


MERIT PROTECTION COMMISSIONER'S (PRC Procedures) instructions 2010

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

- a. issue the following Instructions under regulation 5.15 of the Public Service Regulations 1999 (the Regulations) to commence on 6 December 2010; and
- b. revoke all Instructions previously issued under regulation 5.15 of the Public Service Regulations 1999 when these Instructions commence.

Dated 1 December 2010


MERIT PROTECTION COMMISSIONER

Background to Instructions

- 1. Under regulation 5.15, the Merit Protection Commissioner must issue Instructions about the procedures to be followed by a Promotion Review Committee (PRC) in performing its functions under Division 5.2 of the Regulations. The Instructions must not be inconsistent with the Act, the Regulations or the Public Service Commissioner's Directions.
- 2. Under subregulation 5.15 (3), a PRC must comply with these Instructions.
- 3. Under regulation 5.14, the procedures used by a PRC in conducting a review under Division 5.2 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 the agency head or the delegate of the agency head for the purposes of the promotion decision under review

Applicant means an applicant for review of a promotion or engagement decision under Division 5.2 of the Regulations

Application means an application for review of a promotion or engagement decision under Division 5.2 of the Regulations

Engagement means a decision made by an agency head to employ an employee of the Parliamentary Service

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

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 Division 5.2 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 4.6 of the 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 employees of the Parliamentary Service as described in regulation 5.6(2).

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 PRC carries out its functions

Regulations means the Public Service Regulations 1999.

Instructions

1. Obligations on PRC members

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

- the Public Service Act 1999;
- the Public Service Regulations 1999;
- the Public Service Commissioner's Directions;
- these Merit Protection Commissioner's Instructions on procedures to be followed by PRCs;
- the principles of lawful administrative decision making, including procedural fairness;
- the Privacy Act 1988;
- 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 PRC members

A member of a PRC **must**:

- make any decision in accordance with the principles of lawful administrative decision-making;
- behave in a way which upholds the APS Values and which is consistent with the APS Code of Conduct in undertaking their duties as a PRC member;
- behave with impartiality and without unlawful discrimination towards the parties to the review;
- 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

- 1. 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.
- 2. 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 Committee.
- 3. Where a PRC member declines to continue as a member of a PRC, he or she must advise the Director Review and Casework in writing of the declination and the reasons for his or her withdrawal.
- 4. Where the PRC 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 Director Review and Casework. If the Director Review and Casework is not satisfied that the PRC member would be able to undertake his or her duties impartially, then either
 - a. the relevant agency head must be consulted and asked to nominate a new agency nominee in accordance with Regulation 5.11(1)(b)
 - b. a new APS employee must be nominated in accordance with Regulation 5.11(1)(c).

4. PRC member as a referee

- 1. A PRC member **must** not provide a reference for any party to the review.
- 2. A PRC member **must** declare to the PRC if he or she has been:
 - a referee for a party to the review, in support of their original application for the promotion; and/or
 - asked to be a referee for the purposes of the promotion review.
- 3. In the circumstances described in subparagraph 4(2), the PRC **must** decide whether the member should continue his or her membership of the PRC and **must** consult with the Director Review and Casework.

Note: The Merit Protection Commissioner has authorised the Director Review and Casework for the purpose of the consultation referred to in subparagraph 4(3) of these Instructions.

5. Obligations with respect to 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, or

divulge or communicate to any other person, except for the purposes of completing the review or as otherwise authorised by law, any information that was acquired while he or she was performing the duties as a PRC member.

Note: This obligation is contained in regulation 7.6 of the Regulations 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

- 1. A PRC **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 PRC **must** consult with the Director Review and Casework before the PRC decides on action to resolve the objection.

Note: The Merit Protection Commissioner has authorised the Director Review and Casework for the purposes of the consultation under subparagraph 6(3) of these Instructions.

7. Selection documentation

- 1. 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 for the duties of the relevant employment.
- 2. If a PRC considers that the work-related qualities genuinely required for 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.
- 3. Where a PRC considers that the work-related qualities genuinely required for 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:
 - comment; and
 - submit additional information on their claims to promotion.

8. Representation before a PRC

- 1. Where a person appearing before a PRC seeks to have representation, the PRC **must** refer the request to the Director Review and Casework.
- 2. The PRC **must** advise the affected employee of the decision in relation to their application for representation.

Note: Under regulation 5.14(2) a person appearing before a PRC 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 5.14(2) have been delegated to the Director Review and Casework.

9. Handling adverse information

- 1. 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.
- 2. 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.
- 3. a. Where the PRC:
 - 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 PRC **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.

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

10. Unavailability of PRC member

- 1. If a member of the PRC becomes unavailable, the PRC **must** advise the Director Review and Casework and the PRC is to be reconstituted following a nomination of a new member in accordance with regulation 5.11.
The PRC **must** inform the Director Review and Casework if the unavailability is likely to cause significant delay in finalising the review of the promotion decision.

Note: The Merit Protection Commissioner has authorised the Director Review and Casework for the purpose of the advice and consultation required in subparagraphs 10(1) and 10(2) of these Instructions.

11. Unavailability of party to the review

- 1. 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.
- 2. 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: By reasonable arrangements is meant 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.

12. Considerations other than relative merit

- 1. 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.

- 2. Where:
 - a. the PRC is advised that a consideration other than relative merit was taken into account in making the promotion decision; and
 - b. the PRC decides to take that consideration into account in making its decision; and
 - c. 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 him or her 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.