

Tonga

LEGISLATIVE DRAFTING MANUAL

Authorised by Cabinet to come into force on 1 April 2019.

This Manual is a guide of the processes and technical requirements for drafting Government legislation. All Government Ministries, Departments and Agencies are required to follow this Manual. Please contact the Attorney General's Office for assistance that may be required relating to this Manual.

Attorney General's Office

2019

Tonga

LEGISLATIVE DRAFTING MANUAL

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LEGISLATIVE DRAFTING MANUAL

The Attorney General's Office acknowledges the authors of this Manual, Mr. James Bruce Lutui, Senior Crown Counsel, Ms. 'Akanesi 'Emeline Katoa, Assistant Crown Counsel, and the technical assistance and contribution of the Pacific Islands Forum Secretariat.

AUTHORISED BY CABINET TO COME INTO FORCE ON 1 APRIL 2019[1]

PART I - OVERVIEW

A decision to prepare new legislation should not be taken lightly, as the development and implementation of new legislation often involves significant costs for the community. These costs include the direct development costs, the time and expenses of those who review draft legislation, the costs of the enactment process, printing and publication costs, and the time and expenses of those who need to adjust to, learn about, enforce, administer, implement, or comply with the new legislation.

On the other hand, despite the costs involved, legislation may be the most cost-effective or appropriate means of implementing new policy or resolving a particular problem.

If new legislation is proposed, it is important that the process indicated in this Manual is followed. This process is designed to improve the quality of legislation, and increase its acceptance by the community, by clarifying its objectives, determining how best to achieve the objectives, and ensuring that affected persons are properly consulted.

If this process is followed, the costs of poor quality legislation (including uncertainty and confusion, legal advice, and litigation) should be largely avoided.

Legislation that is well-drafted, easily understood, and legally sound is a cornerstone of a well-functioning democracy, legal system, and society.

The Attorney General's Office (AG's Office), in consultation with all Government Ministries, Departments and Agencies, has developed this Legislative Drafting Manual (Manual) to guide Government's process of developing and drafting legislation. This will ensure a consistent approach to the Government legislative development and drafting process as well as better assisting the fulfilment of Government's legislative agenda.

Consultations with Government Ministries indicated the varying practices or lack of understanding or clarity amongst Government about the process of developing draft legislation. Steps outlined in this Manual will clarify and streamline this process to ensure effective and timely law reform is achieved. It will also minimise challenges associated with limited policy development and drafting capacity.

This Manual is available to all Government officers as a mandatory reference for legislative reform. It is to be used by all Government Ministries, Departments and Agencies to guide their respective work relating to developing and drafting legislation. In particular, the Manual is targeted at policy officials, legislative drafters of the AG's Office, legislative drafting consultants engaged directly by Government Ministries, Departments and Agencies, legal officers in Government Ministries involved in legislative reform, and other officers of Government Ministries, Departments and Agencies whose work involve review and reform of legislation.

There are three main parts to this Manual:

(1) Part One: Background

This Part includes an overview of legislation and important laws to consider in developing and drafting legislation for Tonga, and an overview of the key roles in the legislative development and drafting process.

(2) Part Two: From policy to legislation

This Part outlines the process (from policy to legislation) for developing Government legislation and the specific roles and functions of Government Ministries, Departments and Agencies, and other stakeholders, including roles and responsibilities of Government in engaging and monitoring the performance of legislative drafting consultants.

(3) Part Three: Content requirements for drafting legislation

Drafting legislation is a technical and specialist skill. This Part will provide guidance of the technical requirements involved for the content of draft legislation for the Government of the Kingdom of Tonga. It covers general best practices and principles for drafting effective legislation, including plain language drafting, which must be adhered to by all persons involved in drafting legislation for the Government of the Kingdom of Tonga. The aim of this Part is to avoid previous deficiencies in drafted legislative outputs and assist the attainment of high quality legislation.

PART II - BACKGROUND

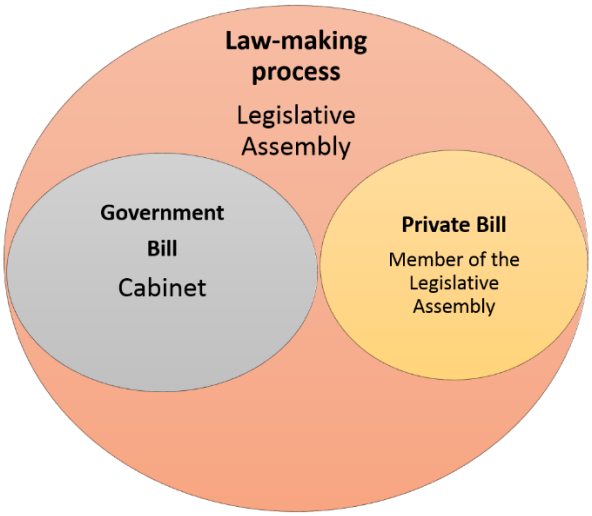


Figure 1 Law-making process

1 Law – Making process

At the outset, it is important to distinguish the 'legislative development and drafting process' of Government (to which this Manual relates) from the 'law-making' process of the Legislative Assembly. In general, the law-making process is the process of political consideration of legislation and involves legislators considering and debating a Bill through three phases (1st Reading, 2nd Reading, and 3rd Reading) before it is passed for Royal Assent and enactment.

This Manual concentrates on the operational process that takes place prior to the parliamentary process. This is the process within Government that involves a policy and Cabinet decision to draft a piece of legislation required for giving legal effect to a particular policy initiative.

Almost all legislation passed by the Legislative Assembly are Government sponsored legislation. Government's legislative development and drafting process is therefore fundamental to the overall law-making process (see Figure 1 above).

2 The Constitution and the Laws of Tonga

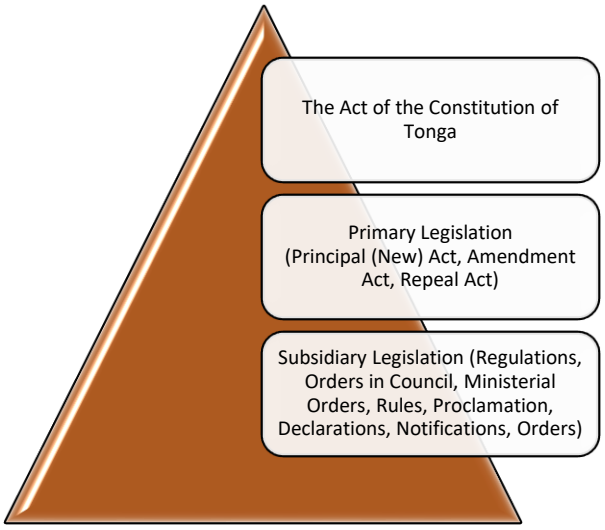


Figure 2 Legislative hierarchy

3 Legislative hierarchy

To understand the process of legislative development and drafting, it is important to have a clear understanding of the legislative hierarchy and the different types of legislation existing in Tonga.

In the legislative hierarchy (summarised in the Figure 2 above), the Act of the Constitution of Tonga is the supreme law. Below the Constitution are a set of written rules of law that are made by Tonga's law making authority. These written rules of law are called 'legislation' or 'statutes'. Clause 56 of the Constitution empowers 'the King and the Legislative Assembly to enact laws for Tonga'.

The highest level of legislation is referred to as primary legislation, for example, Acts of the Legislative Assembly. Primary legislation is referred to as a 'Bill' when it is introduced into the Legislative Assembly. On enactment, a Bill becomes an Act. An 'Act' is an expression of the Legislative Assembly's intent that states or alters the law in some respect. For example, it may establish rights and responsibilities of Tongan subjects and other persons in Tonga, it may impose penalties and sanctions, or it may impose taxes. There are three kinds of Acts – principal Act, amending Act and repealing Act. A principal Act sets up a new legislative scheme. An amending Act amends an existing Act. A repeal Act repeals an existing Act. An Act is enacted when it receives Royal Assent by the King and upon publication in the Gazette, although it may commence (i.e. start to have effect) at a later date.

Several terms are used to describe legislation that is not primary legislation, for instance subordinate legislation[1]. In this Manual, the term 'subsidiary legislation' is used. The making of this lower level legislation requires a delegation of legislative power in an Act. Legislative powers are commonly delegated to many bodies, such as Cabinet Minister or a statutory office holder or body. Regulations and Orders are the most common form of subsidiary legislation used in Tonga.

Legislation gives legal effect to policy decisions. Policy decisions may range from those that are high level at one end to those that involve technical or minor detail at the other. In general, Acts of the Legislative Assembly deal with matters of high level and general policy. Subsidiary legislation deal with the implementation of that policy. Not all Acts need to be supported by subsidiary legislation.

The process for developing primary legislation and subsidiary legislation are similar and will both be elaborated under Part Three.

4 Key laws to consider in developing and drafting legislation for Tonga

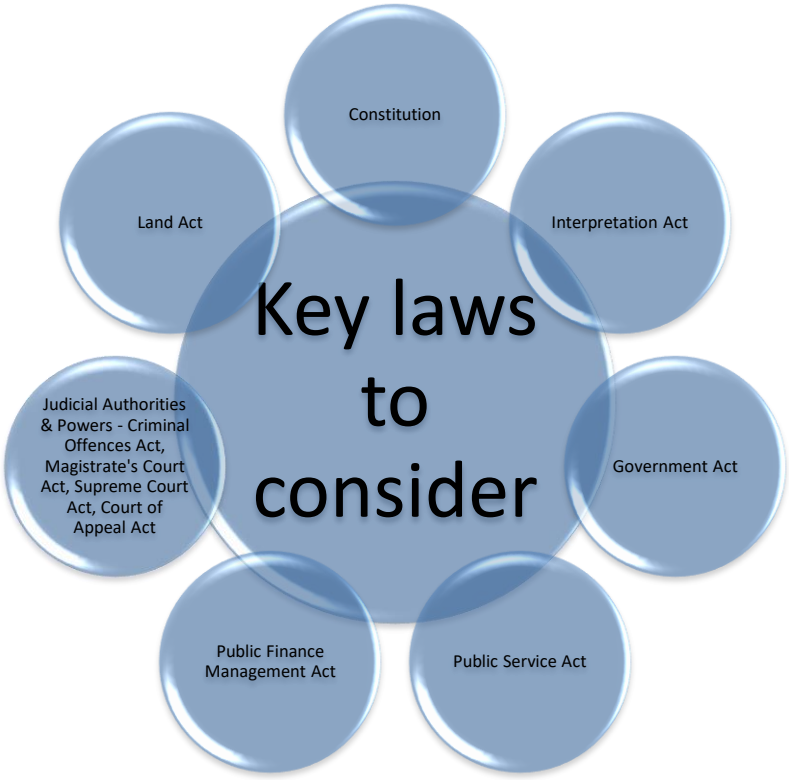


Figure 3 Key laws to consider

[1] Subordinate legislation can also be referred to as delegated legislation, subsidiary legislation and statutory or legislative instruments

(1) Act of the Constitution of Tonga (Constitution)

The Constitution provides the law making power of the King and the Legislative Assembly[2] and stipulates the makeup of Government and the balance between its executive, legislature and judiciary. It is separated into three parts: Part one declares the fundamental rights; Part two addresses the form of Government; and Part three provides for land ownership and succession. As the supreme law of Tonga, any legislation drafted must not be inconsistent with the Constitution[3].

Specific provisions relating to the law making power of the King and Legislative Assembly are as follows

(a)	***King's powers – Signature to Acts[4]***
	… All Acts that have passed the Legislative Assembly must bear the King's signature before they become law.
(b)	***Power of Legislative Assembly [5]***
	The King and the Legislative Assembly shall have power to enact laws, and the representatives of the nobles and the representatives of the people shall sit as one House. When the Legislative Assembly shall have agreed upon any Bill which has been read and voted for by a majority of three times it shall be presented to the King for his sanction and after receiving his sanction and signature it shall become law upon publication. Votes shall be given by raising the hand or by standing up in division or by saying "Aye" or "No".
(c)	***Amendments to Constitution[6]***
	It shall be lawful for the Legislative Assembly to discuss amendments to the Constitution provided that such amendments shall not affect the law of liberty the succession to the Throne and the titles and hereditary estates of the nobles. And if the Legislative Assembly wish to amend any clause of the Constitution such amendment shall after it has passed the Legislative Assembly three times be submitted to the King and if the Privy Council and the Cabinet are unanimously in favour of the amendment it shall be lawful for the King to assent and when signed by the King it shall become law.
(d)	***Enacting formula[7]***
	The formula for enacting laws shall be "Be it enacted by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:".

[2] *Act of Constitution of Tonga* (Tonga), Clause 56.
[3] *Act of Constitution of Tonga* (Tonga), Clause 82.
[4] *Act of Constitution of Tonga* (Tonga), Clause 41.
[5] *Act of Constitution of Tonga* (Tonga), Clause 56.
[6] *Act of Constitution of Tonga* (Tonga), Clause 79.
[7] *Act of Constitution of Tonga* (Tonga), Clause 80.

(e)	***Laws to cover but one subject***[8]
	To avoid confusion in the making of laws every law shall embrace but one subject which shall be expressed by its title.
(f)	***Constitution is supreme law***[9]
	This Constitution is the supreme law of the Kingdom and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

(2) Interpretation Act

The *Interpretation Act* has the specified purpose of 'shortening the language used in legislation Acts, Proclamations and Regulations'. It therefore affects all legislation, so a drafter of legislation must always have regard to it.

The *Interpretation Act* is one of the most important Acts for a drafter to refer to as it contains common provisions and many general rules about the meaning and effect of various terms and provisions that are commonly used in legislation. The drafter can rely on these provisions without having to repeat them in other legislation. As a result, legislation is shorter than it would be if the common provisions had to be repeated in each Act. Drafters should prepare legislation relying on these common provisions, as almost all common provisions apply unless a contrary intention appears. A good draft will indicate a contrary intention clearly.

Some key common provisions and general rules are provided under this Act are as follows:

(a)	***Definition***[10]
	(1) In this Act and in every other Act and in all official, legal or public documents enacted, made or issued before or after the commencement of this Act, unless the contrary intention appears – **"Act"** includes a proclamation, regulation, rule, notice or other instrument made or issued in pursuance of an Act; … **"Cabinet"** means the Cabinet of the Kingdom of Tonga; "financial year" means the period from and including the first day of July to and including the thirtieth day of June next following; … **"Gazette"** means the Tonga Government Gazette published by order of the Government, including a supplement thereto, a Legal

[8] *Act of Constitution of Tonga* (Tonga), Clause 81.
[9] *Act of Constitution of Tonga* (Tonga), Clause 82.
[10] *Interpretation Act* (Tonga), s.2.

	Gazette and an Extraordinary Gazette so published, either in printed form or on an official government internet site;
(b)	***When Acts come into force***[11]
	(1) An Act to which His Majesty's Assent has been given shall come into operation on the day of publication in the Gazette, unless the contrary intention appears. Provided that Acts pursuant to clause 79 of the Act of Constitution of Tonga (Cap. 2), shall come into operation on the day it is signed by His Majesty. (2) Where an Act comes into operation in accordance with subsection (1), or part of that Act, is expressed to come into operation on a particular day, that Act or that part, as the case may be, comes into operation immediately on the expiration of the last preceding day.".
(c)	***Schedule, tables and preamble***[12]
	(1) Every Schedule or table to any Act or to a part of any Act shall together with any notes thereto be construed and have effect as part of the Act. (2) The preamble of any Act may be referred to for assistance in explaining its scope and object.
(d)	***Exercise of powers and duties***[13]
	Whenever by any Act a power is conferred or a duty imposed, then unless the contrary appears to be intended the power may be exercised and the duty shall be performed from time to time as occasion requires.
(e)	***Tongan language version of a law takes precedence***[14]
	Where it appears to a court that the Tongan language version of a provision in an Act differs in meaning from the English language version of that same provision — (a) the court may give the provision its correct meaning and act accordingly if it considers that there has been a simple clerical error or error in translation; or (b) the court shall treat the Tongan language version of that provision as giving the true meaning of the law if it considers that the difference in meaning goes beyond a simple clerical error or error in translation.
(f)	***Administration of Act***[15]

[11] *Interpretation Act* (Tonga) s.3.
[12] *Interpretation Act* (Tonga) s.8.
[13] *Interpretation Act* (Tonga) s.17.
[14] *Interpretation Act* (Tonga) s.21.
[15] *Interpretation Act* (Tonga) s.24

	Where in any Act it is provided that the Act shall be administered by a specified Minister, or shall be administered, controlled or carried into effect by a specific Department of Government – (a) the reference to that Minister shall be read as a reference to any Minister to whom the administration of the Act is allotted and shall be deemed to include any Minister for the time being acting for and on behalf of the Minister to whom the administration of the Act is so allotted; and (b) the reference to that Department shall be read as a reference to any Department of Government to which the administration of the Act is allotted.
(g)	***Construction of Acts to be subject to the Constitution***[16]
	Every Act shall be read and construed subject to the Constitution and so as not to exceed the legislative power of the Kingdom to the intention that where an Act would, but for this section, have been construed as being in excess of that power, that Act shall nevertheless be valid to the extent to which that Act is not in excess of that power.

(3) Government Act

The *Government Act* defines the powers of public officers. Key relevant sections, particularly relating to regulation making powers, that drafters should be familiar with include the following:

	Regulations, Rules and Orders may be rescinded by the Legislative Assembly[17]
	Every Regulation, Rule or Order, whether made by Cabinet, Prime Minister or Minister shall have full force and remain effective until rescinded by the Originating Authority or the Legislative Assembly. All such Regulations, Rules and Orders shall be placed before that session of the Legislative Assembly immediately succeeding the promulgation of the Regulation, Rule or Order for confirmation, amendment or rescission.

(4) Public Service Act

This Act establishes the Public Service Commission and provides for the appointment, promotion, discipline and termination in respect of the Public Service. The Act vests the power of public servants' employment and management in the Public Service Commission. Great care must be taken when drafting laws which provide for the appointment of public servants, and for their employment and management. To do this, drafters need to be clear on who the Public Service covers and does not cover.

[16] *Interpretation Act* (Tonga) s.34.
[17] *Government Act* (Tonga) s.9.

	Application of this Act[18]
	(1) This Act shall apply to the following persons: (a) All chief executive officers and employees in a Government Ministry, as listed in Part 1 of Schedule I; and (b) All chief executive officers and employees in a Government Agency, as listed in Part 2 of Schedule I. (2) This Act shall not apply to persons listed under Schedule II.

(5) Public Finance Management Act

Section 47 provides: 'Subject to the Constitution, where any provision of this Act conflicts any other enactment, the provision of this Act shall prevail'. Draft legislation therefore proposing, for example, to impose new fees or charges or to raise Government revenues, must be consistent with the Public Finance Management Act.

The extensive provisions of this Act concern: responsibility for financial management; budgets and appropriations; public money, the Public Fund and Trust money; borrowing, loans, and guarantees; and financial reporting. In drafting legislation, drafting instructors must be aware of and provide input on financial implications of draft legislation. These are important for the Ministry's, Department's or Agency's preparedness to perform duties required for the administration and implementation of the legislation.

Furthermore, **section 14** authorises the introduction of an Appropriation Bill to the Legislative Assembly on an annual basis (before the end of the previous financial year) to present the Estimates (statements of the proposed public revenues and expenditure in any financial year and any accompanying explanatory statements), in accordance with the Budget, of the total expenditure proposed in the Government's programmes or activities for the forthcoming financial year.

Drafting instructors and legislative drafters alike should be familiar with this mandatory annual process in order to better plan the financial implications of the annual Appropriation Bill.

(6) Judicial authorities and powers –Magistrate's Court Act; Supreme Court Act; The Land Act; Court of Appeal Act

Drafters and drafting instructors should be familiar with the powers and jurisdiction of the formal courts in order to ensure that legislative proposals relating to new or current criminal, civil, and appellate powers and jurisdiction are consistent and appropriate.

The *Magistrates' Court Act* regulates criminal offences in Tonga and provides proper jurisdiction in respect of those offences. Generally, 'the Magistrates' Court has jurisdiction to hear and determine criminal cases in which the maximum punishment

[18] *Public Service Act 2002* (Tonga) s.2.

provided by law does not exceed three years imprisonment or a fine of $10,000 (section 11(2)). In civil matters, the 'Magistrates' Court has jurisdiction to hear and determine civil actions in which the amount claimed does not exceed $10,000' (section 59(1)).

The Supreme Court has all the powers of magistrates' courts[19] and appellate jurisdiction in relation to decisions of magistrates' courts. It has civil jurisdiction in cases where the amount claimed exceeds $10,000, as well as in divorce, probate and admiralty matters, and any other matter not specifically allotted to any other tribunal[20].

The Court of Appeal has all the powers of the Supreme Court and exclusive jurisdiction to determine criminal and civil appeals from the Supreme Court.

(7) Land Act

This Act governs the unique land tenure system of Tonga and includes the establishment and powers of the Land Court to hear and determine all disputes, claims and questions of title affecting land in Tonga. Drafters and drafting instructors, alike, must appreciate implications that new legislative proposals might have on the unique land tenure system.

5 Key Roles



Figure 4 Key Roles

(1) Cabinet

Government legislation is the prerogative of Cabinet and Government. However, the legislative programme is not determined by Government Ministries,

[19] *Supreme Court Act* (Tonga) s.5.
[20] *Supreme Court Act* (Tonga) s.4.

Departments and Agencies acting independently. All legislative proposals and instructions for drafting legislation for Government must have the prior approval of Cabinet, except legislative proposals and instructions for drafting legislation for His Majesty's Armed Forces, which is approved by the Defence Board that is chaired by His Majesty, the Commander in Chief.

Cabinet plays a major role at the beginning as well as at the end of the legislative development and drafting process. At the initial phase, it receives a policy proposal from one of its Ministers seeking a Cabinet decision to approve (or otherwise) a policy proposal that involves legislative drafting.

At the final phase, it receives, for consideration and approval, a final draft Bill before it is submitted to the Legislative Assembly, or a final draft subsidiary legislation before it is submitted to the relevant authority (if not Cabinet) for signing and subsequent enactment.

The Minister responsible for the Bill or subsidiary legislation is responsible for making a submission to Cabinet on a legislative proposal and on the final draft legislation.

(2) Cabinet's Law Committee

The Cabinet's Law Committee is an established sub-committee of His Majesty's Cabinet. The Law Committee consists the following members:

- Minister for Justice, Chairman;
- Deputy Prime Minister, Deputy Chairman;
- Minister for Police;
- Minister for Finance;
- Minister for Revenue;
- Attorney General;
- Chief Secretary and Secretary to Cabinet;
- Solicitor General; and
- Attorney General's Office, as secretariat.

Before draft legislation is submitted to Cabinet, it is submitted by the AG's Office to the Cabinet Law Committee who examines it to ensure the policy content has been approved by the appropriate authority and that the relevant requirements have been satisfied. The Law Committee must be assured that all necessary decisions have been properly taken and that draft legislation conform to legal principles.

The Law Committee will then refer draft legislation to Cabinet for final approval, for introduction into the Legislative Assembly in the case of a Bill, or for enactment in the case of subsidiary legislation. Amendments that may be required by the Law Committee are made to the draft.

The Law Committee may also at times propose new policy while vetting draft legislation, based on any realisation during discussions within the Law Committee that there should be new policy. Such new policy may be reflected in amendment to draft legislation, which will ultimately be approved by Cabinet.

(3) Attorney General's Office

The AG's Office has the overall responsibility for drafting Government legislation to ensure that new, amending or repealing legislation are legally sound, in particular, the draft legislation is not inconsistent with the Constitution or other laws. As the drafter, their key role is to produce plain language drafts that are legally correct and give effect to Government policy. In drafting legislation, the AG's Office acts on instructions from instructing Ministries, Departments or Agencies.

To perform this responsibility in an independent and transparent manner, the AG's Office is not involved in creating policy or in developing policy and legislative proposals. Rather, its role in the legislative development and drafting process begins once it receives a Cabinet Decision to draft a Bill, regulation or other legislative instrument for Government to give effect to a particular policy. In undertaking this role, the AG's Office works closely with the relevant Ministry, Department or Agency responsible for a legislative proposal to receive and clarify drafting instructions, to draft and revise legislation, as well as to support stakeholder consultations.

If it does not have the capacity nor expertise to draft a certain legislation, the relevant Ministry, Department or Agency will be responsible for engaging a consultant drafter to assist with legislative drafting. In any event, all legislative drafting work of Government must be vetted by the AG's Office before they can proceed to the Cabinet Law Committee and subsequently to Cabinet.

In drafting legislation, the AG's Office does so with specialised skills and expertise. Part Three of this Manual outlines the technical requirements relating to substance and format that must be adhered to in drafting legislation.

For all legislative drafting projects, the AG's Office needs to be consulted and kept informed throughout all stages of legislative drafting. The AG's Office designates a legislative drafter or legal officer to provide drafting support. If a legislative drafting project involves a legislative drafting consultant, the designated AG's Office drafter will liaise with the drafting consultant and the drafting instructor on the development of the draft.

Other responsibilities of the AG's Office include formatting draft legislation into the Tongan legislative style, translating or vetting the translation of all legislation into the Tongan language, providing Secretariat assistance to the Cabinet Law Committee, and gazetting and publishing passed and royal assented legislation.

(4) Government Ministries, Departments and Agencies

Government Ministries, Departments and Agencies are responsible for the administration or implementation of legislation. They therefore play the vital roles of:



Developing legislative proposals to Cabinet outlining the policy objectives to be achieved, timelines for the preparation of proposed legislation, budget and resource implications, and request for Cabinet's endorsement of specific drafting instructions to be conveyed to the AG's Office or authorised drafting consultants;



Drafting instructor, which involves developing clear and comprehensive drafting instructions to the AG's Office for the drafting of legislation;



Engaging and overseeing the performance and delivery of duties by a legislative drafting consultant that may be required to assist with legislative drafting;



Providing the technical details and feedback required for draft legislation;



Designating a focal policy officer(s) to liaise with the AG's Office on legislative drafting work and to coordinate the Ministry's, Department's or Agency's feedback and input on draft legislation; and



Undertaking consultations on the legislative proposal and, if necessary, consultations on the text of the draft legislation with the assistance of the AG's Office.

Figure 5 Roles of Ministries, Departments & Agencies

(5) Legislative drafting consultants

Legislative drafting consultants are heavily relied on to supplement the technical drafting roles of the AG's Office. Considering the costs to Government in engaging legislative drafting consultants, the responsibility to effectively manage legislative drafting consultants is a critical responsibility that involves regular oversight by Government.

The following requirements are mandatory for the recruitment and engagement of all legislative drafting consultant by Government Ministries, Department and Agencies:

Legislative Drafting Consultant Checklist	
☐	minimum eligibility requirements for legislative drafters must include the following to ensure that a consultant with proven expertise and drafting experience is retained;
☐	a degree in law from a recognised tertiary institution;
☐	have a minimum of ten years' experience working as a legislative drafter in a Common Law jurisdiction, evidenced by a full list of laws which they have drafted and proof of involvement in drafting those laws;
☐	have drafting experience for small states, preferably Tonga or a country with similar governance and legislative processes and institutions; and
☐	be familiar with the legal subject matter of the legislation to be drafted; and
☐	the terms of reference for all consultant drafters must be vetted by the AG's Office;
☐	Consultancy contracts must include the following minimum requirements:
☐	adherence to the legislative drafting process and technical legislative drafting requirements of this Manual;
☐	a mandatory review of all domestic laws relevant to the proposed draft legislation, to gauge relevancy and appropriateness of the draft in relation to the existing political, economic and social environment;
☐	regular liaison with the AG's Office on the development of the draft;
☐	inclusion of all relevant reports, including consultation reports indicating those consulted and how matters raised during consultations have been reflected in the draft legislation;
☐	approval of outputs by the relevant Ministry, Department or Agency and the AG's Office before consultants are paid and released from their contractual obligations; and

☐	availability to render additional assistance, if called upon to achieve final enactment of drafted laws, even if such assistance is called for after the finalisation of their contracted tasks.

Figure 6 Legislative Drafting Consultant Checklist

Where legislative drafting assistance is provided by development partners (for example ADB, World Bank Commonwealth Secretariat, New Zealand and Australian Governments), the Government Ministries, Departments and Agencies should require that the above requirements are incorporated and complied with in the engagement of legislative drafters.

PART III – FROM POLICY TO LEGISLATION

6 Overview

This Part elaborates the specific steps that must be followed for developing legislation required to fulfil Government's policy aspirations. All Government Ministries were consulted regarding their experiences in these steps, and this Part consolidates those experiences into a single, concise process.

This Part aims to guide the relationship between Government Ministries, Departments and Agencies as drafting instructors and the AG's Office, which has overall responsibility of drafting and vetting Government legislation to ensure legislative and statutory efficacy.

The Cabinet Manual of His Majesty's Cabinet covers the general legislative development and drafting process under two key stages: (1) developing policy and preparing drafting instructions; and (2) drafting legislative text and validating legislation – as follows:

> **'147 All Cabinet proposals requiring legislation should follow the process below:**
>
> *An initial paper should be presented to Cabinet spelling out the policy objectives to be achieved, the timetable, any relevant budget implications, noting any other matters of relevance to the proposals, and seeking the agreement of Cabinet for specific drafting instructions to be conveyed to the Attorney General's Office or authorised external legal drafters;*
>
> *Once the draft legislation is prepared and scrutinised by the Attorney General's Office (if drafted externally), the Law Committee or any other body given that role, the matter should be placed back before Cabinet for approval for Bills to be introduced into the Legislative Assembly and subsidiary legislation to be made by the Cabinet, a Minister or other authority.'*

The same part of the Cabinet Manual further states:

> **'148 These two key steps (approval of policy, and drafting) mean that Ministries concerned with the preparation and drafting of legislation must therefore take account of:**
>
> - *the process for Cabinet/Ministers to approve policy proposals and to decide that legislation should be drafted;*
> - *responsibility for drafting legislation, and the working relationship between departments and the Attorney General's Office;*
> - *matters to be considered when developing legislation, including for example, the need to take into account human rights and other core constitutional principles set out in the Constitution and elsewhere (e.g. the limitations on retrospective laws, taking of property etc.), international obligations, financial implications etc;*
> - *the process for Ministers and the Cabinet to approve Bills for introduction to the Legislative Assembly;*
> - *printing and publication obligations on Government; and*
> - *for subordinate legislation, the process, roles and responsibilities for drafting and for approval by the Minister and Cabinet.'*

The diagram at Annex A illustrates the general legislative development and drafting process.

7 Stage One – Developing policy and drafting instructions

(a) Policy proposal

Government policies deal with a variety of topics that Government is responsible for. This Manual does not examine policy development in detail but makes some general comments.

In developing policy, Ministers and Ministries, Departments and Agencies must ensure that the need for legislative action is not overlooked and, equally, that unnecessary new legislation is avoided. The two basic steps that should be followed to develop policy are to clarify the policy objective and to assess the policy options.

In clarifying policy objectives, it is important that the aims of the policy are clear: what is the policy to achieve and who is to benefit from the policy? This information answers the question of why legislation (if any) is needed.

An essential first step is to clearly define the policy objectives. The time when the policy is to come into effect and the transitional measures necessary for its implementation should also be carefully considered at an early stage.

In an ideal world, the policy to be embodied in new legislation should be clearly determined before preparation of the legislation commences. However, in practice this is not always possible and policy development and preparation of legislation often proceed in tandem.

Nevertheless, before substantive drafting of legislation commences, the broad policy objectives should be clear, and the relationship of the legislation with existing law and alternative means of achieving the policy objective should have been fully considered.

At an early stage, the time of commencement of the legislation and the transitional provisions necessary to implement it should be considered. The latter issue, in particular, can lead to identification of significant difficulties with the proposed legislation and modifications to the legislation to overcome these difficulties are sometimes necessary.

The commencement date of new legislation requires careful consideration. The Government often wishes to have an early commencement date, but the practical effect of this on the community must be considered. It is easy to underestimate the time it takes the community to become aware of new legislation and develop measures to comply with it. The commencement date of new legislation should allow sufficient time after its enactment for the community to become aware of it, and develop measures to comply with it.

The policy objectives of the legislation, and the proposed means of achieving these, can often be clarified by preparing an outline of the proposed legislation including the headings of the principal sections and brief notes as to their content. Such an outline will help to identify any gaps or inconsistencies in the proposed policy.

In assessing policy options, relevant issues include the actual impact of the policy on different groups within the community, existing Government administrative capacity to put the policy into effect and the costs of implementing the policy.

Usually, there will be a number of options for implementing the policy. The options do not always involve legislation. For example, public education programmes could be one option for implementing a policy on a new health initiative. However, as part of the assessment of options for giving effect to the policy, legislation will often need to be considered. If there is existing legislation, is it adequate or will it need to be changed? If there is no legislation, is new legislation needed? If so, what kind of legislation will it be?

The relevant Minister and his Ministry, Department or Agency will be responsible for undertaking the assessment of policy options. If resources to develop and implement

policy are limited, development partners may need to be approached with a request for technical or financial assistance.

In determining the appropriate policy options, Government Ministries, Departments and Agencies must take into account and satisfy the following requirements:

i. Has consideration been given to achieving the policy objective other than by legislation?;

ii. Has there been appropriate consultation within the Government?; and

iii. Have those outside the Government who are likely to be affected by the legislation been consulted?

(i) Has consideration been given to achieving the policy objective other than by legislation?

The development and implementation of new legislation can impose significant costs on the community. Accordingly, other means of achieving the policy objective should be identified, and a decision taken as to whether legislation is the most appropriate means.

Early in the policy development process officials should carry out an informed consideration of the options available to deal with an identified problem. The decision about how to intervene may be as important as the decision about whether to intervene. A variety of options are available. These are likely to have very different implications for results, the magnitude of costs and benefits, their distribution, and administrative requirements.

In more detail, options available to the Government might include the following:



Figure 7 Other options available to Government

The above options for achieving a policy objective should be fully considered on the basis of all relevant information, before a decision is made to prepare new legislation. This consideration should include estimating the benefits and costs of each option that could be used, and comparing those benefits and costs against those of the proposed legislation.

(ii) Has there been appropriate consultation within Government?

In the case of Government legislation, all relevant departments and agencies should be properly consulted in regard to the legislation before it is approved by Cabinet.

The lateral thinking necessary to ensure that all appropriate perspectives have been brought to bear on a Government legislative proposal can usefully begin with consultation with other relevant divisions within the initiating department.

Consultation with other Government departments and agencies is the next step and a very important part of the overall process. It is an efficient use of time and resources. It can avoid piecemeal reform. It ensures that possible problems are identified early in the development of a proposal. It may reveal to the initiating department that there are possible conflicts or inconsistencies with legislation being prepared by another department. In this way it can help to produce a positive and constructive approach towards the proposal on the part of those consulted. This can be important in the search for solutions to any problems that subsequently emerge. Conversely, a failure to consult appropriately with other relevant departments and agencies can lead to substantial loss of time and a lot of unnecessary work in resolving problems and disagreements that could have been readily avoided at an early stage before the initiating department became committed to a particular approach.

Another advantage of early consultation with other departments and agencies is that it can help in identifying the groups and organisations outside the Government that should be consulted about the proposal.

This Manual is not the place to establish comprehensive checklists for deciding which departments and agencies should be consulted on which issues. The list of relevant Ministries, Departments and Agencies must be determined in each case according to the subject matter of the proposal.

Any legislation accorded urgency is sometimes an example of good process having to be avoided. There are two issues: first whether the legislation must be enacted in that way, and, secondly, if it is, whether there has been adequate consultation within the department and more broadly in the Government, as there is not the same opportunity for public scrutiny.

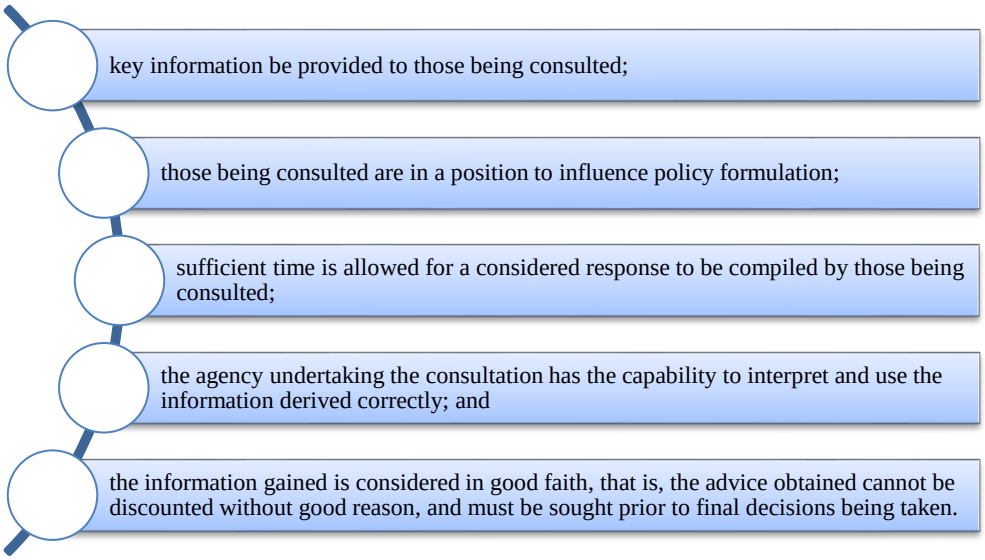
When legislation is being developed, consultations with other Ministers should be considered as Ministers will usually need to consult their political colleagues before introducing legislation. Likewise, inter-departmental consultation is vital as proposed legislation will often affect the interests of other parts of the Government as well as the interests of the Ministry, Department or Agency responsible for the legislation. Other Ministries, Departments and Agencies that have an interest in, or may be

affected by, proposed legislation should therefore be consulted fully as policy is developed.

(iii) Have those outside the Government who are likely to be affected by the legislation been consulted?

A key aim of systematic public consultation is to make information available to the public, to listen to a wide range of interests, to obtain more and better information from affected parties, and to be more responsive to what is heard. This allows for better information for efficient decision-making.

Consultation is not synonymous with consensus. It is, however, a process that permits and promotes the two-way flow of ideas and information among all sectors of society and between them and the Government. Effective consultation is based on principles of openness, transparency, integrity, and mutual respect. It requires that:



A well designed and implemented consultation programme can contribute to higher quality legislation, identification of more effective alternatives, lower administration costs, better compliance, and faster regulatory responses to changing conditions. Just as important, consultation can improve the credibility and legitimacy of Government action, win the support of groups involved in the decision process, and increase acceptance by those affected.

Effective consultation is difficult to carry out and can be costly in terms of time and resources. Less well organised, diffuse, or smaller interests can easily be left out. Information received from stakeholders may be one-sided, of poor quality, or irrelevant to the issues at stake. Consultation can also occur too late to allow affected

groups to influence key decisions such as problem definition and whether legislation is needed.

Invariably, the costs of consultation are incurred in the short term, while the benefits emerge over the longer-term.

There is a wide range of different consultative approaches. These include departmental advisory bodies, secondment of personnel from the private sector, public discussion papers, multi-stakeholder negotiations, focus (consultative) groups, targeted briefings, workshops, questionnaires, public notice and comment, hearings and task forces. The appropriateness of each approach will depend on the issues under consideration, the nature of the group being consulted, and the resources, including time, available for undertaking the consultation.

(b) Policy approval

If a policy initiative requires new legislation, the responsible Minister should take a policy submission to Cabinet to obtain Government's approval of the policy, including the need for the legislation. The drafting of draft legislation should start only after Cabinet has approved the policy and the recommendation for the drafting of legislation to give effect to the policy or an aspect of it.

Cabinet or the Prime Minister and Ministers usually determine the priority of a Bill (or other draft legislation) in the Government's legislative programme. It can be a part of the policy submission. The priority of draft legislation is important and affects what resources are allocated to the drafting of the legislation.

(c) Drafting instructions

A policy proposal that recommends the drafting of legislation must be accompanied with drafting instructions to be provided to the AG's Office should Cabinet approve the policy.

The drafting instructions provide the link between the policy decision makers and the drafter. Ministry, Department and Agency officers develop the policy and prepare the drafting instructions, so the drafter is not involved in these stages.

The drafter's role is to translate the drafting instructions into legislation to give effect to the policy. The drafter can make a contribution to the policy as part of the drafting process by asking questions about the policy and drafting instructions to clarify issues. The drafter may also make suggestions to improve the policy and the drafting instructions. However, the drafter should not instigate policy or make key policy decisions. For example, a drafter should not decide the rate of a new tax. The only exception to this is when the AG's Office itself is the Agency responsible for the policy initiative that requires new legislation.

It must be stressed that Ministry, Department and Agency officers must not assume or abdicate responsibility for developing policy for a legislative proposal to the drafter.

By the time the AG's Office receives a Cabinet Decision for the drafting of legislation, it is expected that the policy and legislative proposal have been fully developed and the drafting instructions are complete in order for the drafter to effectively draft the required draft legislation. Drafters must not be expected to be involved in matters of policy, unless the drafter is a consultant engaged by the Ministry, Department or Agency.

The drafting instructions are often prepared by the Ministry, Department or Agency officers who developed the policy and can be referred to as drafting instructors. In larger offices, other officers, often departmental lawyers, may prepare the drafting instructions.

The drafting instructor's job is to translate particular political and administrative policy into drafting instructions. To do this, the instructor needs to have a thorough understanding of the overall policy as well as the administrative mechanisms that will be needed in the legislation to carry it into effect. He will also need to know how the proposal fits into the general body of law. In particular, what other legislation will affect the proposed legislation. Departmental lawyers should always be well informed to provide the relevant legal advice and support.

The drafting instructions should clearly state the policy objectives of the legislation and the proposed legal mechanisms through which they are to be achieved. Drafting instructions should consist of a statement of legislative proposals to give effect to the policy. They should be in writing unless it is a very urgent matter.

In general, the process of preparing drafting instructions involves:

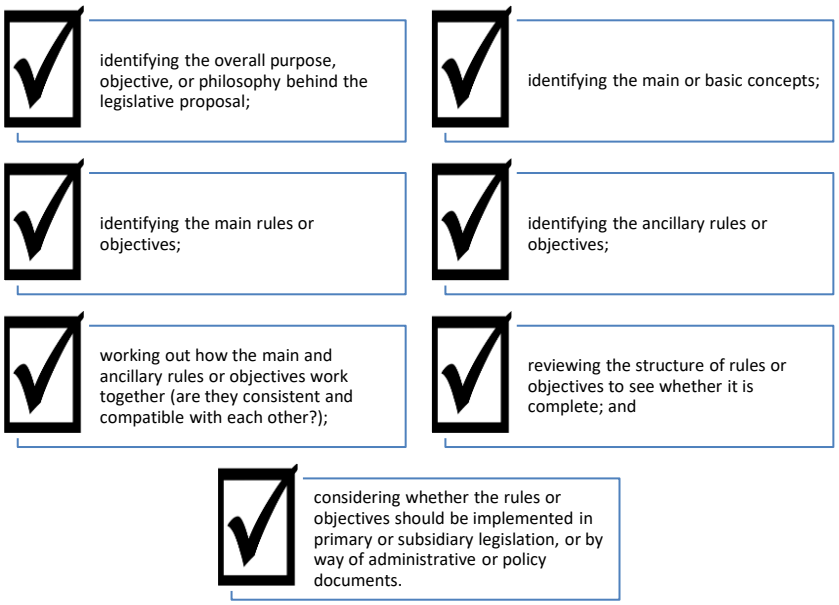


Figure 8 Drafting instructions checklist

The preparation of good drafting instructions takes time. It may be tempting to send the legislative drafter a copy of a Cabinet decision that records general policy

decisions and some background papers and leave it to the legislative drafter to try and work out what is required. By itself, that will not aid the legislative drafter and may simply delay the production of the legislation.

If a departmental lawyer is considering sending drafting instructions in the form of a departmental draft of the proposed legislation, the legislative drafter should be asked whether this would be helpful for the drafter. In some circumstances a departmental draft can be helpful for a drafter, but in others it can be a hindrance in that the drafter has to first work out what was intended by the draft. Likewise, a drafting instructor must not send a copy of a law from another country with a request to the drafter to make it suitable for local conditions. This is not acceptable, and the drafter must resist any attempt to prepare legislation in this way.

In addition to preparing drafting instructions, drafting instructors must also:

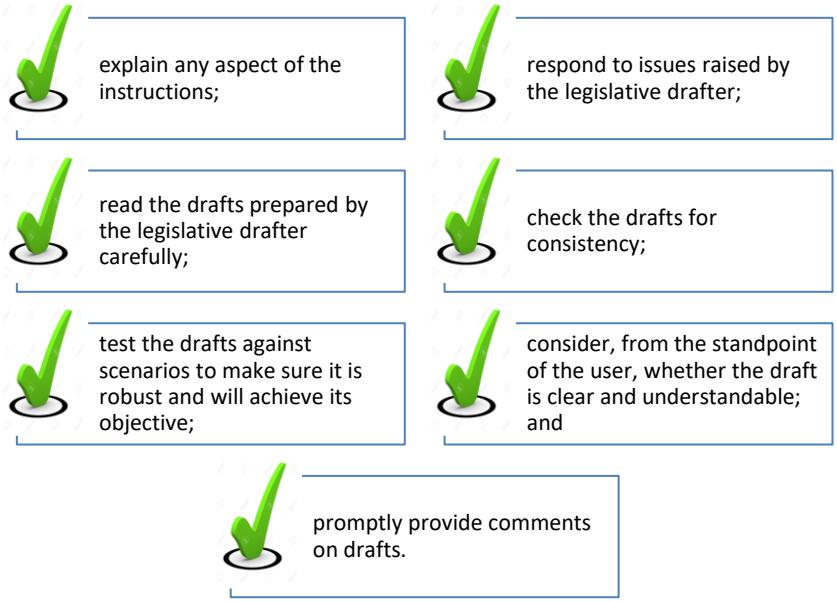


Figure 9 Drafting instructor checklist

Even if the drafting instructions are of a high quality, they may not give the drafter all the information needed to draft the legislation. In most cases, the drafter will need to meet with the drafting instructor to clarify certain aspects of the drafting instructions.

A useful checklist for instructors for Bills or other legislative instruments is at Annex B and an example of a template for drafting instructions is at Annex C.

8 Stage Two – Drafting legislative text

(a) Understanding and analysing drafting instructions

To work out what needs to be drafted, the drafter must understand the policy objective outlined in the drafting instructions and analyse the legislative proposal. The drafter must read the drafting instructions and any other supporting documents carefully.

The drafter often identifies issues in the drafting instructions that need to be clarified. The drafter can also suggest improvements and different approaches to the legislative proposals in the drafting instructions. These matters should be raised with the drafting instructors.

As part of the analysis, the drafter should:

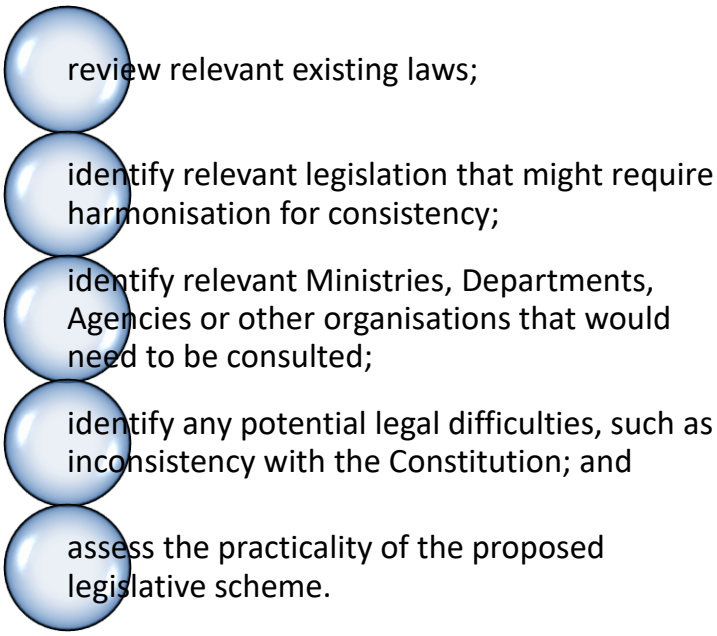


Figure 10 Legislative Drafter Checklist

A drafter is likely to undertake legal research (for example, relevant case law or legal opinions) and examine precedents for the legislation or some of the provisions.

The drafting of legislation is a complex process that involves extensive interaction between the drafter and departmental officials. Good quality legislation is the result of a team effort. In analysing and understanding the drafting instructions, it is vital for the drafter to engage with drafting instructors and departmental lawyers (if any) who would have been brought into the policy development process as early as possible. They have a significant role to play in translating policy into legislation but, to be effective, they need to understand all aspects of it.

Departmental officials involved in the development of policy that is to be embodied in legislation must ensure that the policy is well thought out, coherent, consistent, and workable. They need to consider not just the broad policy objectives, but also the details of its implementation. Clear and understandable legislation is much easier to achieve if the policy is not unnecessarily complex.

Departmental lawyers are familiar with their respective legislation. They can assist in the design of a sound legislative scheme and identify the issues that have to be addressed as well as potential problem areas. One of their principal functions is to provide drafting instructions. To do this effectively, they need to have a thorough understanding of the policy underlying the legislation, what the legislation is intended to do, and how it will work. There is also often benefit in departmental lawyers consulting the legislative drafter during the policy development phase.

It is important to set realistic timetables for making the policy decisions that will constitute the basis of legislation, for providing good drafting instructions, and for the drafting process. Legislation that has been frequently amended is often the result of poorly thought out policy decisions and insufficient time for drafting. The phrase "the devil is in the detail" is as true of legislation. Lack of time spent on getting the detailed provisions of legislation right can be costly both for the Government that promotes it and users.

Time and care should be taken in developing the policy that is to be incorporated in legislation to ensure that it is coherent, consistent, and workable. Ensure that the detailed machinery and other provisions necessary for the proposed legislation are properly worked out. Making sure this is done in the developmental stage will result in the legislation being produced more quickly.

A realistic timetable should be allowed for the drafting of the legislation. Legislation should give effect to policy objectives in a way that will not cause unnecessary difficulties or complications for those who have to comply, and will not require recourse to the Courts to resolve ambiguity, internal inconsistency, or conflict with other legislation.

(b) Planning the draft

A plan of a draft should be prepared before the drafter starts to compose the legislative text.

In planning a draft, the drafter needs to think about the whole structure of the proposed legislation and whether it will be beneficial to divide the legislation into different parts. Provisions with a common subject matter should be grouped together. Provisions should be arranged in logical sequence—for example, in the order in which an activity takes place.

As part of the planning process, the drafter should think about the people who are most likely to use the legislation and how the legislation can be arranged to make it easier for them to understand.

(c) Composing the text

Legislative drafting is not just a technical exercise. A legislative drafter is counsel to the Government in its legislative capacity. He must work in close collaboration with the instructing department and ensure that, so far as possible, composing the text for draft legislation is based on sound legal principles, gives effect to the intended policy, and is as clear and understandable as practicable.

Legislative drafters provide a specialist form of legal service. The relationship between legislative drafter and instructing department is similar to that between lawyer and client. The legislative drafter must provide advice and drafting services in a professional and impartial manner. It is not the legislative drafter's role to push through whatever an instructing department wants at all costs. On occasions legislative drafters have to speak the unpalatable truth or expose the weakness in a legislative scheme. This does not always make them popular with Ministers or policy-makers, but it is a necessary part of their job.

The legislative drafter has a wider responsibility to ensure that, in the public interest, legislation as finally enacted by the Legislative Assembly or made by the Government –

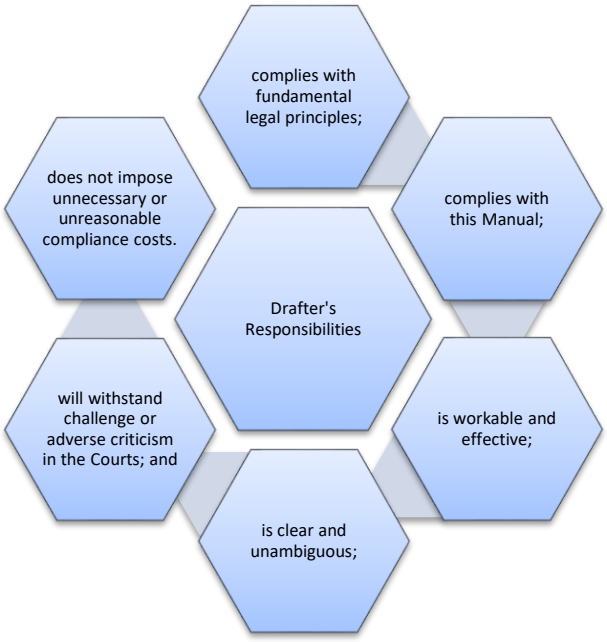


Figure 11 Drafter's responsibilities

Typically, the legislative drafter's work involves –

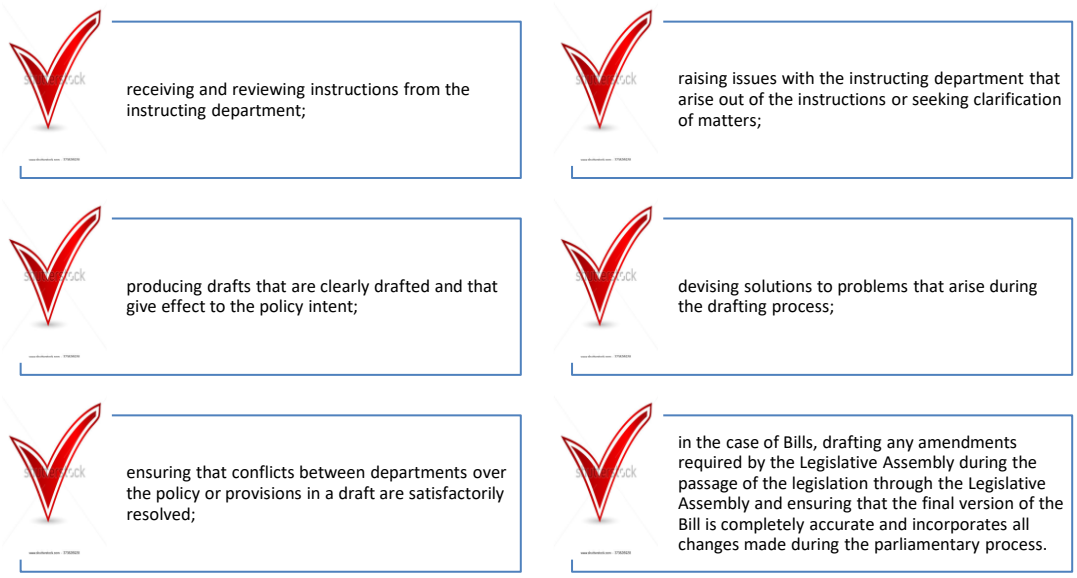


Figure 12 Drafter's work

Drafting involves mastering the policy and legal background of the proposal and dealing with the relationship with other legislation. Importantly, it involves working out a structure for the legislation that is coherent and logical. A sensible structure will aid readability and understanding just as will the use of clear language.

It is the legislative drafter who has ultimate responsibility for the way legislation is drafted and for ensuring that the legislation will be effective and clear.

The drafting of legislation is affected by a number of other matters designed to ensure consistency across the statute books. They include—

- the format or design of Acts of the Legislative Assembly, that is, physical layout, typeface, and size of text; and
- drafting practices and conventions.

In order to draft workable and effective legislation, the legislative drafter must understand the policy objectives and the administrative and other requirements that it will be necessary to include in the legislation to implement the policy.

The legislative drafter should work constructively with the instructing department, seek clarification where necessary, endeavour to devise solutions to problems that arise during the drafting process, and ensure that differences of opinion among departments are resolved.

If a legislative drafter considers that the policy or some aspect of it does not comply with legal principle, is or may be unworkable, or that he is instructed to draft

something will not be understandable, he must raise the matter with the instructing department and, if necessary, with the responsible Minister.

The drafter should use the drafting plan as the basis for drafting the legislative text. The drafter needs to decide the order in which provisions will be drafted. A common approach is to begin by drafting the main provisions, including supporting definitions. The drafter can then draft the preliminary and ancillary provisions and any consequential amendments.

As the draft is developed and discussed with the drafting instructors, more than one draft is likely to be necessary. The drafter should be responsive to the comments from drafting instructors. Producing legislation is a team effort. The final draft needs to be settled with the drafting instructors.

Drafters often do not have enough time to do the drafting as thoroughly as they would like. They may be working on more than one draft legislation, and late changes to instructions are not unusual. A drafter must not put forward legislation that he knows will not work or that contains gaps, even if it could have been made better with more time.

Nevertheless, a drafter must ensure as much as possible that sufficient time and consideration has been given to the preparation of draft legislation. This is because legislation affects individuals, corporations, and organisations in society in different ways.

If rights conferred by legislation are to be exercised and if the obligations it imposes are to be complied with, they must be stated in terms that those to whom they apply can understand them, that is, so that they know what their rights and obligations are. The rule of law as the foundation of democratic society requires good quality legislation. Good quality legislation is understandable and accessible. Poor quality legislation is often neither, and has economic and social costs.

High quality legislation:

endures;
does not need frequest amending;
gives effect to the Government's policies;
reduces fiscal risks to the Government;
avoids the Courts having to decide what it means;
reduces compliance costs for users; and
limits the scope for avoidance.

Figure 13 High quality drafting

In composing the text for draft legislation as well as revising drafts, a legislative drafter must fully involve legal advisers (if any) of the Ministry, Department or Agency. Departmental lawyers play a key role in producing good quality legislation. The departmental lawyer is usually responsible for preparing drafting instructions, working with the legislative drafter to produce the draft legislation, advising the responsible Minister during the passage of Bills through the Legislative Assembly, and providing advice to departmental officials about the implementation of the legislation when it has been enacted or made.

In the drafting of large or complex legislation, it is common for many drafts to be produced. Progress towards completing the drafting of legislation can be incremental as each revision seeks to improve on or refine the previous draft. The process of checking and providing comments should be repeated with each new draft.

The departmental lawyer should have a thorough grasp of the broad policy objectives of the proposed legislation as well as of the detailed administrative, technical, and mechanical aspects.

Drafting legislation is a collaborative undertaking. Good legislation is the product of a team effort. Each draft of legislation should be read critically by the departmental lawyer to ensure it—

- is technically sound;
- will give effect to the desired policy;
- is internally consistent;
- is compatible with the general body of law; and
- will be clear and understandable to users.

Some proposed legislation by its very nature and potential impact would require further stakeholder consultations on the text of draft legislation. Similar to consultation requirements relating to policy development, responsible Ministries, Departments and Agencies must ensure necessary consultation on draft legislation. Effective and appropriate consultation is a key factor in good decision making, good policy, and good legislation. Depending on the size and content of draft legislation, consultation can range from wide stakeholder consultation to email exchanges and phone calls.

Consultation is essential but it can also be time-consuming. At the beginning of the planning process for the development of legislation, consideration must be given to the type of consultation that will be necessary or appropriate. Realistic time frames for that consultation must be built into the legislation timetable. Several rounds of consultation may be needed on complex or significant legislation. At every stage of its development, draft legislation is confidential and must not be disclosed to individuals or organisations outside Government, except in accordance with the

Official Secrets Act or Cabinet-approved consultation procedures. Any such release or disclosure should first have the approval of the Minister concerned. Unauthorised

or premature disclosure of the contents of a draft bill could embarrass the Minister, and imply that the role of the Legislative Assembly is being usurped.

(d) Scrutinising the text

The drafter should scrutinise the draft to ensure it gives effect to the policy and drafting instructions. The draft legislation must conform to the Cabinet Decision approval. The drafter must also be satisfied that the draft legislation is constitutionally valid and is legally effective.

The drafter must also check the draft legislation, for consistency, completeness and orderly sequence and arrangement. The aim is to produce an error free draft that satisfies the drafting style.

It is also essential that the meaning of the legislation be clear. It is an established legal principle that everyone is presumed to know the law. Legislation creates rights and confers powers. It also imposes duties and obligations. The effect of legislation is pervasive. If Acts enacted by the Legislative Assembly, or subsidiary legislation made by the Government, is to be workable and effective, it must be expressed in a way that ensures it is capable of being understood by those to whom it applies.

Consequently, those responsible for the preparation of legislation, both policy-makers and drafters, have a responsibility to make it as understandable as practicable. In scrutinising the text of draft legislation, the drafter must ensure that the draft is understandable.

Furthermore, the drafter must ensure the draft legislation is able to be understood particularly by its target audience. For legislation to command public acceptance it must meet certain standards. It must be developed in accordance with proper processes, reflect legal principle, be technically effective, and be able to be understood by those to whom it applies.

Legislation that deals with complex or technical matters will inevitably be difficult to understand for those who do not have a background in the subject matter. For example, commercial legislation will in many instances demand that the reader have some understanding of the business environment. Revenue legislation may require knowledge of accounting concepts, such as capital, income, and depreciation.

Judgments have to be made continually as to how legislation should be drafted to ensure that persons who will be affected by it will best understand it. There are no simple answers to this dilemma. A lawyer skilled in the law of company law may find provisions included in legislation dealing with these topics and designed to assist readers with less expertise unnecessary. A balance has to be struck and it is ultimately a matter of judgment for the instructing department and legislative drafter.

Legislation must also be technically precise and effective. Precision and effectiveness cannot be compromised in the interests of clarity. Over simplification can result in legislation failing to have its intended result. Again, a balance has to be achieved and that is not always easy.

Legislation is not meant just for lawyers and judges. It is used and applied everyday by persons with no legal training. Members of the Legislative Assembly need to understand the Bills that the Legislative Assembly enacts and the Government has to understand the subsidiary legislation it makes. Effective participation in the law-making process requires a good understanding of the implications of proposed legislation at both the policy level and its implementation.

Basic rules or principles applying to a well drafted piece of legislation can be stated with some assurance. It needs to be remembered, however, that drafting practices are constantly changing as legislative drafters seek better ways of communicating.

All draft legislation should seek to comply with the following criteria.

Good organisation of material

- Material should be arranged in a logical order.
- General provisions should be followed by specific provisions and exceptions.
- Provisions that relate to the same subject should be grouped together.
- Provisions should be arranged in temporal sequence.
- Provisions that are significant should come before provisions of lesser importance.
- Sections should be limited in the number of sub-sections they contain. As a general rule, a section should have no more than 6 sub-sections.
- Division into Parts and the use of headings and subheadings breaks up a long document and aids comprehension.
- Sections should be numbered.
- Definitions should not be used to excess, and should generally not contain substantive elements of law.

Use of clear language

- The drafting should be as simple as possible. It should also be precise so that the document has its intended effect. The instrument must be workable but at the same time drafted in language and in a style that ensures it can be readily understood by its readers. Clarity of drafting should encourage clarity and simplicity of policy, and vice versa.
- Sentences should be short and well structured.
- Sentences should not contain excessive embedded and relative clauses.
- The active rather than the passive voice should be used.
- Archaic language and expressions should be avoided.
- The drafting should be consistent. Words used more than once should be used in the same sense. If the sense is changed, this should be made clear.
- Overuse of capitals should be avoided.

- Propositions should be expressed in positive rather than negative terms.
- Similar propositions should be expressed in similar language.
- Repetition and unnecessary words should be avoided.
- Excessive cross-references and qualifications should also be avoided.
- Expressions in common or everyday use should be used wherever possible. Jargon should be avoided. However, technical terms will be necessary in legislation that deals with technical subject matter.
- Paragraphs and subparagraphs can break up blocks of text but multiple paragraphs and subparagraphs, while having the appearance of clarity, can often involve several ideas or concepts and be difficult to understand.

(e) Validating legislation

The final stage, in the case of a Bill, is the introduction of the legislation into the Legislative Assembly, its passage and assent. Before a Bill can be introduced into the Legislative Assembly, the sponsoring Minister and Cabinet are required to approve the actual text of the draft legislation.

The drafter may be required to draft parliamentary amendments to a Bill if amendments are moved to the Bill as it passes through the Legislative Assembly. After the Legislative Assembly passes the Bill, it must receive His Majesty's royal assent before it is published and notified in the Gazette.

A summary of the two key stages described in this Part are summarised at Annex D.

(f) Other – translation, gazetting and publication

The translation of Bills and subsidiary legislation is to be completed before the draft legislation is submitted to the Cabinet's Law Committee. Further translation is required if the Cabinet's Law Committee proposes changes to the draft legislation.

Translation can be conducted in two ways: AG's Office; or a private translator engaged. All translations must be vetted by the AG's Office. The translation process is overseen by the Secretary to the Cabinet's Law Committee (Counsel of the AG's Office) and the office translators. Initial translations is conducted by the office translators. The Secretary of the Law Committee is responsible for vetting and ensuring that all Bills and draft subsidiary legislation translated by the office is consistent with the English versions.

After the King gives his Royal Assent to a legislation, the AG's Office gazettes and publishes the legislation. To date, the AG's Office prepares and publishes new Acts and an Index of the Tongan Government Legislation that is updated and made publicly available on the website https://ago.gov.to/cms/. The website also contains electronic copies of all legislation (1988 Consolidation and amendments thereafter). This role of the AG's Office is very important as it directly influences and contributes to ensuring ease of access to the updated laws of Tonga.

The tables at Annex E and Annex F depict step by step guides on the administrative processes, particularly within the AG's Office, for developing draft Bills and subsidiary legislation once the relevant Cabinet decisions are issued.

PART IV – CONTENT REQUIREMENTS FOR LEGISLATION

9 General

This Part is a guide to key principles and requirements for the content of draft legislation. It covers general best practices in legislative drafting and must be adhered to by all persons involved in drafting Government legislation.

The AG's Office has the overall responsibility for ensuring that draft legislation is correct as to form and substance before it is submitted to Cabinet for consideration. This includes ensuring that the format for draft legislation is in line with format requirements for all legislation. Basic format requirements include the draft legislation being in a Microsoft Word version, font type 'Times New Roman', font size '12', line spacing of '1.5' lines, arrangement of sections in numerical order and each with section titles in 'bold' format, to name a few.

Where a draft legislation is prepared by a consultant drafter, the consultant drafter is expected to use these basic format requirements and other content principles and requirements outlined in this Part. Upon receipt of the final draft legislation, the AG's Office will convert it into the specific format requirements via an automatic electronic word programme accessible only within the AG's Office.

10 Plain language drafting – general principles

Plain language drafting is encouraged for the drafting of all Government legislation. The aim of plain language drafting is to simplify legislation by removing unnecessary obscurity and complexity and generally to make legislation as easy as possible to understand. This is the case even if the legislation deals with a complicated subject matter.

Plain language drafting is not concerned with producing simple rules that overlook the complexity of the issues with which they deal. Such simple rules do not give the certainty and precision that are fundamental characteristics of common law legislation. To achieve legal precision, legislation must be a complete and accurate statement of the rules and contain every essential item of information.

Complex policy, complicated subject matter and a lack of time can make plain language drafting difficult, but the drafter should always try to draft precise and simple rules. The drafter's goal should be to simplify substantive provisions without sacrificing precision. Plain language drafting will assist the drafter to achieve this goal.

Plain language drafting covers every aspect of legislative drafting. It focuses on the **structure** of legislation, the **grammatical structure of sentences**, and the **language** used.

11 Structure

The proper planning of a draft is an important component of plain language drafting. A plain language drafter will routinely prepare detailed plans, often in the form of diagrams, flowcharts or tables, when undertaking drafting tasks. Only the simplest drafting tasks are undertaken without the preparation of a proper plan.

If a reader can identify a clear pattern for grouping and arranging the provisions in a Bill, the Bill will be easier to understand. In deciding how to group provisions, the drafter should consider what form of grouping will best serve the interests of the readers of the legislation.

A drafter who arranges the provisions in a Bill in a logical and coherent way makes it easier for the reader to understand. The plain language drafter should use the principles for grouping and sequencing provisions to decide on an arrangement that will best suit the interests of the users of the legislation.

The following are plain language drafting techniques the drafter should adopt in planning the structure of a draft legislation.

Main message	The main message in a Bill should come before matters of detail. It follows that the main provisions should appear before the provisions that develop, expand or depend on the main provisions. Putting the main message first can be seen in a lot of legislation creating statutory bodies. The provisions that create statutory bodies usually come before the provisions that set out their functions and powers and regulate their other activities.
Headings	The headings used in a Bill (the Part, Division and section headings) are a useful device for indicating the overall structure of the Bill to the reader and are an important feature of plain language drafting. Headings also act as a signpost to assist readers to locate information they are seeking. They should therefore be as informative as possible and must not be misleading for the reader.
Section length	It is a plain language drafting principle that a section should have a maximum of about five or six subsections. This means there should be at least two section headings on each page. If a drafter rigorously applies this rule to his or her drafts, it will result in a drafting style that is easier to read.
Paragraphs	Paragraphs can be used to list conditions or circumstances and to separate them from the main idea of a sentence. The correct use of paragraphs makes it easier for the reader to identify the grammatical structure of the provision.

<table>
<tr><td>Location of definitions</td><td>Definitions traditionally appear in an early section of an Act. The advantages of locating definitions in one place are that the reader knows where the definitions can be found and can easily find out whether or not a word is defined.

The defined terms should be:
(a) set out in alphabetical order;
(b) in bold and separated by semicolons; and
(c) phrases that are being defined in sections should be put in bold.

Definitions can also be located in different places in the Act—for example, in the Part of the Act where they are most frequently used. The advantage of this for the reader is that he or she does not continually have to turn pages between the definitions section and the operative provisions.

If an Act has a large number of definitions, an index of definitions can be used. A reader can use the index to work out quickly whether a term is defined or not.

It is important that all definitions are cross-checked and in-line with the Interpretation Act, Principal Acts (in the case of Regulations) and other related Acts that may have a definition of the same word.</td></tr>
<tr><td>Simpler way to refer to legislation</td><td>Plain language drafting has an easier and shorter way to refer to provisions in legislation (meaning fewer keystrokes are needed). It makes cross referencing of provisions within the same Act and provisions in other Acts simpler. The following sets out the differences.
<table><tr><td>Plain language</td><td>Common law</td></tr><tr><td>Section 4</td><td>Section 4</td></tr><tr><td>Subsection 4(1)</td><td>Subsection (1) of section 4</td></tr><tr><td>Paragraph 4(2)(a)</td><td>Paragraph (a) of subsection (2) of s</td></tr><tr><td>Subparagraph 4(3)(a)(i)</td><td>Subparagraph (i) of paragraph (a) o section 4</td></tr><tr><td>Subparagraph 4(3)(a)(ii)</td><td>Subparagraph (ii) of paragraph (a) section 4</td></tr></table></td></tr>
<tr><td>Layout and format</td><td>A good layout can make legislation easier to read. A drafter should follow the layout and format of legislation set down in the house drafting style. Layout is affected by the size and kind of font that is used, the range of fonts that are used and the spacing between words and lines.

As a general rule, readers find it easier to read a page that contains a good amount of white space. A drafter should not highlight legislative text too much. If a heading is in larger font and bolded, it does not need to be italicised and underlined as well.</td></tr>
</table>

Dispute Settlement	It is important that all dispute resolution provisions are governed by the laws of Tonga.
Administration	MDAs should ensure to agree on the position of administrative mechanisms.
Exceptions	There should only be specific exception provisions in the sections if they are additional to the sections.
Titles of international agreements and domestic measures	The titles of any international agreements or conventions or domestic legislation or regulations cited in Bills or Regulations should be italicised. For example : *Convention on the Rights of Persons with Disabilities*

12 Grammar

The grammatical structure and length of a sentence affect its readability. A clear and correct grammatical structure improves the readability of all forms of writing, not only legislative drafting. If a drafter is not confident about grammar, the drafter can develop his or her knowledge and understanding of it by reading textbooks and attending writing classes.

By regularly following the suggestions below, a drafter will minimise the chances of his or her sentences suffering from a poor grammatical structure.

Five line rule	Sentences become complicated and difficult to understand if the drafter puts too much information into them. A plain language rule is that a drafter should not have more than five lines of unbroken legislative text in a sentence (about 20 to 25 words). By being disciplined about the size of the sentences that he or she is drafting, a drafter will develop a drafting style that is easier to read. The five line rule forces the drafter to concentrate on the elements of the sentence and prevents the drafter from inadvertently adding more information. If a drafter breaks up a large block of text, the drafter should consider dividing it into subsections or into one or more sections. Some of the subsections may need to be divided into paragraphs. Of course, it may be possible simply to paragraph the large block of text.
One idea	It is a feature of both plain language drafting and common law drafting that each sentence should deal with only one idea. The main proposition in a legislative section should be set out in a single sentence as the first subsection. Other subsections should deal with a particular aspect of the main proposition.
Main clause before conditionals	The main idea of a sentence should appear first, followed by the conditionals ('if' clause). This helps the reader to grasp what the sentence is about straightaway rather than interpreting conditions

	before he or she reaches the main idea. However, if some of the elements of the conditionals are necessary for the main clause, it may be better to put the conditionals first. Also, if there is only one conditional, it can be put first. Section 76(1) of *The Income Tax Act* is a good example of the usefulness of putting the main idea first, followed by a long list of conditions. Putting the conditions first would require the reader to retain a lot of information before arriving at the main idea of the sentence. **76 Remedies of Commissioner.** (1) Where for any reason a deduction of withholding tax is not made or is not made in full, or any such deduction is not paid to the Commissioner in accordance with this part of this Act, the Commissioner may exercise all or any of the remedies available to him under Part V of this Act as if — (a) the payment of withholding income was a payment of salary or wages; (b) the withholding tax deduction were a tax deduction; (c) the person making the payment were an employer; and (d) the person deriving the payment were an employee.
Keep related words close to each other	The grammatical structure of a sentence is improved by keeping its structural components (the subject, verb and object) close to each other and in that order. Similarly, auxiliary verbs (*must, may, is, has*) should be kept close to the main verbs. The drafter should avoid placing a large amount of text between the auxiliary verb and the main verb. *The Chairperson may, after consultation with the Council and if there are no objections, refer the recommendation to the Minister for his or her decision.* *The Chairperson may refer a recommendation to the Minister for his or her decision if the Council has been consulted and there are no objections.* *After consultation with the Council and if there are no objections, the Chairperson may refer the recommendation to the Minister for his or her decision.* In the first sentence, text is placed between the auxiliary verb 'may' and the main verb 'refer' and this disrupts the main idea of the sentence. In the two other examples, the auxiliary verb and the main verb have been kept together.
Draft in the active voice rather than the passive voice	Drafters have used the passive voice a lot in the past. However, it is better to use the active voice. The active voice uses fewer words and has a more natural word order. The passive may leave it unclear who is responsible for taking action. The active voice makes this clear. *The shareholder must be given a notice.*

	The director of the company must give a notice to the shareholder. In the first sentence, it is not clear who gives the notice. In the second sentence, which is in the active voice, it is essential to specify who is to give the notice.
Use the positive rather than the negative	Negative statements often confuse readers because they need to translate a negative statement into a positive one to work out what they can do. Positive statements are easier to understand. If a drafter can use either a positive or a negative statement, the drafter should use the positive statement, e.g. *A person must not enter the building unless the person has identification.* *A person may enter the building only if the person has identification.* A drafter should use a negative statement to prohibit behaviour in criminal offences. *A person must not walk on the grass* A positive statement such as 'A person must walk on the path' does not have the same effect. Multiple negatives (double and triple negatives) are particularly confusing. However, a double negative does not always equal a positive, e.g.: *The Director has not certified that the benefit has not been paid.* *The Director has certified that the benefit has been paid.*
Use definitions to avoid complexity	A drafter can make a sentence less complicated using definitions. A complicated concept can be defined and the operative provision can use the definition. This results in a shorter sentence. *The Chief Executive Officer must develop a human resources management program.* A definition of 'human resource management program' would be in the definitions section or the section in which the above sentence appears.
Participles and relative clauses	Participles (having, determined) are shorter than relative clauses (that has, determined).

	A product that has been manufactured after 1 January 2006… *A product manufactured after 1 January 2006…*
Adverbial clauses	If an adverbial clause or phrase is placed between the auxiliary verb and the main verb, it can weaken the importance of the adverbial clause. It is better to place adverbial clauses at the start or end of a sentence. *A person must, within 7 days after receiving an offer, accept or reject the offer.* *A person must accept or reject the offer within 7 days after receiving the offer.* *Within 7 days after receiving an offer, a person must accept or reject the offer.* In the second and third examples, the adverbial clause 'within 7 days after receiving the offer' is placed at the start or end of the sentence, which avoids separating the auxiliary verb and the main verb.
Ambiguity	The drafter must try to avoid ambiguity. The arrangement of words in a sentence (syntax) can cause ambiguity. *A person must not damage council property in a public place.* Does 'in a public place' apply to the 'council property' or to the 'damage'? Ambiguity also arises if an adjective or adjectival phrase or clause is used with more than one noun. *A charitable organisation or trust must provide an annual statement to the Commission.* A qualifying clause or phrase following more than one noun can also cause ambiguity. *The Commissioner must distribute the emergency funds to a person or organisation whose property is destroyed.* The organisation's property must be destroyed to receive the emergency funds, but what about the person's property? A drafter can avoid this kind of ambiguity by rewording the provisions.

	A person must not damage council property that is located in a public place. *The following entities must provide an annual statement to the Commission:* • *a charitable organisation;* • *a charitable trust.* *If the property of a person or organisation is destroyed, the Commissioner must distribute the emergency funds to the person or organisation.*

13 Language

The language a drafter uses in legislation affects its readability. Below are some suggestions to guide a drafter to choose language that is both precise and simple. If a drafter follows as many of these suggestions as possible when drafting provisions, the combined effect will result in a simpler draft. Adopting just one or two of the suggestions occasionally will have little effect. The drafter should make a concerted effort at every opportunity to use language that will promote readability.

For some drafters, a good writing style is something that comes easily. Others have to work very hard to develop a good writing style. Drafters of all levels of experience are constantly fine tuning their writing style.

Gender neutral language	Section 2(2) of the *Interpretation Act* provides that words importing the masculine gender includes females. Nonetheless, it is the policy of many drafting and other Government offices to use gender neutral language, wherever necessary. For example, gender neutral terms should be used, such as 'chairperson' instead of 'chairman'. A noun can be repeated to avoid use of the masculine pronoun. *A person is entitled to a benefit if the person has been unemployed for more than 3 months.*

Use verbs not nouns	By using verbs instead of nouns in a sentence, a drafter conveys a sense of action that is lost if nouns are used. A single verb is often shorter and more precise. ***Verb*** — ***Noun*** *Agree* — *are in agreement* *Apply* — *make an application* *if he or she does not appear* — *in default of appearance* *to conclude* — *to reach a conclusion*
Avoid words that are unnecessary	A sentence should contain only necessary words. If a sentence contains a string of related or alternative words, it may be possible to replace them with a single word. If necessary, the single term can be defined. Using a string of words invites the reader to look for gaps between the words. *"take" means to kill, injure, capture, handle or molest a native mammal or bird.*
Duplicating words	Drafters often used two words that have the same or substantially similar meaning. It is generally sufficient to use one of the words. *null and void* *due and payable* *null and of no effect* *terms and conditions*
Unnecessary internal references	A reference to another provision in the same Act does not need the words 'of this Act'. They are needed to refer to a provision in another Act. *Subsection (1) applies to a public servant despite section 15.* *Subsection (1) of this section applies to a public servant despite section 15 of this Act.* The first sentence above is adequate without any loss of precision. The second sentence contains unnecessary internal cross references 'of this section' and 'of this Act'.

<table>
<tr><td>False subject</td><td>A provision contains a false subject if it starts with ‘there is’ or ‘there are’. These words are not needed and can be omitted.

If there is a person who makes a verbal complaint about officers, the Attorney General may request the person to put the complaint in writing.

If a person makes a verbal complaint about officers, the Attorney General may ask the person to put the complaint in writing.

The second sentence avoids using a false subject.</td></tr>
<tr><td>Use of single word</td><td>Legislation contains many expressions that can be replaced with a single word.

Single word — Expression
to, of, for, about — in relation to
if — in the event of
despite — notwithstanding anything to the contrary in
because — by reason of
about — in connection with
to — in order to</td></tr>
<tr><td>Words instead of numbers</td><td>In the past, legislation has used words instead of numerals to express numbers. Some legislation has used both. Numerals are easier to read and shorter. Cardinal numbers should be expressed in figures. Ordinal numbers (1st, 2nd, etc.) should be spelt out, up to and including ‘tenth’.</td></tr>
<tr><td>Use common words</td><td>Although legislation must have a certain formality about it, this does not mean that a drafter should try to use grand or unusual words. It is preferable to use a common word if it does the job.

Common words — Grand words
end — expiration
put in writing — reduce in writing
give/supply — provide/furnish
start proceedings — institute proceedings</td></tr>
</table>

<table>
<tr><td>Avoid archaic words, Latin expressions and legalisms</td><td>Similarly, a drafter should avoid archaic words, Latin expressions and legalisms.

Commonly used word — Archaic
under — pursuant to, in pursuance of, by virtue of
despite — notwithstanding
clothes — apparel

Commonly used word — Latin
from the start — ab initio
in good faith — bona fide
with equal treatment — pari pasu

Commonly used word — Legalism
buyer — purchaser
document — instrument
possessing — seized of</td></tr>
<tr><td>Legal concepts</td><td>If a drafter is relying on a legal concept, he or she should use the term that lawyers commonly use to describe it. A drafter should check the latest cases for any judicial rulings relevant to the term. Examples include ‘intentional’, ‘negligent’, ‘reckless’ and ‘fraud’.</td></tr>
<tr><td>Technical terms</td><td>If a drafter is dealing with a technical subject, for example telecommunications law, he or she should use the technical terms that are used for the subject. If the legislation will have a wide audience and not just experts will use it, a drafter should consider defining the technical terms, as long as accurate definitions can be prepared. It is appropriate to use technical terms that are not in common use.</td></tr>
<tr><td>Acronyms</td><td>Sometimes a drafter can use acronyms to avoid repeating long expressions—for example, ‘CEO’ for ‘Chief Executive Officer’. The</td></tr>
</table>

	drafter can make up acronyms as well as use existing ones. Acronyms should be defined.
'Where', 'if' and 'when'	The distinctions between 'where', 'when' and 'if' are fine and they serve little practical importance. In plain language drafting, the word 'if' can be used to introduce a set of facts or circumstances. The word 'when' can be used if the facts or circumstances are certain. If the ABC Act states that it ceases to have effect on 1 July 2007, a drafter referring to this could use: 'when the ABC Act ceases to have effect'. The word 'where' should be used to convey the idea of place, which is how it is commonly used.
'Shall' and 'must'	The word 'shall' is used to impose an obligation. The alternative term 'must' can also be used to express an obligation. The word 'shall' can also be used to make a statement about the future in the same way that 'will' can be used. The word 'must' cannot be used to make a statement about the future.
'And/or'	The expression 'and/or' should not be used because it creates confusion. It can often be replaced by "or" on its own, or by using 'or both'—for example, 'notes or coins, or both' (not 'notes and/or coins').
Possessives	The shorter form of the possessive can be used in preference to the longer form—for example, 'the Commissioner's' rather than 'of the Commissioner'.
Pronouns ('it', 'them', 'they', etc.)	Pronouns are not often used in common law drafting, where drafters repeat the noun instead using a pronoun. If pronouns do not cause any ambiguity, they should be used. *The Commission must publish an annual report and give a copy of it to the Minister.*
Calculations and proportions	A calculation or proportion in a Bill can be described using words. However, a formula is easier to understand. The components of the formula can be expressed in words or symbols. The following is an example from section 27(8) of the *Income Tax Act 2007*.

	(8) If a depreciable asset is not used for the whole of the fiscal year in deriving taxable business income, the depreciation deduction for the year shall be computed according to the following formula — **A x B/C** where — **A** is the depreciation deduction computed under section 28 or 29 after taking into account subsection (7); **B** is the number of days in the fiscal year the asset is used or available for use in deriving taxable business income; and **C** is the number of days in the fiscal year. If some of the components cannot be expressed in words because they are too long or complex, a drafter can use letters as symbols for the components. The initial letters of key words in the components should be used instead of the more traditional a, b, c symbols because such words are more meaningful to the reader.

14 Common legislative provisions

Common Legislative Provisions Checklist		
☐	**1**	***Long title***
		All Acts have a long title. The long title is the full title of an Act and sets out briefly the purpose or scope of the Act. Long titles are not used in subsidiary legislation. In the Legislative Assembly, debate is restricted to the subject matter indicated by the long title. No provision can be included in the Bill unless it is within that subject matter. If amendments beyond the scope of the long title are made to a Bill, the long title will need to be amended to accommodate the amendments. A long title should be broad enough to cover the entire Act. When a draft of a Bill is completed, the long title should be reviewed having regard to the final contents of the Bill. Long titles can take a variety of forms depending on the subject matter of the Bill. Common expressions used in long titles include: • *An Act to make provision for…[the conservation and management of forests]* • *An Act to establish…[the XYZ Authority]* • *An Act to prohibit…[production of chemical weapons]*

		• *An Act relating to…[gun control]* • *An Act to repeal/amend…[XYZ Act]*
☐	**2**	***Short title***
		Clause 81 of the Constitution states that "every law shall embrace but one subject which shall be expressed by its title". This is to "avoid confusion in the making of laws". All Acts have a short title. The short title is a label for the Act, and other legislation will refer to the Act by this name. Short titles are also common in some subsidiary legislation like regulations and rules. A short title is part of the Act and can be used to assist with questions of interpretation. However, in drafting a short title, the drafter should keep in mind that the short title will be used primarily as a means of citation and reference. It follows that the short title should be short, accurate and informative. The other key component of a short title is the year, which refers to the year of enactment of the Act. It may also be necessary to differentiate between Acts with the same name that have been passed in the same year—for example, the *Supplementary Appropriation Act (No. 1) 2006* and the *Supplementary Appropriation Act (No. 2) 2006*. Some examples of short titles are: • *The Roads Act* [short title of an Act with a single subject matter] • *Financial Institutions (Amendment) Act 2014* [short title of an Amending Act] • *Educational Films (Exemption from Duty) Act* [short title of an Act dealing with a part of a particular subject matter] • *2015/2016 Appropriation Act 2015* [short title of a law appropriating funds]
	3	***Commencement***
		An Act to which His Majesty's Assent has been given shall come into operation on the day of publication in the Gazette, unless the contrary intention appears. Provided that Acts pursuant to clause 79 of the Act of Constitution of Tonga (Cap.2), shall come into operation on the day it is signed by His Majesty.

		When an Act is expressed to come into operation on a particular day, that Act or that part, as the case may be, comes into operation immediately on the expiration of the last preceding day. An Act can commence on a specified future or past date. • *This Act commences on 1 January 2017.* • *This Act is taken to have commenced on 1 May 2016.* An Act can contain a mechanism giving a person the power to determine the commencement date. • *This Act comes into force on a day to be fixed by the King by proclamation.* An Act can be drafted so its commencement is linked to a particular event or time period. • *This Act commences on the day on which the XYZ Act commences.* • *This Act commences at the expiration of 3 months after the day on which it is assented to.* A whole Act does not have to commence at the same time. Different provisions of an Act can commence at different times. • *This Act commences on a day or days as the Minister determines by notice published in the Gazette.* • *This Act commences on 1 January 2017, except Part 3, which commences on 1 July 2017.* With regards retrospective commencement, Clause 20 of the Constitution prohibits the enactment of "any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws".
☐	**4**	***Enacting words*** All Acts must contain enacting words. Clause 80 of the Constitution specifies the enacting formula as follows: *Be it enacted by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:*
	5	***Purpose or object clauses***

☐

A purpose or objects clause states the policy objectives of the whole Act. The following is an example from the *Communications Act 2015*.

5 Objects

(1) The objects of this Act are —

(a) to establish a communications licensing and regulation framework in support of the national development policy objectives;

(b) to establish the powers and functions of the Ministry of Communications;

(c) to establish the powers and functions of the Regulator;

(d) to establish the powers and procedures for the administration of this Act;

(e) to establish and to promote fair and sustainable competition in the supply, installation, maintenance and operation of customer equipment and related services;

6 ***Application provisions***

☐

As a general rule, an Act operates within the territory of the Parliament and applies to the inhabitants and activities of that territory. Application provisions are required if an Act is to apply to only some of the population or some of the territory or if it is to apply outside of the territorial limits. Below is an example of an application provision also from the *Communications Act 2015*.

3 Territorial application

(1) This Act (including all regulations and instruments made under it) shall apply within the geographical limits of the Kingdom and its territorial waters.

(2) Notwithstanding sub-section (1), this Act (including all regulations and instruments made under it) shall apply to any person beyond the geographical limits of the Kingdom or its territorial waters provided that such person —

(a) is a licensee or holds a radio spectrum licence under this Act; or

(b) provides a service or owns or operates communications facilities that are subject to licensing under this Act in a place within the Kingdom.

(3) For the purpose of this section, a "**place**" means a point of any nature or description whether on land, in the atmosphere, in outer space, underground, underwater, at sea or anywhere else.

(4) For the purposes of this section, a place that is —

(a) in or below the stratosphere; and

(b) within the geographical limits of the Kingdom and its territorial waters, is deemed to be a place within the Kingdom.

An application provision may also be needed to clarify how a new Act applies to circumstances as they exist when the new Act commences. If there are areas of uncertainty about the range of matters covered by an Act, it is better to use both an application provision and a commencement provision. For example, if a new Act applies to all decisions made after commencement (1 January 2008), is an application provision needed to apply the Act to a decision if the hearing for the decision takes place before commencement?

- *This Act applies to all decisions made on and after 1 July 2006 regardless of when the hearing took place.*

If an application provision is not used, there may be a natural application. For example, an increase in the level of a penalty will probably apply only to new offences.

The traditional rule of law is that an Act does not bind the State unless it does so expressly or by necessary implication. If an Act is intended to bind Government, it is better to state it.

4 Act binds the Crown

Except as otherwise provided, this Act binds the Crown.

☐ **7** ***Preamble***

A preamble is a statement setting out the reasons for an Act. Preambles contain a recital of the circumstances that made the legislation necessary. They are seldom used in modern legislation, where purpose or objects clauses are used instead. The Explanatory Note or Memorandum that accompanies a Bill also makes a preamble largely redundant. Preambles are still used for Bills of constitutional importance, Bills dealing with international law and Bills of a historic nature.

☐ **8** ***Transitional and Savings Provisions***

Transitional and savings provisions may be needed if an existing law is repealed, repealed and replaced, or amended. Transitional provisions set out rules aimed at ensuring a smooth transition from the old law to the new law. For example, it may be necessary to determine how activities that were started under the old law but have not yet been completed will be dealt with under the new law.

The following is an example from the *Seabed Minerals Act 2014*.

124 Transitional provisions

One year from the commencement of this Act –

(a) every exploration licence, prospecting licence and any other authority granted under the Minerals Act or otherwise to carry out activities that constitute Seabed Mineral Activities shall expire; and

(b) any person or persons who were before the commencement of this Act authorised to carry out activities that constitute Seabed Mineral Activities shall, to allow the continuation of such activities, obtain a permit or licence under this Act and comply with the requirements of this Act.

☐ **9** ***Regulation making power***

A common final matter of a draft Bill (particularly a draft primary legislation) is the regulation making provision or provision authorising the making of lower level legislation. This delegation of legislative power is often delegated to bodies such as Cabinet Ministers and statutory bodies.

Best drafting practice is that matters of policy should be included in primary legislation and the legislative implementation of policy left to delegated legislation; however, deciding where that line should be drawn is a matter of careful judgment for the drafter. As far as primary legislation is concerned, the

		drafter must ensure the provisions enabling subsidiary legislation to be made is drafted sufficiently widely to be effective. However, the drafter should also be satisfied that the enabling provisions are no broader that they need be, as Parliament would be vigilant about their scope. The following is an example of a regulation making provision from the *Seabed Minerals Act 2014*. **123 Regulations and Ministerial Orders** The Minister may, with the consent of Cabinet, make Regulations — (a) prescribing anything required or authorised to be prescribed under this Act; (b) generally for carrying this Act into effect; (c) without prejudice to the generality of the foregoing, Regulations may be made with respect to any of the following matters - (i) the gridding, mapping and allocation of blocks, cells and Licence Areas; (ii) classifying particular aspects of work relating to Seabed Minerals as a Major Project under the EIA Act, or absolutely prohibited due to unacceptable anticipated harm to the Marine Environment; (iii) requisite content, format, consultation processes, independent verification, and timeframe for an Environmental Impact Assessment and the establishment of environmental baseline data for Seabed Mineral Activities; (iv) prescribe further rules or processes pertaining to the handling by the Authority of conflicting Applications for the same Title pertaining to the same area;
☐	**10**	***Schedules*** Schedules appear at the end of Acts or instruments and always rely on an earlier section of the Act or instrument. Schedules can be used for several purposes, including to list: amendments of other Acts or instruments; agreements mentioned in an Act or an instrument; procedural or administrative matters; and tables of information e.g. a table setting out fees for particular services.

15 Numbering

(1) Sections and parts of sections

- sections—1, 2, 3
- subsections—(1), (2), (3)
- paragraphs—(a), (b), (c)
- subparagraphs—(i), (ii), (iii)

(2) Grouping sections

- Chapters, Parts and Divisions—1, 2, 3
- Subdivisions—A, B, C

(3) Schedules and parts of schedules

- Schedules—1, 2, 3
- provisions of a treaty or agreement—these are numbered in exactly the same way as in the original treaty or agreement.

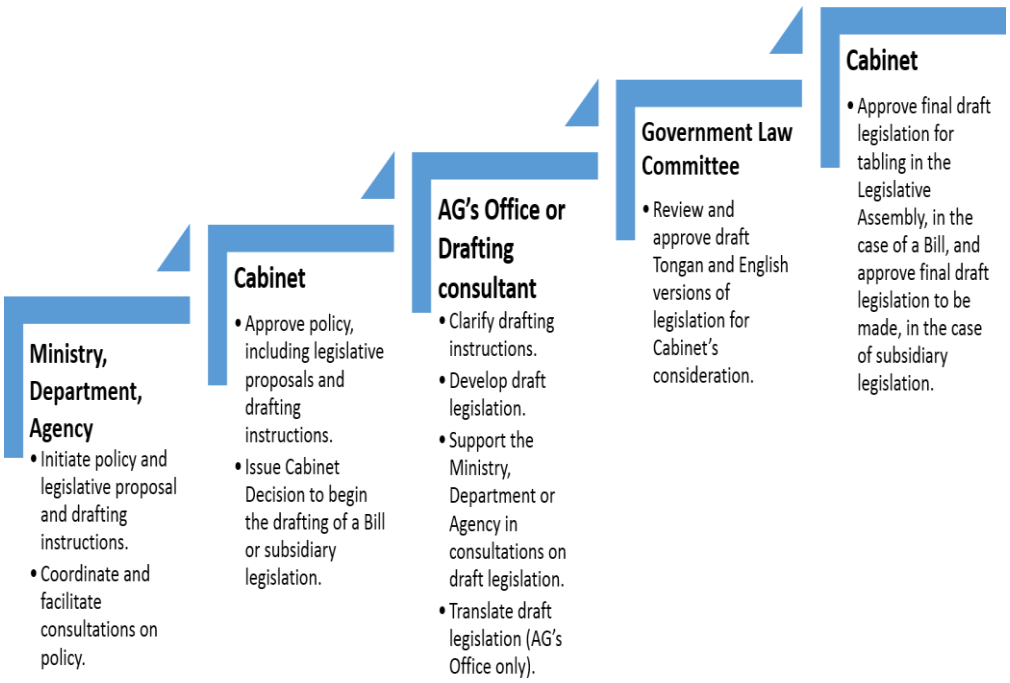
16 Non-legislative material

An Explanatory Notes or Explanatory Memorandum is prepared for a Bill and accompanies it on introduction into the Legislative Assembly. It explains the purpose of the Bill and contains details about the main clauses in the Bill.

The Explanatory Notes are prepared by the AG's Office to provide a brief background of the Bill and to explain the purpose and scope of the Bill. It is attached at the end of the Bill, but it does not form part of the Bill. The Explanatory Notes must be signed by the Minister responsible for the implementation of the Bill. This process is also the same for subsidiary legislation.

ANNEX A

GENERAL LEGISLATIVE DEVELOPMENT AND DRAFTING PROCESS



ANNEX B

CHECKLIST FOR PROVIDING DRAFTING INSTRUCTIONS

- ☐ General background
- ☐ Drafting timetable
- ☐ Detailed instructions for each legislative proposal
  - ☐ Purpose
  - ☐ Proposed title of the draft legislation
  - ☐ Commencement (including retrospective commencement implications)
  - ☐ Problem and solution for which the draft legislation will address
  - ☐ Target audience and conduct affected by the proposed legislation
  - ☐ Amendment of current functions and powers, or creation of new functions and powers
  - ☐ Creation of a new public body, and necessary administrative requirements
  - ☐ Constitutional implications
  - ☐ Relationship to existing law
  - ☐ International obligations and standards
  - ☐ Implementation/Machinery
  - ☐ Criminal offences or administrative penalties
  - ☐ Remedies
  - ☐ Reviewable decisions and appeals

- ☐ Repeal, transitional arrangements or consequential amendments for harmonisation
- ☐ Subsidiary forms of legislation required, if a Bill
- ☐ Law making authority

☐ Outstanding policy

☐ All relevant legal advice

☐ A description of consultations undertaken

☐ Timetable

☐ Miscellaneous

☐ Attach: Cabinet Decision approving the policy proposal

☐ Attach: Copy of the Cabinet Submission recommending approval of the policy proposal

ANNEX C

TEMPLATE – DRAFTING INSTRUCTIONS

<table>
<tr><td colspan="3">DRAFTING INSTRUCTIONS</td></tr>
<tr><td colspan="3">(1) PRELIMINARY</td></tr>
<tr><td rowspan="3">Ministry/ Department/ Agency:</td><td>Phone :</td><td></td></tr>
<tr><td>Fax :</td><td></td></tr>
<tr><td>Email:</td><td></td></tr>
<tr><td>Minister responsible:</td><td colspan="2"></td></tr>
<tr><td>Policy Officer/Instructor:</td><td colspan="2">Consultant drafter (if relevant)</td></tr>
<tr><td rowspan="2"></td><td>Name:</td><td></td></tr>
<tr><td>Contact:</td><td></td></tr>
<tr><td colspan="3">Cabinet Decision reference:</td></tr>
<tr><td>Cabinet Decision No.:</td><td colspan="2"></td></tr>
<tr><td>Cabinet Decision Date:</td><td colspan="2"></td></tr>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">(2) LEGISLATIVE PRIORITY</td></tr>
<tr><td colspan="3">Priority allocated by Cabinet/ Priority for which Minister will bid.</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">When does the legislation need to be introduced to the Legislative Assembly?</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">When does the legislation need to come into force?</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">Are there any other issues (i.e. time constraints etc.)?</td></tr>
<tr><td colspan="3"></td></tr>
</table>

(3) BACKGROUND & DETAILED INSTRUCTIONS
Purpose: What purpose is to be served by the proposal? What is the main objective to be achieved?
State secondary purposes.
Proposed title of draft legislation.
Proposed commencement date for the draft legislation. *Indicate practical date for the new legislation to commence, e.g. date of Assent, or a date to be fixed by the Legislative Assembly?*
Problem/Issues and solution for which the draft legislation will address. *Few short summary paragraphs on facts constituting the issue to be addressed (e.g. what is the legislative gap to be remedied; what is the legislation to do; how is the legislation to do it)*
Target persons. *Who are to be regulated? Whose rights are affected? Have those outside Government who are likely to be affected by the legislation been consulted?*
Target conduct/activity and application. *What conduct or activities are to be regulated? What is the current regulation (if any) for that or similar conduct/activity? Are there any extra-territorial or cross-border issues involved?*
Functions and powers.

Are new public functions or powers being created? Are current functions and powers changed? Have these been widely consulted and understood? How are those functions and powers affected in other legislation?
Creation of a new public body. *If a new body is to be created, is it to be a Ministry, Department, or Agency? State requirements for its composition, functions, powers, administration, etc.*
Constitutional implications. *Is the proposal consistent with the Constitution? Does the proposed legislation comply with fundamental common law principles? Have vested rights been altered? If so, is it essential and have compensation mechanisms been included? Have pre-existing legal situations been affected, particularly by retroactivity? If so, is that essential and what mechanisms have been adopted to deal with them?*
Existing laws. *State any existing laws dealing with the issue and whether harmonisation is required between existing laws and the proposed legislation. Have Ministries, Departments, or Agencies responsible for those existing laws been consulted? How do similar jurisdictions deal with the issue?*
International obligations and standards. *State existing and relevant international or regional instruments relating to the legislative issue or target conduct/activity. Describe Tonga's relevant obligations under that instrument.*
Implementation/Machinery. *Identify the Ministry, Department or Agency responsible for the administration and enforcement of the legislation. Also state other relevant Ministries, Departments or*

Agencies that are affected by the proposed legislation. Provide estimated costs (as necessary) of implementation.
Criminal offences or administrative penalties. *Is it necessary to create a new offence? Has the appropriate mental element been determined? Is the offence a summary or indictable offence, and is this appropriate? If the offence is an infringement offence, is this appropriate? Has an appropriate range and level of penalties been determined? What is the appropriate limitation period?*
Remedies. *If remedies are required, which of the range of remedies is appropriate? Should an existing civil remedy be applied? Should new remedies or processes be established? Should a special limitation period be established?*
Reviewable decisions and appeals. *Should the legislation provide a right of appeal? Specify the proper appellate procedure. Does the legislation unduly restrict judicial review?*
Repeal, transitional and consequential amendments. *What existing legal arrangements would need to be removed or changed as a result of the new legislation? For example, what existing rights, conduct, authority, or powers might be affected by the new law?*
Subsidiary forms of legislation, e.g. regulations. *Have the terms of the empowering Act been complied with when making the subsidiary legislation? Is the proposed subsidiary legislation beyond the power conferred by the empowering Act? Does the proposed subsidiary legislation contain an unlawful sub-delegation? Is the proposed subsidiary legislation invalid by reason of repugnancy to any*

other enactment? Is the commencement of the empowering Act reliant on the making and commencement of the subsidiary legislation?
Law making authority. *Indicate who will sign the instrument, for example, to be assented by the King if it is a primary form of legislation, or to be signed by Cabinet or a Minister if it is a subsidiary form of legislation.*
Outstanding policy. *State any matter of policy that are still to be resolved.*
Relevant legal advice. *Refer to relevant legal advice.*
Consultation. *State consultations required (within and outside Government), including views and how those views have been reflected or addressed in the legislative proposal, what consultations have been undertaken so far, and identify relevant stakeholders that need to be further consulted. Also indicate estimated costs of consultation.*
Timetable. *Indicate what the preferred timetable for the draft legislation is, including whether there are any matters that may affect the timetable for the draft legislation (for example, consultations required and international obligations and timelines involved).*
(5) MISCELLANEOUS
Other necessary information.

Attachments. *Please provide copies of reports, recommendations, case laws, legal or expert opinions, precedent Acts or model provisions, etc.*	
Name of authority:	
Signature:	Date:

ANNEX D

SUMMARY – KEY STAGES

Stages	Activities	Responsibility
Stage One – Developing policy and preparing drafting instructions	• Clarify policy objective(s). • Assess policy options or means of achieving the policy objective(s). • Consult with other Ministries, Departments, or Agencies and non-Government organisations. • Submit to Cabinet a policy proposal for approval. The policy proposal must include the following: o policy objectives to be achieved; o the legislative proposal(s) or reform sought to give effect to the policy; o timelines and relevant budget implications; o drafting instructions to be conveyed to the AG's Office or consultant drafter; o any other relevant matter. • Cabinet approves the policy proposal, including legislative proposal(s) and drafting instructions. • Drafting instructions are sent to the AG's Office or the consultant drafter engaged by the Ministry, Department or Agency.	• Minister • Ministry, Department, or Agency officers (drafting instructors)

Stage Two – Drafting legislative text and validating legislation	• Understand and analyse the drafting instructions. • Plan the draft. • Compose the text. • Check the draft. • Consult with all stakeholders on the draft legislation. • Once the draft legislation is scrutinised by the AG's Office (if drafted externally) and the Cabinet's Law Committee, the draft legislation is submitted to Cabinet for approval for introduction into the Legislative Assembly (if a Bill) or for approval to be made by Cabinet, a Minister or other authority (if a draft subsidiary legislation). • Cabinet approves draft legislation. • Introduction of legislation into the Legislative Assembly, in the case of a Bill, or enactment in the case of subsidiary legislation. • Legislative passage of a Bill. • Enactment of the Bill.	• AG's Office or consultant drafter • Drafting instructors will provide comments on drafts and coordinate all necessary consultation • Minister with support from instructors • Drafters may be required to draft amendments required from the Legislative Assembly

ANNEX E

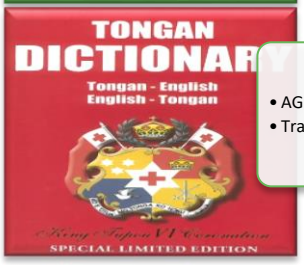
ADMINISTRATIVE PROCESS FOR DEVELOPING BILLS

STEP 1



- AG's Office
- Legal Drafting

STEP 2



- AG's Office
- Translation

STEP 3



Cabinet's Law Committee

STEP 4



Cabinet

Step 5 & Step 6



Legislative Assembly/ AG's Office

Step 7



Royal Assent

Step 8



Gazetting

BILLS			
STEP 1 AG'S OFFICE (DRAFTING)	STEP 2 AG'S OFFICE (TRANSLATION)	STEP 3 CABINET'S LAW COMMITTEE	STEP 4 CABINET
- AG's Office receives Cabinet Decision to process a Bill. - The relevant Ministry provides AG's Office with drafting instructions. - The AG's Office or a drafting consultant drafts the Bill. - Bill is vetted by the AG'S OFFICE, and on-going consultations are conducted between AG'S OFFICE and the relevant Ministry.	- Bill is translated into Tongan. - Translation is proofed and finalised. - The Bill (both Tongan and English versions) is submitted to the Law Committee for discussion and approval for submission to Cabinet.	Amendments made by Law Committee are inserted.	- AG's Office makes 15 copies of the English and Tongan versions of the Bill for submission to Cabinet. - AG's Office prepares Cabinet Submission

STEP 5 LEGISLATIVE ASSEMBLY/ AG'S OFFICE	STEP 6 LEGISLATIVE ASSEMBLY/ AG'S OFFICE	STEP 7 ROYAL ASSENT	STEP 8 GAZETTING
- Bill is submitted to Cabinet for its final approval for submission to Legislative Assembly. - AG's Office receives Cabinet Decision. - Relevant Minister signs the Explanatory Notes before the Bill is sent to the Legislative Assembly.	- AG's Office sends the Bill to the Legislative Assembly. - After the Legislative Assembly passes the Bill, the Act is sent back to AG's Office.	- AG's Office inserts the amendments (if any) made by the Legislative Assembly. - AG's Office sends the final Tongan and English versions to the Lord Privy Seal for onward submission to His Majesty in Council for Royal Assent.	- Once the King gives his Royal Assent, the Act is sent back to AG's Office. - AG's Office gazettes the Act. - AG's Office publishes it on AG's Office website and sends out notification.

ANNEX F

ADMINISTRATIVE PROCESS FOR DEVELOPING DRAFT SUBSIDIARY LEGISLATION



SUBSIDIARY LEGISLATION (Regulations, orders, notices, etc.)			
STEP 1 **AG'S OFFICE (DRAFTING)**	**STEP 2** **AG'S OFFICE (TRANSLATION)**	**STEP 3** **CABINET'S LAW COMMITTEE**	**STEP 4** **CABINET**
- AG's Office receives Cabinet Decision to process the draft regulations or other legislative instrument. - Relevant Ministry provides drafting instructions to the AG's Office. - The AG's Office or drafting consultant drafts. - Draft subsidiary legislation is vetted by AG's Office, and on-going consultations are conducted between AG's Office and the relevant Ministry.	- Final draft subsidiary legislation is translated into Tongan. - Translation is proofed and finalised. - The draft subsidiary legislation (in Tongan and English versions) is submitted to the Law Committee for discussion and approval for submission to Cabinet.	- Amendments made by Law Committee are inserted.	- AG's Office makes 15 copies of the English and Tongan versions of the final draft subsidiary legislation for submission to Cabinet. - AG's Office prepares Cabinet Submission for the final draft subsidiary legislation.

STEP 5 **CABINET**	**STEP 6** **AG'S OFFICE**	**STEP 7** **GAZETTING**	**STEP 8** **LEGISLATIVE ASSEMBLY**
• Cabinet approves the final draft subsidiary legislation (with or without amendments) • AG's Office receives Cabinet Decision.	• AG's Office inserts amendments (if any). • AG's Office print 3 copies each of the finalised Tongan and English versions and arrange signing by the relevant subsidiary legislation making authority. • The 3 copies are each for the Ministry, Solicitor General, and AG	• AG's Office gazettes regulations after the relevant subsidiary legislation making authority signs. • Once gazetted, the subsidiary legislation is effective and published on the AG's Office website and notification is sent out.	• On the following year, all the subsidiary legislation is submitted to the Legislative Assembly, and the Legislative Assembly can approve, amend, or rescind the subsidiary legislation.

ANNEX G

COMMON ARRANGEMENT OF LEGISLATIVE PROVISIONS (BILL)

Type of provision	Description
Introductory mechanisms	
Long title	A statement of the scope of the Act
Preamble*	A statement of the circumstances and reasons for the Act
Commencement date	The date the Act comes into operation
Enacting words	A set of words showing that the Bill has undergone the enactment process
Preliminary provisions	
Short title	The name by which the Act is called
Commencement	A statement of when the Act will come into operation
Application section*	A statement extending or restricting application—for example, if an Act is to have extra-territorial effect
Purpose or objects section*	A statement of the policy objectives of the Act
Interpretation section	A provision containing the definitions and interpretation provisions used in the Act
Principal provisions	
Substantive sections	The main group of rules dealing with the subject matter of the Act
Administrative sections	Other rules dealing with the subject matter
Some other common provisions	
Penal provisions	Offences and penalties
Delegations	Powers to make subsidiary legislation
Service of notices	Provisions setting out contents and how notices are to be served

Type of provision	Description
Powers of entry, search, seizure and arrest	Provisions setting out powers and procedures to be followed
Indemnities	Provisions indemnifying persons for actions taken under the Act
Final provisions	
Savings and transitional (used with repeals and amendments)	Temporary provisions preserving matters under the old law or moving existing matters from the old law to the new law
Amendments and repeals	Changes to existing laws consequential upon the Act
Schedules	Additional provisions that supplement the provisions in the body of the Act

** These features are not always needed but can be important.*

[1] His Majesty's Cabinet Decision No. 925 of 19 October 2019.