.

Note for subsection

***Consent** is defined in section 9.*

- amending schedules – that is, schedules that set out the amendments to be made to other legislation, which are called consequential amendments (discussed in more detail in topic 4.4)
- non-amending schedules – that is, information that relates to an earlier section of the Act/bill/Instrument. For example, section 30 of the *Business Names Act 2014* (Solomon Islands) provides –

(1) An "appealable decision" is a decision specified in the Schedule.

(2) An "affected person", for an appealable decision, is a person specified in the Schedule opposite the decision.

The Schedule to this Act then sets out –

Schedule	
(Section 30) appealable decisions and affected persons	
appealable decisions	affected person
Registration of business name to an entity (section 14(1)(a))	an entity in relation to whom there is a real risk of substantial detriment because of the registration of the name
refusal to register business name to entity (Section 14(1)(b))	the entity
removal of business name from Register (section 24)	the entity
restoration of business name to Register (section 25)	an entity in relation to whom a real risk of substantial detriment because of the restoration
refusal to restore business name to Register (section 25)	the applicant for restoration

Topic 2: Developing your policy

Now that you know the hierarchy of laws and the basic features of legislation, Topic 2 helps you through the process of developing policy.

2.1 What is Policy?

A policy is a decision by government to use its resources, and take actions, to meet some objective, and typically to solve a problem.

Sometimes a government will have a clear idea of the policy direction it wishes to take and the role of the public service will be to implement that policy decision. On other occasions the government will need a range of policy options and it is your role to research and develop those options.

Law reform is only one of many possible options for achieving public policy outcomes. As stated in 1.1.1, law reform should generally be considered a last resort in policy development, not only because it can take a long time, but because of the burden it can place on government to implement and enforce the law and the effect on the community.

Before undertaking law reform you should be confident that it is both absolutely necessary and the most effective way of resolving your particular policy issue. The example below from the United States demonstrates that law reform is not always the best option for addressing a public policy problem:

THE VOLSTEAD ACT

In the early 1900s, the US was facing a range of social problems, including increased crime and corruption. In an effort to address this, a public policy decision was made to introduce a complete ban on alcohol. As a result, the Volstead Act (also known as the National Prohibition Act) was introduced.

Operational between 1920 and 1933, this prohibition was intended to "reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in America."[1]

Rather than achieve these goals, the prohibition instead saw an increase in alcohol consumption, the introduction of more dangerous forms of alcohol, an increased use of other dangerous drugs and substances, an increase in organised crime and the already stretched court and prison system become even more burdened. Not only did the Act fail on these grounds, but it removed a substantial source of government revenue.

1 https://**www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure**

2.2 The Policy Development Process

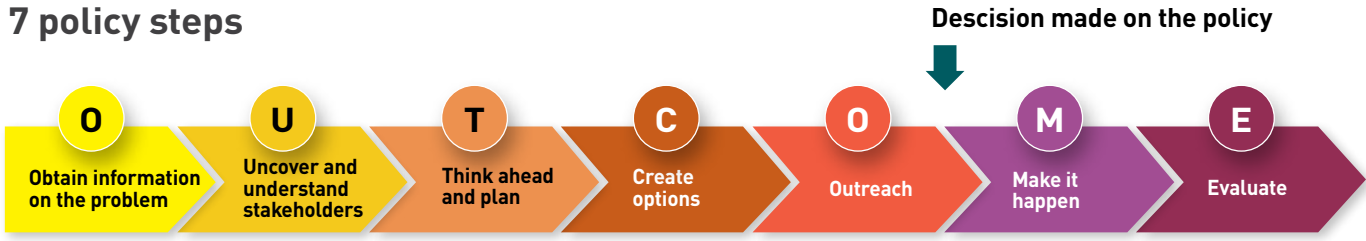
Deciding if law reform is the best option for your policy is part of a larger process of 'policy development'. Policy development, also called 'policy making' or the 'policy process', describes the process governments use to formulate public policy. The policy development process is a series of steps which help guide policy officers.

There is no standard way to undertake policy development and there are a range of different models and examples to assist you. The below is an example which demonstrates that policy development is a circular process.[2] While you may begin with identifying the issues, when you evaluate your policy at the end you may need to start the cycle again to fix issues which have arisen.

2 **Bridgman, P & Davis, G 2004**, The Australian policy handbook, 3rd edn, Allen & Unwin, p26.

Another useful tool to consider is the 7 steps that the Australian Attorney-General's Department has created based on experience developing policy for ministers:

7 policy steps



This is just one way of thinking about developing policy, but is a helpful framework for considering your policy problem and how best to address it. This framework does not need to be followed precisely. The order in which you do things will depend on your particular policy problem, the timeframes given, what the minister has asked for and your country's context.

2.3 Your role in policy making as a public servant

While public servants play a critical role in developing public policy, it is not public servants who decide which policy option to pursue. This decision usually lies with the executive part of the government (and in some countries also with the legislature through standing and select committee processes). The executive part of government is the minister (or ministers) or Cabinet. As the elected officials, it is the role of politicians to make the ultimate decision on how the country should run.

The most effective way for a public servant to ensure that the most effective and efficient policy option is pursued is to provide the best quality advice.

2.4 What is the policy problem you're trying to 'solve'?

Before starting to think about solutions you must first understand the problem your government is trying to solve. This is one of the most common mistakes policy officers make – they fail to clearly define the problem before starting the policy making process. This results in wasted time and effort developing laws that do not solve the problem.

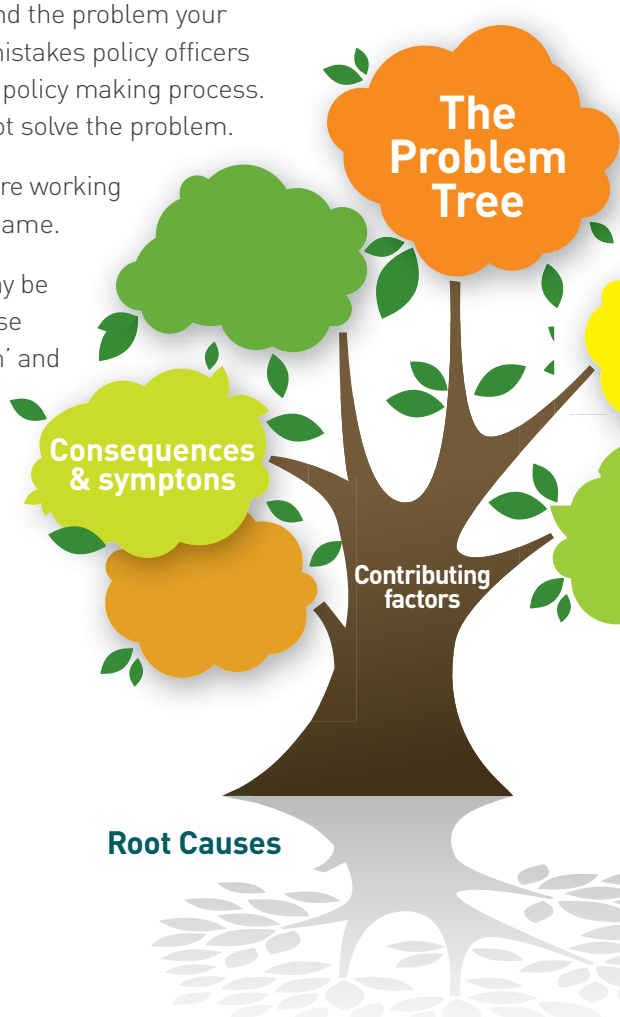
If you were a doctor you wouldn't try to prescribe medication before working out what is wrong with your patient – and policy making is the same.

In some cases, getting a clear understanding of the 'problem' may be one of the largest tasks in the policy development process. In these cases, you may need to get a basic understanding of the 'problem' and continue to gather facts and refine that understanding as you go.

One way to help clarify the policy problem is to consider the issue in terms of a problem tree.

In this analogy, the tree represents the particular policy problem you are trying to address;

- the roots can be considered the 'root' or main causes of the problem;
- the trunk represents contributing factors; and
- the leaves and branches represent the symptoms and results of the problem.



If you cut off the branches or leaves then the problem may be reduced, but you won't have completely solved the problem because the underlying cause has not been identified and addressed. However, if you cut the roots the whole problem can be solved.

In some circumstances the policy problem may be too large, complex or expensive to fully address the underlying cause. In these circumstances it may be acceptable to just address the symptoms. However, even where this is the case, it is important to understand the difference so you can give the best policy advice to government.

2.4.1 Practical ways to understand your problem

To understand the problem you must undertake research. One of the most effective ways to understand the problem is by speaking to those affected. Research can also be done using hardcopy books and papers and electronic documents.

The type and amount of research you will need to do depends on the complexity of the problem, how important it is and the urgency of the task. If your minister wants an answer next week, you will have to be selective about the research you undertake. If you have a longer timeframe you can conduct more thorough research using a broader range of sources.

Below is a list of practical steps you can take to understand your problem:

Ask questions to understand source of problem

- This may require you to clarify the issue with the minister's office
- Why is the minister interested in solving this problem? Where has it come from? For example, it may be an election commitment, an issue that has received media scrutiny, or may have arisen from a court case.
- Knowing the source will help you to focus your research.

Desk top research

- How your country has considered and dealt with the issue in the past (eg files, earlier legislative amendments, past committee reports).
- How similar issues have been addressed in other policy contexts, and in other countries.
- Submissions or papers on relevant topics by stakeholder bodies. For example, some representative bodies and lobby groups have position papers on their websites.
- Models, recommendations or standards put forward by relevant international bodies, and relevant areas of international law (see topic 6.4 for some of these resources).
- Academic research. This may involve reviewing the published literature or undertaking primary research.
- Relevant regional mandates and frameworks endorsed by the Pacific Forum Leaders or Pacific Regional Organisations that specialise in that subject area.

Speak to stakeholders

- People in your agency who have dealt with the same or similar problems.
- Key stakeholders (see topic 2.5 on identifying key stakeholders. You may need permission to discuss this issue externally and it may not be necessary at this point. See topic 2.8 on conducting consultations).
- Other agencies - check whether the problem is already being addressed in a different way by somebody else.

2.4.2 The importance of evidence based research

'Evidence based policy' refers to situations where public policy is informed by rigorous and objective evidence. It is based on the idea that better policy decisions are made when they are based on scientific and objective evidence, rather than evidence that is manipulated or 'cherry picked'.

Finding good evidence can be challenging, take time and be costly – but the costs of an incorrect policy that does not solve the problem can be even greater. You must ensure your evidence comes from a variety of sources and that it is rigorous. This will often mean corroborating your evidence – that is, confirming it is true using two or more different sources.

2.5 Who are your key stakeholders?

It is absolutely essential to identify stakeholders early.

What is a Stakeholder?

> "any individual, group or organisation who has an interest or concern in the outcome of a body of work"

Early in the policy development process it is essential to identify all those who:

- know about the issues;
- care about the issues (because they are affected or have a strong view); and
- are likely to be involved in implementing solutions later on.

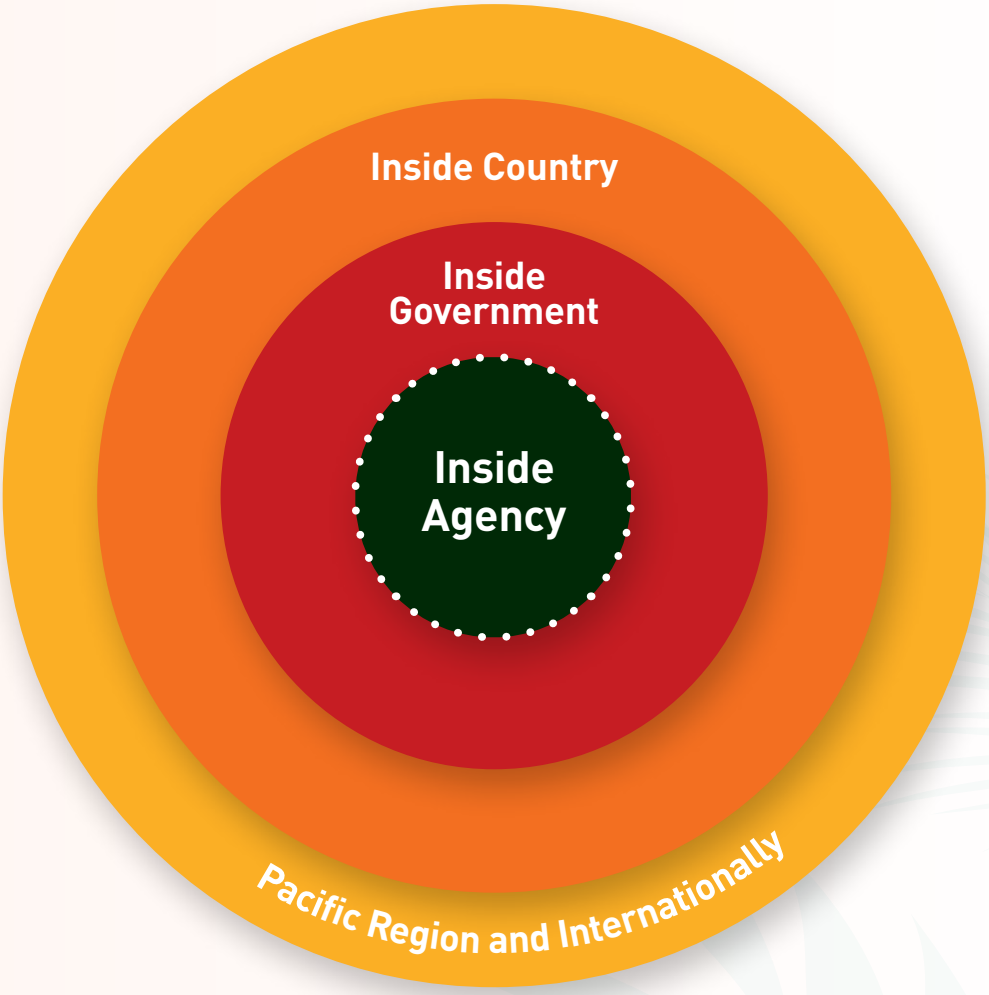
Even if a consultation process is still a long way off, there are good reasons to identify early in the policy development process those who will likely have an interest or contribution. These reasons include that:

- you may need assistance defining your policy problem;
- some stakeholders might need consultation from the start (including, for example, interests within government or interests of vulnerable groups);
- the minister may require advice on the issue, including its implications, who is most likely to be affected or have a view on the issue and any potential sensitivities; and
- the likely scope and method of consultations is an essential ingredient in any project planning.

You should consider not only those who may be affected by a policy proposal, but also those who may have relevant experience or expertise that can help to inform the policy development process.
As a project goes on, it is important to look at and update your list of those with an interest so that any agency, entity or individual who should be given progress updates, or who should be consulted, is not forgotten.

Another helpful tool for identifying stakeholders is to map them:

Map your stakeholders



This tool prompts you to think about all the relevant stakeholders within four broad categories. These are:

- inside your agency (includes your minister);
- outside your agency but within government (eg other agencies);
- outside government but within country (in your broader society: e.g. NGOs, vulnerable groups, individual citizens, private businesses, religious groups, civil society etc.); and
- outside government and outside your country (e.g. regional or international bodies or foreign governments who are aid donors).

2.6 Have you developed a project plan and timeline?

You should consider timeframes as early as possible in the legislative process. There are a number of things that need to be considered – has the minister made a commitment about timeframes? Is there an upcoming election that will impact on the reforms? How frequently is parliament sitting? Are there other related government priorities? Does the policy involve funds that have been budgeted?

Scoping and planning are important for any policy project that will require a sustained effort over an extended period. The policy process can often be long and overwhelming, so breaking it down into manageable pieces can make it easier. A common weakness in legislative reform is setting an unrealistic or ambitious finish date for a project that fails to take account of the various steps (such as consultation) that will be required. The expectations of ministers and others may then become fixed around that date (or, worse still, public announcements are made), leading to a choice between failing to meet these expectations, re-scoping the reforms or cutting corners.

2.6.1 Project plans

To help guide projects and ensure they progress within an identified timeframe and scope, it is helpful to develop a project plan at the start.

There are many ways of doing project plans, and your agency may have a preferred method. The below are some template ideas for you to consider:

Example 1

Project plan: <insert name of project plan>

Project manager: <insert name of project manager>

1. What are we proposing to do?

1.1. Description

< Brief overview description of the project, including what activities will take place, who are the beneficiaries/participants, and what outputs will be achieved>

1.2. Relevant background

< How did this project come about, what previous activities related to the project have occurred>

1.3. What is in and out of scope?

< Include detail about what is being done or not done>

2. Why is this important?

2.1. Link to outcomes/priorities of your program/work area

<How does this work fit with the priorities of your work area? What will it achieve?>

2.2. Broader priorities

<How does this project fit with broader government priorities?>

3. Staffing and project champions/sponsor

<How many staff will be required and will they be full time on this project or part time? Who in a management position is responsible for ensuring the project progresses?>

4. How will we know if we are successful?

4.1. Reporting and oversight processes

<What processes are in place to keep the project on time and in scope, e.g. team meetings, project milestones, etc?>

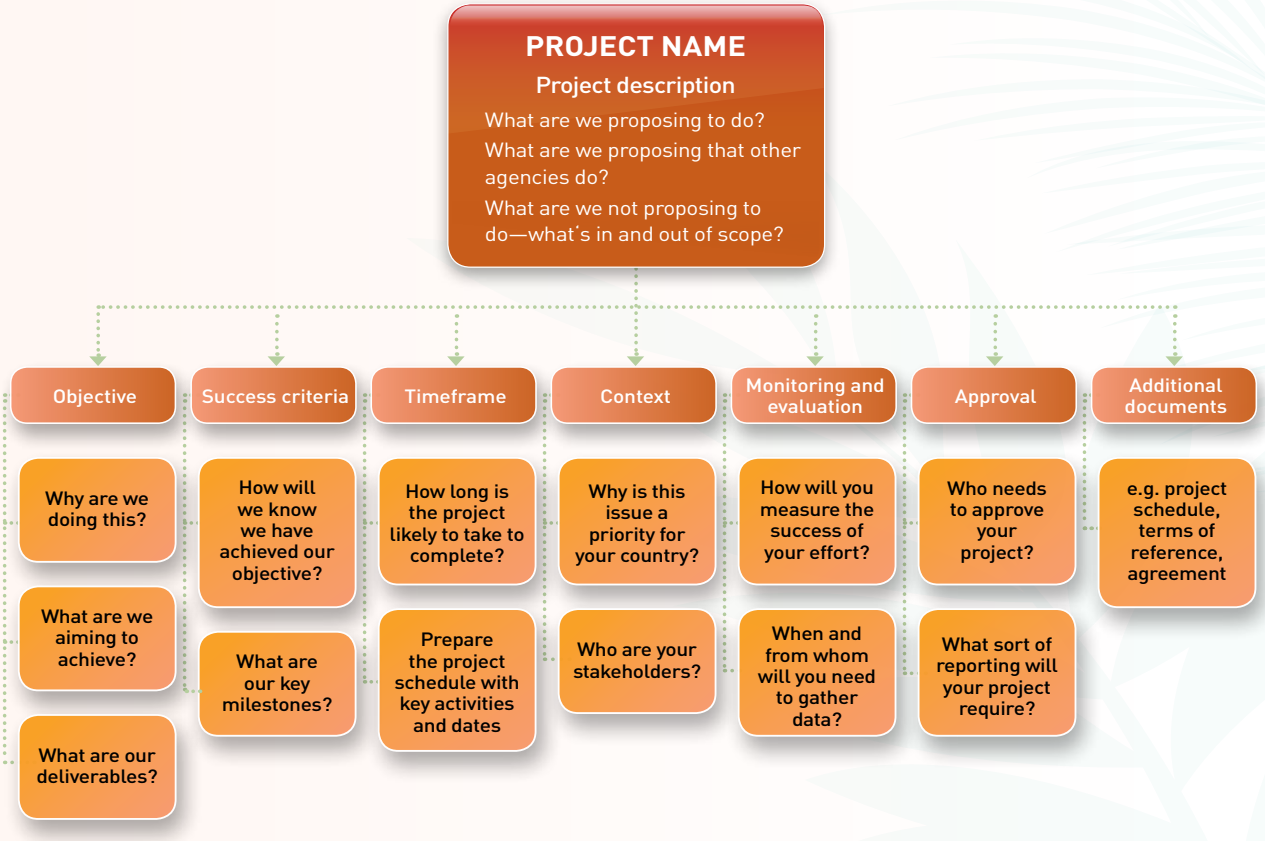
4.2. Monitoring, Evaluation and Learning Plan

Key evaluation questions	Sub questions	Information needs and indicators	Methods and frequency	Responsibility and reporting
<What questions need to be asked to determine if the objective of the project has been met?>	<Break down the key evaluation question into more specific issues>	<What data needs to be collected to answer this question?>	<How will this data be collected and how often>	<Who is responsible for collecting and analysing data for reporting>

5. What are the potential barriers to success and how will we manage them?

Risks	Risk level	Controls	Risk level (post-mitigation)
<Describe risk which has been identified>	<What level is that risk according to the risk matrix>	<What steps will be taken to try to control and mitigate the risk>	<What level is the risk once steps to control the risk are taken?>

Example 2



2.6.2 Risk management

When managing a policy process you must consider what risks might impact on the policy's development and implementation.

When undertaking risk management you should:

Identify the risks (what kind of things could go wrong)

Analyse/assess the risks (what is the likelihood and consequence)

Evaluate them (are we concerned about these risks)

Control them (take action to reduce the risk if necessary and possible)

Something to consider preparing is a 'risk matrix'. A risk matrix is a tool for analysing risks – determining what the chances are of that risk occurring and how serious the consequence will be if it does occur.

Risk matrix

Likelihood	Consequence		
	1. Highly likely (No affect on ability to function)	**2. Moderate** (Manageable impact on ability to function)	**3. Major** (Significant reputational damage / ability to function)
3. Highly likely (From past experience)	**Medium**	**High**	**Very High**
2. Possible (Not unusual, should occur)	**Low**	**Medium**	**High**
1. Highly Unlikely (Very unusual, exceptional circumstances)	**Very Low**	**Low**	**Medium**

Once you have identified the level of risk using the matrix, decisions can be made about whether you should proceed despite the risk, or what action you can and should take to reduce the likelihood or consequences of the risk.

For example:

You have been asked to undertake a policy development process to address a particular issue. However, you are aware that your country is hosting a major regional forum in two months' time that will use significant staff resources from your department. Inserting this information into the risk matrix you can see that the likelihood of this forum occurring is 'highly likely'. Depending on the particular policy issues being addressed, the consequence of being under-resourced is 'moderate' or even 'major'. Having identified this risk as 'high' or 'very high', you might need to think about whether certain resources can be kept isolated from working on the forum, whether additional resources can be used from elsewhere or whether additional recruitment can be carried out. If these options are not possible you will need to factor this into your project plan and timeline.

2.7 What are the policy options?

Once you have a clear understanding of the policy problem, have identified the various stakeholders and developed a project plan, you can start to generate possible policy solutions.

In some cases there will be a clear choice between a particular solution to a problem, or maintaining the status quo (the current situation). However, it is important not to rush to the conclusion that there is only one possible or preferred option. Exploring different policy options is a key part of policy development and the policy process. The process of identifying and exploring options helps to ensure that whichever option is pursued is likely to be the best. Also, the final proposal might draw elements from what started out as a series of different options.

Below are some general rules for developing policy options:

- the more significant the policy problem, the greater the need to explore and provide more options;
- at least one should be non-regulatory (that is, an option that does not create a rule with an expectation of compliance);
- the status quo (or doing nothing) should also be considered, noting the risks;
- a combination of options can also be considered.

There will generally be a range of possible options – from doing nothing, to public information and education campaigns through to law reform.

Law reform is only one possible option among others, and usually the most burdensome option in terms of the time it takes to develop and put in place and its impact on the community.

Some options other than law reform include:

- using the existing law – perhaps what is needed already exists and has just not been well implemented or is not being enforced;
- information or education campaigns;
- monetary options, for example a subsidy, fee or tax (noting this will most likely require legislative reform to support it, see topic 3.7);
- self-regulation, such as voluntary standards or codes of practice;
- no intervention or maintaining the status quo.

This toolkit assumes law reform is the best option available in your circumstances, but there are a number of other options that are common and can be highly effective, and you should explore these.

2.7.1 Considering law reform as an option

A common type of policy action is changing the law to facilitate, enforce, require or prohibit certain behaviours. However, there are a relatively small number of situations that justify direct government intervention in the form of laws.

Some benefits of using law as a policy instrument are:

- dependability and compliance, as generally people seek to follow their obligations under the law;
- it provides a clear statement on the government's approach to a particular issue; and
- it may provide certainty and uniformity – the law applies equally to all.

Possible drawbacks of law reform are:

- it can be long, complicated and expensive;
- it can result in unexpected consequences if not done thoroughly;
- it can be difficult to enforce (for example, due to limited staff or resourcing capabilities or lack of public support);
- it can be too rigid;
- laws are also open to interpretation by courts and are therefore subject to a degree of uncertainty in how they might be applied; and
- imposing legal rules can also create burdens for businesses, individuals and community groups.

The decision to undertake law reform should not be taken lightly. Before suggesting this as a possible policy option you will need to ask yourself a number of questions and undertake research to ensure this would be an effective solution to your problem.

As a starting point, it might be helpful to ask yourself:

- **Are there existing laws governing the issue?**
  - If yes, what does the problem seem to be with them?
  - How can it be fixed? This might involve a legislative amendment or subordinate legislation, but some problems can be resolved simply through a better understanding of the existing framework. For example, the belief that a problem exists may stem from a misinterpretation of relevant law or guidelines.

- **If no laws are in place, have other countries used legislation to solve a similar problem?**
  - What have they done?
  - Is it working?
- **What do your stakeholders think?**
  - Will law reform work in practice?
  - Will law reform fix the problem?
- **Can your proposed reform be implemented?**
  - Do you have the resources?

In addition to the above, topics 3 and 4 below provide a number of additional factors you will need to consider when undertaking law reform. Many of these are not relevant to this policy development phase and will come at a later point. However, many may need to be considered, at least briefly, before you can recommend law reform as an option to your minister. These include, for example, ensuring that your proposal is permitted by the Constitution. You may wish to review topics 3 and 4 at this point to determine what extra research you need to undertake.

2.7.2 Assessing policy options

At this stage you will need to assess the various policy options you have developed. There is unlikely to be a 'perfect' option. As a public servant it is your role to provide your minister/s with honest and well thought through advice on the viable options, including the costs and risks of those options.

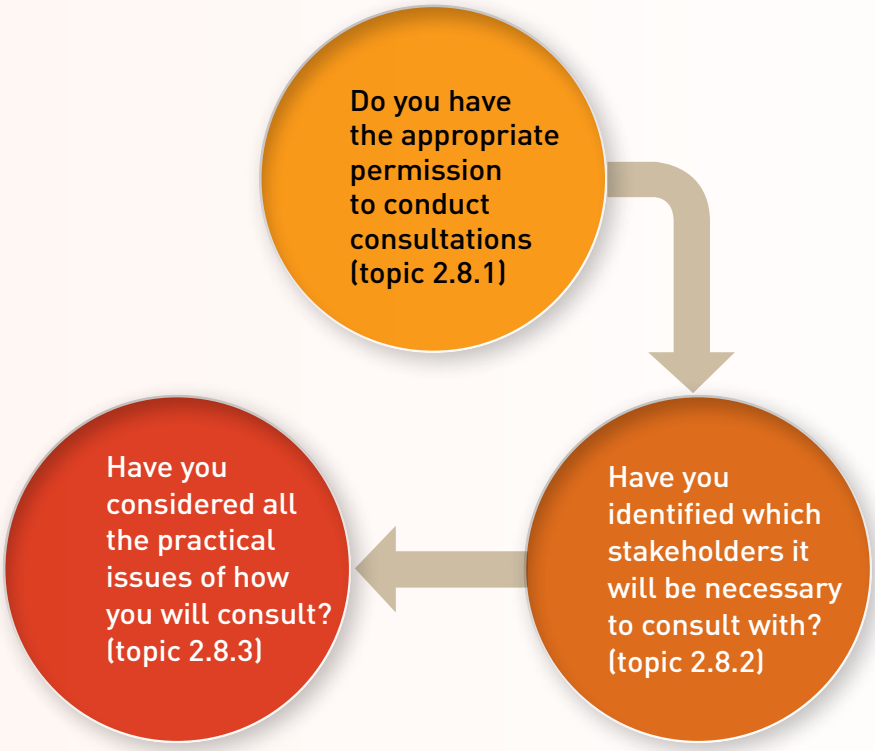
Think about costs and benefits of each option and compare these between options. It might be useful to consider the following categories:

Time	Will the option take a long time to implement or be relatively quick?
Money	Will the option be very expensive or not (resourcing and staff)?
Stakeholders	Will stakeholders and the community be supportive or not? Who will be most affected if the option was adopted (both positive and negative impacts)?
Solving the problem	Is the option likely to address the underlying causes of the problem and really make a difference or whether it only addresses contributing factors or symptoms?
Uncertainty/ risk	What are the potential risks and can they be lessened in any way? (see topic 2.6.2)

2.8 Outreach/consultation

Consultations may be required at various stages throughout the policy development process. It is important to consult early, to help ensure that you have gathered as much information as possible to inform your policy development process. However, consultations may also be necessary later (once a decision has been made) as part of the process of informing stakeholders and finalising the details.

Before beginning consultations, think about the following:



2.8.1 Do you need and/or have authority to consult?

Before you consult with stakeholders, you normally need to get permission from the minister, chief executive officer or permanent secretary to do so. For example, you may seek sign off from your minister on any documents to be provided in the consultation, the process to be followed, the timeframes for the consultation, and the list of those to be contacted for comments.

2.8.2 Who will you consult?

To identify as many interests as possible it can be useful to undertake a formal brainstorming process, running through relevant categories of interest.

Categories of interest:

- other parts of your agency;
- other agencies;
- provincial or local governments, or customary or village leaders (where applicable);
- representative or professional bodies;
- individual businesses and business groups;
- employers and unions;
- non-government organisations and community groups;
- vulnerable groups (such as people with a disability, women and girls, children or the elderly);
- particular racial, ethnic or geographically located groups;
- academic or other experts; and
- foreign countries, regional organisations or international bodies.

It is important to think not only of those directly affected by a proposal, but those who may have relevant experience or expertise that can inform the policy development process. The importance of consulting with other government departments cannot be overstated. This helps to ensure possible problems are identified early and can prevent possible conflicts and inconsistencies between legislation being developed by departments. It also avoids reforms being piecemeal. Additionally, consultations with other government departments can assist you to identify further stakeholders outside of government which may be relevant to your consultations.

As a project goes on, it is important to look at and update your list of those with an interest, so that any agency, entity or individual who should be given progress updates, or who should be consulted, is not forgotten.

2.8.3 How will you consult?

There are a range of options and the method undertaken will depend on the size and urgency of the reforms.

Some options for how to consult include:

- public meetings and briefings;
- calls for submissions;
- industry or sector meetings and briefings;
- direct communications to those affected;
- media and advertising;
- social media activities; and
- exposure drafts (i.e. a draft of the legislative reform released for public comment prior to its finalisation).

In addition to the method of consultation, the scale of consultation must also be determined.

Options for the scale of consultation include:

- full public consultations – this is the broadest form of consultations and provides openness and transparency in decision making;
- targeted consultations – may be necessary for industry or sector specific reforms or reforms that are geographically specific;
- confidential consultations – may be necessary for particularly sensitive issues where prompting unnecessary concern or confusion may result if consultations are undertaken on a broader scale; and
- post-decision consultations – urgency or other circumstances may require that consultations are not carried out until after the decision is made. Consultations will still be important in these instances to ensure implementation and evaluation is discussed and settled with relevant stakeholders.

Whatever consultation process and scale chosen, consultations should ideally aim to be:

- ongoing throughout the reform process;
- broad based, to capture as wide a range of input as possible;
- accessible and inclusive;
- not too burdensome;
- transparent;
- consistent and flexible;
- subject to review and evaluation to ensure ongoing effectiveness;
- not rushed; and
- used as a way to help make the decision, not as a substitute for the decision.

Communication plans can be a useful tool for helping guide stakeholder consultations by ensuring the 'who, what, why, when, where and how' of consultations are considered and planned.

Communication plans:

Who:

- Workplace;
- Government;
- Society; and
- International.

Why?

- Why are they interested?
- Can they influence the outcome of your work or provide information?

What?

- What do you need from them?
- What do they need from you?
- What do they require to facilitate their participation e.g. building accessibility for people with a disability?

How?

- How many people?
- How much notice and preparation?
- In person, telephone, email, radio interviews, newspaper etc
- How will you collect the information?

When and where?

- Appropriate and accessible facillities for the people attending and accessible facilities for the people attending;
- Providing ample time between consultation appointments to allow them to run over and for sufficient time to travel between venues; and
- Avoid scheduling at the same time as other events.

2.9 Presenting options to your decision maker

How you present your policy options to your decision maker will vary from country to country. You may have a particular template or format that is required and this should be adhered to. If not, some suggested headings you could use for a report or submission when seeking approval from a decision maker include:

Executive summary	Short overview of the issues
Introduction	What is the problem? Why are we looking at this issue? Define key terms Outline the structure of the paper
Body	What is the current situation? Include supporting evidence and explanations as required Outline the causes of the problem
Possible options	One issue or option at a time Include analysis of each option – costs and benefits State how the option contributes to solving the cause of the problem
Conclusion	Summarise the paper State preferred option (if decision maker agrees to this)

Whatever format you use, keep in mind that your job is to present clearly reasoned options and recommendations, while leaving the decision to government.

2.10 Checklist before moving on

While the decision maker may choose any option, for the purposes of this toolkit it is assumed that the best option, and the one chosen by the decision maker, is law reform. Despite this, before moving on, it is still essential that you are comfortable with the following topics from this chapter:

Checklist before moving on from this topic		
✓	I understand what policy is and the policy development process	2.1.and 2.2
✓	I am comfortable with my role as a public servant in the policy development process	2.3
✓	I have thought about the problem I am trying to solve	2.4
✓	I have considered who my key stakeholders are	2.5
✓	I have developed a project plan and timeline	2.6
✓	I have considered my policy options	2.7
✓	I have planned what consultations are appropriate for this policy	2.8
✓	I am prepared to present the policy options to my decision maker	2.9

Topic 3: Turning your policy into law

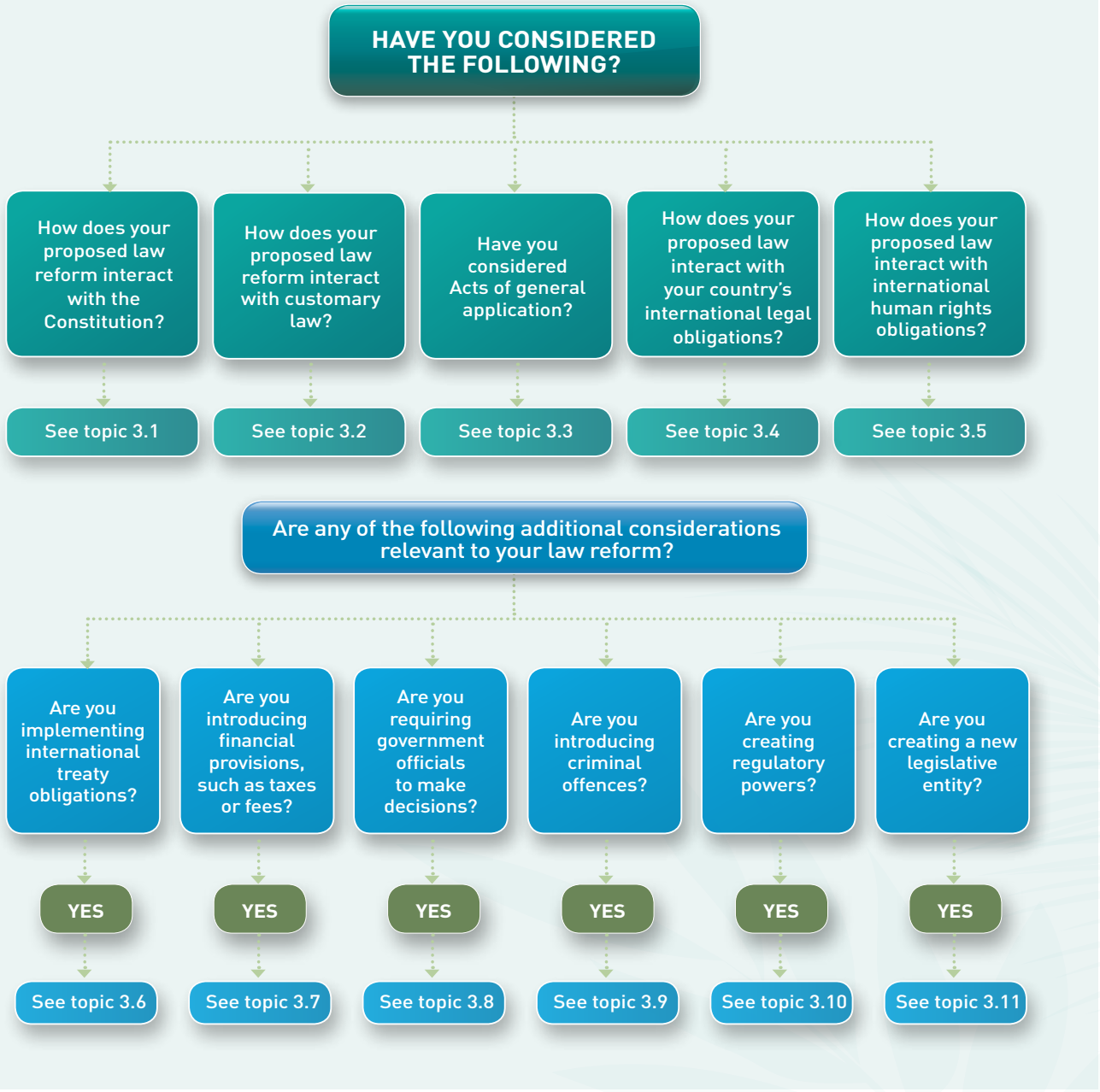
Now that you have a decision from your minister (or cabinet as the case requires) that the government would like to undertake law reform to solve this problem, you need to take steps to turn that policy into drafting instructions, which can then be provided to a legislative drafter to turn into legislation. The process of working with a legislative drafter is explored further in Topic 5.

Depending upon your reform, you may still have only a very broad policy decision at this stage. There may still be a range of additional considerations you may need to think about, make policy decisions on and provide appropriate drafting instructions for. This topic, and the next, help you to turn a broad proposal for law reform into a detailed proposal. This will enable you to provide enough detail to a legislative drafter to develop legislation that will work well in practice, integrates effectively with other existing laws and minimises the risk of unintended consequences.

This topic provides further guidance on factors to consider when addressing common law reform outcomes, such as imposing a tax, introducing a criminal offence or creating a new legal entity. The next topic deals with practical issues you will need to consider when developing your law reform, such as whether the reform will be an Act or subordinate legislation, when it will commence, and how you might transition from an existing legislative regime.

It is unlikely that everything in this topic will be relevant to you, so the flow charts below will help you to identify what is relevant and guide you to the correct sub-topic.

The first flow chart sets out the things that must be considered with every law reform. The second flow chart are things that may be relevant, depending on your particular reform.



3.1 How does your proposed law reform interact with the Constitution?

A Constitution is the central law which sets out how a State is to be organised and governed. As all other laws are subject to the Constitution, any laws that conflict with it will be invalid. For example, Article II, section 1 of the Constitution of the Federated States of Micronesia provides that:

> This Constitution is the expression of the sovereignty of the people and is the supreme law of the Federated States of Micronesia. An act of the government in conflict with this Constitution is invalid to the extent of conflict.

This means you must always ensure, throughout the entirety of your law reform process, that your proposed reforms comply with the Constitution.

When undertaking law reform you should consider what restrictions may exist within the Constitution which may limit the nature and scope of your reform. For example, many Constitutions contain articles setting out the fundamental rights of that country's citizens, which may limit the scope or potential application of a proposed reform.

For example, Samoa's Constitution contains 'Part II Fundamental Rights', which includes:

- Article 5 Right to life
- Article 6 Right to personal liberty
- Article 7 Freedom from inhuman treatment
- Article 8 Freedom from forced labour
- Article 9 Right to a fair trial
- Article 10 Rights concerning criminal law
- Article 11 Freedom of religion
- Article 13 Rights regarding freedom of speech, assembly, association, movement and residence
- Article 14 Rights regarding property
- Article 15 Freedom from discriminatory legislation

Article 4 explicitly provides that:

(1) Any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this Part.

(2) The Supreme Court shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provisions of this Part.

Other issues, such as the establishment and makeup of the judicial system, issues of public employment (such as appointments and terminations of particular roles within the public service) and finance related issues (such as establishing funds for public money), frequently appear in Pacific Constitutions and may impact on your particular reform.

If you have any doubt as to whether your reform complies with your country's Constitution, it is a good idea to seek legal advice as early as possible.

3.2 How does your proposed law reform interact with customary law?

While not relevant to all proposed law reforms, you will need to assess what customary institutions and practises may be relevant to your proposed reform.

Many Pacific Island Constitutions make provision for custom as a source of law where not inconsistent with the provision of the Constitution or other legislation. For example, the Solomon Islands' Constitution provides:

3. (1) Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.

(2) The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.

(3) An Act of Parliament may:-

(a) provide for the proof and pleading of customary law for any purpose;

(b) regulate the manner in which or the purposes for which customary law may be recognised; and

(c) provide for the resolution of conflicts of customary law.

Constitutional provisions such as these allow custom to operate unless inconsistent with the Constitution or an Act of Parliament. It is therefore also important to ensure your reform does not inadvertently alter or negate customary law by introducing legislation that overrides it.

While some jurisdictions have formal mechanisms to prompt a consideration of the impact of proposed law reform on custom, such as the Customs Impact Report required in Samoa, this is not the case in most countries. Instead, if custom is relevant to your reform, you will need to decide which customary features will be affected by your reform, and how, and to what extent, it will need to be incorporated into the legislation being developed. For example, *Village Fono Act 1990* (Samoa):

> 8. **Courts to take account of penalty imposed by Village Fono** – When punishment has been imposed by a Village Fono in respect of village misconduct by any person and that person is convicted by a Court of a crime or offence in respect of the same matter the Court shall take into account in mitigation of sentence the punishment imposed by that Village Fono.

3.3 Have you considered Acts of general application?

When developing new or amending legislation, it is helpful to be aware of any *Acts of general application*. These are Acts which apply to all other legislation and which provide the rules that apply to or are necessary for the interpretation of all other legislation. It is helpful to be aware of these other Acts and how they might interact with your proposed law as they may affect the way it operates.

For example, most countries will have an Interpretation Act which provides information and definitions that are relevant to all legislation. A drafter must always have regard to an Interpretation Act and it is good practice for you as the policy officer to also be aware of how your country's Interpretation Act applies to your proposed reform.

EXAMPLE

By way of example, the *Investment Corporation of Solomon Islands Act 1988* (Solomon Islands) provides the following in section 5:

> (1) Subject to the provisions of subsections (2) and (3), the Corporation shall have powers to do anything which is calculated to facilitate the discharge of its functions, or is incidental or conducive to their discharge.
>
> (2) In particular, and without prejudice to the generality of the provisions of subsection (1), the Corporation may—
>
> ...
>
> *(f)* acquire and dispose of movable or immovable property;
>
> ....

No definition of 'property' is provided for in the *Investment Corporation of Solomon Islands Act.* However, under section 16 of the *Interpretation and General Provisions Act 1978* (Solomon Islands):

"property" includes-

(a) money, goods, chose in action and land; and

(b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition;

In addition, subsection 2(1) of the *Interpretation and General Provisions Act* clarifies:

2. (1) This Act applies to the interpretation of and otherwise in relation to-

(a) this Act;

(b) any other Act made before the commencement of this Act, except in so far as a contrary intention appears in this Act or the other Act; and

(c) any other Act made after the commencement of this Act, except in so far as a contrary intention appears in the other Act.

While acts of general application vary between countries, some common ones to consider include:

- criminal legislation
- ombudsman legislation
- human rights legislation (discussed further in topic 3.5)
- administrative law legislation (discussed further in topic 3.8)
- privacy legislation
- freedom of information legislation
- legislation dealing with the spending of money by government and government borrowing (i.e. public finance).

Again, if you have any doubt it is best to seek legal advice early.

3.4 How does your proposed law interact with your country's international legal obligations?

International law consists of rules and principles which apply to the conduct of states and international organisations in their relations with one another and, in some cases, with individual groups and transnational companies. From these rules and standards arise a range of rights and obligations. You must be aware of these rights and obligations when undertaking any legislative reform which may interact with international law.

3.4.1 Commonly used terms

The most relevant part of international law for the purposes of domestic law reform is international treaties. Under the Vienna Convention on the Law of Treaties (Article 2(1)(a)), a **treaty** is defined as "an international agreement concluded between states in written form and governed by international

law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". The term 'treaties' covers a variety of international instruments, such as conventions, protocols or exchanges of notes.

It is helpful to understand some of the terms frequently used in relation to international treaties. You will often hear that a country is a 'signatory' to a particular treaty. '**Signature**' is the term used to show that a country agrees with the contents of a treaty. It does not necessarily mean that the country intends to be bound by that treaty. However, being a signatory does give rise to a duty to refrain from acts which would defeat the object and purpose of a treaty.

> For example, Country A may have signed the Convention on the Rights of the Child (CRC), but not yet acceded to it. Under Article 37(a) of CRC, "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age". While Country A is not internationally bound to this obligation, it could be argued that to continue to sentence children to life imprisonment could undermine the object and purpose of the clauses of CRC.

'**Ratification**' is when a country agrees to be bound by a treaty. This is also often referred to as becoming 'a party' to a treaty. Depending upon whether your country is monist or dualist (see topic 3.4.2), you may need to undertake domestic law reform to ensure that the domestic legal framework is in place to support the obligations under the treaty.

'**Accession**' refers to the situation where a country was not an original signatory to the treaty, but later decides to be bound by it.

If your law reform is relevant to international treaty obligations, you need to be aware of any '**reservations**' your country may have made to the treaty. A 'reservation' is a "unilateral statement, however phrased or named, made by a country, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State" (Article 2(1)(d) of the Vienna Convention on the Law of Treaties).

3.4.2 Incorporating international law into domestic legal systems

There are two approaches for how international law is adopted into a domestic legal system, the 'dualist' approach and the 'monist' approach. Both of these approaches exist in the Pacific.

The dualist approach treats international law and domestic law as two separate legal systems. In a dualist system, treaties entered into do not directly form part of a country's domestic law. Instead, domestic legislation needs to be enacted separately to give the treaty effect domestically. This approach is generally followed by those countries which have been historically tied to Britain.

There are a variety of approaches for incorporating international law into a dualist system, including:

- reflecting the principles of the treaty text in the legislation (either exactly or in a more contextualised manner);
- setting out the text of the treaty (either in full or in part) in the legislation. This will usually be done via a schedule;
- including a provision in the Act that allows for the making of subordinate legislation that gives effect to the treaty (or particular parts of it);
- a combination of these approaches.

Under the monist approach, the legal system of a country automatically includes those international treaties by which the country has agreed to be bound. There is no subsequent legislation needed to give them effect domestically. This approach is generally followed by those countries which have been historically tied to the United States.

It is helpful to understand what approach your country takes, as it will impact what needs to be done in your domestic legislation to give effect to international obligations.

3.4.3 Ensuring your law reform complies with treaties your country has signed

As described above, if your country has ratified a treaty it may automatically become a part of your domestic law, or you may need to undertake law reform to ensure it is implemented into domestic law (see further guidance at 3.6).

It is critical to understand what treaties your country has signed, and what rights and obligations arise from this, before you proceed with law reform which may inadvertently contradict the object and purpose of one of these treaties. This is because, as stated in 3.4.1, in international law being a signatory to a treaty gives rise to a duty to refrain from acts which would defeat the object and purpose of that treaty. This duty exists unless a signatory has made it clear that it no longer intends to become a party to the treaty.

If you are ever in doubt it is best to seek the advice of your country's relevant legal office.

> For example, Country A is considering legislation to introduce a range of maritime enforcement powers relating to customs and fisheries which can be exercised up to 200 nautical miles from the country's coast. Country A is a party to the United Nations Convention on the Law of the Sea (UNCLOS). While a country has sovereign rights over marine resources in its exclusive economic zone (up to 200 nautical miles), a country can only deal with customs-related matters within the contiguous zone (up to 24 nautical miles from the coast) (see Article 33).

3.5 How does your proposed law interact with international human rights obligations?

3.5.1 What are human rights?

Human rights are an internationally agreed set of principles on how an individual should be treated. Human rights work to promote fairness and equality and apply universally to all people. International human rights treaties provide an agreed set of human rights standards and establish mechanisms to monitor the way a treaty is implemented.

Key international human rights treaties are:

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of All Forms of Discrimination Against Women;
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Rights of the Child; and
- the Convention on the Rights of Persons with Disabilities.

Your country is likely to be a party to at least some of these treaties. It may be helpful to check with your country's Department or Ministry of Foreign Affairs to confirm to which of these your country is a party or signatory.

3.5.2 Will the proposed legislation have any implications for human rights?

You must consider any potential impact your legislative reform will have on human rights.

More than just a statement of good intentions, human rights treaties create legal rights and obligations for those countries which are a party to them. When undertaking legislative reform, you must determine which international treaties your country is a party to and what duties arise from this.

Your analysis should consider any laws in your country that implement international human rights treaties.

You should consider any human rights treaties your country has signed but not yet ratified. This is because, as discussed in 3.4.1, signature gives rise to a duty to refrain from acts which would defeat the object and purpose of a treaty, until such time as a signatory makes it clear that it is no longer intending to become a party to the treaty.

As discussed in topic 3.1, you must also consider what human rights might exist in your country's Constitution which may intersect with your reform.

3.6 Are you implementing international treaty obligations?

3.6.1 Domesticating international obligations

This part provides guidance to policy officers who have been tasked with implementing a treaty, or part of a treaty, that your country has ratified. With the growing number of international instruments, this is likely to be a common law reform topic across many Pacific countries. There are often relevant regional and international organisations who can support you through this process, so keep that in mind as you undertake your law reform and seek assistance if required.

As a first step, you will need to consider how international law is incorporated into your domestic legal system, that is, whether your country is monist or dualist. See topic 3.4.2 above for more guidance on this. If your country follows the monist tradition, it is likely that no further legislation will be required to implement the treaty obligations.

If you determine that law reform is required, a useful approach is to undertake a gap analysis of the obligations of the particular treaty against your existing legal framework. This involves looking at your country's existing legislation to work out whether it already covers any of the treaty's obligations – which means you don't need to do further law reform to implement these measures.

This can be done firstly by summarising the obligation created by each article of the relevant treaty. You will then need to analyse your existing legislation to determine whether the existing framework is compliant, not compliant or partially compliant. It is useful to provide some information about why you have made this assessment and, where an assessment of partial compliance is made, what the gap is. This will give you a good overview of what law reforms will need to be made.

The below provides a fictitious example of mapping compliance against three articles of the Convention on Psychotropic Substances 1971:

Art 5	**Limitation of use to medical and scientific purposes** Parties are to limit the manufacture, export, import, distribution and stocks of, trade in, use and possession of the substances in Schedules II, III, and IV to scientific and medical purposes, by such measures as they consider appropriate. Parties are encouraged to limit possession of these substances to those persons with legal authority.	**Not compliant** While some Schedule IV substances are included in the list of prescription-only medications in Schedule 3 to the *Medical Drugs Regulation 2003*, current legislation does not place controls on the full range of substances included in Schedules II, III and IV to the Convention.
Art 6	**Special administration** Parties are encouraged to establish a special administration to apply the provisions of this Convention. It may be the same as or work closely with the special administration established pursuant to the 1961 Convention on Narcotic Drugs.	**Compliant** The *National Illicit Drugs Board Act 1997* established, the National Illicit Drugs Control Board (the Board) and the National Illicit Drugs Bureau (the Bureau). The Board brings together representation from across the country with an interest in drug-control. The Bureau is established to advise and report to the Board, including making licensing recommendations and ensuring compliance with licences.

Art 7	**Special provisions regarding substances in Schedule I** Use of substances in Schedule I to be prohibited except for limited use for scientific or medical purposes by medical or scientific establishments under government control. Manufacture, trade, distribution and possession of Schedule I substances to be under special licence or authorisation, be closely supervised, restricted in quantity, and subject to record-keeping. Amount of substances supplied to a duly authorized person to be restricted to the quantity required for authorised purpose, and persons performing medical or scientific functions must keep records (for 2 years) of acquisition of substances and their use. Export and import prohibited except where the exporter/importer is a competent agent of the exporting or importing state or region. Article 12 (1) applies to Schedule I substances.	**Partially compliant** While a majority of the substances listed in Schedule I to the Convention were declared to be dangerous drugs by declarations made in 1981 and 1994, there remain a handful of omissions, including MDMA and MMDA.

3.6.2 Assistance interpreting obligations

There are a number of tools which can be used to help you understand which obligations arising under a treaty require legislative reform. These tools will often provide specific guidance on how to implement the treaty's obligations in legislation. While these sources aren't strictly authoritative, they may still help you to understand the meaning and purpose of the treaty.

It is helpful to see if any of the following exist in relation to the treaty you are looking at:

- explanatory reports, for example, the Explanatory Report on the 1980 Hague Child Abduction Convention;
- guidance notes, for example, the Council of Europe has issued a number of guidance notes on specific concepts to aid in the implementation of the Budapest Convention on Cybercrime;
- treaty committee reports, for example, the UN Human Rights Committee reviews periodic reports submitted by states and issues findings and General Comments that interpret the provisions of the International Covenant on Civil and Political Rights; and
- legislative guides, for example, the Legislative Guide for the Convention against Transnational and Organised Crime and the Protocols thereto.

3.7 Are you introducing financial provisions, such as taxes or fees?

Fiscal legislation is legislation that relates to government revenue. Typically, this is in the form of either a tax or a fee.

A tax refers to general revenue raising by a government, for the public purpose, but with no specific public good or service identified at the time the funds are raised. On the other hand, a fee is imposed in return for a specific good or service provided by the government to a particular individual.

There are a number of factors you will need to consider when introducing financial provisions, including how money is to be collected, how it will be held by the government and accounted for, and how the funds will be dispersed. Usually, there will be public financial management legislation with rules that govern these issues. You should also consider any existing taxes, fees or incentives that the government have in place (e.g. tax or fee exemptions) and the legislation which relates to these.

You should talk to the relevant department (e.g. Department of Finance, Treasury etc) in your country as early as possible in the reform process to ensure that the policy introduced by your scheme is consistent with other financial schemes and that any obligations under existing financial management legislation are met.

3.8 Are you requiring government officials to make decisions?

3.8.1 What is administrative law?

Administrative law is the area of law relating to government decisions. Essentially, administrative law ensures that administrative decisions made by government officials (including ministers) are consistent, fair and accountable. This might include providing people affected by a decision with a right to seek a review of that decision, either internally within the agency, by another agency or through the courts.

For example, Part 7 of the *Immigration Act 2010* (Vanuatu), sets out the appeal process following a decision by the Principal Immigration Officer:

58 Review of certain decisions by minister

(1) In this section, reviewable decision means any decision of the Principal Immigration Officer to:

(a) refuse to grant a visa; or

(b) cancel a visa.

(2) When a reviewable decision is made, a person affected by the decision may apply in writing to the minister for a review of the decision.

(3) An application for review must be made within 14 days after:

(a) the date of the notice of the decision given under section 40 or 49; or

(b) the date on which a copy of the removal order is given under section 54.

(4) An application for review of a decision must set out the reasons for making the application.

(5) Within 14 days after receiving an application for review of a decision, the minister must:

(a) affirm the decision under review; or

(b) vary the decision under review; or

(c) set aside the decision under review and make a decision in substitution for it.

(6) The minister must:

(a) record in writing any decision made under subsection (5), and the reasons for the decision; and

(b) give a copy of the decision and the reasons to the applicant and the Principal Immigration Officer within 7 days after making the decision.

(7) This section does not apply to the refusal to grant or the cancellation of a transit visa.

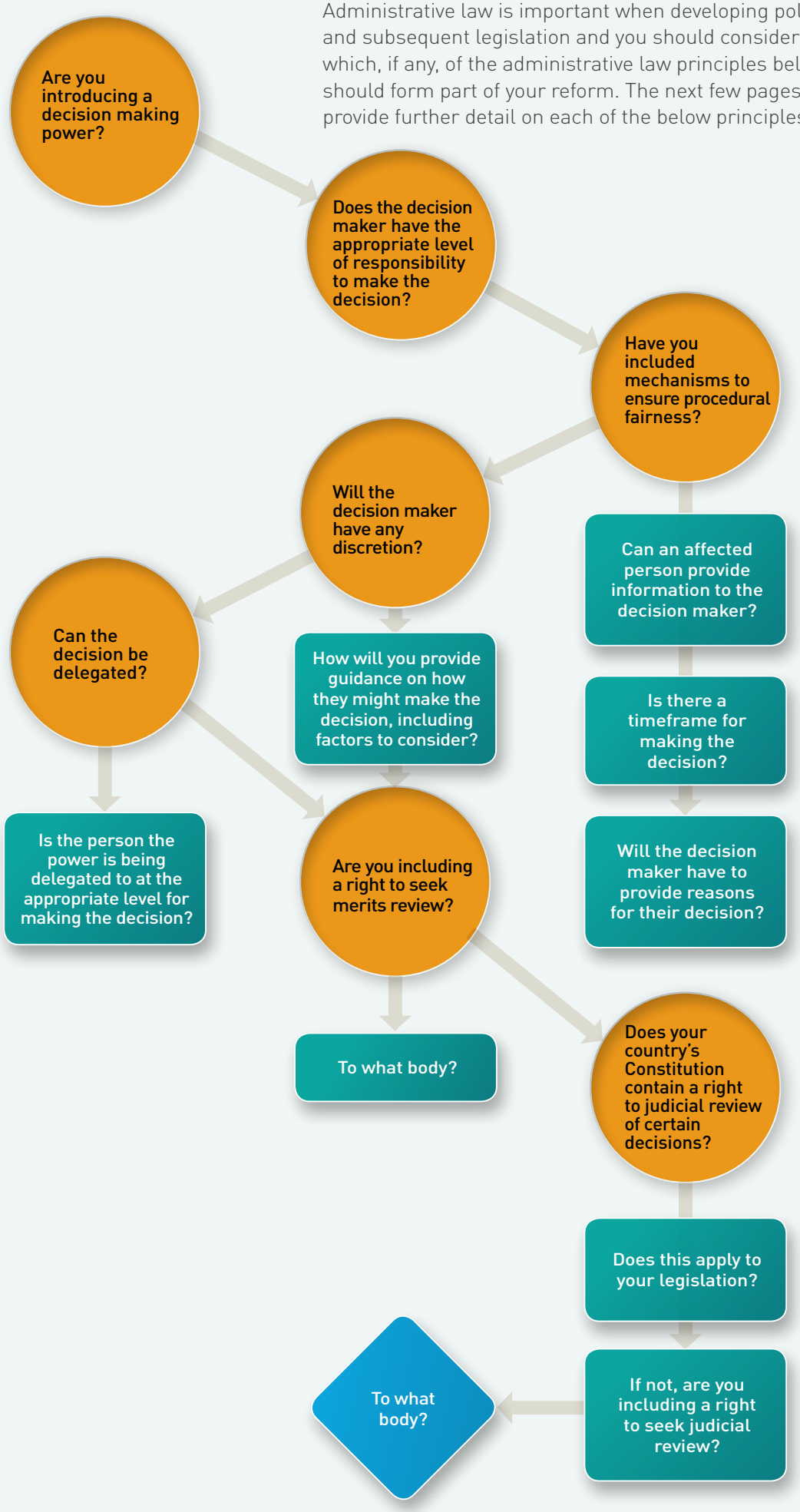
59 Appeal to Supreme Court against minister's decision

(1) If an applicant for review under section 58 is dissatisfied with any decision of the minister made under subsection 58(5), or the decision of the minister under section 53, the applicant may appeal to the Supreme Court against that decision.

(2) An appeal must be made within 21 days after the date of the minister's decision that is the subject of the appeal, or within such extended time as the Supreme Court allows.

(3) On any appeal under this section, the Supreme Court may affirm, vary or set aside the decision that is the subject of the appeal, and may give all such directions (if any) to the minister or any other person concerned as may be necessary to give effect to the Court's decision.

Administrative law is important when developing policy and subsequent legislation and you should consider which, if any, of the administrative law principles below should form part of your reform. The next few pages provide further detail on each of the below principles.



3.8.2 Appropriate level of decision making and procedural fairness

When developing legislation that provides a government official with a decision making power, the responsibilities of the person exercising the discretion should be proportionate, or comparable, to the nature of the decision being made. The decision making power should also be delegated to a level at which the person it is vested in is equipped and appropriately trained to make the required decision.

For example, in relation to decisions which might affect a large portion of the population or which could impact on a country's national interest, the appropriate decision-maker would most likely be the relevant minister. Where decisions are less serious or affect only particular people, the appropriate decision maker might be a particular level of public servant. This is illustrated in the Vanuatu example above, where the decision relates to the refusal, grant or cancellation of a visa, which could potentially have a large impact on someone's life and livelihood. Given the importance of this decision it can only be made by the Principle Immigration Officer, which is reviewable by the minister.

Decision makers must act in a manner which affords procedural fairness (or natural justice) to people affected by the decision. Broadly, procedural fairness requires that the decision-maker be, and appear to be, free from bias and that the person be given a fair opportunity to provide any relevant information to the decision maker before the decision is made affecting them. Procedural fairness may also require that decisions be explained in a way that people can easily understand.

3.8.3 Discretion in decision-making

In many cases, decision makers will have discretionary powers concerning the decision, meaning the decision maker has a choice about whether to do something or, for example, whether to approve or not approve. For example, see section 9(1) of the *Fisheries Act 1973* (Solomon Islands):

> The Principal Licensing Officer **may** on payment of the prescribed fee grant to any person a licence in the prescribed form to operate a fish processing establishment.

The use of the word 'may' in this example demonstrates that the Principal Licencing Officer has a discretion to issue a licence or not.

In these cases, you should consider whether your legislation needs to provide a decision maker with any guidance on how to exercise this discretionary power. This can help guide decision makers and ensure that discretionary powers are not too broad and are applied consistently.

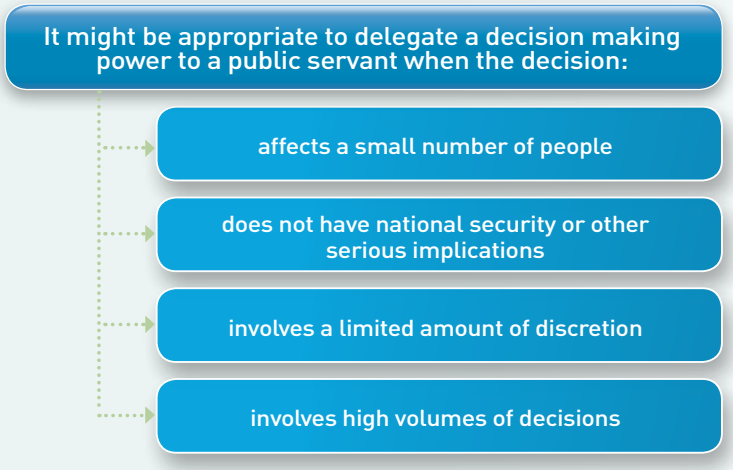
Where the discretionary power being granted is broad it is especially helpful to include guidance and examples of relevant factors the decision maker should take into account.

3.8.4 Delegation of decision-making power

It is common for legislation to allow a decision making power to be delegated from the minister or secretary to a public servant. For example, see section 5(7) of the *Marine Resources Act 2006* (Tuvalu)*:*

> The minister may delegate, in writing, the exercise of any or all powers and functions conferred upon him by this Act to such official or officials as he deems fit, except as may be otherwise provided in this Act.

In these cases, the issues you will need to consider are similar to those discussed above in 3.8.2 about who should make the decision. Where a decision involves a limited exercise of discretion, it may be appropriate for more junior officers to make the decision. Similarly, where a provision will give rise to a high volume of decisions, it is not usually appropriate for senior officers to take on the workload. It may be more efficient for a larger number of junior officers to make primary decisions.



Delegations of power should only be as wide as necessary. Decisions also don't have to be wholly delegated. For example, the provisions may be structured so that decisions can be delegated in most cases, but more significant decisions can be made by the minister personally.

3.8.5 Merits review

If a person is not happy with a decision they may be able to seek a review of that decision, and you may need to include this right to seek a review in your legislation. In administrative law there are two different types of review: merits review and judicial review.

Merits review is a reconsideration of the decision within the same legislative framework as the original decision. Essentially the decision is made again, but this time by someone other than the original decision maker. All of the same discretions and powers which applied to the original decision maker will apply to the person reviewing the decision. As well as ensuring the decision is made correctly in a particular instance, merits review assists to achieve a broader goal of improving the consistency of decision makers.

Examples of situations where it may be appropriate to include merits review include decisions affecting national sovereignty (for example, decisions relating to who is admitted to enter the country) and decisions that are fundamental powers of a government (for example, the issuing of passports).

Generally, any administrative decision that will, or is likely to, adversely affect the interests of a person should be subject to merits review, unless there are particular reasons to exclude it.

Two types of decisions are generally not appropriate for merits review:

- decisions which do not apply to an individual factual scenario, but which apply to the public more generally, and
- decisions which automatically occur following a specific set of criteria (i.e. where there is essentially no discretion in decision-making).

You will also need to consider which body or official would be appropriate to undertake this merits review. If an existing body or official has similar functions you should consider whether that person or body can undertake merits review. Merits reviews may be conducted internally (for example, by a more senior official than the original decision maker reviewing the matter) or externally (such as by a tribunal).

The possible outcomes of a merits review are usually that:

- the original decision is upheld;
- the original decision is varied;
- the original decision is set aside and a new decision is substituted; or
- the matter is returned to the original decision maker to reconsider with specific directions.

3.8.6 Judicial review

Judicial review is not the re-hearing of the particular merits of a decision, but rather a review of whether the decision-maker used the correct legal reasoning or followed the required legal processes.

Judicial review is carried out by a court, but it is a more limited right than a right of appeal. If the court finds that a decision was made unlawfully, then generally the decision will be referred back to the decision maker for reconsideration within the correct legal framework.

Many Pacific Island countries will have some right of judicial review of administrative decisions already available, either under their Constitutions or through common law rights. You need to understand what administrative review rights might be available in your country, and keep that in mind when the legislation is being drafted.

3.9 Are you introducing criminal offences?

3.9.1 Is a criminal offence necessary?

A criminal offence is the ultimate sanction for a breach of the law, with serious consequences involved for a person if convicted. Making an action subject to criminal law may provide police (or other law enforcement agencies) with powers to search and arrest people, and to search and seize property. Additionally, a person subject to a criminal conviction may experience a loss of personal freedom (i.e. through imprisonment or home or weekend detention) or a loss of property (i.e. through confiscation of assets), as well as the stigma associated with a criminal conviction which can affect employment, travel and standing within the community.

Before introducing a criminal offence you should consider the range of alternatives and work out whether any of these would effectively deter the conduct you are trying to prevent.

Some alternatives to consider include:

- penalty notices (see 3.9.6);
- civil penalties, which are usually monetary penalties (though can include injunctions, banning orders or compensation) imposed outside of the usual criminal process; and
- enforceable undertakings and administrative sanctions, such as licence cancellation.

There are a number of factors to consider when deciding whether to impose a criminal sanction. These include:

- the nature of the conduct to be deterred;
- the circumstances surrounding the proposed provision;
- whether the proposed provision fits into the overall legislative scheme;
- whether the conduct causes serious harm to other people;
- whether the conduct so seriously contravenes fundamental values as to be harmful to society;
- whether it is justified to use criminal enforcement powers in investigating the conduct;
- whether similar conduct is regulated in the proposed legislative scheme or other legislation;
- if the conduct has been regulated for some time, how effective have existing provisions been at deterring the undesired behaviour; and
- the extent to which the level and type of penalty that may provide deterrence.

3.9.2 Framing criminal offences

If you decide that a criminal offence is necessary, offences must be defined clearly so that people know what is and is not prohibited. It is important that the offence be clearly described and that it be rationally connected with the harm targeted by the policy objective. An ambiguous statement of the offence may lead to inconsistent enforcement of the law, uncertain application, unintended changes in behaviour or failure to address the conduct that the offence was intended to prohibit.

As part of your policy development process you must decide what the elements of that offence will be. The following topics provide an overview of what you'll need to consider when developing a criminal offence. However, it is recommended that you seek legal advice as to what best suits your reform.

In general, criminal offences are made up of physical elements (the act) and fault elements (the state of mind).

In order to prove a person is guilty of an offence, the prosecution will generally need to prove that both of these elements existed. The standard the prosecution must meet in proving these elements is beyond reasonable doubt. This means that the facts of the case have been proven to such an extent that there is no other conclusion to draw other than the defendant's guilt.

There may be general criminal legislation in your country that governs how criminal offences will operate. This may include 'default' physical and fault elements that will apply if you do not specify them in your legislation. See the below example from *Crimes Act 2016* (Nauru):

> **22 Offences that do not provide fault elements**
>
> (1) If the written law creating an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.
>
> (2) If the written law creating an offence does not provide a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for the physical element.
>
> (3) This section does not apply to create a fault element for a physical element that consists of the existence or content of an Act or law.

If your country has a provision similar to section 22 of Nauru's *Crimes Act 2016* and you do not want the stated physical and fault elements to apply to your legislation, you will need to include specific provisions in your legislation to cover these matters.

Physical Elements

Physical elements can be:

- **Conduct** - an action or a combination of actions, an omission or series of omissions, a combination of both actions and omissions, or a state of affairs being allowed to develop or continue.
- **Result** - what happened as a result of the conduct.
- **Circumstance** - (or context) what was happening at the time of the conduct.

Most of the time, offences are committed by the accused doing a *positive act*. For example, picking up a

knife and striking a person with it.

However, some offences occur if an accused *does not do something they have a legal duty to do.* This is known as an 'omission'.

For example, families, in particular parents, have a legal duty to care for their children. A person who has taken responsibility to look after a sick or disabled person has a legal duty to look after that person. Similarly, teachers, doctors, and law enforcement officers all have a duty to look after people in their care. A failure to fulfil these legal duties may constitute a criminal offence.

Fault elements

The fault elements of an offence are concerned with the accused's state of mind at the time the physical elements of the offence occur. For a defendant to be found guilty, the prosecution must prove each physical element and the corresponding fault element beyond reasonable doubt. Proof of guilt is not established unless the physical and fault elements occur at the same time.

The standard fault elements are:

- **Intention** – did the person mean to do a particular act (or omission) or bring about a particular result? Or did the person believe a particular set of circumstances existed or would exist?
- **Knowledge** - A person will be considered to have 'knowledge' if they were aware of something in a given set of circumstances. For example, did the person know, or were they aware, that a person had not consented to sexual intercourse (and so raped them).
- **Recklessness** - Recklessness can be shown when the accused foresaw a substantial risk that a certain consequence would result from their conduct, but went ahead with their actions (or omissions) anyway.
- **Negligence** – A person is 'negligent' if the person's conduct involves a falling short of the standard of care that a reasonable person would exercise in the circumstances. Generally negligence should be applied to a circumstance or a result, rather than to conduct.

3.9.3 Retrospectivity

A key matter to consider in relation to the commencement of legislation is the principle against retrospective commencements. A retrospective commencement is when legislation is applied to conduct that has occurred in the past. The principle against retrospectivity is that laws should not impose liability for acts (or omissions) which were not considered unlawful at the time they occurred.

While retrospective application of legislation does occasionally occur, it should never create a detriment to anyone other than the government. For example, retrospective legislation may be enacted in order for the government to make payments, but should not be enacted if it has a detrimental result for members of the general public in relation to things that occurred in the past – particularly for criminal offences, as a person cannot be expected to be held criminally responsible for conduct which was not an offence at the time it was carried out.

3.9.4 Setting the penalty

When developing an offence, you will need to consider what the penalty should be. Each offence should have a separate maximum penalty. The maximum needs to be high enough to provide a deterrent effect and also sufficient scope for a court to punish the most serious cases, including repeat offences. It also needs to appropriately reflect the seriousness of the offence relative to other offences and penalties.

It can be helpful to look at similar offences within your country, to ensure the penalty for any new offence fits within the existing penalty scale. It can also be helpful to look to other countries to get a sense of how similar offences are treated.

It is also helpful to think about the broader criminal justice framework when setting a penalty. For example, a Magistrate's Court will most likely be limited in which matters it can hear based on the length of imprisonment attached to offences. If the Magistrate's Court is the most frequently sitting court, it may be worth keeping penalties below this level to ensure that less serious offences can be dealt with quickly. While practical matters such as this will be relevant, a penalty should always be based on the seriousness of the offence.

Something else to consider is whether a fine or community based sentence should be prescribed as an alternative to imprisonment. This gives the court some flexibility if the circumstances are appropriate. The ratio between imprisonment and fines and other sentences will need to be determined. Again, looking at how this has been treated in existing legislation can be helpful.

3.9.5 Defences

When introducing a criminal offence you must consider what defences may be relevant and how they should apply. A defence may already exist that applies. For example, defences existing in criminal legislation may apply to all offences in a country. Alternatively, general defences may need to be extended in their application or offence-specific defences may need to be included.

3.9.6 Infringement/penalty notices

Infringement or penalty notices provide an alternative to prosecution for an offence or litigation of a civil matter. Generally, these notices are used for minor offences, especially ones that are committed frequently, and give the recipient the option to either pay a fine or elect to have the matter heard in court. In addition, infringement notices should also be limited to offences where a breach is readily assessable by an enforcement officer based on physical elements, rather than mental elements. A common example is minor traffic offences.

Frequently infringement notice schemes are included in subordinate legislation, such as regulations, so that fine amounts can be easily adjusted. Where this is the case, remember that the primary legislation must provide a power for making such a scheme (see topic 1.2.4 – Subordinate legislation).

Some things to think about when you are preparing to include an infringement notice scheme in legislation include:

- who should be authorised to issue a notice;
- what amount should be payable for each offence in the scheme (including amounts for a natural person and a corporation);
- the process for withdrawing a notice;
- the process for paying the notice; and
- what should be included in the notice itself, including:
    - a unique identifier for each notice;
    - the name of the person (or some other way to identify the offender) to whom the notice is to be issued;
    - the authorised officer who has issued the notice;
    - the alleged offence and the details of the offence (e.g. time, nature and place of the offence);
    - the amount to be paid;
    - the option to attend court instead of paying the fine; and
    - the method for seeking to have the notice withdrawn.

3.10 Are you creating regulatory powers?

Regulatory powers are the coercive and enforcement powers used by government agencies to ensure individuals and industry comply with legislative requirements.

This includes things like:

- monitoring powers, which can be used to monitor compliance with provisions of an Act and to monitor whether information given to the government is correct;
- investigation powers, which can be used to gather material that relates to the contravention of an offence or civil penalty provision;
- the power to apply to a court for civil penalty orders and injunctions; and
- the power to issue infringement notices.

If you are considering including such powers in legislation, you should also think about what safeguards and guidelines need to accompany that power. For example, if you are introducing a power to execute a warrant of some kind, you should also think about who can issue the warrant, who can exercise it, how the warrant should be executed, what powers that person has while executing the warrant and what rights the person who is the subject of the warrant has.

3.11 Are you creating a new legislative entity?

3.11.1 Is a new entity necessary?

Occasionally, legislative reform will include the creation of a new entity to implement the purpose of the legislative scheme.

An example of a statutory agency can be seen in the *Tertiary Education and Skills Authority Act 2016* (Solomon Islands). Under section 6 of this Act:

> **6. Establishment**
>
> (1) The Solomon Islands Tertiary Education and Skills Authority is established.
>
> (2) The Authority is a body corporate with perpetual succession.

The purpose of the Solomon Islands Tertiary Education and Skills Authority is provided in section 5:

> **5. Objects of Act**
>
> The objects of this Act are, through the establishment and operation of the Solomon Islands Tertiary Education and Skills Authority:
>
> (a) to recognise the importance of planning for tertiary education and skills development as part of national planning for the benefit of the economy and community of Solomon Islands; and
>
> (b) to improve the contribution made by tertiary education and skills development to meeting the needs of local, regional and international labour markets; and

(c) to encourage investment in tertiary education and skills development by both the public and private sectors; and

(d) to improve the provision of tertiary education and skills development; and

(e) to improve the employment prospects of persons with tertiary qualifications obtained in Solomon Islands through recognition of those qualifications outside Solomon Islands; and

(f) to improve participation in, and promote fair and equitable access to, tertiary education and skills development; and

(g) to improve accountability for funding for scholarships for tertiary courses and for providing or improving tertiary education and skills development.

Before creating a statutory agency through a legislative reform, there are a number of things you should consider.

First, is a new agency really needed? Statutory agencies still carry out a governmental function, so you should think about whether the function can be carried out by an existing government department or body or a collaboration of existing agencies. Having the desired activity carried out by an already existing government structure can avoid unnecessary costs, and can take advantage of existing resources and knowledge.

Generally, a statutory agency is only necessary when the function is more effectively performed outside of the government. This might be because the particular function requires a level of independence from government or because there is a specific need to establish a separate legal entity.

When deciding whether to establish a new statutory body, you should check what legislation may already exist which would be common to all statutory agencies. For example, there may be financial management legislation or legislation concerning staff which applies.

As the legislation is being developed, there are many legal and other issues to consider, some of which are discussed in this part.

3.11.2 Functions

Any legislation to create a new entity must clearly outline the purpose and functions of that new entity.

A lack of clarity about the purpose of the entity can result in ineffective governance structures that inhibit the efficiency and performance of the body tasked with undertaking the activity. Only when the purpose of an entity is clear can the direction be set for the entity to achieve its objectives.

Issues to consider include what the intended outcome of the entity's activities will be, and whether there will be any restrictions on the entity's activities.

An example of the functions of a statutory agency is section 38 of the *Leadership Code Act* (Tuvalu):

The Ombudsman has the following functions:

(a) to enquire into any complaints or allegation of misconduct on the part of any leader;

(b) to enquire into any defects in administrative practice appearing from any matter being enquired into;

(c) to enquire into any case of an alleged or suspected discriminatory practice by a leader;

(d) to give prior advice on potential breaches of this Code;

(e) to investigate and report on any complaints of any alleged breaches of this Code.

3.11.3 Powers

It is critical to be clear about what powers the entity can exercise.

For example, section 7 of the *Primary Producer's Authority Act 2018* (Vanuatu) provides:

> (1) The Authority has the power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions under this Act or any other Act.
>
> (2) Without limiting subsection (1) the Authority may purchase, hold, manage and dispose of real or personal property or carry out any act required for the proper performance of its functions under this Act.

This section limits the powers of the authority both to the functions that the Authority can perform and to things that are necessary and convenient to those functions.

3.11.4 Governance structure

The legislation will need to address the entity's governance arrangements. This will include issues such as:

- whether there will be a governing board and, if so, what will the authority and functions of the board be?
- how will board members be appointed, terminated and how long will their length of service be?
- will there be a chief executive or chairperson of the board? How will this be decided and what will the terms be?

An example of a governance structure can be seen in section 4 of the *Financial Supervisory Commission Act 2003* (Cook Islands):

> **4. Board members** - (1) There shall be a Board of the Commission which shall, subject to the provisions of this Act, have overall control of the Commission and which shall exercise the duties, functions and powers of the Commission.
>
> (2) The Board shall comprise 5 members appointed by the minister, all of whom must have qualifications and experience in, and have shown capacity in financial or commercial matters, law or accounting.
>
> (3) No person who is -
>
> (a) a member of Parliament; or
>
> (b) employed in the service of the Crown or any agency of the Crown; or
>
> (c) a director, legal or beneficial shareholder or employee of a licensed financial institution, or the spouse or immediate family of any such person, shall be eligible for appointment as a member of the Board.
>
> (4) The minister shall, from amongst all persons appointed as Board members, appoint one of them as Chairperson of the Board.

3.11.5 Staffing

How will the entity be staffed? Will employees be considered public servants, in which case will existing public service legislation and conditions apply?

If this is not the case, then how will staff be engaged and how will their conditions be determined? How will other human resource related issues be dealt with, such as misconduct and termination?

A further employment consideration is whether, and how, to implement things like delegations and authorisations. Who in the organisation will be able to perform what functions and how can these functions be delegated to others?

3.11.6 Financial accountability

While statutory entities generally have more independence than a government department, a statutory agency is still using public money and must be held equally as accountable.

As such, any enabling legislation will need to specify how the entity and its employees spend and receive money, if that is not already dealt with in other public financial management legislation. You will need to consider issues like:

- how the entity's financial resources will be managed?
- how the entity can enter into contracts and hold property?
- what kind of financial reporting will be required?
- what the approval process will be for spending money and making payments?

For example, under section 26 of the *Financial Supervisory Commission Act 2003* (Cook Islands):

> **26. Financial reporting and fiscal updates** - The Commission shall deliver to the Ministry of Finance and Economic Management, financial reports and fiscal updates in accordance with Parts II and V of the Ministry of Finance and Economic Management Act 1995-96, as if the Commission was a government department as defined in that Act.

3.11.7 Reporting

In addition to financial reporting, what other forms of accountability are necessary? For example, should the entity be required to report to the minister or a relevant department or the Parliament more broadly? Should there be a requirement to produce and make annual reports publicly available? You may also need to think about the role other offices may play, such as the Ombudsman or Auditor-General, in regard to freedom of information or other accountability laws.

For example, under section 28 of the *Financial Supervisory Commission Act 2003* (Cook Islands):

> **28. Annual report** - (1) Within 3 months after the end of each financial year the Board shall deliver to the minister a report of the operations of the Commission during that financial year, including statements of -
>
> (a) financial position;
>
> (b) financial performance;
>
> (c) cashflows;
>
> (d) commitments;
>
> (e) specific fiscal risks;
>
> (f) accounting policies;
>
> (g) outputs and outcomes actually achieved,
>
> together with such other statements as are consistent with generally accepted accounting practice.
>
> (2) The annual report made under subsection (1) shall state the information necessary to enable an informed assessment of the operations of the Commission including a comparison of the performance of the Commission with the statement of corporate intent.
>
> (3) The minister shall, as soon as an annual report is received by him, table a copy in Parliament if Parliament is then in Session and if Parliament is not then in Session, shall table the report at the commencement of the next ensuing Session.

Topic 4: Important practical considerations

This topic covers a number of practical matters that a policy officer must consider in order to effectively manage the law reform process. It is important not only to think about where your reform will best sit within the existing legislative framework, but also about when your reform will be required to operate. You will also need to consider how the reform should be implemented and how you will be able to evaluate whether it has successfully 'solved' the original policy problem.

4.1 Approval processes

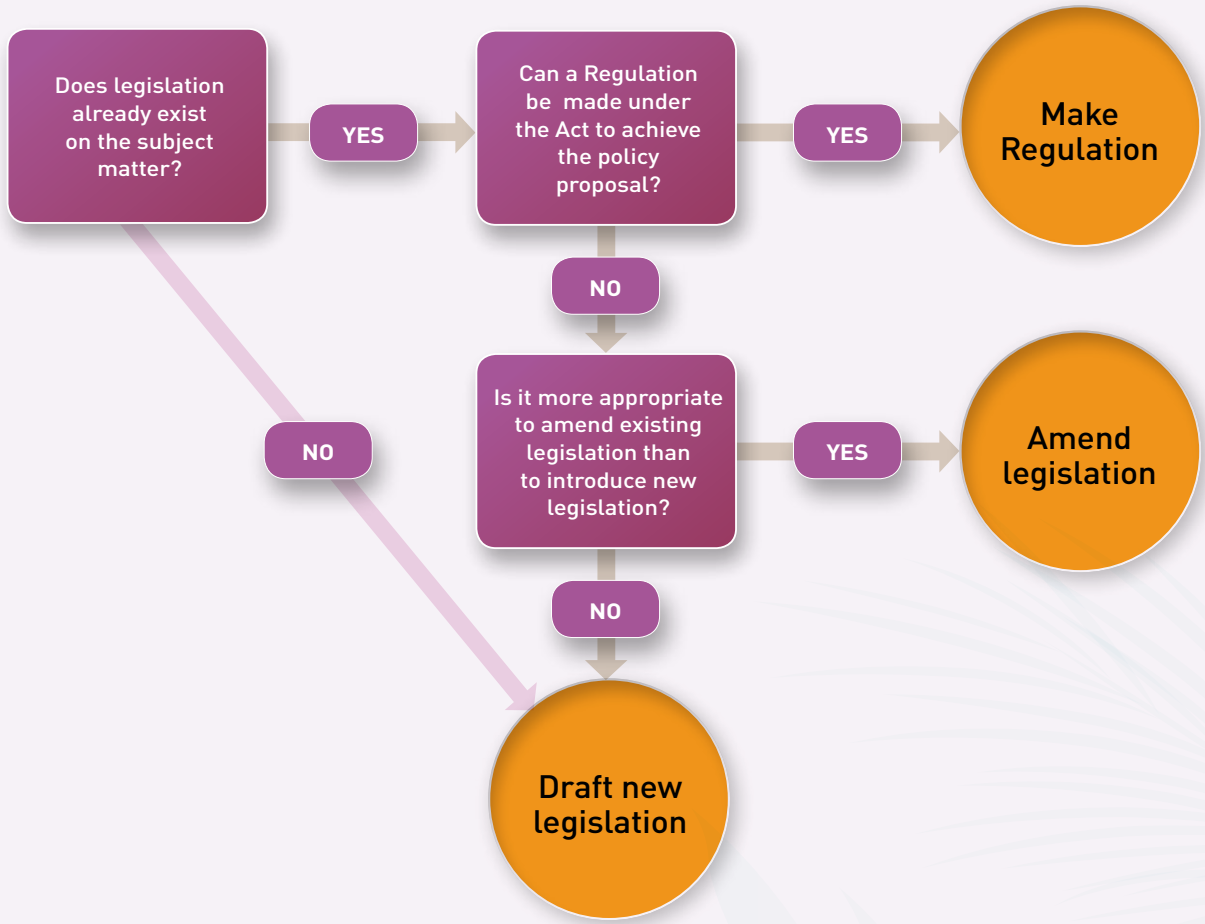
Each country's approach for commencing legislative reform differs, however, the appropriate policy approvals must be sought and gained before time is spent on amendments that the relevant minister or Cabinet may not agree with.

You should check what approval is necessary and the process for obtaining this as early as possible. Obtaining policy approval will also assist in determining the priority of the legislative reform within the government's broader agenda.

4.2 Will your proposed reform require primary or subordinate legislation?

When legislating, a key practical question is whether the subject matter being legislated is better suited to an Act or to a subordinate instrument, such as regulations. An additional question is whether new legislation is required or if existing legislation can be amended.

The following flowchart provides an overview of this thinking and further detail is provided in the following sections:



4.2.1 Act v regulation

The decision whether the reform should be achieved through an Act or through regulations may need to be resolved in consultation with your drafter. It is important to understand this distinction for the purposes of instructing and ensuring any legislative proposals are within the authority of the existing legislative framework.

While there is no definitive list of what should be contained in Acts as compared to subordinate legislation, the following is a list of issues that would generally only be dealt with by primary legislation:

- appropriations of money;
- significant questions of policy including significant new policy or fundamental changes to existing policy;
- rules which have a significant impact on human rights and personal liberties;
- provisions imposing obligations on individuals or organisations to undertake certain activities (e.g. to provide information or submit documentation, noting that the detail of the information or documentation required may be included in subordinate legislation) or desist from activities (e.g. to prohibit an activity and impose penalties or sanctions for engaging in an activity);
- provisions creating offences or civil penalties which impose significant penalties;
- provisions imposing administrative penalties for regulatory offences (administrative penalties are imposed automatically by force of law instead of being imposed by a court);
- provisions imposing taxes or levies;

- provisions imposing high or substantial fees and charges;
- provisions authorising the borrowing of funds;
- procedural matters that go to the essence of the legislative scheme;
- provisions creating statutory entities (noting that some details of the operations of a statutory entity would be appropriately dealt with in subordinate legislation); and
- amendments to Acts of Parliament.

As regulations and other subordinate instruments do not undergo as much scrutiny as Acts, significant matters and issues of great public interest should only be in Acts. Regulations generally contain the detail surrounding the significant principles set out in an Act, as well as matters that are likely to change frequently, for example, forms and fees.

Remember that subordinate legislation can only deal with the subject matter allowed under the empowering provision of the Act (see above in topic 1.2.4 - Subordinate legislation).

4.2.2 New legislation v amending legislation

A key preliminary issue is whether new legislation is required or if the policy change can be achieved through amending existing legislation. If legislation already exists on the subject matter, then it may be more appropriate to amend that legislation rather than introduce a new Act.

For example, a country may want new legislation to deal with an emerging issue, such as cybercrime. The benefits of this are that all issues relating to cybercrime can be located in one piece of legislation, which can be helpful for familiarising and training law enforcement. This approach also allows a government to highlight a particular issue to the public, by announcing the introduction of a standalone piece of legislation that addresses a public concern. However, this can also mean that broader issues, such as criminal offences and police powers, can be spread across multiple, subject-specific Acts. This can then make criminal offences and relevant police powers harder to find.

You may be tempted to 'clean up' the statute book by repealing and replacing existing legislation. This may be especially tempting if a number of previous amendments have occurred without being compiled into a single version of the Act. However, this can open previously settled issues up for debate and create more complications in the legislative process.

When undertaking legislative amendments you should also check whether there have been previous amendments made to the Act or instrument. Any amendments must be read into the Act so that you can be sure you are amending the right version.

4.3 When and how will your law commence?

You will need to decide when the draft legislation, once enacted, is to commence. There may be specific conventions around how legislation is to commence in your country, so this should be considered and followed. Additionally, there can be default commencements which may apply if a specific commencement provision is not given. Instructors should be aware of this and provide instructions as to whether the default commencement is appropriate or not.

Some common mechanisms for commencements include:

- commencing on a specific date;
- commencing on Royal Assent, or when certified by the Speaker of the Parliament;
- commencing on a future date to be decided – for example, commencing on a date to be proclaimed by the minister; or
- commencing on gazettal (see topic 1.2.2 for further information on gazettes)

Other more complicated commencement provisions may involve a contingent commencement. For example, an Act may be stated to commence on the commencement of another piece of relevant legislation. Alternatively, there may be a staggered commencement, where different parts of the legislation commence at different times. See some examples below of the variety of commencement provisions:

In deciding the most appropriate commencement, you should consider what time frame you require to ensure that the legislation can be appropriately implemented on commencement.

Questions to consider when working out an appropriate commencement date include:

- do regulations need to be prepared to commence with the Act?
- what practical steps need to be taken before the public service will be ready to operationalise the law?
- what will be the practical effect of this legislation on the community?
- is there is sufficient time for the community to learn about the law, and develop ways to comply with it?

Talk to your legislative drafter early about the anticipated commencement provisions and remember to include an explanation about the reasoning for commencement in the explanatory information (see topic 5.5 – Explanatory material).

4.4 What impact will your law reform have on existing legislation?

4.4.1 Consequential amendments

It is important to start thinking early in the reform process about what impact your law reform will have on existing legislation. When your new legislation interacts with existing legislation, it may be necessary to change the existing legislation. Such changes are referred to as 'consequential amendments'.

For example, when Nauru introduced the *Crimes Act 2016*, all other pieces of legislation which referred to the old *Criminal Code 1899* needed to be updated via a consequential amendment. These amendments are located in Schedule 2 to the *Crimes Act 2016*, such as:

PART 9 — FISHERIES ACT 1997

67 **Sections 22(8), 23(3) and 24(5)**

omit

Section 24 (Mistake of Fact) of the Criminal Code 1899 is

substitute

Sections 44 and 45 of the Crimes Act 2016 are

4.4.2 Transitioning from an existing legislative scheme

Where a legislative reform creates a change from an existing legislative arrangement to a new one, a specific provision to deal with the changeover period may be required. This kind of transitional provision explains how the existing scheme should be treated when the new scheme comes into force.

For example, a legislative scheme might exist where people who would like to operate small businesses must apply for a small business permit for which they must meet a variety of criteria. If a legislative reform was introduced to change that criteria, then a number of issues would arise that the new legislation would need to address. These issues include:

- Should a permit granted under the old scheme continue to have effect once the new permit scheme begins?
- If a person had applied for a small business permit under the existing legislation, what should happen to their application when the new legislation is enacted? Should they have to apply again?
- If there were any regulations or other subordinate instruments relating to the existing permit scheme, do these continue as if they were made under the new scheme?

It is also possible to 'save' an existing rule, right, privilege, obligation or liability by preserving such a provision (either wholly or partially) from being repealed or ceasing to have effect because of new legislation.

An example of a simple transitional provision can be seen in section 151 of the *Police Powers and Duties Act 2008* (Kiribati), which allows for offence proceedings which had been started under the previous police legislation to continue as though the new legislation did not exist:

> **151. Proceeding for offences**
>
> A proceeding for an offence, that was started under the Police Ordinance, and was pending at the commencement of this section, may be continued as if this Act had not been enacted.

Another example can be seen in the *Planted Forest Act 2015* (Vanuatu):

> **30 Transitional provisions**
>
> (1) On the commencement of this Act, a person who is granted a forestry right in respect of an accredited timber plantation under the Forestry Rights Registration and Timber Harvest Guarantee Act [CAP 265], is taken to have been granted forestry rights in respect of his or her timber plantation under this Act.
>
> (2) To avoid doubt, on the commencement of this Act, a timber plantation referred to under subsection (1) is to be known as a planted forest.

4.5 How will your reform be implemented?

Law reform alone cannot solve policy problems. The new law will need to be implemented and enforced in order to have any effect on the policy problem. Implementation can have implications for financial, human and other resources.

Before commencing any law reform it is critical that you develop a clear plan for how the reform will be carried out. You should identify any implementation challenges, resources, timeframes, roles and responsibilities very early on, possibly even before recommending this option to your minister. This is even more critical when the reform is connected to other regulations, policies or projects being undertaken to address the policy problem.

Some specific considerations include:

- Have those responsible for applying the new law been identified and their roles and responsibilities clearly defined? For example, there is no point in creating a law that allows for complaints to be made about government decisions if there is no one responsible for receiving and responding to those complaints.
- What resources will be required to implement the new law? For example, will new institutions need to be created? How will these be staffed?
- How will those responsible be held accountable for implementing the legislation?
- Are there reporting procedures in place?
- Have stakeholders been adequately informed and included in the process?
- Have threats and risks been identified and mitigated against?
- Has it been decided how success will be judged and evaluated?

Implementation plans can assist to guide implementation by creating a shared understanding of who is responsible for what actions. An example of a simple implementation plan is set out below.

Policy Implementation Plan

Policy Owner_____ Policy Objective_____ Policy Approval_____

Sexual Harassment Policy (what)	ACTIONS (How)	RESPONSIBLE (Who)	TIMEFRAME (When)	BUDGET (Cost)	BUDGET SOURCE (Cost)	STATUS
Complaints procedure	What actions must be completed to implement this policy?	Who is responsible for the action?	When must the action be completed by?	How much will it cost to implement the action?	Where will the funding come from?	Is the action not started, in progress or complete?
	Draft guidelines for selection of contact officer e.g. must have counselling qualification or list of current services to refer complainants to	Policy team	June	$10,000	National budget	Complete
	Select appropriate contact officer	HR	June			Complete
	Train contact officer on correct handling of cases	Training Department	July			Complete
	Train staff on policy	Training Department	July	$20,000	AFP	In progress
	Conduct follow-up review to measure effectiveness	Director of Prosecutions	December and ongoing	$30,000 per year	National budget	No started

4.6 How will you monitor and measure success?

It is important to build monitoring and evaluation into policy development. These steps will help you assess whether the outcome sought from your policy has been achieved. For example, if the policy problem being addressed was underage drinking and the policy option pursued was to increase penalties for this offence in the Crimes Act, then monitoring and evaluation would help you determine if the levels of underage drinking have actually declined as a result of the law reform undertaken.

'Monitoring' is essentially a management process to periodically report against planned targets. The gathering of this evidence over time will help evaluation. It helps to have what is called 'baseline data' – relevant information on how things were before the policy was implemented.

Once this evidence has been gathered, 'evaluation' can be undertaken to make judgments about the effectiveness of the policy action/option, and can help decisions be made on whether to expand, modify or stop the policy.

Evaluation is usually focussed on how effective, efficient and appropriate the policy response to the issue being addressed is (or was). It is also a key mechanism for gathering evidence to inform future policy making.

The design of any policy should include a system for evaluating the effectiveness of the policy.

4.7 Checklist before moving on

Once you have worked your way through all the chapters above, you will be in a great position to work as effectively as possible with a legislative drafter. However, before moving on to the next chapter, be sure you are comfortable with the below checklist:

Checklist before moving on from this topic		
✓	I am comfortable that I have the necessary approval for proceeding to draft the proposed reform	4.1
✓	I have considered whether my reform is better dealt with through either primary or subordinate legislation	4.2.1
✓	I have considered if new legislation is necessary or whether my reform can be achieve through amending existing legislation	4.2.2
✓	I have considered when and how the law should commence	4.3
✓	I have considered what consequential amendments may need to be made as a result of my reform	4.4.1
✓	I have considered whether transitional arrangements are necessary to introduce my reform	4.4.2
✓	I have planned how to implement my reform	4.5
✓	I have considered how to monitor and evaluate the success of my reform	4.6

Topic 5: Working with a legislative drafter

Once the government has decided that legislative reform is necessary, you will need to engage a legislative drafter to draft the reform. Your country may have an office dedicated to legislative drafting or it may be that the lawyers in your Attorney-General's office or Department of Justice do the drafting. Sometimes private drafters are engaged or donors may have legislative drafting skills. Whatever the arrangement, instructions will need to be prepared for the legislative drafter.

5.1 Drafting instructions

5.1.1 What are drafting instructions?

Drafting instructions provide the link between the policy and the legislation.

Drafting instructions are usually written and provide the legislative drafter with an explanation of:

- what needs to be done and why – what is the policy that needs to be put into law;
- when the draft legislation is required by and when it should commence;
- what is the background and context for the reform; and
- any legal issues of which the drafter should be aware.

5.1.2 Why do drafting instructions matter?

The importance of clear drafting instructions cannot be underestimated. Not only do good instructions contribute to a smoother and more efficient drafting process, but they are critical to achieving clear and good quality laws. Where instructions are unclear, ambiguous or lacking in detail, not only will time be wasted, but there is the potential for the resulting legislation to also be unclear, ambiguous and confusing.

Imagine, for example, a drafter receives an instruction that the government would like all people fishing in Town A be licenced.

A range of policy issues are left undefined, such as:

- Does this apply to residents of Town A only or to visitors to Town A also?
- Where are licences obtained?
- How long do licences last for?
- Will there be a fee for a licence – if so, how will that be collected?
- What geographical area does this apply to?
- Are there any exceptions?
- What are the consequences of fishing without a licence?
- What is the problem the issuing of licences is hoping to address?

5.1.3 What is the role of the instructor?

As the instructor it is your role to tell the drafter everything he or she needs to know in order to be able to effectively and efficiently prepare a draft that solves the policy problem the reform is intended to address.

The instructor will be the primary contact point for the drafter on everything to do with the reform, so it is critical that the instructor:

- is fully across the policy problem;
- understands how the reform will address the policy problem;
- understands the current legal framework and how the reform will affect it; and
- is familiar with the legislative process.

Ideally, all the policy decisions regarding new legislation should be clearly determined before you start working with your drafter to prepare the legislation. However, in reality this is rarely the case and your drafter will often identify further policy questions that you will need to consider. It is your role to resolve these matters in a timely manner for your drafter.

5.1.4 What is the role of a legislative drafter?

It is the role of the legislative drafter to receive the drafting instructions and 'translate' them into a legally effective draft bill.

The drafter is not the policy officer. Although the drafter may point out gaps in policy, they will ask you as the policy officer to clarify these issues. It is not the drafter's role to develop policy or make policy decisions.

In order to give effect to instructions, a drafter will strive to produce a draft that:

- gives effect to the stated policy intention;
- is clear and easily understandable;
- is legally effective – for example, a draft that is made within authority of the Constitution or enabling legislation;
- is consistent with the existing legal framework; and
- is error-free.

The drafter will ask many questions during the drafting process to achieve this – and you must be prepared for this.

5.2 Giving instructions

5.2.1 Drafting checklist

The following checklist provides a helpful overview of what should generally be included in drafting instructions. However, your drafting office may have its own guidelines for drafting instructions and, if so, you should familiarise yourself with those.

✓	Instruction	Further information
Preliminary Issues		
	Instructor's details Provide the name(s) and contact information for the instructor. Ideally there should be at least two people with sufficient knowledge of the project to be able to assist the drafter.	
	Background and purpose Describe how this proposed reform has come about and the policy problem it is aiming to 'solve'. Describe the objective of this reform.	5.2.2
	Policy authority Provide the details around who gave authority for this reform to occur. If it was cabinet authority, provide the details about when the decision occurred. If authority was given by a particular person (e.g. a minister) provide the name and title of the person who gave that authority and provide any written correspondence seeking and granting the authority.	
	Legislative priority If given, state the priority for this reform set by Cabinet/the person who gave policy authority.	
	Timetable Set out the proposed timetable for the reform, including • when the legislation is intended to be introduced to Parliament • when it is intended for consultations on the draft to be undertaken • any other key dates known, such as unavailability of the instructor.	
	Proposed title State if there is a particular short title or name that the legislation should have.	
	Relationship to existing laws State whether there are any existing laws (both primary acts and legislative instruments) dealing with this subject matter. If there is, describe how the proposed reform will fit with the existing framework. Include which ministry/department is responsible for any existing legislation.	
	Relevant legislation or legal opinions Provide any relevant legal advice or opinions that have been given on the matter, including any relevant case law.	

	Related proposals and projects Describe any related projects, either existing or proposed, including any related projects for which another ministry/department is responsible.	
	Summary of consultations Summarise any consultations that have occurred, or are intended to occur, on the reform including with particular stakeholders, other ministries/departments and the general public.	2.8
	For legislative instruments, the legislative power for making the instrument If your instructions relate to a legislative instrument, include the name and particular section of the Act or instrument which provides the power to make the proposed instrument. Also include the title of the person who has the power to make the instrument.	5.3.2
Substantive Issues		
	Commencement Provide instructions on when the bill should commence. Keep in mind that different parts of the bill may commence at different times. If commencement of the bill is contingent upon an event (for example, the commencement of a related piece of legislation), provide information about that event.	4.3
	What is to be done and why Provide detailed instructions for each policy proposal.	5.2.3
	Power to make instruments If your reform includes a bill or instrument that will provide the power to make an instrument, the instructions will need to be provided on what matters should be addressed by the instrument.	
	Consequential amendments State whether any consequential amendments of existing legislation will be needed and list the affected provisions. Provide instructions on how the affected provisions are to be amended.	4.4.1
	Savings/Transitional provisions Detail any arrangements required to transition the existing legislative scheme to the new one. State what kind of provisions will be required to achieve the desired transition.	4.4.2
Specific Issues		
	Constitutional implications Consider whether the proposal is consistent with the Constitution and that the reform is within the limitations set by the Constitution. You may need to seek legal advice about this before issuing instructions.	3.1
	Customary Law Consider whether your law reform may have implications for customary law, including what customary institutions and practises may be relevant and whether your reform may inadvertently alter or negate customary law.	3.2
	Acts of general application Provide information on whether provisions of any acts of general application will apply to your reform.	3.3
	International obligations and standards State whether there are any international treaties relevant to the reform, including what obligations arise.	3.4 and 3.6
	Human rights Are there any human rights implications relevant to the reform being undertaken? Will there be any impact on vulnerable groups, e.g. children, women, the elderly, people with a disability etc?	3.5
	Financial provision If the reform will include a financial provision, provide necessary instructions on how the money is to be collected, held, accounted for and distributed.	3.7

	Powers to make administrative decisions If the reform includes the power to make a decision of an administrative nature, include information on who should have the power to make that decision, what the nature and criteria of that decision should be. Also include any discretionary powers with regards to the decision, and whether decisions are subject to review and by whom.	3.8
	Delegations If the reform creates particular powers for a person or body, provide information on whether any of those powers can be delegated and to whom.	3.8.4
	Criminal offences If it has been decided that a criminal offence is necessary, state the relevant physical and fault element for each offence. Also include what the penalty should be and state any defences which should apply to the offence.	3.9
	Infringement notices If relevant, provide any details around the infringement notice scheme.	3.9.6
	Regulatory powers Set out the detail of any coercive and enforcement powers intended to be used by government, and who should be able to exercise them.	3.10
	Creation of new statutory entity If a new statutory entity is to be created by the reform, provide instructions on the requirements for its composition, functions, powers, administration and reporting/ oversight.	3.11
	Amending legislation If the reform will involve amending other pieces of legislation, identify each provision which is to be amended and provide instructions for each amendment.	
Other issues		
	Supporting documents Include any other relevant documentation, such as: relevant legislation, copies of court cases, copies of legal advice, relevant cabinet submissions or decisions, model provisions etc.	5.3.3
	Other information Include any further relevant information.	

5.2.2 Background

As a starting point, you should provide the legislative drafter with some background to the policy. This includes a description of the broad policy proposal as agreed by the minister and the objective of the reform. This should be in general terms. The specifics can be provided within the more detailed instructions. The background should just give the legislative drafter an understanding of the policy story.

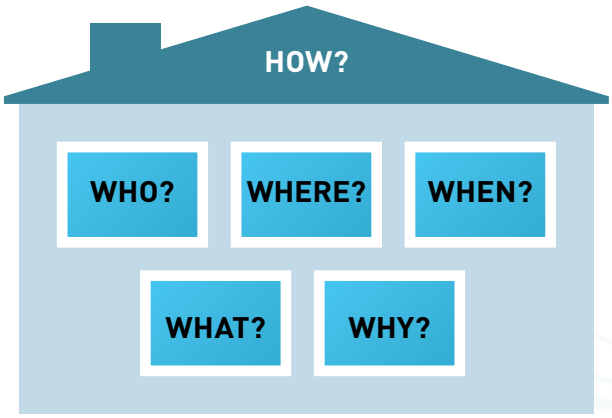
In the background portion of instructions, you should also include things like:

- an overview of the legislative scheme being created/amended/replaced – this provides the drafter with an understanding of the current arrangement so they may determine where to best fit the proposed reforms, for example, whether new legislation is necessary or existing legislation can be amended;
- the timetable for the reforms – including when versions of the draft will be required (for example, for consultation purposes) as well as the final deadline for introduction to Parliament;
- any related proposals;
- identification of empowering provisions – for example, if the instructions are for regulations, then the enabling provision of the Act should be identified and an explanation provided of how the proposed regulations are within the scope of the enabling provision; and
- an outline of any consultations that took place and a summary of their outcome, including consultations held with other departments, relevant stakeholders or the public more generally.

5.2.3 The specifics

Where possible, you should break the broad policy proposal into individual concepts so that you provide specific instructions in relation to each.

The **'House with five Windows'** analogy can remind you to provide as much detail as possible. Using this analytical tool will also help you to spot potential policy gaps before the instructions reach the legislative drafter.



As an example, if the government wanted to provide an incentive payment to parents for vaccinating their children, applying the House with five Windows tool might prompt you to consider and provide instructions for issues like:

Who?

- Just parents? What about other people the child lives with or other kinds of guardianship?
- Who is authorised to give the vaccinations?
- Who is responsible for making the payments?

What?

- Vaccinations for which diseases?
- What happens if parents do not get their children vaccinated – will there be any negative consequence for them?

When?

- All children or just children of a certain age?
- Is there a certain time that vaccinations need to have been given by for eligibility? For example, by the time the child turns two?

Where?

- Are there particular providers parents are required to use in order to be eligible for the incentive payment?
- Does this scheme apply to all children in the country or just in a certain geographical area? For example, in the capital city where diseases might spread more easily.

Why?

- Is there a particular disease that has become a concern?
- Have vaccination rates fallen in recent times? Why?

How?

- How will parents prove that vaccinations have taken place?
- How will payments be given? For example, cash payment, cash transfer, voucher, cheque etc.

As well as providing instructions in this narrative form, tools such as diagrams, flowcharts and tables can help explain processes and relationships between concepts.

5.2.4 Defining terms

Many of the terms used in your legislation may need to be defined. Definitions not only make the legislation more readable (by reducing the need to repeat concepts), but help minimise ambiguity and interpretation problems. Your legislative drafter should be able to help you identify which terms require definitions, but you should also be mindful of this and form your own views.

5.3 Further issues to consider

5.3.1 Using overseas legislation and lay drafts

Frequently, an instructor will have seen legislation from another country that appears to address the policy issue they are currently facing. The temptation in these cases is often to either use the overseas example, substituting one country's name for another, or to instruct the drafter to follow this example. Alternatively, the temptation exists for instructors to simply draft what they think the legislation should look like in an effort to assist the legislative drafter.

You should avoid these practices. Legislative drafters need to understand the intention behind provisions, not simply see provisions. As each country's legislative framework and context is different, inserting legislation from another country without adapting it appropriately may lead to messy and unsatisfactory outcomes.

While providing examples from other countries is common, and may be used as an illustration or guide for how legislation might look, it is not enough to simply provide the example without explanation. The legislative drafter cannot be expected to understand what it is about that example that is considered 'good' and how it should fit within the broader context. Instead, each example provision being provided should include an explanation of the objective and rationale for the example, including instructions on where the example should be departed from and why.

Instructions should describe the effect of a provision – that is, what the provision is trying to achieve – rather than provide the actual wording of the provision. You should not tell the legislative drafter to use a specific form of words in the Bill.

5.3.2 Power to make legislative instruments

The power to make a legislative instrument is found in the primary piece of legislation, i.e. the Act to which the legislative instrument relates. As a legislative instrument must be made within the power granted by the Act, it is important when developing that power to think about its nature and scope. How broad should it be? Should it be limited to specific subject matter? Who may make the legislative instrument, e.g. the minister? Are there any conditions imposed on the exercise of the legislative instrument making power?

It is common for Acts to provide general instrument making powers by including in the Act that instruments may be made which are 'required or permitted' or are 'necessary or convenient'. While such terms are relatively general, they cannot be used to extend the scope or general operation of the Act. Legislative instruments can only be used to flesh out the framework of the Act and support its operation.

An example of a general regulation making power can be seen in the *Statistics Act 2015* (Tonga).

7 Minister responsible for statistics

...

(4) The minister may make regulations as are necessary to give full effect to the provisions of this Act and its administration.

5.3.3 Supporting documents

It is important to also provide your legislative drafter with any other relevant documentation. This may include:

- any relevant legislation;
- any legal advice which has been obtained;
- details and summaries of consultations which have been carried out in relation to the policy;
- copies of any relevant court cases;
- details of any relevant international agreements or obligations; and
- any cabinet submissions or decisions.

5.4 Reviewing the draft

5.4.1 What should you do when you receive a draft bill back?

Once you receive a draft bill back from the legislative drafter, it is important to review it with a critical eye to ensure it gives effect to the policy intention. There are a few things to look for when reviewing the draft:

- Has the draft given effect to the policy proposed? - remember to check it against your instructions to make sure everything has been captured appropriately;
- Is there anything missing? - reviewing the draft is an important opportunity to determine whether there are any gaps in the policy for which further instructions will be needed;
- Has the legislative drafter raised any questions that need to be resolved?
- Does the draft make sense to you? – do not be afraid to point out if something does not make sense to you in the draft. As the policy officer, you are best placed to be able to assess this and if it doesn't make sense to you, then it will not make sense to those without your policy knowledge;
- Are the provisions in a logical order and easy for the reader to follow?; and
- Are there any grammatical errors, spelling errors or internal inconsistencies?

When reviewing the draft it is helpful to test it by generating practical scenarios in which the legislation will be used and assessing how it will operate.

Given that legislative drafting is inevitably an iterative process, you can expect to review and comment on several – often many – drafts before the bill is finalised.

5.4.2 Commenting on the draft

Comments on the draft can be made in any way (for example, in writing or during a face to face meeting), though the legislative drafter may have a preference on how they would like to receive feedback.

When providing comments, focus on the concepts rather than the particular words – for example, if the draft does not work, try to explain how the draft does not reflect the policy rather than return the draft with suggested wording. It is more useful to explain why the draft does not work, rather than how it should be fixed. Using examples to highlight the problems may also assist.

5.5 Explanatory material

In many countries draft legislation must be accompanied by explanatory material that explains how the law is expected to operate. Explanatory material is an important interpretation tool and can be used by a court and lawyers to assist in understanding the intention of the legislation. Due to the need to ensure that legislative provisions are short, simple and clear, explanatory material provides the opportunity for policy officers to explain what the policy intention of the legislative provisions are in more detail. This may include a summary of the reform and consultations held on the particular policy issue.

It is helpful to prepare the explanatory material at the same time the draft is prepared. Many decisions will need to be made about the draft as it is written and it is much easier to record the reasoning of these decisions at the time.

Topic 6: Further resources

6.1 Legal Resources

Pacific	
General	http://www.paclii.org PacLII collects and publishes legal materials from 20 Pacific Island Countries. The materials consist mainly of primary materials such as court decisions and legislation but also include decisions of various tribunals, panels, Ombudsmens' reports or secondary information such as court rules or bench books.
	https://libguides.library.usyd.edu.au/c.php?g=508236&p=3476280 University of Sydney Asia Pacific library guides, provides resources on Fiji, Samoa, Tonga and Vanuatu
	https://www.loc.gov/law/help/guide/nations.php US Library of Congress annotated guide to sources of information on government and law available online
Legislation	Cook Islands - http://www.paclii.org/countries/ck.html
	Fiji - https://www.fiji.gov.fj/Fiji-Laws/2017-Acts.aspx
	FSM - http://www.fsmlaw.org
	Guam - http://guamlegislature.com/index/
	Marshall Islands - https://rmiparliament.org/cms/legislation.html
	Nauru - http://ronlaw.gov.nr
	Kiribati – https://www.parliament.gov.ki/acts-of-kiribati/
	Palau - http://www.paclii.org/pw/indices/legis/
	PNG - http://www.parliament.gov.pg/bills-and-legislation
	Pitcairn Islands - http://www.government.pn/Laws/
	Samoa - http://www.samlii.org and http://www.palemene.ws/new/parliament-business/acts-regulations/
	Solomon Islands - http://www.parliament.gov.sb/index.php?q=node/237
	Tokelau – http://www.paclii.org/tk/indices/legis/
	Tonga - https://ago.gov.to/cms/
	Tuvalu - https://tuvalu-legislation.tv/cms/
	Vanuatu - https://parliament.gov.vu/index.php/icons
Journals	Journal of South Pacific Law - http://www.paclii.org/journals/fJSPL/index.shtml
	Hawaiian Pacific Journal Index - https://hilo.hawaii.edu/library/hawaiian-collection/pacific-journal

Australia	
Legislation	www.legify.com.au Legify helps you find the authoritative version of almost 14,000 Australian Acts and Regulations, instantly and direct from the legislative publishers of the Commonwealth, States and Territories.
	Commonwealth: https://www.legislation.gov.au
	NSW: https://www.legislation.nsw.gov.au/
	Victoria: www.legislation.vic.gov.au/
	Queensland: www.legislation.qld.gov.au
	South Australia: https://www.legislation.sa.gov.au/
	Tasmania: https://www.legislation.tas.gov.au/
	Western Australia: https://www.slp.wa.gov.au/legislation/statutes.nsf/default.html
	Northern Territory: https://legislation.nt.gov.au
	ACT: http://www.legislation.act.gov.au
Journals	http://www.nla.gov.au/app/eresources/list/free National Library of Australia free eResources includes journals and databases
	http://www.austlii.edu.au/au/journals/: A large range of free journals can be accessed through Austlii
Case law	www.austlii.edu.au: Austlii provides access to case law from most superior Australian courts and tribunals, as well as current and past Federal, State and Territory legislation.
	http://jade.barnet.com.au: Jade is a free subscription service for searching, annotating and sharing Australian legal judgments and decisions. Delivers tailored results to your inbox daily of the latest superior court decisions.
New Zealand	
Legislation	www.legislation.govt.nz: New Zealand government website provides access to full text of acts, bills and regulations.
Journals	http://natlib.govt.nz/collections/a-z/subscription-e-resources: National Library of New Zealand eResources (some free)
	http://www.worldlii.org/catalog/53183.html : provides range of free NZ law journals
Case law	NZLII: NZLII provides free access to New Zealand's legal materials.
Canada	
Legislation	http://laws.justice.gc.ca/eng/
Journals	http://digitalcommons.osgoode.yorku.ca/sclr/ : Supreme Court law review
	Osgoode Hall Law Journal
	Ottawa Law Review
	Queen's Law Journal
	University of Western Ontario's Journal of Legal Studies
Case law	Canlii - https://www.canlii.org/en/index.php
United States	
Legislation	Federal Digital System (FDsys) (USA): Official website of US government Printing Office (GPO). FDsys provides free online access to official publications from all three branches of the Federal government. Eg: United States Courts Opinions, Code of Federal Regulations and United States Codes.
Journals	New York Law School Law Reviews: This portal lists about 150 journals where, at minimum, the latest edition is freely available online. There is also a Google powered search box
	American Bar Association portal: This is a portal to free law reviews and journals. There are links through to the journals as well as a Google powered search engine.

Case law	LII: Legal Information Institute : Providing free open access to US Federal and State case law and legislation, coverage includes Supreme Court decisions from 1990, legislation, and also the CFR.
	FindLaw: searchable database from FindLaw offers U.S. Supreme Court opinions since 1893. FindLaw also maintains a database of case summaries for lower court opinions since 2000.
United Kingdom	
Legislation	Legislation.gov.uk: This government-sponsored site provides free access to legal materials from Scotland, Wales, Northern Ireland and the United Kingdom.
Case law	Bailii: British and Irish Legal Information Institute
	House of Lords Judgments: Archive: Full text judgments of the House of Lords delivered from 14 November 1996 to 30 July 2009 are archived in this section of the UK Parliament web site.
	Courts and Tribunals Judiciary: Judgments: Selected judgments from the Court of Appeal, High Court and First-tier and Upper Tribunals, and also sentencing remarks from the Crown Court, judgments of district judges (magistrates' courts), and County Court and Military Court judgments, late 2011 onwards. The database can be searched and filtered by court or jurisdiction. Judgments from 2009 to 2011 are available via an archived site.
	Judicial Committee of the Privy Council: The Judicial Committee of the Privy Council (JCPC) is the court of final appeal for the UK's overseas territories, crown dependencies, and military sovereign base areas, and for several Commonwealth countries. Includes details of JCPC's role and powers, lists of relevant legislation, procedural information (forms, rules and practice directions), details of current cases and future sittings; live television coverage of hearings; and judgments November 2009 onwards.
Other resources	
Legal dictionaries	http://thelawdictionary.org/ - Black's Law Dictionary
	http://legal-dictionary.thefreedictionary.com/
	http://dictionary.law.com/
	http://www.nolo.com/dictionary
General resources	https://doaj.org: Directory of Open Access Journals – links to scholarly journals which can be accessed for free.
	LawCite: automatically generated international legal case and journal article citator which is being developed at AustLII. Over 18,000 law report and journal series are currently indexed, and the database includes over five million cases and law journal articles from around the world.
	GlobaLex: This site includes sections on foreign, international and comparative law. The section devoted to foreign law includes excellent summaries of legal research in a wide range of countries and jurisdictions including links to resources where available.
	WorldLII: This site collects laws, treaties, cases, journals and other materials from around the world. It covers both foreign and international law.
	CommonLII: provides free access to the legal materials of 59 Commonwealth and common law jurisdictions.
	Global and Comparative Law Resources - Library of Congress includes the Global Legal Information Newtowk (GLIN), Global Legal Monitor, Guide to Law Online, Global Legal Information Catalogue.
	http://www.legalabbrevs.cardiff.ac.uk/ - Cardiff Index to Legal Abbreviations: search for the meaning of abbreviations for English language legal publications and law reports.
	http://www.unimelb.libguides.com/australianlaw-freeonlineresources: This guide outlines free legal resources to conduct Australian legal research (legislation, case law and secondary sources), followed by links to research guides covering the Australian, and foreign/international/comparative context.
	https://academic.microsoft.com :Top authors in field, conferences, journals
	https://scholar.google.com: web search engine that indexes the full text or metadata of scholarly literature

6.2 Australian Attorney-General's Department Legal Policy Development Course

To help understand and navigate policy development, the Australian Attorney-General's Department (AGD) runs the 'Legal Policy Development Course'.

The Course uses 7 'policy steps' as a framework to understand and describe the policy process, including guidance on how to identify the root cause of the policy problem and different approaches to solve that problem (including law reform as only one option among others).

This Course has been delivered for over five years throughout the Pacific using a train the trainer approach, under the AGD 'Legal Policy Champions Program'. The Legal Policy Champions Program aims to build the capacity of Pacific law and justice officers to develop rigorous public policy proposals and enable them to be champions for good policy development practices.

To find out more about the Legal Policy Development Course, please refer to the following website:

https://www.ag.gov.au/Internationalrelations/pacific-law-justice-program/Pages/pacific-legal-policy-champions-program.aspx

6.3 Additional resources

Administrative Review Council, *What decisions should be subject to merit review?*

<https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx#law>

C Althaus, P Bridgman and G Davis (2018, ed 6) *The Australian Policy Handbook*

<https://books.google.com.au/books?id=HKEtDwAAQBAJ&source=gbs_book_similarbooks>

Australian Attorney-General's Department, *Australian Administrative Law Policy Guide*

<https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Australian-administrative-law-policy-guide.pdf>

Australian National Audit Office (2001) *Developing Policy Advice*

<http://www.anao.gov.au/uploads/documents/2001-02_Audit_Report_21.pdf>

Australian Public Service Commission (2007) *Tackling Wicked Problems: A Public Policy Perspective*

<http://www.apsc.gov.au/publications-and-media/archive/publications-archive/tackling-wicked-problems>

Australian Public Service Commission (2007) *Changing Behaviour: A Public Policy Perspective*

<http://www.apsc.gov.au/__data/assets/pdf_file/0017/6821/changingbehaviour.pdf>

Australian Public Service Commission (2009) *Smarter policy: choosing policy instruments and working with others to influence behaviour*

<http://www.apsc.gov.au/publications-and-media/archive/publications-archive/smarter-policy>

G Banks AO, (2008) *Evidence-based policy making: What is it? How do we get it?*

<http://www.pc.gov.au/speeches/cs20090204>

Commonwealth Association of Legislative Counsel Drafting Manuals

<http://www.calc.ngo/drafting-manuals>

Department of Prime Minister and Cabinet, *Australian Government Guide to Regulation*

<https://www.pmc.gov.au/sites/default/files/publications/Australian_government_Guide_to_Regulation.pdf>

Department of Prime Minister and Cabinet, *Australian Government Legislation Handbook*

<https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf >

Department of the Prime Minister and Cabinet and Australian National Audit Office (2014), *Better Practice Guide: Successful Implementation of Policy Initiatives*

<http://www.anao.gov.au/~/media/Files/Better%20Practice%20Guides/2014%202015/ANAO%20-%20BPG%20Policy%20Implementation.pdf>

Dr M Lalotao, (2017) *Legislative Drafting in the Pacific Context*

National Archives of Australia, *Records Management pages*

<http://naa.gov.au/records-management/getting-started/>

New Zealand Legislation Design and Advisory Committee website

<http://www.ldac.org.nz/>

Queensland Government, *Role of instructing officer in providing effective drafting instructions*

<https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/drafting-process/instructing-officer.aspx>

Solicitor-General's Legislative Drafting Directives for the Cook Islands

<http://pilonsec.org/images/stories/Documents/LegislativeDraftersForum/ci_sg_legislativedirectivesfinal%20170712.pdf>

Tasmanian Government, *Tasmanian Government Project Management Guidelines*

<http://www.egovernment.tas.gov.au/project_management/tasmanian_government_project_management_guidelines>

6.4 International model laws, legislative guides, explanatory notes etc

International organisation	Relevant resources available on -
United Nations Office on Drugs and Crime https://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html	Trafficking in persons Money-laundering and financing of terrorism Smuggling of migrants Illicit manufacturing of and trafficking in firearms Terrorism Extradition Mutual assistance in criminal matters Child victims and witnesses of crime
United Nations Commission on International Trade Law https://uncitral.un.org/en/texts	International commercial arbitration International commercial mediation International sale of goods and related transactions Procurement and infrastructure development Micro, small and medium-sized enterprises Electronic commerce Insolvency Security interests Online dispute resolution International payments International transport of goods
Council of Europe https://www.coe.int/en/web/cybercrime/guidance-notes	Cybercrime guidance notes
Office of the High Commissioner for Human Rights https://www.ohchr.org/EN/PublicationsResources/Pages/Publications.aspx	Human Rights (Model law on Racial Discrimination - https://www.ohchr.org/Documents/Publications/Discrimination962en.pdf)
Commonwealth Secretariat https://thecommonwealth.org/commonwealth-model-laws	Electronic transactions Recognition and enforcement of foreign judgments Implementation of the Rome Statute of the International Criminal Court Measures to combat terrorism Mutual assistance in criminal matters Evidentiary provisions Criminal disclosure and prosecution disclosure Judicial service commissions Competition Freedom of information Protection of personal information Privacy Integrity in public life

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