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Ms J White
Clerk to the Committee
Secondary Legislation Scrutiny Committee
By email: seclegscrutiny@parliament.uk

23 March 2014

Dear Ms White

Re: Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014

This is a submission by the Young Legal Aid Lawyers (YLAL) in relation to the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 (“the Regulations”).

About YLAL

YLAL is a group of junior lawyers who are committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. Currently, we have around 2,000 members.

Our concerns

We are concerned about the impact of these Regulations on access to justice in judicial review cases, particularly in situations where urgent help is required.

First, the Regulations contain no provision for the payment of work done to provide “interim relief” in judicial review. This goes against an express assurance by the Government at the consultation stage that legal aid payments for interim relief would not be “at risk” like all other work carried out after a claim is issued.¹ Applications for interim relief are made when people are in the most desperate circumstances, for example, emergency injunctions requiring local authorities to house homeless families, or an application for an urgent decision on permission if someone is in detention or facing removal from the country. In our view, there must be specific provision to ensure payment for this work set out in the Regulations.

Second, more generally, our members are concerned that these Regulations overall will lead to a chilling effect on access to justice as lawyers will be unable to take the financial risk of not being paid for thousands of pounds worth of work. The lack of clarity within the Regulations over payment for interim relief and pre-issue work on judicial review cases increases this risk. The Regulations do introduce a means for the Lord Chancellor to make

¹ *Judicial Review – proposals for further reform: the Government response, Annex B, Paying for permission work in judicial review cases*, MoJ Feb 2014, CM 8811, para 149

discretionary payments in cases where permission is not granted. However, in our view there is a lack of clarity and precision to the discretionary criteria. With reference to these criteria one cannot confidently predict in advance whether or not the Legal Aid Agency will exercise their discretion to make payment. Hence the discretion does little to alleviate the chilling effect of the changes.

We should add also that the existence of the “exceptional” case funding scheme does not provide a sufficient safety net to mitigate against the rigours of these changes. Statistics were recently released showing a 3% success rate for all such applications made, including those for legal aid for inquests, and a 1.22% success rate for non-inquest related applications.² Our members have made such applications and experienced the onerous nature of the process of assessment and high rate of refusal.

In view of these concerns, we feel that the Regulations are of major constitutional significance in relation to the ability of the citizen to check the power of the executive. As such they should only be implemented through a positive statutory instrument, not a negative one, to ensure at least a minimal level of Parliamentary Scrutiny. In this context we note that the Government refrained from making any significant changes to judicial review through primary legislation in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) stating in consultation that:

4.97 In our view, proceedings where the litigant seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly. In addition, the issues at stake themselves in public law challenges can be of very high importance where they are used to address serious concerns about the decisions of public authorities. For example, a decision by a public authority to detain someone without sufficient reason would be a very important issue as the case concerns the litigant’s liberty. Similarly, a challenge to a decision to refuse a litigant a life-saving medical treatment on an irrational basis would be of great importance as their life is at risk.

...

4.99 We therefore consider that legal aid for most public law challenges is justified on the basis that they enable individual citizens to check the exercise of executive power by appeal to the judiciary, often on issues of the highest importance, and we propose that it be retained.³

Our view is that if the Government wishes to depart from these assurances which preceded and coloured the Parliamentary debates on LASPO, then, as a matter of process, it should do so either through primary legislation or through the positive resolution procedure further to s9 LASPO.

We hope that these concerns can be taken into account and that the committee will give due consideration to reporting accordingly.

Yours sincerely

Connor Johnston and Katie Brown
Co-chairs, Young Legal Aid Lawyers

² *Ad hoc Statistical Release, Exceptional Case Funding Application and Determination Statistics: April-December 2013*, Ministry of Justice, 13 March 2014, p3

³ *Proposals for the Reform of Legal Aid in England and Wales*, Cm 7967, Ministry of Justice, November 2010