Instructor Guidance Note—Rewriting existing legislation

1 Agencies may seek to rewrite legislation without making significant policy changes, focusing on improving the existing legislation. At other times, a rewrite is done when implementing policy changes. In the case of a legislative instrument, the trigger for seeking a rewrite may be the impending sunsetting of the instrument under the *Legislation Act 2003*.

2 While rewriting existing legislation can have clear benefits, this should be balanced against potential costs, including the resources required.

3 OPC can discuss timeframes and potential resource requirements, based on experience with rewrite projects.

Scoping a rewrite project

4 Agencies should consider the extent of the existing legislation to be rewritten. Some rewrites involve a whole piece of legislation, while others focus on specific parts of a piece of legislation. If a rewrite focuses on specific parts, this may be because they are the only parts seen as needing change, or because a complete rewrite is seen as logistically difficult. In deciding whether a part should be rewritten, agencies should consider how much of the existing legislation relies on that part, as this can affect the scope of the project.

5 The other aspect to consider is the extent to which that existing legislation will be reconsidered. Some rewrites have been aimed purely at improving the drafting of the legislation concerned, while others have reflected an agency's view that the policy and operation of the legislation require a complete reconsideration. A rewrite to improve the drafting may be quicker and easier than a rewrite involving a complete reconsideration of the legislation, but the benefits may be correspondingly smaller.

6 If the long-term commitment to the project is not clear, consider whether the project can be split up into smaller projects requiring less time for completion. If the project can be split up, the early work need not be wasted even if the agency's priorities change and the project is never finished.

Considerations in deciding whether to rewrite legislation

Potential benefits

7 Depending on the existing legislation, a rewrite could improve the clarity and consistency of the legislation, as well as reduce complexity. A rewrite could give rise to compliance and administrative efficiencies.

8 A rewrite of existing legislation might directly benefit those who have to work with the legislation, such as legal professionals, administrators and future amending instructors and drafters, as well as the general public, including through cheaper and more accurate legal advice and regulatory decisions.

9 An assessment of the existing legislation and how it operates can identify potential benefits. For example, consider whether the existing legislation is fit for purpose and whether there are known issues to be remedied.

Resources required for rewrite

10 Agencies might focus their attention on the availability of drafting resources for their proposed rewrite. This makes sense because drafting resources may be difficult to obtain, especially for a rewrite not involving policy changes. However, rewrites require a substantial input of resources from the instructing agency as well. OPC's experience suggests that it can take up to 10 instructors to keep a single drafter occupied in a rewrite project. A project involving a whole drafting team may need 20 or more full-time staff working within the instructing agency. Agencies should also be aware that rewrite projects can reduce the drafting resources available for the agency's other legislative projects.

11 Drafting resources will be allocated in line with the priority given to the project. This may mean pausing a rewrite drafting project to work on higher priority projects. *Instructor Guidance Note—Bills prioritisation and policy authority* and *Instructor Guidance Note—Instrument program and policy authority* provide more information.

12 The instructing team will need an in-depth knowledge of the existing legislation and its operation to ensure that matters are not missed in the rewrite. As with any legislation project, settled policy and a clear understanding of how the rewritten legislation will fit within the broader context will also be required.

13 Agencies should consider the resources required to implement the change when the rewritten legislation commences, for example changes to systems, operations, contracts, guidance material and forms. This could have significant resource implications.

14 Consider also the resources required from stakeholders to respond to change, in particular those required to comply with the new legislation.

Rewrite versus amendment

15 It will generally be easier to implement a policy change by amending existing legislation, rather than rewriting it. Limited time or resources may mean that only substantive changes can be made, and a wider rewrite does not progress.

Some policy change is likely to be required

16 Rewrites intended only to improve the drafting of legislation routinely turn out to raise difficult policy issues which must be resolved before the drafting can be improved. Some agencies have found that improving the drafting of their legislation simply reveals the policy deficiencies of the legislation more starkly.

17 New legal policy requirements or Senate scrutiny standards may apply, meaning that the rewritten legislation cannot adopt the same approach as the existing legislation. For example, offences previously in regulations may need to be moved to the Act, investigation powers may need to align with more recent standard requirements and merits review may need to be available for a wider range of decisions. Agencies will need to assess the existing legislation against newer standards, such as *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* published by the Attorney-General's Department.

Interaction with other potential changes

18 Agencies should consider the likelihood of the existing legislation needing to change for other reasons. The existing legislation will need to be maintained while the rewrite happens. Changes to the existing legislation during a rewrite can lead to delays and duplication of effort. Frequent changes after the legislation is rewritten may affect some of the benefits sought to be obtained by the rewrite.

Settled aspects can be reopened

19 Rewritten legislation is subject to the same requirements as entirely new legislation. The whole rewritten legislation will be open to scrutiny, even aspects that are rewritten without policy change. For example, an explanatory memorandum or explanatory statement will need to explain each provision of the rewritten legislation. Senate scrutiny committees may comment on aspects that reflect existing arrangements. Rewritten legislation will need to be fully justified, even if it reflects existing arrangements. Amending rather than rewriting may be preferable for contentious legislation.

20 Agencies should be aware that court decisions on the existing legislation may not apply to the rewritten legislation.

Additional legislation is usually required to support the rewrite

21 If the legislation being rewritten is referred to in other legislation, consequential amendments to the other legislation are likely to be required. This may include legislation outside the agency's portfolio, requiring resources from other portfolios. Depending on the legislation involved, consequential amendments can be a significant part of a rewrite project. *Instructor Guidance Note—Consequential amendments* provides more information.

22 Even if very little change occurs between the existing and the rewritten legislation, transitional issues will still need to be considered and addressed. For example, specific legislative provisions may be required to ensure that processes that start under the existing legislation can finish under the rewritten legislation. Complex transitional situations will require a higher level of instructing and drafting resources. *Instructor Guidance Note—Application, saving and transitional provisions* provides more information.

23 A rewrite of principal legislation will often require instruments made under that legislation to be rewritten too, requiring further instructing and drafting resources.

The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.