



## **Immigration Law Specialist Accreditation (NSW) Assessment Requirements 2010**

These notes should be read in conjunction with the Guide to Application and Assessment. They will assist practitioners interested in becoming accredited in Immigration Law to understand and prepare for the assessment process.

Included are:

- A** The performance standard which is the benchmark for competent practice in this area and the performance criteria which form the basis for the assessment
- B** A list of the core skills and areas of knowledge
- C** The methods and dates of assessment which applicants are required to undertake

## **A. PERFORMANCE STANDARD**

### **Standard of Accredited Specialist**

**(NOTE: THIS STANDARD IS APPLICABLE TO NSW CANDIDATES)**

The Standard of an Accredited Specialist in Immigration Law is that of a '*specialty competent practitioner*' in the core skills and practical capabilities in the selected area of practice, as assessed against the spectrum of capability of all practitioners in the area of immigration law. This standard is to be distinguished from the idea that the Scheme requires the highest technical legal knowledge across all aspects of the selected area of practice.

## **B. CORE SKILLS/PRACTICAL CAPABILITIES AND KNOWLEDGE AREAS**

Practitioners wishing to be accredited in Immigration Law should be able to:

- Display knowledge of the law and procedure which underpins the performance of tasks in this area of practice; and
- Demonstrate the following skills to the level of the performance standard

### **B.1 CORE SKILLS AND PRACTICAL CAPABILITIES**

#### **1. Take instructions and give initial advice by**

##### *1.1 Developing relationship with the client*

Through a broad knowledge of other cultures, world affairs and human experiences the specialist immigration law solicitor demonstrates an understanding of the issues and concerns particular to immigration clients. The solicitor adopts a non discriminatory, empathetic and ethical approach to encourage the client to give full instructions. The solicitor communicates with the client in plain language using interpreters effectively.

##### *1.2 Taking instructions*

The specialist immigration law solicitor works from a sound knowledge base including an understanding of all aspects of immigration law, policy, and departmental practices enabling the solicitor to identify relevant facts to question and to obtain the client's account of facts and his or her expectations. The solicitor adopts an ordered approach to eliciting information, checking with the client and the client's records to clarify data. The solicitor displays familiarity with appropriate documentation.

##### *1.3 Appraising the situation*

The specialist immigration law solicitor analyses the information provided by the client and identifies the relevant issues of fact, law and policy, and the extent to which these are clear and settled. The solicitor distinguishes realistic and unrealistic expectations and decides if the client's problems are capable of resolution. The solicitor identifies the immediately available options including appropriate legal and other courses of action. The solicitor communicates clearly to the client the factors relevant to choosing between available options and courses of action and the consequences of each including procedural requirements, time frames, costs and the dynamic nature of the law. The solicitor checks to ensure the client's understanding of the advice and reviews the resources available to the client to undertake the various options. The solicitor advises on and recommends interim actions in the light of the client responses.

#### 1.4 *Responding*

The specialist immigration law solicitor identifies matters of urgency and responds immediately with court or administrative action. In respect of other matters he or she responds promptly and as appropriate. At all times the solicitor acts in accordance with properly obtained instructions and keeps the client fully informed.

### **2. Research and investigate by**

#### 2.1 *Gathering information*

The specialist immigration law solicitor adopts an orderly and creative approach to gathering and assessing relevant information. The solicitor demonstrates an ability to communicate with a wide variety of people who may assist, and to access potential sources of information. The solicitor keeps a full and accurate record of the information obtained.

#### 2.2 *Analysing information obtained*

The specialist immigration law solicitor analyses the information provided by the client and obtained from third parties, including experts, government and non government agencies and through appropriate enquiry or investigation. The analysis of the facts involves a cross-referencing of documents and statements and obtaining relevant expert comment on the evidence. The solicitor also assesses the reliability of witnesses, the competence of experts as witnesses, the relative weight of evidence and, where necessary, determines what is admissible.

#### 2.3 *Determining legal issues*

The specialist immigration law solicitor recognises the legal issues arising from the facts and identifies the extent to which the legal principles are clear. The solicitor identifies areas where the law is unsettled or where arguments can be developed. The solicitor promptly and efficiently identifies the sources available to resolve legal issues, eg legal texts, law report, tribunal decisions, legislation, explanatory memoranda, departmental instructions, circulars and relevant databases. The solicitor determines whether to seek counsel's opinion on the legal issues and seeks appropriate instructions.

### **3. Develop a plan by**

#### 3.1 *Formulating options*

The specialist immigration law solicitor develops courses of action in the light of relevant legislation, case law, departmental practices and the client's instructions and circumstances. The solicitor displays a comprehensive knowledge of immigration law and related areas to identify all available options. Such options may include doing nothing; non legal action; applications to and negotiation with Department of Immigration and Citizenship (DIAC) and other agencies; tribunal and court action.

#### 3.2 *Advising client*

The specialist immigration law solicitor communicates clearly the possible courses of action open to the client and the procedures involved in each option. The solicitor clearly explains the legal and practical consequences of each option, the advantages and disadvantages and the extent to which each will achieve the client's objectives. The solicitor is aware of Legal Aid arrangements.

### 3.3 *Confirming instructions for action*

The specialist immigration law solicitor obtains feedback from the client on relevant issues, recommends the preferred option and determines with the client the plan to be implemented. The solicitor confirms very clearly the client's instructions, preferably in writing.

### 3.4 *Use of interpreters*

As required the specialist immigration law solicitor uses competent interpreters in clarifying instructions and confirm content with clients.

## **4. Implement plan by**

### 4.1 *Conducting negotiations*

When negotiating, the specialist immigration law solicitor assesses the client's eligibility and legal entitlements against the Department's position, and demonstrates an ability to put the client's case coherently and persuasively.

### 4.2 *Preparing written submissions to Department*

The specialist immigration law solicitor prepares submissions and documents which are clear, concise and comprehensive. Submissions, whether written or oral, summarise the relevant evidence and legal issues in a logical sequence, relate the evidence to the matters in issue, and emphasise key issues in a structured way. The solicitor prepares a plan for each submission to ensure all relevant matters are addressed, including: facts, law and policy, areas of discretion, previous decisions of Courts and Tribunals and their application to the client's case. The solicitor prepares submissions in a form which assists the decision maker's consideration of the case and argues the client's case persuasively. The solicitor is conscious of the parameters in which the decision maker operates.

### 4.3 *Preparing and conducting hearings*

The specialist immigration solicitor is familiar with the rules and practice of the courts and the relevant tribunals including Refugee Review Tribunal, Migration Review Tribunal and Administrative Appeals Tribunal. The solicitor operates effectively within the framework of the non adversarial jurisdictions. The solicitor initiates proceedings and prepares supporting documentation, including submissions, statements, declarations and affidavits. The solicitor conducts interlocutory procedures and where necessary advises on appeals.

### 4.4 *Briefing counsel*

The specialist immigration law solicitor considers when to brief counsel, having regard to the nature and the complexity of the issues and the likelihood of success. The solicitor chooses the appropriate barrister for the matter, and knows when the registration requirements are involved. An instructing solicitor understands the relationship between barrister and client and plays an active role in the conduct and management of the case and acts as liaison between the barrister and the client.

### 4.5 *Acting as advocate*

When appearing the specialist immigration law solicitor is well prepared, organised, clear and effective with the ability to think quickly on his or her feet. The solicitor tries to achieve the best result having regard to the client's instructions and the limits of the law and the remedies available. The solicitor prepares the client and witnesses to give evidence and may prepare written material for tender. The solicitor operates effectively within the non adversarial system and demonstrates a knowledge of the rules of evidence and the rules of natural justice and other administrative law principles as well as current legal principles and case law that apply to the case.

#### 4.6 *Managing the plan*

The specialist immigration law solicitor constantly reviews the plan in the light of changing circumstances in particular resulting from clarification or changes in the position of the other parties; procedural requirements, information gained, judicial or arbitral decisions, actual or proposed legislative changes. The solicitor informs the client of any changes and explains their impact on the plan, any variation in prospects and the impact on costs.

#### 4.7 *Finalising the matter*

The specialist immigration law solicitor ensures all necessary documentation and correspondence are prepared and processed. The solicitor advises, as to the outcome of the matter, any further work required on the case and how to meet any obligations arising therefrom, including payments of any outstanding accounts and expenses.

## **B. 2 KNOWLEDGE AREAS**

Please note the following knowledge which underpins the performance of the specified tasks.

Any of the matters listed here could be addressed in the assessment program.

Reference has not been made to any specific cases but practitioners are expected to have working knowledge of leading cases in these areas of law.

### **1. Fundamental Principles**

- Constitutional basis for migration law and citizenship law
- Legislative framework: Act, Regulations, Policy (PAM & MSIs); implications of a codified system of entry, policy including directions under s.499
- Basic principles of administrative law including:
  - Rules of procedural fairness and natural justice
  - Concepts of jurisdictional error
  - Concept of ultra vires
  - Access to information (FOI and reasons)
  - Distinguishing merits and judicial review
  - Choice of remedy
- Changes in the law and determining what law applies at a particular time including transitional arrangements
- Definitions contained in the Migration Act and Regulations and other relevant laws and Conventions (including international law)
- Registration of migration agents
- Relevant merits and judicial review decisions

### **2. Requirements relevant to more than one class of visa**

#### *2.1 General requirements*

- Classes and subclasses of visas
- Schedules 1- 9
- Resident return visas
- Conditions of visas
- Criteria at time of application and decision
- Requirements of a valid application
- Codes of procedure for dealing with visa applications including time limits
- Lodgement of applications (different venues) and internet applications
- Exclusion periods
- Evidencing of visas
- Period of validity of visas
- Settlement criteria

- Sponsorship
- Limitations on sponsorship including
  - Partner and family related
  - Guardianship of children
  - Business sponsorship
- Assurance of support
- Capping
- Time limits for lodgement of primary applications and review applications
- Requirements of a valid decision and valid notification
- Immigration clearance procedures
- Family unit and secondary applicants

## 2.2 *Public interest criteria schedule 4 /schedule 5*

- Health criteria
  - Applicability of waiver
  - Role of the Medical Officer of the Commonwealth
  - Scope of the review authority of MOC's opinion
- Character requirement
- Settlement criteria
- Debts due to the Commonwealth
- Migration related debts (removal/detention)
- Other debts
- Applicability of the Financial Management and Accountability Act 1997 (provision for waiving debts)
- Risk factor profiles
- National interest consideration
- Exclusion periods & waiver requirements

## 2.3 *Points tests and skills determination*

- General points test and sections 92-96
- Application of transitional arrangements
- Schedule 6, 6A & 6B, allocation of points, definitions, pass and pool marks, combination of scores, nominated skilled occupation,
- Assessment of applicable criteria at time of application and decision
- Regulations 2.26 - 2.29K, allocation of points, applications including publications relevant to skills assessment: ASCO, ANSZCO, PAM, NOOSR Country Education Profiles
- Guidelines of "relevant assessing authorities"
- Business skills points test, regulation 2.29 and Schedule 7
- Migration Occupations in Demand List and Critical Skills List (CSL)
- Skilled Occupation List (SOL) and other skilled lists

### **3. Migrant entry (provisional and permanent**

- Family: partner, child, parent, orphan relative, remaining relative, adoption, carer other family.
- Skilled categories (pre and post 1 September 2007):
  - Independent
  - Family sponsored (provisional and permanent)
  - State/territory nominated (provisional and permanent)
  - Students
  - Skill matching
- Employer Nomination Scheme - approved appointments Regulation 5.19
- Labour market agreement
- Business skills and post settlement business surveys
- Distinguished talent
- NZ citizens
- Special categories including:
  - Former citizen
  - Former resident
- Quotas, capping and priorities
- Relevant merits and judicial review decisions

### **4. Temporary entry**

- Visitors
- Students
- Temporary residents
- Working holiday
- Dependant children
- New Zealand citizens – pre and post 26 February 2001
- Business
- Nomination of 457 visa holders
- Miscellaneous temporary entry categories eg. Medical treatment, transit, occupational
- Occupational trainee
- Criminal justice and enforcement
- Retirement
- Investor retirement

### **5. Change of status**

- General issues
  - Choice of visa subclass
  - Limitation on applications eg. (schedules 3, 4 and 8, SS S48, 48A, 48B
  - Substantive visa requirement
  - Family violence and other exemption provisions
  -

- Partner
- Permanent visas (based on) family relationships
- Occupational and business grounds
- Close ties (schedule 2, clause 832)
- Refugee and humanitarian “Temporary Protection & Humanitarian visa holders - applications for other visas (Reg.2.07 AO)”
- Act based visas including:
  - Absorbed person
  - Special purpose
  - Criminal justice
- Employer nomination
  - Nomination process under the Subclass 457 visa program
- Business skills
- Temporary visas
  - Temporary resident
  - Student
  - Visitor
- Unlawful non-citizens
  - Schedule 3 criteria
- Processing of applications
  - Change of conditions
- Bridging visas
- No further stay conditions and provisions for waiver

## **6. Refugee and humanitarian entry**

- General
  - U.N. Convention, Protocol and other international human rights instruments
  - Definition of “refugee” as modified by legislation and judicial interpretation
  - Stateless persons
  - Excised offshore places
- Offshore
  - Offshore entry persons
  - Refugee subclass 200
  - Special humanitarian programs subclass 201-204
- Onshore
  - Temporary humanitarian
  - Temporary safe haven
  - Transitory person
  - Return pending visa
  - Complementary protection
  - Trafficking
  - Resolution of status visa (s851)
- Ministerial power under s48B

## **7. Detention, Cancellation and Compliance**

- Powers of entry, search and questioning
  - Site visit guidelines
- Mandatory detention of unlawful non-citizens
- Release from detention
  - Bridging visas
  - Wrongful detention
  - Ombudsman review of detention
- Mandatory removal of unlawful non citizens
  - Costs of detention, removal and deportation, recovery
- Offences under the Migration Act including employer sanctions
- Powers and procedures of cancellation: Division 3, subdivisions C-H, *Migration Act*;
  - Incorrect information s109
  - General s116, s128
  - Business visas s134
  - Business sponsorship s137A
  - Student visas s137J
  - Regional sponsorship employment visas s137Q
  - General cancellation power s140
- Character s501 and s502
  - Refusals (including refusals by the Minister personally)
  - Cancellations (including refusals by the Minister personally)
  - Review by the AAT
- Departmental revocation of automatic cancellation of student visas under s137J
- Criminal deportation

## **8.1 Choice of remedy – Avenues of Appeal and Review**

### *8.1.1 Merits review*

- Definition of MRT and RRT reviewable decisions
- Role, powers and policies of the MRT and RRT
- Review powers and jurisdiction of the AAT
- Time limits
  - Detainees
  - Non detainees
- Ministerial discretion
  - Requests to the Minister seeking his/her personal intervention under sections 137N, 345, 351, 391, 417, 454
  - Ministerial override of character decision by delegate or AAT under ss 501A, 501B and 501C
- Relevant merits and judicial review decisions

### 8.1.2 *Judicial review*

- Definition of judicially reviewable decision
- The privative clause
- Grounds of judicial review
- Time limits
- Legal and ethical considerations and unmeritorious applications
- 'Reasonable prospects of success'
- Powers of the Federal Court, Federal Magistrates Court and High Court
- Role of High Court
- Relevant merits and judicial review decisions

## **9. Citizenship**

- Australian Citizenship Act 2007
  - Transitional provisions
- Acquisition of citizenship
  - by birth
  - by adoption
  - by conferral
  - by descent
- Australian Declaratory Visa
- Dual citizenship
- Loss and resumption of citizenship
- Character issues
- Review of decisions
- Offences

## **10. Responsibilities of a Lawyer**

- Professional Conduct and Practice Rules
- Assisting in completing applications
- Solicitor's responsibilities for bona fides of applications
- Issues of privilege
- Conflict of interest
- Solicitors lien on documents
- Use of solicitor's trust account
- Relevant merits and judicial review decisions
- Legal Profession Legislation
- Trust Accounting
- Insurance
- Ethics

## **11. Regulation of Migration Agents**

- O'MARA's powers
- Appeal Rights
- Migration Agent Regulations – Code of Conduct
- Continual Professional Development (CPD) requirements
- Complaints/ malpractice processes

## **12. Other issues**

- Freedom of information
- Legal Aid and Pro Bono Scheme
- Alternative avenues of redress
  - Australian Human Rights Commission (AHRC formerly HREOC)
  - Ombudsman
- Privacy Commissioner
- Appeal rights under relevant international instruments

## B.2.2 Core Legislation

Candidates can expect the assessment program to draw upon knowledge of any of the following acts and relevant regulations.

- *Administrative Decisions (Judicial Review) Act 1977* and Regulations
- All Migration Regulations from December 1989
- *Australian Citizenship Act 1948* and Regulations
- Commonwealth Gazette Notices
- Convention Relating to the Status of Refugees 1951 and the Protocol.
- Convention on the Rights of Persons with Disability and Protocol
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Protocol.
- Declaration and Convention on the Rights of the Child and the Protocol
- *Education Services for Overseas Students Act 2000* and Regulations
- *Electronic Transactions Act 1999*
- *Federal Court Act 1976* and Rules
- *Federal Magistrates Court Act 1999* and Rules
- *Freedom of Information Act 1982*
- *Health Insurance Act*
- International Covenant on Civil and Political Rights and Protocol
- *Human Rights and Equal Opportunity Commission Act 1986*
- *Judiciary Act 1901*
- *Migration Act 1958* as amended
- Migration Agent Regulations (1998)
- *Migration Reform (Transitional Provisions) Regulations*
- *Migration (Visa application) Charge Act 1997*
- *Ombudsman Act 1976*
- *Passports Act 1938* and Regulations
- *Race Discrimination Act 1975*
- *Sex Discrimination Act 1984*
- *Social Security Act 1991*
- Other relevant International Instruments

## B.2.3 Further Reading

Note: There are a number of texts available about refugee law, but Immigration texts in relation to immigration practice are few. Candidates should assume that the knowledge areas to be assessed will be weighted proportionately to the emphasis given in paragraphs 1-13 above.

Candidates may find it useful to refer to the following texts:

IARC, *The Immigration Kit* 8<sup>th</sup> Edition (Sydney: the Federation Press)

Crock M, Saul B, Dastyari A, *Refugees and Irregular Migration in Australia* (Sydney: Federation Press 2006).

Germov, R and Motta , A. *Refugee Law in Australia* (Melbourne: OUP 2003)

Goddard, J et al. *Australian Immigration Law* (loose leaf service). Sydney. Butterworths

Goodwin-Gill, G and McAdam, J *The Refugee in International Law* 3<sup>rd</sup> ed (London: Clarendon Press, 2007).

Hathaway, J.C. *The Law of Refugee Status*. (Toronto: Butterworths, 1991).

Hathaway, J.C. *The Rights of Refugees Under International Law* (Toronto: Butterworths, 2006).

Rubenstein K, *Australian Citizenship Law in Context* Law Book Company 2003

Vrachnis J, Boyd, K, Bagaric, M and Dimopoulos, P *Migration and Refugee Law: Principles and Practice in Australia*, 2<sup>nd</sup> ed (Melbourne: Cambridge University Press, 2007)

#### Other References

Legend.com online service run by Department of immigration, available by subscription.

Department of Immigration and Multicultural and Indigenous Affairs publications

Australian Citizenship Instructions  
The Procedures Advice Manual  
Policy Control Instructions MSI's  
Administrative Circulars

The Migration Review Tribunal practice notes.

RRT Decision Bulletins and practice notes

Australian Bureau of Statistics, *Australian Standard Classification of Occupations* (ASCO Dictionary) (2nd edition)

Useful websites:      [www.austlii.edu.au](http://www.austlii.edu.au)                      [www.immi.gov.au](http://www.immi.gov.au)  
                                 [www.comlaw.gov.au](http://www.comlaw.gov.au)

All relevant NOOSR publications.

## C. METHODS OF ASSESSMENT

(NOTE: the following methods of assessment are applicable to all NSW candidates)

### MOCK FILE

Candidates will be required to complete specific tasks on a mock file, including the preparation of legal advice, court documents and presentation of various options to the client. Candidates may use the resources of their offices in completing this exercise. However consultation with any other person in completing the exercise is not permitted.

**Distribution Date:** Wednesday, 26 May 2010  
**Return Date:** Wednesday, 16 June 2010

### Assessment criteria

In your response to the Mock File you will be assessed on the following performance criteria. You will be required to perform each criterion to the level of the performance standard.

- (a) Ability to identify relevant issues from a given fact situation
- (b) Depth of knowledge of the law and skill in applying that knowledge to the given fact situation
- (c) Knowledge of procedural rules and practices
- (d) Ability to provide practical, clear and accurate advice
- (e) Use of clear English expression.

### WRITTEN EXAMINATION

The examination will be open book and candidates may take into the examination room any books, notes or other written material. The exam will be three hours in duration with reading time of thirty minutes.

The paper will test knowledge of procedure and rules as well as the ability to apply relevant knowledge to situations encountered in practice.

The examination paper will be in three sections:

**Section A** - 15 questions worth 2 marks each.  
**Section B** - 6 questions worth 5 marks each.

These sections will contain questions requiring brief answers. The questions will cover a wide range of migration and citizenship topics drawn from the list of topics for assessment. The emphasis in this section is on knowledge of fundamental legislation, regulations and procedures.

**Section C** - 2 questions worth 20 marks each.

This section will present candidates with more complex fact situations in which expert legal advice might be sought.

**Date:** Saturday, 31 July 2010  
**Venue:** College of Law, 2 Chandos Street, St Leonards

### **Assessment criteria**

In your response you will be assessed on the following performance criteria. You will be required to perform each criterion to the level of the performance standard.

- (a) Identify correct and accurate knowledge of law
- (b) Ability and identify relevant issues given I the fact situation
- (c) Ability to provide concise and clear advice
- (d) Use of clear English expression

### **CLIENT SIMULATION**

Candidates will be asked to conduct a simulated first interview with a person acting in the role of a client. The interview will take up to 60 minutes and will be videotaped for assessment by the examiners.

At the conclusion of the interview, candidates will be given 10 minutes to prepare a brief file note which records in point form the steps to be taken following the interview. This file note will be assessed by the examiners in conjunction with the videotaped interview.

The time allocated for the interview and writing up of the file notes will be strictly enforced.

**Date: Sunday, 1 August 2010**  
**Venue: College of Law, 2 Chandos Street, St Leonards**

Applicants will be notified of the time in mid July.

### **Assessment criteria**

In your response you will be assessed on the following performance criteria. You will be required to perform each criterion to the level of the performance standard.

- (a) Elicit relevant information and facts from the client
- (b) Obtain and clarify instructions
- (c) Identify relevant issues
- (d) Communicate clearly with the client in plain English
- (e) Assess facts and legal options
- (f) Indicate procedural steps and timelines for responses
- (g) Develop an appropriate action plan
- (h) Consideration of ethical and cost issues
- (i) Awareness of cross cultural and human right considerations

## **IMMIGRATION LAW ADVISORY COMMITTEE 2010**

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