



Merit Protection Commissioner's (PRC Procedures) Instructions 2024

I, Mark Davidson, Acting Merit Protection Commissioner, hereby:

- (a) issue the following Instructions under section 30 of the *Public Service Regulations 2023* (the Regulations) to commence on 8 January 2024; and
- (b) revoke all Instructions previously issued under section 30 of the Regulations when these Instructions commence.

A handwritten signature in black ink, appearing to be 'Mark Davidson', written over a faint, illegible background.

Mark Davidson
Acting Merit Protection Commissioner
5 January 2024

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Background to Instructions

1. Under section 30 of the Regulations, the Merit Protection Commissioner must issue Instructions about the procedures to be followed by a Promotion Review Committee (PRC) in performing its functions under Part 4 Division 2 of the Regulations. The Instructions must not be inconsistent with the Act, the Regulations or the Public Service Commissioner's Directions.
2. Under subsection 30(3) of the Regulations, a PRC must comply with these Instructions.
3. Under section 29 of the Regulations, the procedures used by a PRC in conducting a review under Part 4 Division 2 of the Regulations must meet the following minimum requirements:
 - a. the procedures must have due regard to procedural fairness;
 - b. the review must be conducted in private;
 - c. the review must be finished as quickly, and with as little formality, as a proper consideration of the matter allows.

Definitions

In these Instructions:

Act means the *Public Service Act 1999*

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 purposes

Agency Nominee means the APS employee nominated by the relevant Agency Head under subsection 26(1)(b) of the Regulations.

Applicant means an applicant for review of a promotion or engagement decision under Part 4 Division 2 of the Regulations

Application means an application for review of a promotion or engagement decision under Part 4 Division 2 of the Regulations

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 PRC carries out its functions

APS means the Australian Public Service established by section 9 of the Act.

APS Code of Conduct means the rules in section 13 of the Act

APS Employee means a person engaged under section 22 or section 72 of the Act.

APS Employment Principles means the principles in section 10A of the Act.

APS Values means the values in section 10 of the Act.

Convenor means the person nominated by the Merit Protection Commissioner under subsection 26(1)(a) of the Regulations.

Engagement means a decision made by an Agency Head to employ an Ongoing Parliamentary Service Employee.

Merit Protection Commissioner means the Merit Protection Commissioner appointed under section 52 of the Act and includes any person authorised by the Merit Protection Commissioner for the relevant purpose

Ongoing APS Employee means a person engaged as an ongoing APS employee, as mentioned in subsection 22(2)(a) of the Act.

Ongoing Parliamentary Service Employee means a person engaged as an ongoing Parliamentary Service employee, as mentioned in subsection 22(2)(a) of the *Parliamentary Service Act 1999*.

Parties to the review means persons who have submitted an application for review of a promotion or engagement decision and persons whose promotions or engagements have received an application for review

PRC means a Promotion Review Committee appointed under Part 4 Division 2 of the Regulations. In these Instructions there are individual obligations on the members of the PRC and on the PRC acting collectively.

Privacy Act means the *Privacy Act 1988*

Promotion means the ongoing assignment of duties to an Ongoing APS Employee at a higher classification than the employee's current classification as defined in Clause 6 of the Australian Public Service Commissioner's Directions

In these Instructions, a reference to a promotion decision is also a reference to an engagement decision with respect to Ongoing Parliamentary Service Employees as described in section 20 of the Regulations.

Regulations means the *Public Service Regulations 2023*.

Instructions

1. Obligations on PRC members

Each person nominated to be a member of a PRC **must** inform themselves about the legislation, principles and guidelines relevant to employment decision-making in the APS including:

- a. the *Public Service Act 1999*;
- b. the *Public Service Regulations 2023*;
- c. the Australian Public Service Commissioner's Directions;
- d. these Merit Protection Commissioner's Instructions on procedures to be followed by PRCs;
- e. the principles of lawful administrative decision making, including procedural fairness;
- f. the *Privacy Act 1988*;
- g. 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 PRC members

A member of a PRC **must**:

- a. make all PRC-related decisions in accordance with the principles of lawful administrative decision-making;
- b. behave in a way which upholds the APS Values and the APS Employment Principles and which is consistent with the APS Code of Conduct in undertaking their duties as a PRC member;
- c. behave with impartiality and without unlawful discrimination towards the parties to the review;
- d. maintain the confidentiality of personal information consistent with the Privacy Act and not disclose information about the parties to the review except as necessary for the purposes of undertaking the functions of the review.

3. Obligations with respect to impartiality

- a. Before a PRC begins to deal with an application for review of a promotion decision each member of the PRC **must** sign a declaration of impartiality.
- b. Where a PRC 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 PRC.
- c. Where a PRC member declines to continue as a member of a PRC, he or she **must** advise the Merit Protection Commissioner or delegate in writing of the declination and the reasons for his or her withdrawal.

- d. Where the Convenor forms a belief that a member of the PRC would not be able to undertake his or her duties impartially, the Convenor **must** consult with the Merit Protection Commissioner or delegate. If the Merit Protection Commissioner or delegate is not satisfied that the PRC member would be able to undertake his or her duties impartially, then either
 - i. the relevant Agency Head must be consulted and asked to nominate a new Agency Nominee in accordance with subsection 26(1)(b) of the Regulations; or
 - ii. a new APS Employee must be nominated in accordance with subsection 26(1)(c) of the Regulations.

4. PRC member as a referee

- a. A PRC member **must** not provide a reference for any party to the review.
- b. A PRC member **must** declare to the PRC if he or she has been:
 - i. a referee for a party to the review, in support of their original application for the promotion; and/or
 - ii. asked to be a referee for the purposes of the promotion review.
- c. In the circumstances described in subparagraph 4(b), the PRC **must** decide whether the member should continue his or her membership of the PRC and **must** consult with the Merit Protection Commissioner or delegate.

5. Obligations with respect to use and non-disclosure

Prior to considering information submitted by the parties to the review, each member of the PRC **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 a PRC member, except for the purposes of completing the review or as otherwise authorised by law.

Note: This obligation is contained in section 72B of the Act and applies during the life of the PRC and after the member ceases to perform his or her duties as a PRC member.

6. Objections to PRC composition

- a. A PRC **must** make a written record of the receipt of any objection to the composition of the Committee.
- 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 PRC **must** consult with the Merit Protection Commissioner or delegate before the PRC decides on action to resolve the objection.

7. Selection documentation

- a. A PRC **must** satisfy itself that the work-related qualities identified by the agency head as part of the original promotion decision are genuinely required to perform the duties of the relevant employment.
- b. If a PRC considers that the work-related qualities genuinely required to perform the duties are different from those used by the agency head in arriving at the promotion decision the PRC **must** consult with the maker of the promotion decision.
- c. Where a PRC considers that the work-related qualities genuinely required to perform the duties are different from those identified in the promotion decision under review the PRC **must** advise the parties to the review of the nature of the differences and give them a reasonable opportunity to:
 - i. comment; and
 - ii. submit additional information on their claims to promotion.

8. Representation before PRC

- a. Where a person appearing before a PRC seeks to have representation, the PRC **must** refer the request to the Merit Protection Commissioner or delegate.
- b. The PRC **must** advise the affected employee of the decision in relation to their application for representation.

Note: Under subsection 29(2) of the Regulations a person appearing before a PRC must do so without representation unless the Merit Protection Commissioner or delegate decides that, in all the circumstances, it would be reasonable to allow the person to be represented.

9. Handling adverse information

- a. Where, in its deliberations, the PRC proposes to take into account in deliberations any adverse information of which a party to the review is, or is likely to be, unaware, the substance of that information **must** be conveyed to the relevant party. The information may be conveyed in writing or orally.
- b. The PRC **must** give the relevant party a reasonable opportunity to provide comment on the information, orally or in writing, to the PRC. Both the opportunity to provide comment and any response **must** be documented.
- c. Where the PRC:
 - 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 PRC **must** document the information and:

- iii. advise the party of the nature of the information it has received; and

- iv. provide the party with an assurance, orally or in writing, that the information will not be taken into account in its decision; and
- v. provide an opportunity for the party to comment on the information.

Note: For the purposes of this Instruction the relevant party is the person about whom the information has been supplied.

10. Additional inquiries

- a. If a PRC identifies gaps in information provided by the promoting agency, the PRC is encouraged to request the agency to provide that information.

Note: Section 32 of the Public Service Regulations 2023 gives a PRC the power to require an agency head by written notice to give to the PRC information or documents relevant to the review.

- b. If a PRC is considering overturning a promotion, the PRC is encouraged to, as part of the PRC's deliberations to determine who has the greater merit:
 - i. Interview the promotee and the person who the PRC is considering promoting in their place and/or
 - ii. Speak to the referees of the promotee and the person who the PRC is considering promoting in their place and
 - iii. Undertake any fact checking the PRC thinks fit.

Note: The applicant(s) seeking review of a promotion(s) needs to demonstrate greater merit than the promotee(s) for a promotion to be overturned. If a PRC considers the applicant(s) and promotee(s) to be of equal merit then the promotion decision is not overturned.

11. Unavailability of PRC member

- a. If a member of the PRC becomes unavailable, the PRC **must** advise the Merit Protection Commissioner or delegate and the PRC is to be reconstituted following a nomination of a new member in accordance with section 26 of the Regulations.
- b. The PRC **must** inform the Merit Protection Commissioner or delegate if the unavailability is likely to cause significant delay in finalising the review of the promotion decision.

12. Unavailability of party to the review

- a. Where an application for review is received, and a party to the review is unavailable to participate in the review, for example to attend an interview, the PRC **must** consider whether reasonable arrangements can be made for the party to participate in the review.
- b. The PRC may proceed to finalise its deliberations on the evidence to hand if the needs of the party in question cannot be accommodated within a reasonable timeframe.

Note: Reasonable arrangements are arrangements that are cost effective and allow the review to be finished as quickly and with as little formality as proper consideration of the matter allows.

13. Considerations other than relative merit

- a. Prior to commencing its assessment, the PRC **must** seek written advice from the maker of the promotion decision of any factors other than the assessment of the relative merits that were taken into account in making the promotion decision.
- b. Where:
 - i. the PRC is advised that a consideration other than relative merit was taken into account in making the promotion decision; and
 - ii. the PRC decides to take that consideration into account in making its decision; and
 - iii. the information is adverse to the interests of a party to the review;

the PRC **must** advise the relevant party to the review and give them an opportunity to comment on the relevance and substance of the information before making its decision.

Note: For the purposes of this Instruction the relevant party is the person whose interests are adversely affected.

14. Promotion review committee outcome notice

- a. A PRC is not required by the Act or Regulations to provide reasons for its decision. Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* provides that a decision of a PRC is not a decision to which the requirements of section 13 applies to provide a statement of reasons upon request.
- b. However at the completion of its deliberations the PRC **must** complete the Promotion Review Committee Outcome Notice.
- c. The Promotion Review Committee Outcome Notice records the PRC's reasons for its decision for the purposes of the Convenor and the Agency Nominee to provide feedback to the unsuccessful party/ies to the review and to understand the PRC's decision.
- d. All members of the PRC **must** sign the Promotion Review Committee Outcome Notice declaring:
 - i. Unanimous compliance with the Part A checklist and have answered the questions accordingly in relation to this review matter
 - ii. Confirm the PRC's decision as recorded in Part B.
- e. The Convenor and the Agency Nominee **must** provide feedback to the unsuccessful party/ies to the review on the date of the decision of the PRC or where not practicable to do so on another day.
- f. The Convenor and the Agency Nominee **must** record the feedback provided in and sign Part C of the Promotion Review Committee Outcome Notice confirming that feedback to the unsuccessful party/ies to the review has been provided.
- g. Where an unsuccessful party to the review declines the offer of feedback this **must** be confirmed in and by the Convenor and Agency Nominee signing Part C of the Promotion Review Committee Outcome Notice.