# DISALLOWABLE AND NOTIFIABLE INSTRUMENTS STANDARD OPERATING PROCEDURE

## Standard Operating Procedure Purpose

Notifiable instruments (Ns) and disallowable instruments (DIs) are deemed as such under the relevant authorising Act, regulation or other instrument.

This SOP details the procedures for drafting and notifying DIs and Nis, to ensure that:

* Instruments are drafted correctly; and
* Instruments are in accordance with relevant legislation

A DI must be presented to the Legislative Assembly. If the instrument is disallowed it is taken to have been repealed and ceases to have effect from the date of its disallowance. All DIs must be accompanied by an explanatory statement (ES). A DI may or may not require a regulatory impact statement (RIS).

A NI does not need to be presented to the Assembly, and does not require a RIS or ES. However both NIs and DIs must be notified on the Legislation Register to have effect.

## Scope

| Business Area | Responsibility |
| --- | --- |
| Policy areas | * Identify the need for a DI or an NI * Prepare (where required) draft brief, instrument, ES, RIS, response to Scrutiny Committee comments * Coordinate signature by others (not Minister/DG/DDG/CEO) |
| **Legal Services and Integrity** | * Provide assistance to policy areas in drafting the NI or DI * Review and clear instrument and brief prior to policy area seeking executive clearance * Assist in the preparation of response to Scrutiny of Bills Committee recommendations (when required, DIs only) * Provide assistance on drafting of brief, instrument, ES and RIS, and responses to Scrutiny Committee comments |
| **Government Services** | * Coordinate signature by Minister/DG/DDG/COO/CEO as necessary * Liaise with Parliamentary Counsel’s Office for notification of the instrument |
| **Communications** | * Assist in the preparation of media material (if required) |

This SOP applies to all staff within the EPSDD portfolio with responsibility for preparing DIs and NIs, under legislation administered by EPSDD.

## Procedure – Description of activities

#### **PRELIMINARY STEPS**

* 1. ***Early consultation with relevant stakeholders***
* Consult with any other divisions, Directorates and other stakeholders that may be impacted by the instrument.
* Involve Legal Services and Integrity early in the process. Legal Services and Integrity can ensure an instrument is appropriate, and can assist with drafting.
  1. ***Identify source of power***

Confirm if:

* The Act/regulation requires or permits an NI or DI.
* The proposed instrument is within the scope and objectives of the authorising legislation.
* That any conditions on making the instrument are satisfied.
  1. ***Consider timing***

The default date for commencement of an instrument is the day after its notification day. Consider whether your instrument, or some of its provisions, should commence at a later date. There is a presumption against retrospective commencement. Legal Services and Integrity can assist with commencement issues.

* 1. ***Revocation of earlier instrument***

If the instrument is intended to replace a current instrument, which does not expire prior to the commencement of the new instrument, the instrument will need to provide for revocation of the current instrument.

* 1. ***Review Legislation Register***

The [Legislation Register](https://legislation.act.gov.au/) has examples of DIs, NIs, explanatory statements and regulatory impact statements. Consider these when drafting the instrument.

#### **PREPARING AN INSTRUMENT**

Create an Objective folder and prepare the below documents:

* 1. ***Instrument***
* Refer to the PCO [Sample Documents for Legislative Instruments](http://www.pco.act.gov.au/library/Samples.pdf) and [Drafting Practice Guide](http://www.pco.act.gov.au/pages/draftpubstand/dpg.htm) for drafting guidance.
  1. ***Brief***

1. **Minister/DG/DDG/COO/CEO signature**

* Prepare a brief for signature. In the brief, set out the relevant head of power under which the instrument is made, any conditions on the exercise of this power, and how these conditions have been met. Template briefs can be found [here](https://objective.act.gov.au/id:fA6154383).

1. **Other decision-maker signature**

* Prepare an approval of instruments form. Set out the relevant head of power under which the instrument is made, any conditions on the exercise of this power, and how these conditions have been met. Template forms can be found [here](https://actgovernment.sharepoint.com/sites/Intranet-EPSDD/Pages/Legal-services.aspx).
  1. ***Explanatory Statement (ES) - DIs only***
* Every DI requires an ES; note that NIs do not require an ES. The ES outlines the policy objectives and intended operation of the instrument and its provisions.
* The [Standing Committee on Justice and Community Safety’s Guide to Writing an Explanatory Statement](https://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf) provides guidance on what the ES should include. Check particularly that the ES addresses the Scrutiny of Bills Committee principles on human rights. If there is any inconsistency, set out the reasons for the inconsistency.
  1. ***Regulatory Impact Statement (RIS) - DIs only (if required)***
* Many DIs do not require a RIS. A RIS is required when a piece of legislation is likely to impose ‘appreciable’ costs on the community.
* Section 36 of the *Legislation Act 2001* sets out a number of exceptions to when a RIS is required. The brief and ES should explain why a RIS has not been prepared.
* If you are unsure if a RIS is required, or what information it should include, discuss with Legal Services and Integrity.
* The [Best Practice Guide for Preparing Regulatory Impact Statements](http://www.treasury.act.gov.au/documents/regulatory_impact_statement_guide.pdf) provides further guidance on drafting a RIS.
  1. ***Send to Legal Services and Integrity for clearance***

Send a link to the Objective folder, containing the instrument, brief, ES (for DIs) and RIS (if required) to [Legal Services and Integrity](mailto:EPSDLegalServices@act.gov.au) for clearance prior to seeking executive approval.

* 1. ***Send to Communications***

Send a link to the Objective folder to [Communications](mailto:EPSDDComms@act.gov.au) to see if any media material is required.

* 1. ***Progress for signature***

Once reviewed by Legal Services and Integrity and Communications, the policy area progresses the brief for signature to the relevant decision-maker.

1. **Ministerial/DG/DDG/COO/CEO signature**

* Send to [Government Services.](mailto:EPSDGovernmentServices@act.gov.au)

1. **Other decision-maker signature, such as a statutory office holder**

* Provide directly to the decision-maker or their Executive Assistant for signature.
  1. ***Notification, scrutiny and implementation***
* Where the decision-maker is the Minister/DG/DDG/COO/CEO, Government Services will arrange for notification on the Legislation Register after signature.
* Where there is another decision-maker, the policy area sends the signed instrument to Government Services for notification on the Legislation Register.
  + In both circumstances, Government Services require both the Word version and a signed version of the DI/NI via provision of relevant OBJ links.
* A DI must be tabled in the Assembly not later than 6 sitting days after if it notified. The DI will be referred to the Standing Committee on Scrutiny of Bills. Any comments received by the Committee must be addressed. Liaise with Government Services and Legal Services and Integrity in preparing a response if required.
* After notification (and in the case of a DI, if it is not disallowed) consider implementation of the instrument in your policy area.

## Records Management

Records need to be managed in accordance with the *Territory Records Act 2002* and Directorate policies and procedures.

Policy areas need to keep an Objective folder in the relevant area with all background, such as records of consultation, in addition to Ministerial folders prepared by Government Services.

Legal Services and Integrity maintains records of clearances of instruments in Objective.

## Evaluation

| Outcome MeasuresWhat will be measured to determine achievement – has the procedure purpose occurred? | MethodHow will this be done? | ResponsibilityWho is responsible for evaluation? |
| --- | --- | --- |
| Accuracy of instruments | Feedback from Legal Services and Integrity, Government Services and PCO | Policy areas, Legal Services and Integrity and Government Services |
| Timely progression of legislation for signature | Early engagement with Legal Services and Integrity, Communications, and Government Services | Policy areas, Legal Services and Integrity, Government Services |

## Related Documents

* [PCO website](http://www.pco.act.gov.au)
* [NI and DI templates](mailto:http://www.pco.act.gov.au/pages/notifications/notifications.htm)
* [Objective Ministerial templates](https://objective.act.gov.au/id:fA6154383#layout=compact-view)
* [Approval of Instruments template](mailto:https://actgovernment.sharepoint.com/:w:/r/sites/Intranet-EPSDD/_layouts/15/Doc.aspx?sourcedoc=%7BE55590CE-E52A-4522-A2B4-F7C58CD5A261%7D&file=Approval%20of%20instruments%20form.docx&action=default&mobileredirect=true&DefaultItemOpen=1)
* [Guide to Writing an Explanatory Statement](http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf) of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
* [Best Practice Guide for Preparing Regulatory Impact Statements](http://www.treasury.act.gov.au/documents/regulatory_impact_statement_guide.pdf)
* [*Legislation Act 2001*](http://www.legislation.act.gov.au/a/2001-14/default.asp)
* ACT [Legislation Register](http://www.legislation.act.gov.au/default.asp)
* EPSDD [Legal Services](mailto:EPSDLegalServices@act.gov.au) and Integrity e-mail
* *[Territory Records Act 2002](https://legislation.act.gov.au/View/a/2002-18/current/PDF/2002-18.PDF)*
* *[Information Privacy Act 2014](https://legislation.act.gov.au/View/a/2014-24/current/PDF/2014-24.PDF)*

## Version history

The following table details the published date and amendment details for this document

| Version | Date | Amendment details |
| --- | --- | --- |
| 1.0 | 24/07/2019 | First publication of this policy |