

## MERIT PROTECTION COMMISSIONER'S (ISAC PROCEDURES) INSTRUCTIONS 2010

I, Annwyn Claire Godwin, Merit Protection Commissioner, hereby:

- a. issue the following Instructions under regulation 4.5 of the Public Service Regulations 1999 (the Regulations) to commence on 6 December 2010; and
- b. revoke all Instructions previously issued under regulation 4.5 of the Public Service Regulations 1999 when these Instructions commence.

Dated 1 December 2010

  
MERIT PROTECTION COMMISSIONER

### Background to Instructions

- 1. Under regulation 4.5, 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 Public Service Commissioner's Directions.
- 2. Under subregulation 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, 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 subregulation 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 *APS Employment Gazette* **after** the ISAC has been established, to enable reasonable time for:

- the ISAC to satisfy itself that the selection process, including any proposed selection documentation and advertising, properly reflects the work-related qualities genuinely required for the duties; and
- potential candidates to know that the selection will be undertaken by an ISAC and be provided with access to information on the ISAC process and the effect an ISAC process has on promotion review.

## 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 purpose

**APS** means the Australian Public Service

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

**Privacy Act** means the Privacy Act 1988

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

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

## Instructions

### 1. Obligations on ISAC nominees

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

- a. the *Public Service Act 1999*;
- b. the Public Service Regulations 1999;
- c. the Public Service Commissioner's Directions;
- d. these Merit Protection Commissioner's (ISAC Procedures) Instructions 2010;

- 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, the Disability Discrimination Act 1991 and the Human Rights and Equal Opportunity Act 1986.

## 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 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 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

- 1. Following receipt of applications for an employment opportunity and before the assessment of candidates commences, each member of an ISAC **must** sign a declaration of impartiality.
- 2. 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 Committee.
- 3. Where an ISAC member declines to continue as a member of an ISAC, he or she **must** advise the Regional Director NSW, and the relevant agency head in writing of the declination and the reasons for his or her withdrawal.
- 4. 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 Regional Director NSW. If the Regional Director NSW is not satisfied that the ISAC member would be able to undertake his or her duties impartially, then the relevant agency head 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 non-disclosure

- 1. 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, or divulge or communicate to any other person any information that was acquired while he or she was performing the duties as an ISAC member, except:
  - for the purposes of completing the functions of the ISAC; or
  - as otherwise authorised by law.
- 2. 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: This obligation is contained in regulation 7.6 of the regulations and applies during the life of the ISAC and after the member ceases to perform his or her duties as an ISAC member.

#### 5. Objections to ISAC composition

- 1. An ISAC **must** make a written record of the receipt of any objection to the composition of the Committee.
- 2. The written record **must** specify:
  - a. the date when the objection was made;
  - b. the name of the person who made the objection; and
  - c. the reasons for the objection.
- 3. The ISAC must consult the Regional Director NSW and the relevant agency head before the ISAC decides on action to resolve the objection.

Note: The Merit Protection Commissioner has authorised the Regional Director NSW for the purposes of the consultation under subparagraph 5(3) of these Instructions.

#### 6. ISAC member is also a referee

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

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

- 1. An ISAC **must** satisfy itself that;
  - a. the selection process and methodology proposed by the agency head, including any selection documentation, advertising and selection tools, properly reflect the work-related qualities genuinely required for the duties; and

- b. any considerations other than the assessment of the relative merits of the candidates, identified by the agency head, are relevant considerations in framing its recommendations; and
  - c. 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.
- 2. The ISAC **must** consult the agency head where the ISAC proposes to:
    - a. alter the selection process and methodology proposed by the agency head; and/or
    - b. 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.
  - 3. 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 subparagraph 7(1) have been met.
  - 4. If the ISAC is not satisfied that the requirements in subparagraph 7(1) have been met, the ISAC **must** consult with the Regional Director NSW to determine whether the ISAC can proceed.

Note: The Merit Protection Commissioner has authorised the Regional Director NSW for the purpose of the consultation referred to in subparagraph 7(4) of these Instructions

## 8. Representation before an ISAC

- 1. Where a candidate who is required to appear before an ISAC seeks to have representation, the ISAC **must** refer the request to the Regional Director NSW.
- 2. 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.

The Merit Protection Commissioner's powers under regulation 4.4(2) have been delegated to the Regional Director NSW.

## 9. Handling adverse information

- 1. 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.

- 2. The ISAC **must** give the candidate a reasonable opportunity to provide comment on the information (whether orally or in writing) to the ISAC. Both the opportunity to provide comment and any response must be documented.
- 3. a. Where the ISAC:
  - 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
  - proposes not to take that information into account in its deliberations concerning the application for review of the promotion decision; then
- 3. b. the ISAC **must** document the information and:
  - advise the party of the nature of the information it has received; and
  - provide the party with an assurance, orally or in writing, that the information will not be taken into account in its decision; and
  - provide an opportunity for the party to comment on the information.

## 10. Adjournments and delays

- 1. The Convenor, on behalf of the ISAC **must** inform the agency head and the Regional Director NSW, either orally or in writing as appropriate, on any matters that the ISAC believes will unreasonably impede the completion of the ISAC's functions.
- 2. 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.
- 3. If a member of the ISAC becomes unavailable, the ISAC **must** advise the Regional Director NSW and the ISAC then be reconstituted following a nomination of a new member in accordance with regulation 4.3.

## 11. ISAC's recommendations

- 1. An ISAC **must** provide its recommendations in a report to the agency head at the conclusion of its functions in a timely manner.
- 2. 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 10(2) of the Act and **must** not consider any other factors unless the ISAC is satisfied that the requirements in subparagraphs 7(1) to 7(4) of these Instructions have been met.
- 3. An ISAC **must** ensure that:
  - a. 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 Public Service Commissioner's Directions; and
  - b. 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; and

- c. 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.

- 4. Once an ISAC has fulfilled its responsibilities in accordance with subparagraphs 11(1)–(3) above, an 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 subparagraph (4) above, the ISAC has completed its statutory functions and is not able lawfully to reconvene.

## 12. Reporting

At the completion of the performance of an ISAC's functions the Convenor **must** submit a written report of the ISAC's performance of its function to the Regional Director NSW 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 Regional Director NSW.

Note: The Merit Protection Commissioner has authorised the Regional Director NSW to receive reports made under paragraph 12 of these Instructions.

## 13. Misconduct

- 1. Prior to commencing to assess the candidates, the ISAC **must** provide the agency head with an opportunity to identify whether any candidate has a record of misconduct that is material and relevant 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.

- 2. If during the ISAC's consideration of the candidates, the agency head identifies that a candidate has a record of misconduct, including in the circumstances in subparagraph 13(1), or an ISAC becomes aware of a record of misconduct, the ISAC may:
  - a. decide not to take the information into account; or
  - b. 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.
- 3. In the circumstances set out in subparagraph 13(2), the ISAC **must**:
  - a. follow the procedures in paragraph 9 of these Instructions with respect to handling adverse information; and

- b. seek the views of the agency head on the relevance of the information to the ISAC's assessment of the recommendations.

Notes: If an agency head becomes aware of a record of misconduct with respect to a candidate after the ISAC has made its recommendations to the agency head, the ISAC will have completed its functions and is unable to be reconvened to take this information into account. If the candidate is removed from order of merit, the promotion of any candidate further down the order of merit will be subject to review (see regulation 4.11).

In determining the relevance of information relating to a record of misconduct or other integrity information to its recommendations, the ISAC should give due consideration to the policy guidance provided by the Australian Public Service Commission including in its publication Handling Misconduct published in 2008 and as amended from time to time.