



Parliamentary Service Merit Protection Commissioner's (Independent Selection Advisory Committee (ISAC) procedures) Instructions 2021

I, Linda Waugh, Merit Protection Commissioner, hereby:

- a) issue the following Instructions under clause 63(1) of *Parliamentary Service Determination 2013* (the Determination) to commence on 6 September 2021 (Part A of this instrument);
and
- b) issue the following Instructions under clause 63(2) of the Determination to commence on 6 September 2021 (Part B of this instrument)
- c) revoke all Instructions previously issued under clause 63 of the *Parliamentary Service Determination 2013* when these Instructions commence.

Linda Waugh

Merit Protection Commissioner

6 September 2021

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Background to Instructions

1. Under clause 63(1), the Parliamentary Service Merit Protection Commissioner must issue Instructions about the procedures to be followed by an independent selection advisory committee (ISAC), in performing its functions under Part 8 of the Determination. The Instructions must not be inconsistent with the *Parliamentary Service Act 1999* (the Act) or the Determination.
2. Under clause 63(4), an ISAC must comply with these Instructions.
3. Under clause 62, 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 Secretaries. Nevertheless, to ensure the proper working of ISACs as a statutory function of the Parliamentary Service Merit Protection Commissioner, the Parliamentary Service Merit Protection Commissioner expects Secretaries to observe the following processes in requesting that an ISAC be established:
 - a) the Secretary is satisfied that the person the Secretary nominates under clause 61(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 Secretary 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 clause 63(2), the Parliamentary Service Merit Protection Commissioner may issue Instructions about the procedures to be followed by a Secretary who is appointed under clause 65(3) to act on behalf of an ISAC. The Instructions must not be inconsistent with the Act and the Determination.
6. Under clause 65(4), a Secretary appointed to act on behalf of an ISAC must comply with these Instructions.

Note: Under clause 69(2)(b), a Secretary is required to consult with the Parliamentary Service Merit Protection Commissioner if the Secretary wishes to not promote a Parliamentary Service employee (or engage an APS employee) in accordance with an ISAC recommendation.

Definitions

In these Instructions:

Act means the Parliamentary Service Act 1999.

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

Determination means the Parliamentary Service Determination 2013.

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 8 of the Determination.

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.

PS means the Parliamentary Service.

Privacy Act means the Privacy Act 1988.

Secretary means the Secretary of a Department and includes the Clerk of the Senate, the Clerk of the House of Representatives and the Parliamentary Budget Officer.

Note: Clause references in these Instructions are references to clauses of the Determination.

Part A: Instructions under clause 63(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 Act;
- b. the Determination;
- c. these Merit Protection Commissioner's (ISAC Procedures)—Instructions 2021;
- d. the principles of lawful administrative decision making including procedural fairness;
- e. the Privacy Act; and
- f. 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 PS Values and that is consistent with the PS Employment Principles and the PS 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 clause 61.

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 65AB 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 Secretary 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 Secretary, other than the assessment of the relative merits of the candidates, are relevant considerations in framing its recommendations
 - iv. where relevant, the Secretary 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 Secretary where the ISAC proposes to:
- i. alter the selection process and methodology proposed by the Secretary; 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 Secretary.
- c. If the employment opportunities are notified in the *Gazette* by the Secretary 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 clause 62(b) 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 Secretary 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 clause 61.

11. ISAC's recommendations

- a. An ISAC must provide its recommendations in a report to the Secretary 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 Secretary 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 and the Determination; 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 clause 65, of the candidate's work-related qualities.

Note: For a PS employee or an ex-PS employee a record of misconduct would be a determination that the employee had breached the PS 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 clause 65.
- 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 clause 65(2) 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 clause 65(2), the ISAC must consult with the delegate of the Merit Protection Commissioner.

15. Appointing a Secretary to act on behalf of an ISAC

- a. Where an ISAC decides to appoint the relevant Secretary to act on behalf of the ISAC in conducting some or all of an assessment in accordance with clause 65(3) 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 clause 65(4) the Secretary must act in accordance with any instructions given to the Secretary by the ISAC. The Secretary must also act in accordance with the instructions issued by the Merit Protection Commissioner under clause 63(2) in relation to acting on behalf of the ISAC included in Part B of these Instructions. These provisions do not cover the recommendation of the ISAC, which is not binding on the Secretary.

- b. The ISAC must be satisfied with the relevance and quality of any assessment conducted by a Secretary on behalf of the ISAC prior to using it as part of the ISACs decision-making.
- c. If, during the conduct of an ISAC, any issues arise with the appointment of a Secretary to conduct part or all of the assessment in accordance with clause 65(3), the ISAC must consult with the delegate of the Merit Protection Commissioner.
- d. An ISAC can decide to rescind the appointment of a Secretary to act on its behalf but before doing so must consult with the delegate of the Merit Protection Commissioner.

Part B: Instructions under clause 63(2)

1. Obligations on Secretary appointed to act on behalf of an ISAC

- a. A Secretary appointed by an ISAC to conduct part or all of the assessment in accordance with clause 65(3) must follow:
 - i. any instructions provided by the ISAC (clause 65(4)); and
 - ii. this Instruction issued by the Merit Protection Commissioner under clause 63(2).

Note: This Instruction does not apply to the recommendation of the ISAC which is not binding on the relevant Secretary.

- b. A Secretary must not act contrary to the written agreement between the ISAC and the Secretary unless he or she has obtained the written agreement of the ISAC.
- c. A Secretary 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 a Secretary's appointment to conduct part or all of the assessment in accordance with clause 65(3), the Secretary must consult with the delegate of the Merit Protection Commissioner.