DRAFT

A PIDC Framework for Developing Immigration Policy and Legislation

PART A:

Issues and approaches to developing policy and legislation

1. Introduction

1.1 Overarching purpose of the framework

This PIDC framework has been created to assist members assess their existing legislation and where required develop effective, modern legislation for immigration purposes that is in line with national strategy.

The framework is intended to assist members to bridge the gap between an awareness that existing legislation is not fit for purpose and the drafting of an immigration bill. It is also intended that an agreed and regularly updated framework will over time contribute to immigration legislation being increasingly harmonised across the region.

1.2 Purpose of Part A

The framework has been divided into two parts. This part (Part A) details issues and approaches that should be taken into account. It is intended to guide and provide support to the process of developing new or revised immigration laws.

Part B provides a framework for the legislation itself. This is not a model immigration bill, but rather a practical document or tool that sets out relevant sections and key provisions to help assess existing legislation and provide a basis for the development of any new legislation.

1.3 Who is the framework for?

The framework is primarily for immigration directors, policy-makers and others involved in developing immigration legislation in the Pacific region. It has also been designed to act as a foundation document to be used when the PIDC secretariat assists members in this area, and for donors as a statement of agreed standards and content for immigration legislation in the Pacific region.

1.4 Why is the PIDC not developing model legislation?

The PIDC has opted to not develop a model immigration bill at this stage, in favour of developing this framework. This stems from a belief that the way in which legislation is developed in a country can be as important as the final bill and that one size does not fit all. Learning from members that have recently changed their legislation, the PIDC wants to encourage a focus on the way in which legislation is developed. A model bill risks certain parts of the process being overlooked, buy-in and understanding being minimised, and clauses important to individual members being left out. However, a model bill, based on this framework, can be developed if it is requested by members.

1.5 Format of this part

Drawing on the experience of PIDC members, discussions with partner agencies, and reviews of existing legislation this part looks first at the issues and challenges that are often faced when developing policy and legislation. It then goes on to look at how various approaches have been and can be used to address these issues and challenges. A

set of principles are then identified that should underpin the development of policy and legislation, before finally some of the key elements of immigration legislation are set out. These elements lead into Part B which sets out key parts and provisions in an immigration bill.

2. Issues and challenges when developing policy and legislation

Developing legislation is a complex task. The following are some of the common issues and challenges faced by officials in the region as they have sought to change their country's laws.

2.1 Political will

"We had to convince our political leaders of the importance of the bill; political will is very important" – Vanuatu Immigration

Commitment and buy-in from government Ministers and from politicians are key factors in the ultimate success of a bill. Without this commitment it is very difficult to find the parliamentary time for the bill to be discussed and voted on, or for key clauses to be retained in a meaningful form. Unless the law-makers understand the importance of the bill it might take a long time before it becomes law.

2.2 Support from other agencies

"Work cooperatively with other agencies of government... to ensure that [proposed legislation] does not conflict with other laws" – Papua New Guinea Immigration

Immigration departments do not operate in isolation. Changes in legislation can affect the way Immigration Officers work with the police, customs, and quarantine, in enforcement and at the border. They can also affect the interests of other government departments, including labour departments, health departments, and departments responsible for tourism, investment and overseas promotion. There may be suspicion and concern within these agencies that changes may have a negative impact on them or their objectives.

2.3 Ensuring new legislation is comprehensive

When legislation is updated the intention is often to ensure that the new legislation is comprehensive, that areas are not overlooked, and that loopholes are firmly closed. The new legislation should also fulfil international obligations or best practice and solve identified challenges and needs. It is difficult to be confident that it will do all of this.

2.4 Capacity

Most immigration departments in the Pacific have limited resources. Those resources that are available are often focussed on day-to-day permit processing, enforcement and border management. Developing new legislation is a large undertaking that requires a significant amount of staff time and commitment. Extra capacity needs to be found to successfully introduce new legislation.

2.5 Controversial aspects

"The section on refugees in the bill was a 'hot potato'. Refugees are 'alien' to Pacific thinking." – Vanuatu Immigration

There may be sections of proposed policy or a bill that are contentious. This can affect political buy-in and support from other agencies, and therefore ultimately affect whether the bill becomes law. Where the section is important, such as with refugees, it can be hard to ensure the bill can still pass without this part being amended or removed.

3. Approaches to developing policy and legislation

These issues and challenges cannot be entirely avoided, but they can be managed to minimise misunderstanding, increase cooperation and ultimately achieve the desired changes to legislation. This section looks at how to manage potential obstacles through various approaches that members have used previously and which are generally considered good practice.

3.1 Consider the whole process

Changing legislation is part of a much bigger process that neither begins nor ends with the creation of an Immigration Act. The process can take months and even years beginning with an idea of what you want to achieve through immigration controls and ending with the implementation of that idea in the real world. This process can be viewed as a cycle whereby current practice is constantly reviewed against what a government wants to achieve starting the process over again.

Diagram 3.1 below illustrates this cycle highlighting some of the key steps that will be discussed in this section. However, it is important to note that one step will not necessarily lead to the next.
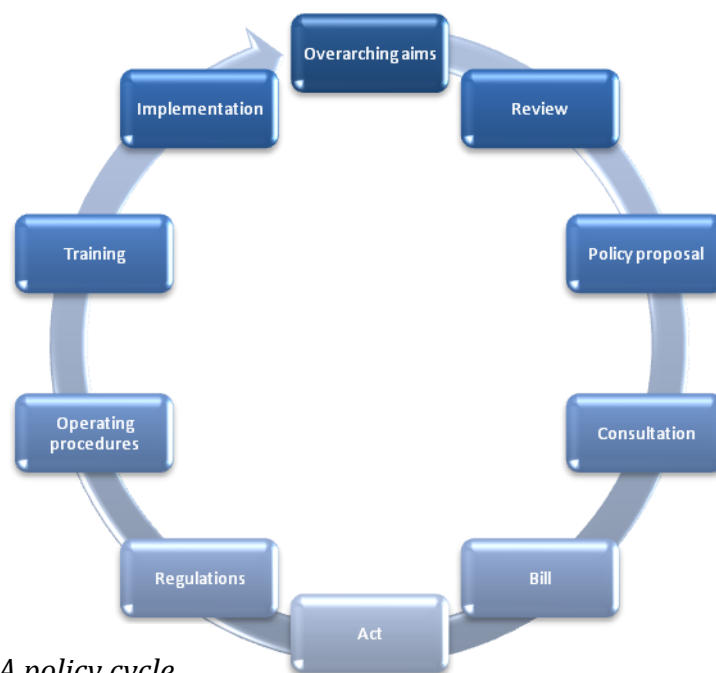

Diagram 3.1: A policy cycle

The following paragraphs in this section look at some of these stages in more detail beginning with being clear about what it is you want to achieve through developing overarching aims (3.2), reviewing existing policy and practice to identify what is preventing and contributing to these aims (3.3), setting out what you want to do in a policy proposal (3.4) and how this might be achieved (3.5), and how this policy can be developed, improved and accepted through consultation (3.6). The final paragraphs in the section draw attention to the need to plan ahead and make use of available resources (3.7 and 3.8) to ensure a bill is drafted and enacted within an agreed timeframe.

Although this framework does not look beyond the creation of an Act it is important to have in mind, as the diagram illustrates, the work that needs to follow enactment to develop regulations, rewrite procedures, and train officers in these procedures, as only with these further steps will a policy finally be implemented.

3.2 Be clear about what you want to achieve

It is important from the beginning to be clear about what it is you want to achieve. If this can be framed as overarching objectives or aims then these objectives can be used to help build consensus, convince Ministers and politicians of the importance of proposed changes, and give you a reference point for everything that follows. During discussions you will always be able to ask, "Will it contribute to what we want to achieve?" and thereby help ensure the work does not become side-tracked.

Your overarching objectives should be linked to national development plans or government strategies. If the connections are clear this will further demonstrate the importance of the changes you want to make. Immigration policy and legislation often contributes in three key areas:

1. Building the economy through immigration rules that allow for growth in tourism, are accommodating to business travellers, and ensure investors and those with needed expertise are able to effectively contribute to economic development.
2. Safeguarding the national interest through immigration rules that protect borders, prevent the entry of non-genuine persons, including known criminals and terrorists, and allow for the fair, but effective treatment of those that abuse the system.
3. Fulfilling international commitments or meeting international expectations through immigration rules that provide for the fair and equal treatment of persons and the upholding of human rights.

The intention behind changes to immigration legislation will often be to better achieve objectives in one of more of these areas.

3.3 Identify what is preventing these objectives being achieved now

In many cases current policy and legislation will not run counter to overarching objectives. It is more likely that they will in some way simply hinder progress towards these objectives. For example, no PIDC member's legislation prevents visitors arriving, but the periods of stay granted or visa requirements can discourage a person from choosing to visit and thereby reduce benefits from tourism.

Reviewing existing practice, policy and legislation and identifying what is hindering objectives or simply not working is important. It will help you understand what needs changing and will help to ensure that proposed changes will improve the situation. A review may identify certain missing provisions in legislation, or out of date instructions, or simply that front-line practice does not follow stated procedure.

It is equally important, however, that you also identify what immigration procedures are working well and already contribute to your stated objectives. This will ensure that these existing strengths are not lost in any changes, but built on.

Being clear on the issues that affect the achievement of objectives that in turn affect national goals will help build a strong argument that can be put to Ministers or other agencies for making any changes.

3.4 Set out what you plan to do

Armed with what you want to achieve, the issues that are preventing you achieve this, and an understanding of what is working well, you are well placed to set out what exactly it is you want to do to improve on the existing situation. This forms a policy paper which will act as the basis for consultation and will eventually form the basis for drafting a bill. It is normal for sections within this paper to be revised and redrafted many times as ideas are refined and changed as they receive greater consideration and input.

It can feel as though you are exposing yourself to undue criticism by putting out a policy paper, but even though people may disagree or have different ideas, this will ultimately contribute to making the policy and eventual legislation better.

3.5 Consider different options for how changes can happen

Once you have a policy paper setting out what you want to do it becomes possible to consider how changes can be made. The original intention may have been to develop primary legislation, but it may be that some changes can be made through regulations, immigration instructions or existing procedures. It is usually much easier to amend and change these things than it is to introduce a new Immigration Act.

3.6 Consult widely

"Consultation is the best medicine, both horizontal and vertical" – Vanuatu Immigration

"Consult widely to determine the key issues and the best approach" – Papua New Guinea Immigration

Consultation sometimes feels like a lot of effort with little return. However, a good consultation process is extremely important for building understanding and consensus, as well as ensuring all key issues and the widest possible range of solutions are considered. It will also help to ensure that any new legislation is forward-looking and will be consistent with changes other departments or agencies are planning.

Informal consultation often happens instinctively through discussions with colleagues and key contacts in other organisations. Thinking about a more formal process helps to ensure that the consultation is inclusive, that certain groups are not marginalised, and that the views expressed are properly recorded and fed into the development of policy.

Consultation should be ongoing throughout the process although at different stages it may take different forms. Initially it may be confined to the immigration department as you develop an initial policy paper, before broadening out to other government departments and key stakeholders, and eventually to the wider public as the policy becomes clearer and more comprehensive. At each stage you may encounter ideas or suggestions that you did not know about or did not realise were an issue.

Identifying and prioritising stakeholders is an important first step of any consultation. Although this is not a comprehensive list, you will want to consider consulting with the following:

Government	Other domestic	Regional/International
Customs Defence Police Quarantine Labour department Health department Tourism National development/ promotion organisations	Airline companies Maritime industry Transport companies Port/airport management companies Business community Tourism industry Travel companies NGOs	PIDC UNHCR Providers of travel documents

Thinking about where each of these organisations would fit in the following diagram will help you decide how best to approach them and the type of consultation you will need to undertake. For example, a Minister's importance to the success of legislation is high because of the influence they have, but their support may be low. Therefore you will need to actively manage the relationship to try and increase the level of support. Customs may be fully supportive of proposed changes, but they need to be involved in ongoing discussions to ensure their support is maintained.
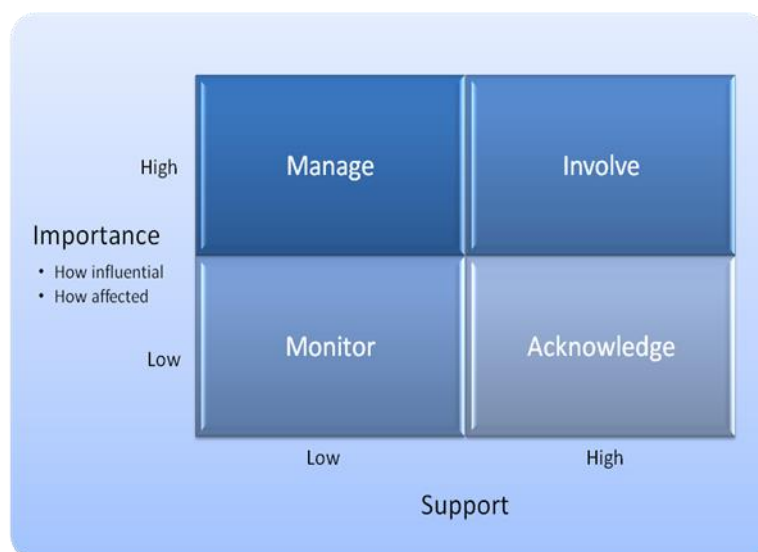
Diagram 3.2: An example consultation matrix

3.7 Plan ahead

Setting out a timeframe for the process of developing policy and legislation has a number of advantages. It will help you to identify when you may need extra capacity or additional assistance. It will also help to ensure deadlines are met and the work does not get held up by external factors. For example, knowing when a legal drafter will be available, when there will be parliamentary time to debate a bill, or when donors may be able to provide assistance will inform when other parts of the work need to be completed.

Planning ahead will also help ensure enough time is allocated to, for example, consultation or drafting, so that activities do not need to be completed in a rush.

3.8 Identify and make use of available resources

"It's easy to forget that even before a donor gets involved, a lot of hard work needs to be done" – Cook Islands Immigration

Outside agencies, including the PIDC secretariat and other PIDC members, are usually best able to provide or arrange assistance in specific areas. These include, reviewing existing legislation, the process of drafting the core policy paper, the technical drafting of the bill, and providing advice on the management of the whole process. They can also act as key consultation partners who can provide comments on any draft papers, can help direct you to or arrange specialist assistance where needed, or can simply act as a sounding board.

Although this assistance can be of great help and is there to be used, it should not be seen as a way to short-cut or replace time and effort internally. There is a lot of work that can only be done by the relevant agencies in-country.

If the PIDC Secretariat or other outside agency is asked to assist whether in developing overarching objectives, a policy paper, or a well-planned consultation, the key input still needs to come from you and the immigration department. Although guidance can be provided, it is what you want to do and how you want to do it that outside agencies will be looking for.

Planning also plays a key role here. Any outside agency will need to factor in to its existing work plan any assistance they are going to provide. Therefore engaging with potential assisting agencies early will ensure that they actually have the time to assist when it is needed.

4. Principles underpinning immigration legislation

There are various principles that generally underpin good immigration legislation. These have been variously identified by organisations including Asia-Pacific Economic Cooperation (APEC), the International Organization for Migration (IOM) and PIDC. Immigration legislation developed on the basis of these principles will usually have a better chance of achieving its objectives. They include the following:

Balance

At the core of any immigration policy or legislation is the issue of balancing security with economic development. Stringent checks should be balanced against the risk of deterring legitimate travellers and preventing investment. Where this balance is found will often depend on national goals.

Fairness

The burden placed on legitimate travel should be minimised. Consideration should be given to the capability of those travelling, and of carriers, employers and education providers to meet the demands placed on them by legislation. A clear process for reviewing and appealing decisions is essential to ensuring fairness.

Security

Checks and processes should be sufficient to provide a high level of security pre-border, at the border, and in-country. Penalties should be sufficient to deter violations of immigration law.

Implementation

There should be a realistic assessment of the capacity and capability of an immigration department in the context of a nation's geography and bureaucratic structure to ensure that the checks and balances established by legislation can be implemented.

Technology

Legislation should allow for the maximum use of technology to assist with security and facilitation and be flexible enough to allow for foreseeable future developments and procedures. However, it should not place unrealistic immediate requirements that exceed a country's current technological capability or capacity.

Clarity and openness

Legislation should be clear so that it can be readily understood by officials and the public, and is not susceptible to multiple interpretations. Clarity should lead to openness about how legislation is to be applied and what requirements are placed on users. Clarity and openness will also help to ensure that legislation is able to be applied consistently by all immigration officials.

Consistency with relevant international instruments and best practice

Immigration legislation should seek to be consistent with international instruments and best practice even where a country is not a signatory to a convention.

5. Key areas for immigration legislation

This section provides a summary of the key parts of immigration legislation. These key parts should be considered when policy or legislation is being developed. Part B

provides a detailed breakdown of these parts as well as listing the acts and policy documents from which they are derived. They include the following:

	Key parts	Reason for part
1.	Core provisions	To make clear the fundamentals that underpin the immigration system, including who is entitled to be in or enter the country and who is excluded
2.	Permissions required to travel to or be in your country	To define the various visa requirements, entry or residence permissions
3.	Arrivals and departures – passenger responsibilities	To clearly set out the obligations and responsibilities of people arriving in your country
4.	Arrivals and departures – carrier responsibilities	To clearly set out the obligations and responsibilities of the airplane, ferry and other transport operators or owners who bring people to your country
5.	Decisions and refusal of permissions	To establish the process of refusal and the rights of people who are refused any immigration permission set out above
6.	Turnaround, removal and deportation	To set out the circumstances and processes by which a person can be removed from your country
7.	People smuggling and human trafficking	To deter and address the serious and often organised crimes of people smuggling and human trafficking, and to ensure the appropriate treatment of victims of trafficking
8.	Refugee and protection status determination	To set out the process by which a migrant can claim refugee or other protection status, how that claim will be considered, appropriate treatment and rights to appeal
9.	Appeal and review measures	To ensure that there is a process by which decisions can be reconsidered within a context of fairness and accountability
10.	Designation of powers	To establish who has the power to designate and appoint immigration officers and the role of ministers
11.	Powers	To provide powers to immigration officers to

		perform their functions and carry out their duties
12.	Arrest, detention and monitoring	To give immigration officers the power to arrest certain persons for specified purposes as well as the periods of detention
13.	Responsibilities of employers and education providers	To ensure employers and education providers share some responsibility for the integrity of the immigration system
14.	Information collection, sharing and data protection	To allow for the sharing of information for certain purposes with specified agencies
15.	Offences	To set out what are the offences and penalties against the act

6. Concluding comments to Part A

This part of the PIDC framework for immigration legislation (Part A) has sought to set out issues and approaches to help with the development of immigration policy and legislation based on members' experiences and best practice. It is not a comprehensive list of factors. National circumstance will require additional considerations and factors may vary depending on what you want to achieve. Part B of this framework sets out the parts listed above in detail.