

Specialist Accreditation Scheme



2020 Dispute Resolution Assessment Requirements



THE LAW SOCIETY
OF NEW SOUTH WALES



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Introduction

These notes should be read in conjunction with the **2020 Guide to Application and Assessment**. They will assist practitioners interested in becoming accredited in Dispute Resolution Law to understand and prepare for the assessment process.

Included are:

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

Dispute resolution specialist

Specialist Accreditation in Dispute Resolution assesses candidates as a Representative of parties in dispute. It is aimed at lawyers who represent clients in dispute resolution processes as part of their legal practice.

Candidates are expected to be specially competent in the core skills and capabilities, general knowledge and processes required of Representatives of parties in dispute.

General knowledge and processes

All candidates are expected to demonstrate that they are a 'specially competent practitioner' in the non-adversarial, problem-solving processes that are commonly required under legislation and model litigant guidelines, such as court-ordered mediation, interest-based negotiation, pre-action protocols, mandatory pre-litigation mediations, conciliation conferences and neutral evaluations.

It also covers the less adversarial decision-making processes such as post-litigation mediation, statutory conciliation, settlement conferences, expert determination, and hybrid processes such as concilio-arb and med-arb, which are specific to a number of tribunals and commissions.

In addition to the above shared general knowledge and processes, it also includes specialist jurisdictional processes such as:

- Collaborative Law; and
- Evaluative Mediation.



Timetable

The shaded area below shows the core assessment period including the dates associated with each assessment.

Candidates need to focus on this core assessment timeframe, planning their workload well in advance, accordingly.

Based on feedback reports from previous years, candidates are encouraged to dedicate and manage their time during this period to optimise their performance across all assessment tasks.

Candidates are reminded that participating in the Specialist Accreditation program requires a considerable level of commitment if candidates are to achieve their desired outcome.

| Activity | Date |
|---|---|
| Question & Answer sessions for potential candidates | 3 – 5 March 2020 |
| Applications for Specialist Accreditation close | 27 March 2020 |
| Candidature confirmed | Week commencing 4 May 2020 |
| Take Home Assessment | Released: 13 May 2020 Due: 3 June 2020 |
| Formal Written Examination | Saturday, 25 July 2020 |
| Peer Interview | Sunday, 26 July 2020 |
| Results released to candidates | Early October 2020 |
| Reassessment and/or Appeal applications close | 14 days from notification of results |
| Reassessment results released | December 2020 |
| Appeal results released | December 2020 |



A. Performance standard

Standard of Accredited Specialist

The Standard of an Accredited Specialist in Dispute Resolution is that of a '*specially 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 that area of practice. 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 and capabilities

Candidates wishing to be accredited in Dispute Resolution should be able to:

- Display knowledge of the law and procedure which underpins the performance of tasks in their area of practice; and
- Demonstrate the following professional core skills and capabilities to the level of the performance standard of a specially competent practitioner:

1. Assessing the suitability of an individual case for the appropriate dispute resolution process

- Taking instructions from the client;
- Identifying the client's personal, commercial or other goals;
- Information gathering and analysis of the dispute;
- Case preparation and risk assessment;
- Assessing capabilities of client and conflict management history;
- Identifying and understanding client needs and interests;
- Choosing appropriate processes and timing of processes to support resolution; and
- Engaging with other practitioners and parties to support best dispute resolution practice.

2. Advising a client

- Legal advice;
- Dispute resolution process options and selection of appropriate process;
- Risk assessment and case analysis;
- Reasons for process recommendation:
 - When dispute resolution process is mandatory; and
 - When dispute resolution process is voluntary;
- Negotiation planning, advising as to conduct of the process;
- Preparing for participation in dispute resolution processes.



3. Selection of a dispute resolution practitioner (Third Party Neutral)

- Relevant considerations when nominating appropriate dispute resolution practitioner, including qualifications and experience and cost.

4. Preparing for the dispute resolution process

- Preparing for the process including preparation of necessary documents;
- Preparing the case;
- Prior exchange of information / documents;
- Preparing the client for participation in the dispute resolution process;
- Preparing problem-solving strategy especially in regard to the client's interests, options, BATNA and standards of legitimacy;
- Preparing personally to advise, support and /or represent the client in the process; and
- Managing client expectations.

5. Involvement in the dispute resolution process

- Understanding the role of legal representative as dispute resolution advocate;
- Contributions of legal representative and client at each stage in process; and
- Demonstrated skills in negotiation, advocacy and dealing with difficult behaviours from the client, other party or lawyer.

6. Formalising the agreement

- Including (where appropriate) recording the agreement, including preparation of deeds, heads of agreement, undertakings and/or court documents.

7. Professional obligations in connection with the dispute resolution process

8. Post-process advocacy

- Support and ongoing representation including strategy if process does not result in agreement or resolution;
- Assessment and evaluation of the process, including (where appropriate) the dispute resolution practitioner;
- Lodgement or filing of documents (where appropriate); and
- Monitoring performance of agreement (where appropriate).

9. Understanding the role and skill of the dispute resolution practitioner.

For example:

- Behaving in a non-confrontational manner
- Using appropriate strategies in joint and private sessions;
- Focusing parties on a problem-solving approach; and
- Decision facilitator not decision maker.

C. General knowledge, processes, skills & ethics

1. General knowledge

The following knowledge underpins the performance of any aspect of dispute resolution:

- The principles of dispute resolution;
- The place of dispute resolution in the justice system;
- The range of dispute resolution processes being used and a familiarity with the model adaptations of these processes;
- The stages of the most common dispute resolution processes and their purposes;
- The communication techniques and skills that can be effectively employed by both legal representatives and dispute resolution practitioners in dispute resolution processes; and
- The models of negotiation, their purposes and uses in dispute resolution.

2. General process knowledge

- The advantages and limitations of the major dispute resolution processes;
- Criteria for entering the processes;
- Pre-process preparation, screening / intake and risk assessment;
- The nature of conflict, including the dynamics of power and violence;
- Communication patterns in conflict and negotiation situations;
- The principles, stages and functions of dispute resolution processes:
- Information gathering;
- Presentation of information;
- Distilling issues;
- Analysis and evaluation of all elements of the case;
- Reasoning and timing;
- Discussion / argument / negotiation;
- Negotiation dynamics and how they function in dispute resolution processes;
- Cultural issues in dispute resolution processes;
- The roles and functions of dispute resolution practitioners in dispute resolution processes;
- The qualities of dispute resolution practitioners that enhance the conduct of a dispute resolution process;
- The roles and functions of legal representatives, support persons and other professionals in dispute resolution processes;
- Awareness of clients understanding of the dispute resolution process that is chosen or ordered; and
- The law pertaining to confidentiality, enforceability of settled outcomes and the liability of the legal representatives and dispute resolution practitioners.

3. General core skills

- Dispute diagnosis, planning and preparation;
- Intake and screening of both the client and the dispute to assess suitability for a dispute resolution process;
- Collection and use of information;
- Analysis and definition of the issues in dispute;



- Conduct and management of the dispute resolution process;
- Appropriate communication skills, including active listening, questioning, reframing, reflecting and summarising;
- Negotiating techniques and the facilitation of negotiation, problem-solving and decision making;
- Understanding potential and possible responses to high emotion, power imbalances and common difficulties in the process;
- Awareness of the legal representatives own value system and an appreciation of its potential impact in a dispute resolution process;
- Use and function of joint and separate meetings/ sessions and shuttle negotiations;
- Reality checking settlement options / offers;
- Drawing up / drafting the final process outcome; and
- Concluding the process.

4. General core ethics

- Conflicts of interest;
- Marketing and advertising of services;
- Confidentiality, privacy and reporting obligations;
- Lack of bias obligations – neutrality and impartiality;
- Fiduciary obligations;
- Fairness and Equity in dispute resolution processes;
- Withdrawal from / termination of a dispute resolution process; and
- Awareness of and commitment to the uniform solicitors' rules.



D. Legislation

Candidates are expected to be aware of relevant legislation in their chosen area. The following are sources of law which include but are not limited to:

1. Core legislation, regulation and rules

- *Legal Profession Uniform Law*
- *Legal Profession Uniform Regulations 2015*
- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*

2. Legislation, regulation, rules and practice notes applicable to specific jurisdiction

For example:

- *Civil Procedure Act 2005 (NSW)*
- *Uniform Civil Procedure Rules 2005 (NSW)*
- Supreme Court Practice Note 118, Mediation
- *Civil Dispute Resolution Act 2011 (Cth)*
- *Federal Court of Australia Act 1976 (Cth)* Part VI ss. 53A,53B and 53C

3. Legislation, regulation, rules and practice notes applicable to mandatory dispute resolution processes

For example:

- *Native Title Act 1993 (Cth)*
- *Farm Debt Mediation Act 1994 (NSW)* as amended 2002, Parts 2,3,4 & Schedule 1
- *Civil and Administrative Tribunal Act 2013 (NSW)*



E. Recommended reading and resources

The following materials is a suggested list only. Candidates are encouraged to undertake their own research in this area of law using a variety of digital and print mediums (being careful to ensure the sources reflect the current status of the law).

Alexander, N; J Howieson; K Fox, *Negotiation - Strategy, Style, Skills* (Lexis Nexis Butterworths, 3rd ed, 2015)

Fisher, R, and W Ury, *Getting to Yes: Negotiating an Agreement Without Giving In*, (Random House, 2012)

Hardy, S and Rundle, O, *Mediation for Lawyers* (Sydney, CCH Australia: 2010)

Law Council of Australia, *Guidelines for Lawyers in Mediations*, online (2011)

Law Society of NSW, ADR website: <https://www.lawsociety.com.au/practising-law-in-NSW/working-as-a-solicitor-in-NSW/alternative-dispute-resolution>

NMAS Approval Standards and Practice Standards – www.msb.org.au

Sourdin, T. M, *Alternative Dispute Resolution*, Fifth Edition, Law Book Co of Australasia 2016

Spencer, David and Hardy, Samantha *Dispute Resolution in Australia. Cases, Commentary and Materials* Third Edition, Lawbook Co Casebook 2014

Boulle, Laurence and Field, Rachael *Australian Dispute Resolution. Law and Practice* Lexis Nexis Butterworths Australia 2017



F. Methods of assessment

1. Take Home Assessment (Mock File)

Candidates will be given a factual scenario and will be required to prepare a detailed written plan for the carriage of the matter.

Release date: 10am, Wednesday, 13th May 2020

Due date: 4pm, Wednesday, 3rd June 2020

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) Depth of knowledge of the theoretical principles and concepts of dispute resolution;
- b) Understanding the function and purpose of the stages of dispute resolution processes;
- c) Depth of knowledge of skills relevant to dispute resolution practice;
- d) Knowledge of procedural rules, practice and professional and ethical issues;
- e) Practical application of the aforementioned criteria (a to d) to the scenario.

2. Formal Written Examination

Candidates are required to sit a formal written examination.

The test will take the form of short and long answer questions. These will cover the general core areas of knowledge and performance standards.

The test will be open book and 3 hours in duration with thirty minutes reading time.

Date: Saturday, 25th July 2020*

Venue: TBC

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) Knowledge of relevant law and procedure;
- b) Ability to identify relevant issues;
- c) Ability to provide concise and clear answers.

*Candidates will be advised of the written examination time closer to the date.



3. Peer Interview

Candidates will participate in a peer interview conducted by a panel of two assessors for up to 60 minutes. The interview will take the form of a discussion of selected issues arising from the Take Home Assessment and may include identifying options, practical application of knowledge and dispute resolution techniques, and providing comment on a short vignette of a selected dispute resolution episode to be provided on the day by The Law Society of New South Wales. The interview will be recorded for assessment purposes.

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) Ability to prepare for a dispute resolution process;
- b) Ability to prepare and support a client in a dispute resolution process;
- c) Ability to demonstrate the requisite, skills, knowledge and approach of dispute resolution advocacy;
- d) Ability to give advice and select appropriate process and dispute resolution practitioner.

Date: Sunday, 26th July 2020*

Venue: The Law Society of New South Wales

*Candidates will be advised of their peer interview time closer to the date.

END