JUSTICE
59 Carter Lane
London
EC4V 5AQ
DX 323 Chancery Lane
(020) 7329 5100
(020) 7329 5055
admin@justice.org.uk
www.justice.org.uk

Mr George Mudie MP
Chair
Joint Committee on Statutory Instruments
House of Lords
London SW1A 0PW

21 March 2014

Dear Chair,

The Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014

The Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014 ("the Regulations") will give effect to the Government's decision to significantly restrict access to legal aid for judicial review applications. We understand that the Joint Committee on Statutory Instruments will shortly consider the Regulations and outline our concerns below.

By way of summary, JUSTICE is concerned that – in light of the significant constitutional function of judicial review – these changes are unnecessary and ill-considered. They will, in our view, have a damaging effect on the right of individuals without means to secure advice and representation for the purposes of pursuing a judicial review. In turn, this will inhibit transparency and accountability in public decision-making and the long-term development of public and administrative law. The Regulations themselves contain little detail and appear to have a broader effect than expressed by Government. Finally, we consider that there are significant questions to be raised about their legal basis.

The Regulations

The Regulations were laid on 14 March 2014 and are scheduled to come into force on 22 April 2014. The Regulations are made pursuant to Section 2(3) and Section 41, Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), pursuant to negative resolution procedure.

The constitutional function of judicial review

Judicial review and associated administrative law provide an essential opportunity for people who are aggrieved by poor public decision-making to take their challenge to an independent and impartial tribunal with the power to undo or reverse its effects and to require the decision to be taken again. In a country with no written constitution to control the relationship

between the citizen and the State, this function takes on a particular constitutional significance.[1]

The effect of the proposed changes

The Government proposes that legal aid should not be recoverable in judicial review claims except where a claim is issued and permission is subsequently granted. In cases where applications are withdrawn before a permission hearing, the Legal Aid Agency ("LAA") will have limited discretion to make *ex gratia* payments in connection with work done.

The determination that the risk of public law litigation should be met by lawyers representing vulnerable people without other means to challenge life-changing decisions, in our view, shows a profound misunderstanding of administrative law in practice. As the senior judiciary have themselves explained, many cases are currently settled prior to any hearing on permission.[2] The ethical position of both solicitors and barristers who accept instructions subject to a legal aid certificate, and who subsequently seek to withdraw before issue, is far from clear. As cases evolve, the nature of judicial review means that the likelihood that a case will proceed to permission or succeed at that stage may shift dramatically and without forewarning as a result of actions entirely outside the knowledge and control of claimants or their representatives.

Given the risks involved, the likelihood that many providers will turn away from providing any public law assistance at all in legally aided cases is high.[3]

The policy objective of the Government is to reduce the bringing of "unmeritorious" claims. Numerous consultation respondents highlighted the inadequacy of the Government's implication that cases not granted permission lack merit, as indicated, above. JUSTICE considers that the changes proposed are not justified by any significant risk to the public interest or the operation of the Administrative Court. In any event, it is apparent that, regardless of the impact of these changes on weak cases, a significant number of valid claims are likely to be deterred for want of advice or representation.

The scope of the Regulations

During the course of consultation on these changes, the Government has made a number of commitments:

a. Interim applications – designed to protect clients from irreparable damage, often in emergency circumstances – will continue to be funded in all cases;
b. All work prior to the issue of an application for judicial review will continue to be paid for (albeit that the determination of work done on an application and prior to the issue of an application remains unclear); and
c. Some cases where permission is not granted will be eligible to apply for an ex-gratia payment, in recognition that many cases which do not proceed may secure a valuable result for the claimant in any event.

---

[1] We consider the full constitutional function of judicial review and its evolution in our Response to *Judicial Review: Proposals for Further Reform*, at paras 9 – 15. http://www.justice.org.uk/resources.php/359/judicial-review-proposals-for-further-reform

[2] See paras 23-25. Response of the Senior Judiciary of England and Wales, *Judicial Review: Proposals for further reform* (2013) http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf

[3] The Public Bill Committee considering the Criminal Justice and Courts Bill recently heard clear evidence from Nicola Mackintosh and Nick Armstrong on the risk facing solicitors and barristers who practice principally on judicial review, PBC Deb, 13 March 2014, Q298 on.

Importantly, there are concerns that the Regulations fail to deal adequately with each of these promises:

d. **Interim relief:** New Section 5A – which gives effect to the new rule - relates to an "application for judicial review" (thus, applications pursuant to Part 54 of the Civil Procedure Rules ("CPR")). While Part 25 CPR governs interim applications – and thus may not be covered by Section 5A – most applications for interim relief in judicial review are currently made as part of the wider application pursuant to Part 54. For example, the application form associated with judicial review asks claimants to indicate whether they are seeking interim relief. Thus, it is unclear whether all applications for interim relief are intended to be fundable and whether – in future – all applications for such relief must be made independently pursuant to a Part 25 application.

e. **Preparatory and pre-issue work:** New Section 5A applies when an application for judicial review is "issued". Where applicable, the Lord Chancellor "must not pay remuneration for civil legal services *consisting of making that application*". It appears clear that where proceedings are not issued, Section 5A will not apply, so work will be funded by legal aid (allowing for correspondence between a claimant and a public body and other investigatory work, for example). However, it is less clear what is intended when a claim is issued. What work will be considered as services "consisting of making that application"? This is clearly ambiguous and without clarity will compound the chilling effect of these measures. At best, this could lead to significant disputes between the Legal Aid Agency and providers as it is determined what work can and can't be done.

f. **The ex-gratia scheme:** The Regulations provide very little detail and the Lord Chancellor is granted a significant degree of discretion as to when payment may be made if a claim ends before permission is granted. No payment is permitted when permission is refused, regardless of whether the reason for refusal is entirely unpredictable or outside the control of the claimant or his advisers (for example, late disclosure or a change in the practice of the Respondent decision maker). Importantly the guidance includes the discretion for the Lord Chancellor to consider the reason why a case may have settled and to second guess the facts that a provider ought to have known at the time of issue.

   These limitations aside, the Regulations provide that there will be no route of appeal from a determination not to pay. No consideration beyond the Lord Chancellor – likely the Legal Aid Agency – will be permitted and consideration by the Independent Funding Adjudicator appears to be precluded.

Parliamentary scrutiny and legal basis

Section 1 LASPO places a duty on the Secretary of State to ensure that legal aid is made available consistent with the provisions of the Act. Section 9, by extension, provides that such services as are specified in Schedule 1 (including judicial review, specified at paragraph 19) <u>are</u> to be made available provided the individual concered qualifies for legal aid. Section 2 LASPO gives the Secretary of State the power to make arrangements for the payment of "remuneration" for legal aid. By way of contrast, Section 9 LASPO permits the Secretary of State to vary or remove services from the scope of legal aid only subject to affirmative resolution. JUSTICE considers that Parliamentarians should question whether the Regulations are laid more properly under Section 9 than Section 2.

Where an application for judicial review is issued, the Regulations, pursuant to Section 5A(1) will prohibit the Lord Chancellor from making <u>any</u> payment for legal aid services except in cases where permission is granted, or subject to an ex gratia scheme. On any interpretation, this is a significant variation in the legal services for judicial review available pursuant to

LASPO. Notably, there is nothing in Section 2 which expressly permits the Secretary of State to exempt services otherwise covered by the Act from payment.

JUSTICE is concerned that this major part of the Government's package of proposals for reform of judicial review is subject only to secondary legislation without opportunity for full parliamentary debate. Debate on LASPO and its remaining provision for civil legal aid – including for judicial review – was lengthy and contentious. It seems remarkable that Parliament could have intended the Minister to be able to make such sweeping changes to funding without further primary legislation, let alone by negative resolution, without opportunity for effective parliamentary scrutiny.

We have written in similar terms to the Secondary Legislation Committee in the House of Lords. We would be happy to provide copies of that correspondence if helpful. If we can assist further with the work of the Committee, we would be pleased to do so.

Yours sincerely,

Angela Patrick
Director of Human Rights Policy

T: 020 7762 6415
E: apatrick@justice.org.uk

Chairman of Council **Baroness Kennedy of The Shaws QC** *Director* **Andrea Coomber**

JUSTICE Registered Charity No 1058580
A company limited by guarantee and registered in England No 3216897 Registered office as above
British Section of the International Commission of Jurists