Community Legal Centres NSW

25 July 2011

The Hon Chris Bowen MP
Minister for Immigration and Citizenship
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Dear Minister,

Community Legal Centres NSW is the peak body for 40 community legal centres across NSW. Community legal centres provide a variety of free legal services to disadvantaged clients and communities including legal advice, casework, community legal education, law reform activities and referrals.

We draw your attention to *Migration Amendment Regulation 2011 (No 4)* and call for this regulation to be disallowed. The regulation, made on 30 June 2011 and taking effect on 1 July 2011, introduces a serious financial barrier to access to justice for people who are experiencing financial hardship.

In particular, it reduces access to merits review of Department of Immigration & Citizenship (DIAC) decisions to refuse or cancel a visa. Such decisions have a major impact upon the lives of the individuals concerned (whether a visa applicant, visa holder, or their Australian sponsor). An opportunity for merits review of such decisions is fundamental to ensuring that justice is done, and seen to be done.

Furthermore, this reduction in access to merits review, for people facing severe financial hardship, is not compatible with the *Strategic Framework for Access to Justice in the Federal Civil Justice System*, commissioned and adopted by the Government in 2009.[1]

[1] Available at http://www.accesstojustice.gov.au/agnet/accesstojustice.nsf/pages/accesstojustice.html

Community Legal Centres NSW
State Office c17, 99 Jones Street Ultimo NSW 2007 Australia
Phone 02 9212 7333 **Fax** 02 9212 7332 **Email** clcnsw@clc.net.au **Website** www.clcnsw.org.au

What does the *Migration Amendment Regulation 2011 (No 4)* do?

Until 1 July, the Migration Review Tribunal (**MRT)** had the power to waive the application fee for merits review, if satisfied that "payment of the fee has caused, or it likely to cause, severe financial hardship to the review applicant".[2]

From 1 July, this power has been removed by *Migration Amendment Regulation 2011 (No 4)*. As a result of this regulation the MRT can only reduce the fee by 50% if satisfied that the payment of $1540 would cause severe financial hardship to the review applicant. The person facing severe financial hardship still has to pay $770 to access merits review.

Without the fee, the application will be invalid. This amendment will result in a significant number of vulnerable people being unable to access merits review, as they cannot raise the $770.[3]

Who does the abolition of MRT fee waivers affect?

The abolition of fee waivers will adversely affect people experiencing financial hardship, who wish to seek review of those DIAC decisions that can be reviewed by the MRT.

The MRT has power to review decisions relating to a wide range of visas, including family category visas (child visas, partner visas, carer visas etc); visitor visas; some economic category visas; onshore student visas; bridging visas etc.

The inability to waive the MRT fee will adversely affect Australian citizens and permanent residents, as well as people trying to obtain or retain a variety of permanent and temporary visas. It will no doubt affect some of your constituents.

For example, it will affect:
1) People who have come to Australia on temporary partner visas, who have ended the relationship with their Australian partner / sponsor, having suffered from domestic violence.
2) Australian citizens or permanent residents with serious medical conditions / disabilities, and in need of care, who are trying to sponsor a relative for a Carer visa.

Two examples, below, show how such people will be affected, and the unjust ramifications of this change.

---

[2] A separate regulation - *Migration Legislation Amendment Regulations 2011 (No 1)* – increased the MRT application fee from $1400 to $1540, effective 1 July 2011.

[3] In 2010-2011, the MRT processed 1009 "Fee Waivers". Of these, 511 fee waivers were granted. The total number of applications for merits review by the MRT lodged in 2010-2011 was 10, 314. Details from *MRT – RRT Caseload Report: Detailed Statistics 2010-11* (found at: http://www.mrt-rrt.gov.au/Conduct-of-reviews/Conduct-of-reviews/default.aspx#stats) plus email from Tina Edwards, acting Executive Officer, MRT, to Roxana Zulfacar, 14 July 2011.

Example 1 – Victim of Domestic Violence

Laila separated from her Australian-citizen husband due to serious domestic violence, and is staying on her cousin's couch. She had been married for 3 years, and living in Australia for 15 months. Laila is 8 months pregnant, and during a visit to the GP, the GP had questioned her about bruising and Laila had explained her fear of her husband. Laila also disclosed the domestic violence to her one cousin in Australia, and a migrant support worker, but not to the police.

Despite some casual work, Laila has no savings. As the holder of a temporary partner visa, Laila is not eligible for ongoing Centrelink payments. Her family overseas are very upset that she is pregnant and separated. They are not offering her support, and have warned her not to return to them.

Wanting to remain in Australia, she contacted DIAC. She was told that there are domestic violence provisions for the type of visa she held: she told to submit evidence of the domestic violence. Laila did not receive any professional migration advice and submitted statutory declarations from her cousin, her neighbour, and the migrant support worker. She did not ask her GP, as she could not afford the GP's consultation fee at the time. DIAC refused her visa application on the basis that the statutory declarations were not made by the approved "competent persons" (only declarations from certain professionals are accepted).

Laila sought advice from a community legal centre. She was advised about the exact form of evidence required, and that she should apply to the MRT for review, where she could submit the appropriate evidence and had a good chance of success.

However, Laila does not have $1540, nor $770, so she cannot apply to the MRT. She will be denied merits review merely for financial reasons, and is left with stark options:
- as soon as her child is born, taking her Australia-citizen child to a country where they will be ostracised, and where she has no housing or means of support to care for a child; or
- returning to her violent husband, and seeking his help with the MRT fee (to argue that they are still partners, despite the period of separation).

This is completely at odds with the intention of the domestic violence provisions in the migration legislation, to allow people to leave violent relationships without jeopardising their immigration status.

Example 2 – Australian citizens needing a carer

Alberto and Maria came to Australia 20 years ago, and are Australian citizens.
Alberto, now 65, is partially paralysed due to a stroke 5 years ago, and suffering from depression. Maria is getting older and frailer, and can no longer provide all the assistance that Alberto requires. They have no other relatives in Australia, and in the town where they live, there are no community or health services which can provide daily practical assistance in their home.

Their daughter, who had stayed in Peru and studied nursing, was willing to move in with them and take on the caring duties.

Maria sought advice and was told she could sponsor her daughter for a Carer Visa. Six months later, DIAC refused the visa application, stating that Maria could not be the sponsor since it was Alberto who needed care.

This was an error on the part of the DIAC officer, as the *Migration Regulations* do allow a family member of the person needing care to be the sponsor for a Carer Visa. This visa refusal could, and should be, easily remedied by the MRT.

However, Alberto and Maria are both on Centrelink payments, with high medical costs. They spent all of their savings on modifying the bathroom to allow Alberto to use it, and on the initial application fee for the Carer visa. They cannot raise the $1540 (nor the $770 reduced fee) for the MRT within the time limit. They will therefore be prevented from applying for review of the DIAC decision, unless they go to the High Court and argue about a point of law.

Application fees for the MRT are significantly higher than other merits review fees

The MRT application fee is already significantly higher than the fee for other types of merits review of Commonwealth agency decisions. The fee after any fee waiver or fee reduction is granted (e.g. on the basis of financial hardship) is also significantly higher than in other tribunals.

Tribunal	**Matter type**	**Fee payable after any waiver /reduction**
Migration Review Tribunal	Variety of visa refusals and visa cancellations	$770
Social Security Appeals Tribunal	Centrelink decision about entitlements	0 (no fees apply)
Administrative Appeals Tribunal	Appeal of SSAT decision about Centrelink entitlements	0 (no fees apply)
Administrative Appeals Tribunal	Commonwealth workers compensation decision	0 (no fees apply)

Administrative Appeals Tribunal	Visa cancellation on character grounds	$100
Small Taxation Claims Tribunal / AAT	Certain taxation objection decisions for <$5000	$77
Refugee Review Tribunal	Protection visa decisions	$0 upfront, but $1540 if unsuccessful in the RRT

Why is access to the MRT important?

DIAC makes important decisions, affecting the lives of visa applicants and their sponsors, such as whether a husband may join his Australian wife in Australia, or whether an Australian citizen can bring a young relative who has been orphaned to Australia to care for them.

Where those decisions are negative, justice requires that the person(s) affected have a right of review: an opportunity to have independent verification of whether DIAC made the right decision on the facts, or not.

Applications for review by the MRT are certainly not futile. Access to the MRT means real outcomes for many of the applicants: During 2010/11, 41% of all DIAC decisions reviewed by the MRT were "set aside" (i.e. overturned from a negative to a positive decision). Only 36% of the DIAC decisions were "affirmed" (i.e. determined to be correct).[4]

For partner visa applications (which includes people using the domestic violence provisions), the set aside rate is even higher: 62%.[5]

Even where a Department of Immigration officer has made a blatant error or omission in reaching their decision to refuse a visa, it is *extremely* rare and difficult to convince them to retract and re-make their decision[6].

If people are effectively prohibited from seeking merits review due to the cost, they may be left with no recourse, even if the decision was incorrect or unjust. Alternatively, they may have to resort to judicial review (using the High Court's jurisdiction), where the fees are effectively lower, to challenge the DIAC decision. Being disentitled from a "fair, just, economical, informal and quick"[7] review of the facts, these people could end up as unrepresented litigants in the courts system, trying to argue errors of law, as the only way to

[4] *MRT – RRT Caseload Report: Detailed Statistics 2010-11* (p.7), available at: http://www.mrt-rrt.gov.au/Conduct-of-reviews/Conduct-of-reviews/default.aspx#stats

[5] Ibid.

[6] DIAC is reluctant to re-make decisions, believing it is inappropriate under the common law doctrine of *functus officio*.

[7] From section 353 of the *Migration Act 1958*, which sets out the MRT's objectives.

challenge a DIAC decision. Not only is this situation unjust, it is an inefficient use of public money and the courts' resources.

From a public policy point of view, access to the MRT is important for government accountability and transparency. As the *Strategic Framework for Access to Justice* states:

> Commonwealth tribunals are independent bodies that review administrative decisions on the merits—standing in the shoes of the original decision maker. Tribunals were originally established in the 1970s to improve government accountability and transparency, provide an informal alternative to judicial review and introduce a tier of administrative review before appealing to court. (at p 30)

Request that the regulation be disallowed

We are calling on you, as the Minister who has signed off on *Migration Amendment Regulation 2011 (No. 4)*, to remedy this situation by moving or supporting a motion in Parliament to disallow this regulation.

We have also written to the Attorney General about this matter, and to the Senate Standing Committee on Regulations and Ordinances.

It is unreasonable to expect that someone who would face "severe financial hardship" if required to pay $1540, will never-the-less be able to pay $770. The new regulation does not call for any assessment of whether the potential applicant for review can actual pay $770, or whether they will effectively be denied merits review.

It is essential that complete fee waivers are available where the situation is warranted: most obviously where the person would be otherwise prohibited from seeking review of a government agency's decision about an significant entitlement or other issue affecting the person's life.

We thank you for your consideration of the issue, and hope that you will take action to disallow this amendment regulation.

We look forward to hearing from you about this request, as a matter of urgency. If you have any questions, or wish to discuss by telephone or in person in your Fairfield office, please contact the writer on (02) 92127333.

Yours sincerely,

Roxana Zulfacar
Advocacy & Human Rights Officer
Community Legal Centres NSW

This request is endorsed by the following organisations:

- Salvation Army – Australia Eastern Territories
- Immigrant Women's Speakout Association of NSW
- Refugee and Immigration Legal Service (RAILS) Inc (QLD)