



# **Merit Protection Commissioner's (Independent Selection Advisory Committee (ISAC) procedures) Instructions 2021**

I, Linda Waugh, Merit Protection Commissioner, hereby:

- issue the following Instructions under Regulation 4.5(1) of the *Public Service Regulations 1999* (the Regulations) to commence on 6 September 2021 (Part A to this instrument); and
- issue the following Instructions under Regulation 4.5(1A) of the *Public Service Regulations 1999* (the Regulations) to commence on 6 September 2021 (Part B to this instrument); and
- revoke all Instructions previously issued under Regulation 4.5 of the *Public Service Regulations 1999* when these Instructions commence.

Linda Waugh  
**Merit Protection Commissioner**  
6 September 2021

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## Background to Instructions

1. Under Regulation 4.5(1), the Merit Protection Commissioner must issue Instructions about the procedures to be followed by an Independent Selection Advisory Committee (ISAC), individually and collectively, in performing its functions under Part 4 of the Regulations. The Instructions must not be inconsistent with the Act, the Regulations or the Australian Public Service Commissioner's Directions.
2. Under Regulation 4.5(3), an ISAC must comply with these Instructions.
3. Under Regulation 4.4, the procedures used by an ISAC in carrying out its functions must meet the following minimum requirements:
  - a. the procedures must have due regard to procedural fairness;
  - b. the functions must be carried out in private;
  - c. the functions of the ISAC must be finished as quickly, and with as little formality, as a proper consideration of the matter allows.
4. These Instructions are binding on an ISAC but not on agency heads. Nevertheless, to ensure the proper working of ISACs as a statutory function of the Merit Protection Commissioner, the Merit Protection Commissioner expects agency heads to observe the following processes in requesting that an ISAC be established:
  - a. the person nominated by the agency head under Regulation 4.3(1)(b) has the skills and attributes necessary to undertake his or her role independently and impartially and be aware of the relevant legislation, principles and guidelines;
  - b. the agency head notifies the employment opportunity(ies) in the *Public Service Gazette* **after** the ISAC has been established, in reasonable time to enable the ISAC to:
    - i. plan the selection process, and to ensure that any proposed selection documentation and advertising, properly reflects the work-related qualities genuinely required to perform the duties; and
    - ii. let potential candidates know that the selection will be undertaken by an ISAC and to give them access to information on the ISAC process and the effect an ISAC process has on promotion review.
5. Under Regulation 4.5(1A), the Merit Protection Commissioner may issue Instructions about the procedures to be followed by an agency head who is appointed under Regulation 4.7(1B) to act on behalf of an ISAC. The Instructions must not be inconsistent with the Act, the Regulations or the Australian Public Service Commissioner's Directions.
6. Under Regulation 4.5(3), an agency head appointed to act on behalf of an ISAC must comply with these Instructions.

**Note:** Under Regulation 4.11(1A)(b), an agency head is required to consult with the Merit Protection Commissioner if the agency head wishes to not promote an APS employee (or engage a Parliamentary Service employee) in accordance with an ISAC recommendation.

## Definitions

In these Instructions:

**Agency head** means an agency head within the meaning of section 7 of the Act and includes a person authorised by an agency head for the relevant purpose.

**APS** means the Australian Public Service.

**Australian Public Service Commissioner's Directions** means the directions made by the Australian Public Service Commissioner under section 11 of the Act which apply at the time that the ISAC carries out its functions.

**Candidate** means a candidate for engagement, promotion, or assignment of duties on the recommendation of an ISAC.

**Employment opportunity** means the job vacancy or vacancies to be filled on the recommendation of an ISAC.

**Gazette** means the Public Service Gazette.

**ISAC** means an Independent Selection Advisory Committee established under Part 4 of the Regulations. In these Instructions there are individual obligations on the members of the ISAC and on the ISAC acting collectively.

**Merit Protection Commissioner** means the Parliamentary Service Merit Protection Commissioner appointed under section 50 of the Act and includes any person authorised by the Parliamentary Service Merit Protection Commissioner for a relevant purpose.

**Privacy Act** means the *Privacy Act 1988*.

**Regulations** means the *Public Service Regulations 1999*.

## Part A: Instructions under Regulation 4.5(1)

### 1. Obligations on ISAC nominees

Each person nominated to be a member of an ISAC must inform himself or herself about the legislation, guidelines and principles relevant to employment decision-making in the Parliamentary Service including:

- a. the Public Service Act 1999;
- b. the Public Service Regulations 1999;
- c. the Australian Public Service Commissioner's Directions;
- d. these Merit Protection Commissioner's (ISAC Procedures) Instructions 2021;
- a. the principles of lawful administrative decision making including procedural fairness;
- b. the Privacy Act; and
- c. Commonwealth anti-discrimination legislation.

**Note:** See, for example, the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*.

### 2. Responsibilities of ISAC members

A member of an ISAC must:

- a. make any decision in accordance with the principles of lawful administrative decision-making;
- b. behave in a way that upholds the APS Values and that is consistent with the APS Employment Principles and the APS Code of Conduct in undertaking his or her duties as an ISAC member;
- c. behave with impartiality and without unlawful discrimination towards the candidates who have applied for the relevant employment opportunity;
- d. maintain the confidentiality of personal information provided to the ISAC consistent with the Privacy Act; and
- e. not disclose information about the candidates for the employment opportunity except as necessary for the purposes of undertaking the functions of the ISAC or as otherwise authorised by law.

### 3. Obligations with respect to impartiality

- a. Before the assessment of candidates commences, each member of an ISAC must sign a declaration of impartiality.
- b. Where an ISAC member forms a belief that he or she would not be able to undertake his or her duties impartially, or refuses to sign a declaration of impartiality, he or she must decline to continue as a member of the ISAC.
- c. Where an ISAC member declines to continue as a member of the ISAC, he or she must advise the delegate of the Merit Protection Commissioner, and the relevant Secretary in writing of the declination and the reasons for his or her withdrawal.
- d. Where the ISAC convenor forms a belief that a member of the ISAC would not be able to undertake his or her duties impartially, the convenor must consult with the delegate of the Merit Protection Commissioner. If the delegate of the Merit Protection Commissioner is not satisfied that the ISAC member would be able to undertake his or her duties impartially, then the relevant Secretary must be consulted and asked to nominate a new member in accordance with Regulation 4.3.

**Note:** A high standard with respect to impartiality is placed on ISAC members in recognition of the provision that there are no promotion review rights available after an ISAC recommendation has been implemented.

### 4. Obligations with respect to use and non-disclosure

- a. Following nomination to an ISAC, a member of the ISAC must acknowledge in writing the obligation not to, directly or indirectly, make a record of, disclose or otherwise use any

information that was acquired while he or she was performing the duties as an ISAC member, except:

- i. for the purposes of completing the functions of the ISAC; or
  - ii. as otherwise authorised by law.
- b. This obligation applies in relation to both personal information about the candidates and information about the assessment materials and methodology used by the ISAC.

**Note:** The obligation on the use and disclosure of information is contained in section 72B of the Act and applies during the life of the ISAC and after the member ceases to perform his or her duties as an ISAC member.

- c. If an ISAC member is unsure of whether it is appropriate to use or disclose information, the ISAC member must consult with the convener of the ISAC who may refer the matter to the delegate of the Merit Protection Commissioner.

## 5. Objections to ISAC composition

- a. An ISAC must make a written record of the receipt of any objection to the composition of the ISAC.
- b. The written record must specify:
- i. the date when the objection was made;
  - ii. the name of the person who made the objection; and
  - iii. the reasons for the objection.
- c. The ISAC must consult the delegate of the Merit Protection Commissioner and the relevant Secretary before the ISAC decides on action to resolve the objection.

## 6. ISAC member is also a referee

- a. Where a member of an ISAC is also a referee for a candidate, that member **must** write and submit the reference in accordance with departmental procedures, before the ISAC commences assessing candidates.

## 7. The selection process and development of selection documentation

- a. An ISAC must satisfy itself that:
- i. the selection process and methodology proposed by the agency head are suitable to properly assess the relative merits of candidates
  - ii. any selection documentation, advertising and selection tools properly reflect the work-related qualities genuinely required to perform the duties
  - iii. any considerations identified by the agency head, other than the assessment of the relative merits of the candidates, are relevant considerations in framing its recommendations
  - iv. where relevant, the agency head has advised prospective candidates, as part of the selection documentation, of considerations other than the assessment of the relative merits of the candidates that will be taken into account by the ISAC.
- b. The ISAC must consult the agency head where the ISAC proposes to:
- i. alter the selection process and methodology proposed by the agency head; and/or
  - ii. take into account considerations other than the assessment of the relative merits of the candidates that have not already been identified by the agency head.
- c. If the employment opportunities are notified in the *Gazette* by the agency head prior to the establishment of the ISAC, the ISAC must satisfy itself that requirements specified in (a) above have been met.
- d. If the ISAC is not satisfied that the requirements in (a), above, have been met, the ISAC must consult with the delegate of the Merit Protection Commissioner to determine whether the ISAC can proceed.

## 8. Representation before an ISAC

- a. Where a candidate who is required to appear before an ISAC seeks to have representation, the ISAC must refer the request to the delegate of the Merit Protection Commissioner.
- b. The ISAC must advise the affected candidate of the decision in relation to his or her application for representation.

**Note:** Under Regulation 4.4(2) a person appearing before an ISAC must do so without representation unless the Merit Protection Commissioner decides that, in all the circumstances, it would be reasonable to allow the person to be represented.

## 9. Handling adverse information

- a. Where, in deliberations in relation to a candidate, the ISAC proposes to take into account any adverse information of which the candidate is, or is likely to be, unaware, the substance of that information must be conveyed to the candidate. This information may be provided either orally or in writing.
- b. The ISAC must give the candidate a reasonable opportunity to provide comment on the information, orally or in writing, to the ISAC. Both the opportunity to provide comment and any response must be documented.
- c. Where the ISAC:
  - i. receives information in relation to a party to the review which it is reasonable to expect would be highly prejudicial to the interests of the person concerned; and
  - ii. proposes not to take that information into account in its deliberations concerning the application for review of the promotion decision; then

the ISAC must document the information and:

- i. advise the party of the nature of the information it has received; and
- ii. provide the party with an assurance, orally or in writing, that the information will not be taken into account in its decision; and
- iii. provide an opportunity for the party to comment on the information.

## 10. Adjournments and delays

- a. The Convenor, on behalf of the ISAC, must inform the agency head and the delegate of the Merit Protection Commissioner, either orally or in writing as appropriate, on any matters that the ISAC believes will unreasonably impede the completion of the ISAC's functions.
- b. Where an ISAC has already begun its formal assessment of candidates and a circumstance arises whereby the assessment of a candidate cannot proceed as the ISAC intended, the ISAC must not unreasonably delay its proceedings in the interests of an individual candidate.
- c. If a member of the ISAC becomes unavailable, the ISAC must advise the delegate of the Merit Protection Commissioner and the ISAC must then be reconstituted and another member nominated in accordance with Regulation 4.3.

## 11. ISAC's recommendations

- a. An ISAC must provide its recommendations in a report to the agency head at the conclusion of its functions in a timely manner.
- b. In making its recommendation(s), an ISAC must give primary consideration to the assessment of the relative merits of the candidates in accordance with section 10A(2) of the Act and must not consider any other factors unless the ISAC is satisfied that the requirements in paragraph 7 of these Instructions have been met.
- c. An ISAC must ensure that:
  - i. the documentation containing its recommendations will enable the agency head to clearly demonstrate that the legal obligations have been met in respect of

- engagement, assignment of duties or promotion, as set out in the Act the Regulations and the Australian Public Service Commissioner's Directions; and
  - ii. the recommendations include a numerical ranking of candidates (often referred to as an order of merit) according to their relative suitability for the relevant employment opportunity.
- d. Where more than one employment opportunity is to be filled, the ISAC may provide a separate numerical ranking for each of the employment opportunities.

**Note:** An ISAC may provide separate numerical rankings to reflect options made available to candidates in the selection documentation. For example, candidates may be asked to nominate regional or work function preferences, or identify specific skill requirements such as fluency in a particular language.

- e. Once an ISAC has fulfilled its responsibilities in accordance with (a)–(d), above, the ISAC cannot be reconvened to consider additional evidence, including evidence about a candidate which was not available when the ISAC made its recommendations

**Note:** In the circumstances described in (e), above, the ISAC has completed its statutory functions and is not able lawfully to reconvene.

## 12. Reporting

- a. At the completion of the performance of an ISAC's functions the Convenor must submit to the delegate of the Merit Protection Commissioner a written report of the ISAC's performance of its function that has been agreed to by the members of the ISAC. If there is disagreement amongst members on the performance of the ISAC, separate statements must be submitted to the delegate of the Merit Protection Commissioner.

## 13. Misconduct identified during the conduct of an ISAC

- a. Prior to commencing to assess the candidates, the ISAC must provide the Secretary with an opportunity to identify whether any candidate has a record of misconduct that is material to the ISAC's assessment, under Regulation 4.7 of the candidate's work-related qualities.

Note: For an APS employee or an ex-APS employee a record of misconduct would be a determination that the employee had breached the APS Code of Conduct contained in section 13 of the Act.

- b. If during the ISAC's consideration of the candidates, the Secretary identifies that a candidate has a record of misconduct, including in the circumstances in (a), above, or an ISAC becomes aware of a record of misconduct, the ISAC may:
  - i. decide not to take the information into account; or
  - ii. take the information into account where the ISAC forms a view that the information is materially relevant to assessing the work related qualities of the candidate, consistent with Regulation 4.7.
- c. In the circumstances set out in (b) above, the ISAC must:
  - i. follow the procedures in paragraph 9 of these Instructions with respect to handling adverse information; and
  - ii. seek the views of the Secretary on the relevance of the information to the ISAC's assessment of the recommendations.

**Note:** In determining the relevance of information relating to a record of misconduct or other integrity information to its recommendations, the ISAC may give consideration to the policy guidance provided by the Australian Public Service Commission including in its publication *Handling Misconduct* and as amended from time to time.

## 14. Seeking expert opinion

- a. Where an ISAC seeks expert opinion about the work-related qualities and capabilities of candidates in accordance with Regulation 4.7(1A) the request and the response to the ISAC must be documented and an appropriate record made.



- b. The ISAC must be satisfied with the relevance and appropriateness of any expert opinion provided prior to considering it as part of the ISACs decision-making. An ISAC can decide to take into account in its decision-making, all, part or none of the expert opinion made available to the ISAC.
- c. If, during the conduct of an ISAC, any issues arise with the seeking of expert opinion in accordance with Regulation 4.7(1A), the ISAC must consult with the delegate of the Merit Protection Commissioner.

### 15. Appointing an agency head to act on behalf of an ISAC

- a. Where an ISAC decides to appoint the relevant agency head to act on behalf of the ISAC in conducting some or all of an assessment in accordance with Regulation 4.7(1B) the appointment and the nature of the assessment to be conducted must be documented in writing and an appropriate record kept.

**Note:** In accordance with Regulation 4.7(1C) the agency head must act in accordance with any instructions given to the agency head by the ISAC. The agency head must also act in accordance with the instructions issued by the Merit Protection Commissioner under Regulation 4.7(1B) in relation to acting on behalf of the ISAC included in Part B of this instrument. These provisions do not cover the recommendation of the ISAC, which is not binding on the agency head.

- b. The ISAC must be satisfied with the relevance and quality of any assessment conducted by an agency head on behalf of the ISAC prior to using it as part of the ISACs decision-making. An ISAC can decide to rescind the appointment of an agency head as an agent but before doing so must consult with the delegate of the Merit Protection Commissioner.
- c. If, during the conduct of an ISAC, any issues arise with the appointment of an agency head to conduct part or all of the assessment in accordance with Regulation 4.7(1B), the ISAC must consult with the delegate of the Merit Protection Commissioner.
- d. An ISAC can decide to rescind the appointment of an agency head to act on its behalf but before doing so must consult with the delegate of the Merit Protection Commissioner.

## Part B: Instructions under Regulation 4.5(1A)

### 1. Obligations on agency head appointed to act on behalf of an ISAC

- a. An agency head appointed by an ISAC to conduct part or all of the assessment in accordance with Regulation 4.7(1B) must follow:
  - i. any instructions provided by the ISAC (Regulation 4.7(1C)); and
  - ii. this Instruction issued by the Merit Protection Commissioner under Regulation 4.5(1A).

**Note:** This Instruction does not apply to the recommendation of the ISAC which is not binding on the agency head.

- b. An agency head must not act contrary to the written agreement between the ISAC and the agency head unless he or she has obtained the written agreement of the ISAC.
- c. An agency head must conduct any assessment in accordance with the arrangements established by the ISAC including quality control measures.
- d. If, during the conduct of an ISAC, any issues arise in relation to an agency head's appointment to conduct part or all of the assessment in accordance with Regulation 4.7(1B), the Secretary must consult with the delegate of the Merit Protection Commissioner.