

INTERIM APPROACH TO IMPLEMENTING
THE REQUIREMENTS OF SECTION 3 OF THE

Declaration on the Rights of Indigenous Peoples Act

Prepared by the Declaration Act Secretariat



BRITISH
COLUMBIA



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Purpose

Section 3 of the *Declaration on the Rights of Indigenous Peoples Act* requires that Province “in consultation and cooperation with Indigenous Peoples” take “all measures necessary” to ensure consistency between the laws of British Columbia and the *United Nations Declaration on the Rights of Indigenous Peoples*.

Implementing section 3 means that the Province must work to ensure better consistency and clarity of process for involving Indigenous Peoples¹ in policy and legislative development. The Province is developing measures to achieve this through multiple venues, including working directly with First Nations on a government-to-government basis, implementing treaties, agreements, and other constructive arrangements, as well as through on-going work with the Alliance of BC Modern Treaty Nations² (ABCMTN), First Nations Leadership Council³ (FNLC), and Métis Nation BC⁴ (MNBC).

This includes measures that were evolving through current ministry-specific policy and legislative development processes. All of this work must be distinctions-based, including as stated in the Draft 10 Principles, the Declaration Act, and the Declaration Act Action Plan.

The Declaration Act Secretariat⁵ supports routine cross-government measures, that will ultimately constitute a reformed process, for including Indigenous Peoples in policy and legislative development. It is also recognized that while those measures are being fully developed, interim guidance for public servants is needed as the obligations in section 3 of the Declaration Act are in force.

This document provides **interim guidance** for implementing section 3 of the Declaration Act and, in particular, regarding approaches for involving Indigenous Peoples in policy and legislative development. This is an interim document; it may be updated periodically to incorporate additional information and guidance from the Declaration Act Secretariat. All ministries needing guidance and advice regarding the understanding and implementation of the policy contained in this document should contact the [*Declaration Act Secretariat*](#).

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- 1 Consistent with Section 35(1) of the Constitution Act, 1982 and section 1 of the Declaration Act, the term “Indigenous Peoples” includes First Nations, Métis and Inuit Peoples in Canada.
 - 2 The Shared Priorities Framework, signed in March 2022 between British Columbia and the members of the Alliance of BC Modern Treaty Nations, renews a commitment to timely, effective and appropriately resourced implementation of modern treaties with broad outcomes that included meaningful involvement of modern treaty nations in legislative and policy initiatives.
 - 3 The First Nations Leadership Council acts pursuant to mandates provided by Title and Rights Holders, including through resolutions passed through the member organizations of the FNLC.
 - 4 The October 27, 2021, Letter of Intent between Métis Nation British Columbia (MNBC) and the Province proposes a new whole-of-government approach to Métis relations as a partnership between MNBC and British Columbia that respects Métis self-determination.
 - 5 The development of the Secretariat is directed in the mandate letter (2020) of the Minister of Indigenous Relations and Reconciliation.



Context

The UN Declaration is the most comprehensive international human rights instrument to explicitly address the human rights of Indigenous Peoples.

The UN Declaration:

“...emphasizes the rights of Indigenous Peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations. It establishes an important standard for eliminating human rights violations against Indigenous Peoples worldwide and for combating discrimination and marginalization.”⁶

The UN Declaration has 46 articles that constitute the “minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world” and “elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous Peoples”. The UN Declaration is to be read as a whole; the rights and standards within it are interconnected. They cannot be isolated from one another or chosen between.

The UN Declaration also contains direction to States (e.g. Crown governments), on how to develop policy and legislation.

Article 19:

States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions **in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures** that may affect them.

Article 38:

States in consultation and cooperation with Indigenous Peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

The importance of the UN Declaration was reinforced in 2015 in the Truth and Reconciliation Commission of Canada’s Call to Action 43:

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

⁶ https://www.un.org/esa/socdev/unpfii/documents/Declaration_ip_pressrelease.pdf



The Declaration Act reflects the role of the UN Declaration as the framework for reconciliation.⁷

The purposes of the Declaration Act are to:

- Affirm the application of the UN Declaration to the laws of B.C.;
- Contribute to the implementation of the UN Declaration in B.C.; and
- Support the affirmation of, and develop relationships with, Indigenous governing bodies.

The Declaration Act requires the Province, in consultation and cooperation with Indigenous Peoples, to:

- Ensure provincial laws are consistent with the UN Declaration (section 3);
- Develop and implement an action plan to achieve the objectives of the UN Declaration (section 4); and
- Monitor progress through public annual reporting (section 5).

Key terms in the Declaration Act include:

“Indigenous Peoples” has the same meaning as Aboriginal Peoples in section 35 of the *Constitution Act, 1982* (note that this term includes First Nations, Inuit and Métis peoples);

“Indigenous governing body” means an entity that is authorized to act on behalf of Indigenous Peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

The Declaration Act sets out a process for the Province to enter into agreements with Indigenous governing bodies, including joint or consent-based decision-making agreements (sections 6 and 7). The following link provides guidance on [Indigenous governing bodies](#).

The phrase “consultation and cooperation” in the Declaration Act is taken from the UN Declaration and its meaning has been the subject of advice from the United Nations Expert Mechanism on the Rights of Indigenous Peoples:

“Use in the [UN] Declaration of the combined terms ‘consult and cooperate’ denotes a right of Indigenous Peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard. It also suggests the possibility for Indigenous Peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.”⁸

As such, the Province must approach policy and legislation development that may affect Indigenous Peoples in a manner that ensures Indigenous Peoples are fully involved partners in the process and have opportunities to influence the outcome of matters that may affect them.

⁷ The federal United Nations Declaration on the Rights of Indigenous Peoples Act also reflects the role of the UN Declaration as the framework for reconciliation, as called for by the Truth and Reconciliation Commission Call to Action 43.

⁸ United Nations, General Assembly, Human Rights Council, *Study of the Expert Mechanism on the Rights of Indigenous Peoples: Free, prior and informed consent: a human rights-based approach*, [A/HRC/39/62](#) (10 August 2018) at para. 15.



Interim Approach for Implementing Section 3

The guidance in this section focuses on the process for developing policy and legislation to ensure the requirements in section 3 of the Declaration Act are met. As the Province is continuing to develop measures to implement section 3, the guidance in this section should be considered interim. It will be updated and supplemented as the work of implementing the Declaration Act in consultation and cooperation with Indigenous Peoples continues. The Declaration Act Secretariat supports ministries in implementing this guidance, as well as the development of additional measures for implementing section 3. Additionally, ministries should seek guidance from the Indigenous Legal Relations Solicitors Unit (NATRIL) within the Legal Services Branch (MAG), as well as ministry-specific legal counsel, throughout the application of this interim process.

The interim process has been developed through on-going efforts to effect consultation and cooperation with Indigenous Peoples during the development of policy and legislation. The experiences of ministries in working with Indigenous Peoples on policy and legislative change since the passage of the Declaration Act have informed the development of this guidance.⁹

The following diagram (Appendix 1) illustrates the interim process for working with Indigenous Peoples in the development of policy and legislation. This interim process is intended to support new approaches to collaboration, information sharing and drafting that bring in the Indigenous perspectives to build a shared understanding of the effect of the policy and legislation on Indigenous people's rights or interests and ensure that policies and laws are developed or amended to be consistent with the UN Declaration.

See [Appendix 1](#).

The diagram identifies five points in time where involvement of Indigenous Peoples takes place in the development of policy and legislation.

9 Some examples of recent processes that have illustrated certain current effective practices include: MCFD's "Letter of Commitment" of how they will work with the FNLC; the process for the development of the Anti-Racism legislation; and the process used to develop the Declaration Act itself.



1: Initiate Policy Exploration and Establish Consultation and Cooperation Plan

At the earliest stage of policy development for potential legislation – when the Province is identifying the problem statement (what is the issue or problem we are trying to address or solve through potential policy and legislation?) – dialogue with Indigenous Peoples is required. Dialogue at this stage is to identify priorities, begin to consider how the policy and potential legislation may affect Indigenous Peoples, and begin to identify how it may be consistent with the UN Declaration.

There is no single, prescriptive approach to how this vitally important early engagement may take place. What is required will vary, depending on how the policy being developed and how potential legislation may affect Indigenous Peoples. It may be that early engagement will include a range of measures (e.g., meetings, workshops, correspondence) to share information and dialogue with First Nations, other Indigenous Peoples, and Indigenous organizations, taking the required distinctions-based approach.¹⁰ For example, it may often be appropriate to also work not only with Indigenous Peoples, but also in collaboration with political and advocacy organizations established by Indigenous Peoples, and sectoral organizations, with whom the Province has established relationships and processes that continue to evolve.¹¹

It is important to understand that legislation or policy of “general application” may affect Indigenous Peoples, as indicated by the United Nations:

It would be unrealistic to say that the duty of States to consult directly with Indigenous Peoples through special, differentiated procedures applies literally, in the broadest sense, whenever a State decision may affect them, since almost all legislative and administrative decisions that a State adopts may affect the Indigenous Peoples of the State along with the rest of the population in one way or another. Rather, ...it applies whenever a State decision may affect Indigenous Peoples in ways not felt by others in society. Such a differentiated effect occurs when the interests or conditions of Indigenous Peoples that are particular to them are implicated in the decision, even when the decision may have a broader impact, as in the case of certain legislation.¹²

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- 10** The distinctions-based approach requires that the Province’s dealings with First Nations, Métis and Inuit Peoples be conducted in a manner that acknowledges the specific rights, interests, priorities and concerns of each, while respecting and acknowledging these distinct Peoples with unique cultures, histories, rights, laws, and governments. Section 35 of the Constitution Act, 1982, recognizes and affirms the rights of Aboriginal Peoples of Canada, while all Indigenous Peoples have human rights that are expressed in the UN Declaration. However, not all rights are uniform or the same among or between all Indigenous Peoples. In many cases, a distinctions-based approach will require that the Province’s relationship and engagement with First Nations, Métis and Inuit Peoples include different approaches or actions and result in different outcomes.
- 11** Ministries should seek guidance from MAG and MIRR at this stage on any MOU’s or established protocols or processes that may be engaged by the evolving policy proposal, including those with First Nations, FNLC, First Nations Organizations, ABMTN, MNBC, and urban Indigenous organizations.
- 12** United Nations, General Assembly, Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, [A/HRC/12/34](#) (15 July 2009) (*Report of the Special Rapporteur 2009*) at para. 43.



For example, land and resource policy and legislation may affect First Nations in particular ways due to their rights and interests relating to land in their traditional territories (see Articles 26 and 29 of the UN Declaration) and identifying and addressing these impacts will require a distinctions-based approach. As well, legislation dealing with children in care affects Indigenous Peoples in particular ways, given the ongoing impact of colonialism on Indigenous societies and relevant UN Declaration standards relating to children (see, for example, UN Declaration Article 7.2 and TRC Calls to Action 1 to 5).

The potential to affect Indigenous Peoples gives rise to the need to engage in dialogue with Indigenous Peoples to determine whether and how they wish to be involved in developing policy or laws, to ensure consistency with their human rights set out in the UN Declaration, which may include co-development of proposed policy and legislation, through actions in the other points in time in the interim legislative process.

Once it is determined that the proposed policy or legislation may affect Indigenous Peoples, effective processes for Indigenous Peoples to participate in developing policy and legislation must be implemented. There is no single model for this consultation and cooperation. How processes may look will vary depending on the nature, scope, and potential effects of the proposed policy or legislation and what Indigenous Peoples have indicated are substantive or process priorities through early engagement. As well, a distinctions-based approach must always be followed.

Approaches to consultation and cooperation are informed by, but not limited to, the following:

- The subject-matter of the policy or legislation being developed and how it relates to Indigenous Peoples or their rights (e.g. engagement relating to land and resources is often more specific to First Nations, while engagement on social sector initiatives will include not only First Nations, but potentially First Nation organizations, Inuit or Métis Peoples);
- The level of interest in the proposed policy and legislation indicated by Indigenous Peoples;
- The desired degree and form of engagement as indicated by Indigenous Peoples and partners;
- Existing commitments, treaties, agreements or other constructive arrangements with Indigenous Peoples and Indigenous governing bodies, which include obligations and must be considered when relevant to the policy issue or situation;¹³ and
- Crown obligations under section 35(1) of the Constitution Act, 1982 (e.g. upholding the honour of the Crown).

In situations where mechanisms and processes for engagement are not in place, they should be jointly determined with Indigenous partners. It is important to establish clear expectations around matters such as process, mandates, development of documents, tracking of outcomes, and funding. Ensure there is adequate time for consultation and cooperation.

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¹³ The Government of B.C.'s website provides a list of [modern treaties](#), historic treaties and [reconciliation and other agreements](#). In addition, historic treaties (the "Douglas" or "pre-confederation" treaties on Vancouver Island and Treaty 8 in the northeast) and modern treaties contain treaty rights that are protected under section 35 (1) of the Constitution.



Determining who should be involved in consultation and cooperation is also vitally important. Indigenous Peoples, as rights holders, must be the focus of consultation and cooperation. However, not all Indigenous Peoples will choose to be involved in the same way. Issues that are priorities for some, and priorities for the Province, may be determined by some Indigenous Peoples to not be a priority for them. As well, a distinctions-based approach must be applied. For example, there will be circumstances and contexts, such as with respect to land and resource matters, where only First Nations will be part of the process of development of the policy and legislation.

As a general practice as well, any process of consultation and cooperation should accommodate multiple ways for Indigenous Peoples to be involved. It should never be presumed (or imposed) that Indigenous Peoples will all choose to be involved in the same way, and it is not for the Province to impose modes of involvement.

To establish who should be involved in the consultation and cooperation, consider the following:

- Determine how both Indigenous Peoples and their organizations should be involved. For instance, in some cases First Nations' political leadership collaborate with First Nation organizations for technical and subject matter expertise. Be sure to understand how Indigenous organizations relate to leadership and the peoples they represent.
- Seek internal advice from those who understand the complexities and dynamics of collaborating with Indigenous Peoples on policy and legislation – this includes the Declaration Act Secretariat, regional staff that work closely with Indigenous partners or Indigenous Relations and Affairs units across ministries.
- Seek internal advice on required protocols and practices in place through treaties, agreements, and other constructive arrangements.
- Seek guidance from Indigenous partners on how to respect any Indigenous protocols, traditions, governance processes, laws and jurisdiction.
- Seek internal advice on any legal matters that may have to be addressed through working with the Indigenous Legal Relations Solicitors Unit (NATRIL) within the Legal Services Branch (MAG), as well as ministry-specific legal counsel.
- While some ministries will have existing relationships with Indigenous partners, others may not. Seek cross-ministry dialogue across relevant sectors to learn more about established relationships where they exist, and to support this collaborative work in an effective and efficient way.
- Seek clarity and understanding of how to appropriately engage the diversity of voices among engaged Indigenous partners. This includes opportunities beyond governance structures (e.g. hereditary and elected leaders) to an intersectional approach that could engage Indigenous women, Elders and youth, persons with disabilities and 2SLGBTQIA+ organizations that serve urban Indigenous populations and other subject matter experts and impacted peoples within an Indigenous community. This helps ensure that all relevant Indigenous Peoples have participated.
- Seek guidance from other subject matter experts (e.g. youth) of the Indigenous Peoples you have determined should be involved in your process.
- Always apply a distinctions-based process.



Finally, it is critically important to remember that any consultation and cooperation plan ministries develop must contemplate what might be done throughout the entire development of policy and legislation – through all of the points in time outlined in the interim approach for implementing section 3 ([see Appendix 1 – Interim Legislative Process](#)). As such, all the points in time must be considered in developing the consultation and cooperation plan.

2: Development of Request for Decision

Based on the early development of policy and the on-going implementation of the consultation and cooperation process a “Request for Decision” (RFD) will be developed. A request for decision must be informed by the early exploration of policy ideas with Indigenous Peoples, provide clarity on the particular policy areas engaged by the proposed policy or legislation, examine how the proposed policy may affect Indigenous Peoples and is consistent with the UN Declaration, and provide clarity on the expected legislative timeline.

Requests for Decision can be jointly prepared with Indigenous Peoples (also known as co-development), and the work done at points 1 and 2 will determine when it is necessary and appropriate to undertake this joint development. In some instances, such as where document for Cabinet are being developed and shared, confidentiality protocols will be necessary.¹⁴

It may also be the case that First Nations organizations may play a direct role in supporting how consultation and cooperation takes place in the development of the Request for Decision, based on their mandates from First Nations. For example, often this may include the legal and policy teams of the First Nations Leadership Council (FNLC) being actively engaged in the joint development of the Request for Decision to Cabinet. You may also work collectively with the Alliance of BC Modern Treaty Nations respecting individual modern treaties, and the Shared Priority Framework with Alliance of BC Modern Treaty Nations (ABCMTN), and Treaty Nations as required by treaties, agreements and other constructive arrangements, and with Métis Nation BC (MNBC) as appropriate. A distinction-based approach must always be applied.

Based on your consultation and cooperation process, there may also be on-going dialogue, engagement, and work with Indigenous Peoples throughout the development and consideration of a Request for Decision.

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14 If your efforts involve the sharing of legislation or confidential documents associated with legislation, a new confidentiality agreement has been developed that can be used across all provincial ministries. These agreements are valid for a calendar year and should be used in situations where the individual you’re consulting with is someone you plan on interacting with more than once in a calendar year. Once an agreement has been signed by an individual, any ministry official is able to share legislation or associated documents with them, being mindful that the specific documents you intend on sharing should be confirmed by your solicitor.



3: Development of Request for Legislation

Subsequent to the approval of a Request for Decision, the development of a “Request for Legislation” (RFL) will take place. A central aspect of this will be the development of a “three-column document” that identifies the proposed contents of the legislation and their policy rationale. The three-column document must reflect the outcome of the Request for Decision, must be informed by the on-going exploration of policy ideas with Indigenous Peoples, and reflect how the proposed policy may affect Indigenous Peoples and is consistent with the UN Declaration.

Requests for Legislation can be jointly prepared with Indigenous Peoples (also known as co-development), and the work done at points 1 and 2 will determine when it is necessary and appropriate to undertake this joint development. In some instances, such as where documents for Cabinet are being developed and shared, confidentiality protocols will be necessary.

As with the RFD, it may also be the case that First Nations organizations, and in particular the FNLC and the ABCMTN, may play a direct role in supporting how consultation and cooperation takes place in the development of the Request for Legislation, based on their mandates from First Nations. This may include the legal and policy teams of the FNLC being actively engaged in the joint development of the Request for Legislation. You may also work collectively with the Alliance of BC Modern Treaty Nations respecting individual modern treaties, and the Shared Priority Framework with ABCMTN, and Treaty Nations as required by treaties, agreements and other constructive arrangements, and with MNBC as appropriate. A distinctions-based approach must always be applied.

Based on your consultation and cooperation process, there may also be on-going dialogue, engagement, and work with Indigenous Peoples throughout the development and consideration of a Request for Legislation to Cabinet.



4: Legislative Drafting

Legislative drafting takes place by legislative counsel working under the direction of a directing official. The three-column document developed under 3 above guides the legislative drafting.

The current policy and practice of British Columbia is that co-development does not include Indigenous Peoples drafting together with legislative counsel or the sharing of legal advice relating to the policy or legislation.¹⁵ However, it can include, with confidentiality protocols in place, the sharing of consultation drafts of legislation with Indigenous Peoples, the joint review of those drafts, and the directing official taking proposals for change to the legislative council based on that consultation and cooperation. In some instances, this process of reviewing and proposing change(s), may take place multiple times.¹⁶

As well, additional guidance and measures regarding legislative drafting are being discussed with the Declaration Act Secretariat, through processes in place with the ABCMTN, the FNLC based on their mandates from First Nations, and with MNBC as appropriate.

5: Introduction of Bill – Parliamentary process

Once the Bill (legislation) has been tabled for debate in the legislature, there may sometimes be additional opportunities for reviewing, and potentially amending, the proposed legislation in collaboration. However, currently this is subject to the Parliamentary process and decisions made by provincial elected officials during the Parliamentary process. Some of the many opportunities that may exist, as determined by the Parliamentary process and political decision-making, include: meetings and briefings for Indigenous representatives with Ministers and the public service; public forums about the legislation; and legislative committee hearings and processes. As well, during the Parliamentary process statements and documents may be made public about how the legislation was developed, the consultation and cooperation that took place, and how the legislation is consistent with the UN Declaration.

It is important to continue to engage with Indigenous Peoples and partners as the Bill proceeds through the legislative process and to advise them of any issues that may arise during the debate or committee process, and especially if any amendments to the Bill arise.

For further information:

Please contact the Declaration Act Secretariat at DeclarationActSecretariat@gov.bc.ca

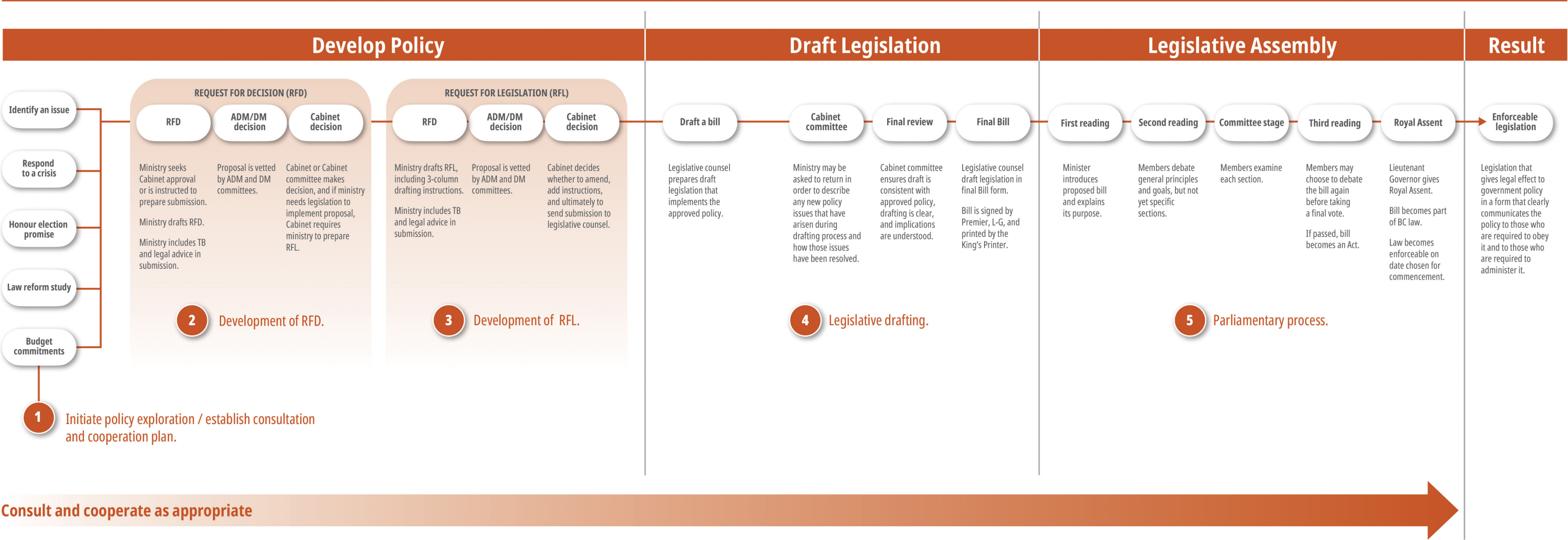
15 If you are unsure about what can be shared, seek advice from your advising solicitor in the Indigenous Legal Relations Solicitors Unit (NATRIL) within the Legal Services Branch (MAG).

16 In some instances, such as was the case in the development of the Declaration Act, this may take the form of “joint instructions” for drafting.



Appendix 1 – Interim Legislative Process

Approach to Implementing Section 3 of the Declaration on the Rights of Indigenous Peoples Act





Appendix 2 – External guidance documents

United Nations Guidance

- Duty of States to consult with Indigenous Peoples on decisions affecting them
 - » <https://undocs.org/A/HRC/12/34> (starting on page 12)
- The requirement that consultations be in good faith, with the objective of achieving agreement or consent (FPIC)
 - » <https://undocs.org/A/HRC/12/34> (starting on page 16)
- Free, prior and informed consent: a human rights-based approach
 - » <https://undocs.org/A/HRC/39/62>

Indian Residential School History and Dialogue Centre

- Implementing *UNDRIP in BC: A Discussion Paper Series*
 - » *A Commentary on the Federal Government's Legislation to Implement the United Nations Declaration on the Rights of Indigenous Peoples*
 - » *Emergencies, Indigenous Governance and Jurisdiction*
 - » *Indigenous Rights in Times of Emergency*
 - » *Operationalizing Free, Prior, and Informed Consent*
 - » *Co-operatively Resolving Conflicts Through the Application of UNDRIP*
 - » *"Indigenous Governing Bodies" and advancing the work of Re-Building Indigenous Nations and Governments*
 - » *Achieving Consistency between the United Nations Declaration on the Rights of Indigenous Peoples to the Laws of British Columbia*
 - » *Taking "All Measures Necessary" to Ensure Laws are Consistent with the United Nations Declaration on the Rights of Indigenous Peoples*



Appendix 3 – Internal guidance documents

- [*Alliance of BC Modern Treaty Nations Shared Pathways Framework agreement*](#)
- [*BC Declaration Act*](#)
 - » [*General Website: Home 2022 | A New Path Forward*](#)
 - » [*Declaration on the Rights of Indigenous Peoples Act*](#)
- [*BC Declaration Act Action Plan*](#)
- Commitment Document: [*Concrete Actions: Transforming Laws, Policies, Processes and Structures*](#)
- Commitment Document: [*Shared Vision and Guiding Principles*](#)
- [*Draft 10 Principles*](#)
- [*MNBC and BC Letter of Intent*](#)