



Positive Changes to Australian Migration Laws were Short Lived

You may recall an article in the November edition of *Talkabout* where I was gushing about the small but positive changes to the health criteria which would mean such conditions as HIV would not be a barrier to obtaining a temporary visa. Unfortunately we were a tad premature in this announcement as, no sooner had the ink hit the paper than did the Department of Immigration notice what they term ‘an unintended consequence’¹ of the regulations.

Just to recap from the previous article - all Australian visas are subject to health criteria. Some temporary and all permanent visa applicants have to undergo health checks, which may include an HIV test. Applicants² are assessed against three main points. The first two are that they are not ‘a threat to public health or a danger to the community’ or have ‘a condition that would prejudice access to health care or community services’. Neither of these are ordinarily applicable to people with HIV.

The third point is a cost consideration, which is applicable to people with HIV.

Many temporary applicants and all permanent applicants who test positive for HIV will be deemed Medical Officer of the Commonwealth (MOC) to be a ‘significant cost to the Australian community in terms of health care and community services’ [the costing]³. Being assessed as a ‘significant cost’ means failing the health criteria.

The mid 2011 change essentially meant that ARVs (anti-retrovirals) and medical care and follow up for HIV positive temporary visa applicants would not be included in the costing as they could not be accessed via Medicare. However, this changed at the end of 2011 to (re)include in the costing pharmaceuticals listed under the Pharmaceuticals Benefits Scheme (PBS) that if ceased would be seriously detrimental to the applicant’s life or wellbeing. Accordingly ARVs were written back into the costing consideration.

The rationale behind the ‘retraction’ was because “it is possible that certain temporary visa applicants with diseases or medical conditions could access health care or community services even if they are not eligible for them. This might occur, for example, because a hospital will not refuse to provide medical treatment to people who require

it. As these cases would result in a cost to the Australian community, it is reasonable that these costs should be taken into account by a MOC when assessing the applicant against the health criteria.”⁴

Unfortunately, the net outcome from this reversal in the Regulations is that HIV positive temporary visa applicants continue to face discrimination by the Department even when they cannot access free medical services. Recently HALC assisted clients in two cases which highlight the unfairness of this situation. One was a pregnant HIV positive skilled migrant who because she was not Medicare eligible was turned away from three hospitals before she found one who would deliver her baby without concern over mother to child transmission, despite her paying for all medication herself and her indicating that she could pay in advance of the delivery of the baby. Another was an HIV positive student from Zimbabwe who was encouraged to return home after diagnosis because he wasn’t Medicare eligible, despite his paying to import his ARVs from abroad.

In 2011 I wrote about how from HALC’s experience HIV positive applicants are more often than not of benefit to the Australian community and can easily offset any costs to the Australian community. However, this revision of the Migration Regulations means that HIV positive applicants will continue to be discriminated against when endeavouring to study, work or visit Australia without regards to whether or not they can or will access medical care or consideration of their benefit to the Australian community. **Alexandra Stratigos, HIV/AIDS Legal Centre**

The information contained in this document is current as at 12 June 2012, and should not be used as a substitute for legal advice. If you have any questions about positive migration, contact HALC on (02) 9206 2060.

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1 Explanatory Statement to the Migration Legislation Amendment Regulations 2011 (No.6) (Cth)

2 Applies to all applicants with the exception of Medical Treatment Visas, where the applicant is seeking medical treatment (as opposed to a support person), and Protection Visas (on-shore refugees), in these circumstances an altered health criteria is applied.

3 sub sub-paragraph (1)(c)(ii)(A) of Sch4005/4006/4007 of the Migration Regulations 1994 (Cth)

4 Explanatory Statement to the Migration Legislation Amendment Regulations 2011 (No.6) (Cth)