

# How to draft effective coastal fisheries and aquaculture legislation

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## Introduction

With the endorsement of the regional policy “A new song for coastal fisheries – pathways to change: The Noumea strategy” in 2015 (Anon. 2015), Pacific Island countries and territories (PICTs) have committed to updating and strengthening their laws and regulations to ensure sustainable, accountable and participatory management of marine resources. Since then, fisheries agencies around the region have been leading the effort to review their national legislation and identify gaps in their coastal fisheries and aquaculture regulatory frameworks. Given the limited number of legislative drafters in many countries, fisheries officers are often tasked with preparing a first draft of the laws or regulations required to manage coastal fisheries. Some have requested guidance from the Pacific Community (SPC) (Box 1).

This brief guide provides an overview of how to draft legislation to manage small-scale coastal fisheries and aquaculture. It reviews what legislation is, and explains where officials

## Box 1: Assistance and training

SPC has been providing technical assistance to PICTs to develop sound coastal fisheries legislation since 2017 under the Effective Coastal Fisheries Management Project, through the New Zealand Ministry of Foreign Affairs and Trade. In 2019, the first SPC Short Course in Preparing and Drafting Coastal Fisheries Legislation was held in Noumea, New Caledonia, in collaboration with Solon Law ([www.solonlaw.uk](http://www.solonlaw.uk)). Plans to organise a second one in 2021 were thwarted by the COVID-19 pandemic. Instead, SPC is now developing an online course targeting the Pacific region with the expert support of the University of California, Hastings College of the Law ([www.uchastings.edu](http://www.uchastings.edu)).

should start when preparing a piece of legislation. It also provides tips for drafting comprehensive and clear legislation, as well as clues for better compliance with the legislation once enacted.

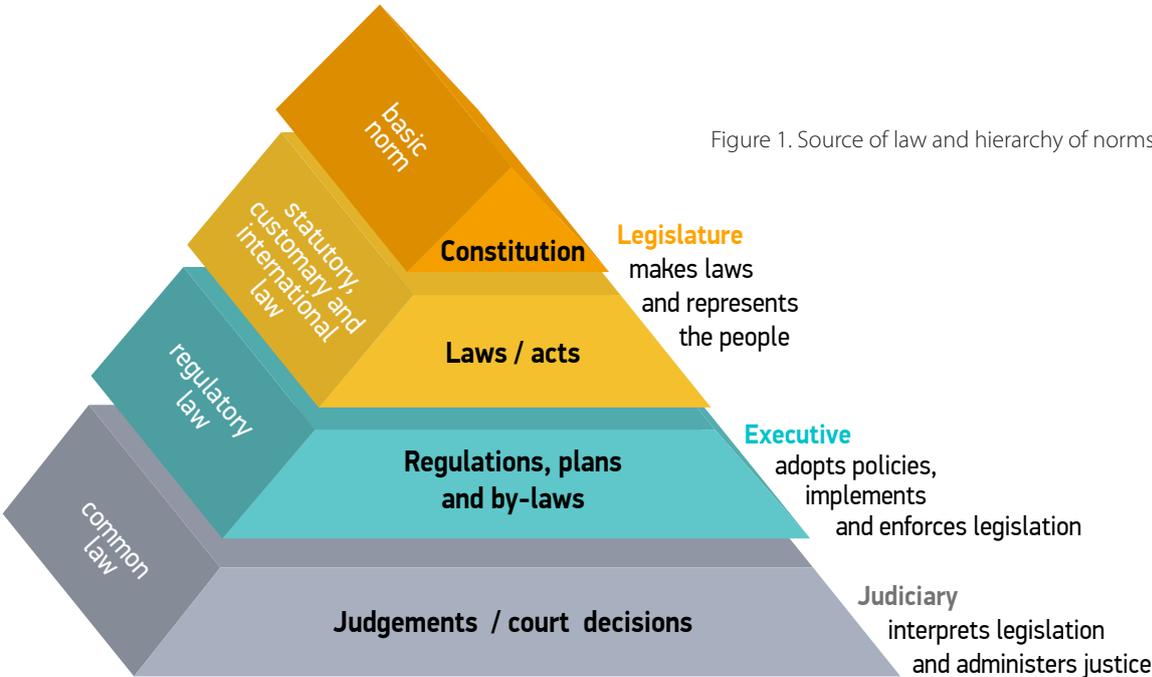


Figure 1. Source of law and hierarchy of norms.

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## What is legislation?

Legislation is a type of binding legal instrument passed by a legislature or by the executive. Common examples are laws and acts passed by a parliament or congress, as well as other regulatory instruments (such as regulations, decrees, orders, and bylaws) issued by a cabinet, minister, or agency. Laws and acts are called primary legislation while other regulatory instruments are called subsidiary legislation. Primary legislation outlines broad principles and goals, and sets up structures, powers and procedures. Subsidiary legislation fills out the details of whatever is established in the primary legislation. Subsidiary legislation – also called secondary or subordinate legislation – is invalid if it contradicts or goes beyond the scope of the primary legislation (Fig. 1). Legislation is different from policies and plans, which are not normally binding, although management plans are considered to have the force of regulations in some jurisdictions.

Imagine parliament passes legislation to accomplish the goal of preserving local fisheries (e.g. a Local Fisheries Act). This would be the primary legislation. The act may delegate authority to the ministry or department in charge of fisheries, or to a local governing body. To accomplish the stated goal of the primary legislation, the delegated body (the ministry or department) may create subsidiary legislation, such as regulations, to do things like impose permit requirements or prohibit fishing during certain seasons to allow fish to spawn (e.g. Bonefish Fishery Regulations). Details are placed in the subsidiary legislation to allow for rapid changes in response to scientific or other developments (e.g. to open or close a fishing season based on a stock assessment). Otherwise, any changes would have to go through parliament again (to change the primary legislation), which would be time consuming.

The legislation mentioned above is statutory law, meaning it has been formally approved and written down. In contrast, customary law refers to the customs established by longstanding practice within a community that are widely accepted as legally binding on its members. Customary law

is generally orally held and transmitted within the community. Although many PICTs have pluralistic legal systems that recognise customs as a source of law alongside statutory law, this guide focuses only on statutory legislation, both primary and subsidiary. We now turn to how to word such statutory legislation in a clear and effective way to ensure that it is properly understood and consistently applied.

## Steps to start drafting legislation

### **Step 1: Understand the political background and policy objectives**

The political background refers to the reason the legislation is being drafted. For example, a recent Fisheries Act may require a governing body to draft regulations to curb fishing during a certain season or area. This could be because a popular practice is negatively affecting fisheries in a particular community (e.g. fishing during spawning season, or in a spawning area). It is important to keep this political background in mind when drafting, to ensure that the legislation targets the relevant issue and advances the policy objectives (Box 2). Furthermore, the political nature of new

### Box 2: Ask “Why?”

A common question asked during stakeholder consultations is why a certain regulation or legal provision is being adopted. Resource management legislation should be based on science. Although it is unusual to explicitly mention the justification for each provision in statutory law, the overall policy or management objective being pursued should be clearly stated at the beginning of the act or regulations or in the associated policies and plans.



Participants to a short course in preparing and drafting coastal fisheries legislation in Noumea, New Caledonia, 10–14 June 2019.

### Box 3: Voluntary guidelines and standards

Organisations such as the United Nations and its specialised agencies like the Food and Agriculture Organization (FAO) may produce guidance on the subject matter of the legislation. In fact, FAO has produced the Code of Conduct for Responsible Fisheries and Voluntary guidelines for sustainable small-scale fisheries. Tools like these are not mandatory, but they are an invaluable resource when drafting national legislation. This is because the guidance represents the consensus of many countries, including one's own. In addition, these organisations have the resources to conduct high-level comparative research, which strengthens the persuasive power of these voluntary guidelines and standards.

legislation is important because implementing it will affect people's lives. Industry players, local fishing communities, or environmental groups may have strong opinions about the legislation, depending on how they are affected. While the legislation is being prepared, it is critical to involve and consult all affected groups, or stakeholders – both because taking their interests into account helps to achieve the intended policy objectives and to avoid catching them by surprise when the legislation is enacted.

#### Step 2: Define the scope

It is important to consider the scope of the legislation before beginning to prepare it. "Scope" means the intended impact of the legislation – broad or narrow. For example, the legislation may target all domestic waters, a portion of those waters (such as a certain reef area or a community-managed area), or a particular marine species or fishery. The scope of the legislation must be clearly defined so that authorised enforcement officers understand the intent behind the legislation and appreciate exactly what (and whom) it targets. The scope is also important to ensure that parameters are imposed on the government, since government action may affect people's rights and freedoms.

#### Step 3: Choose the right provisions

The next step is to sketch out the main content or types of provisions the legislation will include to achieve the policy objectives. For example, the legislation may outline management measures that restrict access to fishing grounds (e.g. licensing or registration), prohibit the use of certain fishing gear or methods (e.g. explosives or poisons), or put limitations on catches (e.g. size or quantity restrictions). Perhaps the legislation will empower local communities to adopt

community-based fisheries management plans or to appoint honorary fish wardens to conduct surveillance in the area.

Before delving into the content, however, it is good practice to become familiar with the relevant guideposts, such as any international treaties the country may have signed, international or regional standards and guidelines that apply to the country (Box 3), other existing national legislation on the subject, and (in common law jurisdictions) any applicable court cases interpreting relevant existing legislation.

#### Step 4: Implement safeguards

It is important to include safeguards in legislation to prevent decision-makers from exercising too much discretion, which can lead to corruption. There are several tools that can help ensure that decisions are made in a consistent manner. First, legislation should clearly define the criteria for making decisions, for example to issue or revoke a licence. Second, legislation should require decision-makers to consult with or seek approval from another relevant agency. Third, legislation should require decision-makers to justify and

### Box 4: Ten guiding principles for clear drafting

<b>Active</b> vs passive	Prefer verbs to nouns and choose active over passive phrases
<b>Clear</b> vs ambiguous	Clearly identify the subject and avoid ambiguity
<b>Coherent</b> vs illogical	Group related ideas into organised sections and subsections
<b>Concise</b> vs wordy	Use short, simple sentences, and get to the point
<b>Consistent</b> vs inconsistent	Use defined terms consistently
<b>Inclusive</b> vs biased	Be socially inclusive and avoid gendered language (see Tip #2)
<b>Modern</b> vs archaic	Avoid old-fashioned language
<b>Positive</b> vs negative	In most cases, use positive rather than negative statements
<b>Simple</b> vs complex	Use the simplest word that conveys the meaning
<b>Singular</b> vs plural	Prefer singular over plural form

document their decisions in writing for future scrutiny so that they can be held accountable. Fourth, legislation can require reports detailing the decision-making process, so that the process is transparent and freely available for stakeholders wishing to understand it. Fifth, stakeholders should be allowed to challenge or appeal official decisions and to submit complaints about actions stemming from the legislation.

 **Step 5: Check for legislative processes or requirements**

Sometimes countries have specific legislative drafting, approval and adoption requirements. Even if non-lawyers are drafting legislation that government lawyers will later review, it is important to draft the legislation properly from the outset. This means finding and following any drafting or procedural manuals or other applicable requirements. It is also important to understand and follow the process of drafting, proposing and shepherding legislation to approval. For example, the country may have embraced a specific drafting style, or a particular format or structure for the legislation. A piece of legislation may need to be brought to a vote in the legislature, or approved by the cabinet, or submitted to an agency for input or sign-off. These are all important considerations to note before drafting the legislation, to avoid delays and ensure proper approval.

Box 5: The “universal he” and “man” words*	
Avoid	Use
Businessman	Businessperson; business executive; entrepreneur
Cameraman	Camera operator
Chairman	Chairperson; chair
Fisherman	Fisher
He	They
His	Their
Mankind	Humankind
Manning	Working; staffing; running; crewing
Policeman	Police officer
Workman	Worker

\* Suggestions in this table are based on Revell and Vapnek 2020.

## Tips to draft clear and effective legislation

 **Tip #1: Be clear, concise and consistent**

Legislation should be drafted so that it is clear, concise and consistent. This ensures that once enacted, it will be effective and enforceable. The legislation should give effect to government policy, promote good governance, and minimise corruption and abuse. When drafting legislation, use words consistently and be specific.

**Use plain language** rather than legalese. For the sake of clarity, sentences should be short and get straight to the point, using simple terms and phrases with clear meaning. Long and convoluted sentences could confuse the reader. Ten guiding principles are proposed in Box 4 for clear drafting.

**Only use necessary words.** Courts and those enforcing legislation will read every word of the legislation and assume that each word has meaning. For this reason, drafters of legislation should think carefully about each word and only include those that are necessary to accomplish the intended outcome.

 **Tip #2: Use gender-neutral expressions**

Gender-neutral or gender-silent drafting is the best practice for inclusive legislation. As a simple matter of fairness and equality, all persons covered by a law should be able to imagine themselves in it. Language shapes perceptions, which can continue, deepen, or counteract power and status imbalances among the genders. Internationally, there is a growing recognition of non-binary gender identities and the need to address masculine bias in language. Avoid masculine or feminine pronouns where possible, even if it means repeating the noun. Generally, replace gendered terms with gender-neutral or silent synonyms (Box 5).

 **Tip #3: Specify the who, how, when, where and what**

It is important to clearly specify all aspects of a particular obligation or prohibition. This also helps the drafter advance policy goals. For example, legislation may specify that parrotfish may not be caught and kept. The what – catching parrotfish – is clear. But for this legislation to be enforceable, it also needs to specify:

**The who:** Legislation should specify who is not allowed to catch this fish (e.g. only commercial fishers, recreational fishers, subsistence fishers). Further, the legislation should specify who is responsible for enforcing the legislation.

**The how:** Legislation should specify how catching the fish is prohibited (e.g. from a boat, on foot, with certain specified gear or methods). This is important so that people who will be affected by the legislation will understand exactly how it works.

**The when:** Legislation should specify when its provisions are enforceable (e.g. only during certain months, year-round, during spawning season, at night). This will put stakeholders on notice of when they may engage in an activity.

**The where:** Legislation should specify where the target prohibition applies (e.g. only in the lagoon, on the reef slope, in a marine reserve, in certain islands, or throughout the country). Explain the requirements in sufficient detail so that people will be able to comply with the legislation.

**The what:** As stated above, the “what” is clear in the example – landing parrotfish. It is important to clearly define the subject of the legislation and the action(s) in question so that those enforcing the legislation know what to enforce, and so that those affected by the legislation are on notice regarding the expected behaviour.

 **Tip #4: When to use must, may and may not**

Legislation confers benefits and imposes restrictions. The words must, may and may not are used to accomplish these goals, but there are differences.

**Must** is most effective when it is used to impose a duty to act. For example, The aquaculture operator must provide a production report to the director every six months. A drafter of legislation should use the word must in place of shall because shall could be misconstrued (e.g. to mean a future action), whereas must is clear. Use must when you want a person to have an obligation to act in a prescribed way.

**May** is used to grant discretion or authority to a person. For example, The minister may issue a fishing licence means the minister has the authority to issue or not issue a fishing licence. Use may when you want a person (usually a government official empowered in the legislation) to have the discretion to decide whether and how to act.

**May not** is used to prohibit an action. For example, People may not fish in the bay during the summer months. In this example, people do not have permission to engage in the prohibited action. Use may not when you want to deny a person (usually an official) the power to act or you want to prohibit a person from engaging in an action.

 **Tip #5: Clearly define terms**

Defining terms is a very powerful tool when drafting legislation because it gives the drafter the ability to control the meaning of the words, which can determine how the legislation is applied. Clearly defining terms is also important because it helps stakeholders understand the intention of the legislation and, more importantly, it allows the legislation to be enforced as intended. If the targets are defined too narrowly or too broadly, the legislation can miss certain people or things, or cover too many people or things. For example, when drafting legislation on a place called “the bay”, include a definition that clearly identifies what and where the bay is and what water is included (consider using GPS coordinates). This means the legislation can simply refer to the bay, but all parties will know what that means.

**Include a definitions section.** Remember to include a list of definitions at the beginning or end of the legislation. Do not gloss over common words under the assumption that local parties will know what they mean – always define a word or phrase that does not already have a legal significance. At the same time, only define terms that are actually used in the text and need to be interpreted in a specific way to achieve the objectives of the legislation (no need to define everything!).

## How to ensure compliance and effective implementation

 **First clue: Identify enforcement officers**

When drafting legislation, identify the authorised officers who will enforce the legislation, including how they will be appointed and what their duties will be. In addition, specify the powers the authorised officers will have. For example, Agents may enter boats or premises to perform inspections, take photographs, samples, or measurements, and seize items not in compliance with this legislation. In some cases, community officers or local fish wardens can be appointed, or there are general provisions for participatory surveillance (e.g. citizens can report a breach to an officer). When giving powers to government officials or community wardens, it is important to consult the constitution, which may impose limits on how governments can infringe on people’s rights; for example, to not have the government enter their home without authorisation.

 **Second clue: Spell out offences and penalties**

Legislation should clearly define offences, which are actions that constitute a breach of the law, and penalties, which are the punishments associated with each offence. Punishment should be proportional to the breach. For example, a

minor infraction would not call for a year's imprisonment or a million-dollar fine. Depending on the jurisdiction, a punishment may be applied by a court, or by an administrative agency (through a police officer or fishery management officer). Court-imposed sanctions might include imprisonment, whereas administrative sanctions might include monetary penalties, such as spot fines, or other sanctions, such as licence revocation or suspension. Legislation should clearly identify the punishment. For example, *A person in violation of this law may face a fine of up to \$500 or the revocation of the fishing licence.* This puts people on notice before they engage in the prohibited activity and provides clear guidance to the officers who enforce the legislation. It is important to spell out in the legislation the consequences for violations because this leads to better compliance. It also prevents constitutional challenges if people allege that penalties were not properly established or clearly stated.

### *Third clue: Recognise existing rights and situations*

Legislation is normally written for the future, meaning that it typically affects only events taking place after its entry into force. Nonetheless, legislation frequently affects existing rights or situations. For example, if the legislation establishes a new requirement that all aquaculture farms must be licensed, then all farms that have been operating (legally) without a licence under the previous regime will become illegal as soon as the new legislation comes into force. To avoid this unfair situation, the legislation should include transitional and savings provisions. Transitional provisions are provisions that explain how the new law will bridge the past and current situations (i.e. situations that are ongoing at the time of entry into force). For instance, there may be a grace period for people to take the necessary action to comply with the new rules. On the other hand, savings provisions are provisions that extend the validity of the old rules that would otherwise be immediately changed or repealed by the new law. Taking the example above, a transitional provision might allow people who started fish farming operations before a given date to keep applying the old rules for a certain time period. This type of provision is known as a “grandfather” clause in some jurisdictions. For a savings clause, an example might be that when repealing an old Fisheries Act, the new legislation states that the existing subsidiary regulations will remain in force under the new act until new regulations are adopted.

### *Fourth clue: Consider implementation capacity*

When drafting legislation, make sure that the new provisions can be implemented with the available resources. To become operational, coastal fisheries legislation must be put in practice by trained fisheries officers who understand they have an important educational role. Consider the capacity of the country's fisheries agency, or how to secure funding

for additional monitoring, control and surveillance (MCS) operations that may be required under the new law. This might include staff, training and equipment. Inspections and MCS operations should be planned, and standard operating procedures developed to streamline implementation. Resources are also needed to ensure that adequate forms and data collection systems are available (e.g. for fisheries officers to record fishing activities by licensed vessels or registered fishers or boats). In certain cases, fisheries agencies may rely on community-based fisheries management (CBFM) or local authorities for the control of local fishers and small boats.

### *Fifth clue: Foster awareness and participation*

Community awareness and participation are key to the success of new legislation. As mentioned in Step 1, consultation with stakeholders – including the local communities affected by the legislation – is essential before and during the legislative drafting and adoption process. In this way, the legislation will be more effective because it is adapted to the local context. Legislation that reflects community concerns and considers traditional knowledge will be better understood and accepted by people in the area, thereby promoting buy-in. In turn, local awareness of the legislative goals can promote compliance. Community outreach is also important in order to provide people with accurate information on the new rules. If the legislation allows for adoption of CBFM plans or other co-management arrangements, consider including such provisions in those plans. Say, for example, the legislation is needed to protect a certain fish species that is overfished in some areas. Rather than banning all fishing of that species nationally, which may lead to local pushback and less effective implementation, it may be wise to address the issue under a CBFM plan (Fig. 2). This helps to promote ownership of the rules by local communities, which in turn fosters compliance.

## Conclusion

To summarise, when preparing statutory legislation, it is important to follow the five steps outlined above:

1. Understand the political background and policy objectives of the legislation being drafted.
2. Define the scope of the legislation so it is not too broad or too narrow.
3. Choose the right provisions to accomplish the stated goals, bearing in mind the defined scope.
4. Be sure to implement safeguards to prevent corruption.
5. Always check for special legislative processes or requirements that might affect the legislation.



Figure 2. How to establish a community-based fisheries management (CBFM) plan.

Drafting effective legislation can be accomplished by considering the five tips we have addressed here:

1. Be clear, concise, and consistent, and use plain language.
2. Use gender-neutral expressions and avoid exclusionary language so all readers can envision themselves in the legislation.
3. Specify the who, what, when, where and how.
4. Respectively use must, may or may not when imposing a duty, granting authority or making a prohibition.
5. Clearly define terms and include a definitions section so the legislation is always interpreted the way it was intended.

Remember that legislation must be complied with to be effective and follow the five clues provided to maximise compliance:

1. Consider the roles and powers of enforcement officers.
2. Clearly define the offences and penalties for violation.
3. Take into account existing rights so that the legislation is not challenged or ignored.
4. Crucially, do not ignore the financial and human capacity to implement the legislation.
5. Finally, involve stakeholders in the drafting process so they can have a hand in shaping the legislation and can understand how it will affect them once it is enacted; this will foster ownership, buy-in, and ultimately, compliance with the new legislation.

## Acknowledgements

The authors would like to thank Roy Lee, SPC Consultant from Solon Law; Julia A. Rogers, UC Hastings Consultant; and Solène Devez, SPC Legal Research Assistant (Coastal Fisheries and Aquaculture) for their input in this guide.

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Fisherman landing his daily catch, Nauru. (image: Ariella D'Andrea, ©SPC)



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Original text: English

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