

# UNIFIED LEGAL AID CONTRACT: A DETAILED GUIDE

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28 FEBRUARY 2007

Please note this is not a commentary on any document other than the Contract. Terms and expressions defined in the Contract have the same meaning when used in this document.

### BACKGROUND

Bircham Dyson Bell LLP (**BDB**) provided a detailed analysis of the contract published by the LSC following the closure of the November 2006 consultation period. BDB also prepared a mark-up containing amendments to that document designed to give greater protection to practitioners and delivered this mark-up to the LSC on 26 January 2007 (the **Mark-up**). Two meetings were then held between the LSC and TLS on 14 and 21 February 2007 at which the provisions of the draft contract were discussed. The Contract was published on 26 February 2007.

### EXECUTIVE SUMMARY

As a result of amendments made by the LSC, the Contract has been improved to an extent (as noted in the Specific Observations below). However, the majority of amendments to the Contract requested by TLS were not accepted and it is TLS'Ss view that significant and fundamental revision to the Contract is still required to remedy the following issues with the Contract, namely that it:

- may be unilaterally amended by the LSC on as little as 7 weeks' notice
- purports to oust the jurisdiction of the courts in relation to recovery of certain costs
- is terminable by the LSC without fault on 6 months' notice without compensation
- contains a number of provisions entitling the LSC to act with complete discretion, unlimited by any contractual requirement to act reasonably or proportionately
- contains a number of provisions lacking reciprocity

### GENERAL OBSERVATIONS

1. The Mark-up proposed substantial amendments to the draft contract in order to provide greater protection and certainty for practitioners.
2. A number of TLS'S amendments have been accepted by the LSC and to that extent the Contract has been improved.
3. But the LSC has resisted a majority of TLS'Ss suggested amendments for the following reasons:
  - **Policy:** that to accept certain amendments would impede the ability of the LSC to carry out its statutory functions and reduce its flexibility in doing so;
  - **Public body:** as a public body, the LSC is legally required to act reasonably in all that it does;
  - **Previous conduct:** that practitioners have been subject to a majority of the contractual provisions in the past;
  - **Litigation:** that certain of the proposed amendments (such as a requirement for the LSC to act reasonably) would encourage vexatious litigation by practitioners. The LSC contends that litigation against the LSC is wasteful of public funds and reduces the money available for legal aid services;
  - **Practice:** that wide-ranging powers (for example, to audit, to require documentation and to sanction and terminate) are required to enable the LSC to deal with the dishonest or incompetent legal aid practitioners, which is not only in the interests of the majority of practitioners, but also that such powers are unlikely ever to be used against the majority of practitioners.
4. **Reasonableness:** TLS suggested the insertion of a number of references to reasonableness and materiality throughout the Contract.

There is no legal obligation on public bodies, and therefore on the LSC, to act reasonably. There is only the option for an aggrieved party to bring judicial review proceedings in the event that it believes a public body has failed to act reasonably (based on the "Wednesbury" reasonableness test).

The insertion of a contractual requirement that the LSC act reasonably when making decisions and taking action would introduce an objective standard against which the LSC's actions and decisions could be measured and would also act as a limitation on its discretion. Without a contractual requirement for reasonableness, materiality or proportionality the LSC would not be subject to challenge for breach of contract if it failed to act reasonably or have regard to materiality or proportionality.

Although the LSC has made some concessions which the TLS is happy to acknowledge, numerous requests for insertion of references to reasonable or material by TLS were rejected by the LSC.

5. **Reciprocity:** TLS suggested a number of amendments designed to introduce reciprocity to certain provisions. These amendments were largely rejected by the LSC.
6. **Contract analysis:** because the government has indicated its intention to introduce substantial reforms of the legal aid sector and the LSC will effect these reforms, the Contract requires close scrutiny as it will be the means by which such reforms (some of which may be considered prejudicial to practitioners) will be enforced. This Contract, therefore, requires greater critical analysis than any contract that has gone before.

## SPECIFIC OBSERVATIONS

Please note these observations are made in relation to some of the clauses and Annexes only. Practitioners are, therefore, recommended to read the Contract in its entirety.

CLAUSE	COMMENTS
<b>2. RELATIONSHIP</b>	
2.1 and 2.2	<p>In the original draft of the Contract clauses 2.1 and 2.2 and Annex D appeared to require that, in the event of a conflict, practitioners' statutory and professional duty to act in the best interests of their clients would be subject to the terms of the Contract and in particular, the requirement to assist the LSC with its statutory obligation to aim to obtain best value for money.</p> <p>The LSC agreed to re-draft these provisions to remove this apparent subordination of solicitors' professional duties. However, it did not accept TLS'S amendments which would have removed the contractual requirement on practitioners to assist the LSC with its statutory duty to aim to obtain best value for money and would have replaced it by a provision under which each party would simply have acknowledged the other's statutory duties.</p> <p>Practitioners may note the new statement of the LSC's responsibility in clause 2.2, but should also note that breach of this requirement by the LSC has been disapplied as a right of claim by practitioners in specific circumstances (see clause 32.5).</p>
2.5	Practitioners cannot give, bargain, sell, assign (or otherwise dispose of) the benefit of any of their rights or sub-contract (or otherwise delegate) any of their obligations under the Contract without the prior written consent of the LSC. Any transfer of a practitioner's legal aid business will, therefore, require the LSC's prior written consent.
<b>3. COMMUNICATION</b>	
3.4	Practitioners are required to have access to the LSC's website. From October 2007 the LSC may require practitioners to make transactions

	<p>(including Claims) via the LSC’s website.</p> <p>TLS’S proposed amendments to oblige the LSC to ensure that its website is, therefore, readily accessible and available (with limited downtime) were not accepted by the LSC.</p>
<b>4. FINANCIAL DISCLOSURE AND RISK</b>	
4.1	<p>Practitioners must produce annual accounts which are audited or certified within 8 months of the end of the period to which they relate.</p> <p>The LSC agreed to increase the time limit to 8 months from 4 months as contained in the original draft of the Contract. The increase in the time limit is beneficial to practitioners but these provisions still require certain practitioners to keep and produce more financial information and in a shorter time period than they are required to do at law.</p>
4.2	<p>If the LSC considers that “there is a risk to Clients or public funds” as a result of a practitioner’s financial position, it can request that it be provided, within 28 days of its request, with the annual accounts, such other financial information as it reasonably specifies and any related documentation it specifies.</p> <p>TLS’S requests that this provision be amended to require the LSC to act reasonably in its consideration, that the reference to “any related documentation it specifies” be deleted and that the risk to funds be material were not accepted by the LSC.</p>
4.3	<p>Failure to provide to the LSC, within 28 days of its request, with such financial information as it reasonably specifies and any related documentation it specifies will result in a practitioner losing its Preferred Supplier status (or its application for Preferred Supplier status ceasing).</p> <p>Whilst it is accepted that the LSC should have the right both to request and to scrutinise certain key documents, because there is no requirement of reasonableness in relation to “related documentation” and, therefore, no limit on what documentation may be requested, practitioners will find it difficult to judge what documentation they must retain in order to satisfy this obligation. The failure to keep and provide such documents as the LSC requests within the time limit could, therefore, result in the loss of Preferred Supplier status and severely prejudice a practitioner’s legal aid practice. Without Preferred Supplier status, it appears that a practitioner would be unable to apply for a contract extension or bid for a new Unified Contract (clause 10.8). TLS’S request that this provision be deleted was not accepted by the LSC.</p>
4.4	<p>In respect of practitioners with limited liability (whether companies or LLPs), the LSC can request “appropriate” guarantees and indemnities from the ultimate owners of the practitioner’s business and/or such persons as the LSC may regard as being controllers and/or senior</p>

	<p>managers of that business.</p> <p>This provision, therefore, would entitle the LSC to have recourse to the ultimate owners of practices with limited liability as well as to persons who do not own the business. Firms operating without limited liability (i.e. a general partnership) are, therefore, in a more favourable position than those operating with limited liability status.</p> <p>There is no requirement that the LSC act reasonably in requiring such guarantees and indemnities and no indication of what is meant by “appropriate”.</p> <p>TLS’S request that the indemnities and guarantees be limited to members and shareholders only (not personnel), that a prescribed form of indemnity be used and that the protection afforded under the indemnity and guarantee be no greater than that provided if the LSC were contracting with a general partnership were not accepted by the LSC.</p>
<b>7. LOOKING AFTER CLIENTS, COMPLIANCE AND SELF-MONITORING</b>	
7.3 and Annex E	<p>After consultation, practitioners will be required to have, and use for all Contract Work, a matter and case management system that meets the specification reasonably required by the LSC.</p> <p>Although the case management system must comply with a specification reasonably required by the LSC (and although, helpfully, the LSC has now indicated the current basic functionality requirements for such a system in Annex E (Monitoring)) there is no contractual limitation by reference to affordability of such systems (or that financial assistance will be available for practitioners) or time limit on its introduction. TLS’S requests that requirement for the system is subject to funding being available and that a system capable of interfacing with the LSC’s system (but not necessarily up to the specification stated by the LSC) should be sufficient were not accepted by the LSC.</p>
<b>8. DEMONSTRATING COMPLIANCE AND CO-OPERATING IN AUDITS</b>	
8.1	<p>The LSC requires that practitioners demonstrate, to its reasonable satisfaction, compliance at all times with the terms of the Contract, whether at the time of an audit or any other time.</p> <p>The clause is not limited by reference to materiality and theoretically, requires an ability to demonstrate a negative. A minor breach could, therefore, lead to non-compliance with this clause which, if it occurs on a number of occasions could give rise to persistent breaches of contract and, therefore, to Sanctions under clause 29. TLS’S request for the deletion of this clause was not accepted by the LSC.</p>
8.4	<p>The LSC has rights of access to a practitioner’s premises, equipment, documents, information and data on five specified grounds. Clause 8.4(e) allows the LSC access to such information for such purposes as it</p>

	<p>considers necessary in connection with its statutory duties or functions.</p> <p>There is no limit to the documents, data and information which must be provided. TLS'S request that this provision be limited by reference to reasonableness was not accepted by the LSC. Whilst it may be appropriate for the LSC to have such wide-ranging powers for the purposes of an Official Investigation, a more proportionate and reasonable approach should apply where there may be no reason to suspect any wrong-doing by a practitioner.</p>
<b>9. KEEPING AND PROVIDING DOCUMENTS AND COMPLETING AND RETURNING FORMS</b>	
9.1	The LSC has acceded to the TLS'S request that the LSC's right to call for documentation and the time for the production of those documents are subject to the requirements of reasonableness.
9.2	<p>The LSC is entitled to remove information and documents for such periods as it specifies.</p> <p>There is no limit on the documents and information which may be removed, no limit on the time for which documents may be retained by the LSC and no contractual right of the practitioner to require the return of such documents (even, for example, it would appear, on termination of the Contract). TLS'S request that this clause be deleted was not accepted by the LSC.</p>
9.5	<p>Failure by a practitioner to co-operate, provide access and documents as required by clauses 7, 8 and 9 will result in an immediate suspension of that practitioner's authority to start new matters and cases and of their entitlement to receive payment until further notification from the LSC.</p> <p>The discretion to be exercised by the LSC in applying such suspension is not limited by a requirement of materiality nor is there a requirement for there to be a connection between the failings and the matter in respect of which payment has been suspended. TLS'S request that this clause be deleted was not accepted by the LSC.</p>
<b>10. APPROVED PERSONNEL AND SUPERVISORS, STANDARD OF WORK, INDEPENDENT PEER REVIEW AND OTHER KEY PERFORMANCE INDICATORS</b>	
10	<p>An Independent Peer Review rating of 1 or 2 is required for a practitioner to qualify as a Preferred Supplier, to be eligible for a contract extension and to bid for a new Unified Contract. A rating of 4 is a breach of contract (but two successive ratings of 4 is a Fundamental Breach (Annex H, paragraph 9)); a rating of 5 is a Fundamental Breach which entitles the LSC to terminate the Contract immediately.</p> <p>Because of its concerns that the current system is insufficiently developed, reliable or independent for matters of such importance to be</p>

	<p>based upon it, TLS requested that all references to Independent Peer Review be deleted from the Contract and a detailed negotiation of the appropriate contractual provisions in respect of performance standards be carried out. This request was not accepted by the LSC.</p>
10.9 to 10.11	<p>The Contract has been revised to clarify that a failure to achieve KPIs nos. 1 to 5 (see Annex G) before March 2008 will not of itself constitute a breach of contract, and neither will a subsequent failure. In view of the importance of KPIs it is regrettable that clauses 10.9 to 10.11 are ambiguous and imprecise. For example, it is not clear what is meant by “subsequent failure” and there is no precision as to whether the achievement of KPIs is required for Preferred Supplier status or only that they are “likely” to comprise part of the entry criteria for that status.</p> <p>TLS is aware that the ASA has raised anxieties concerning the lack of consultation over KPI 5.</p>
<b>11. SCHEDULES AND KEY INFORMATION TABLES</b>	
11.6 and 11.10	<p>The LSC has “complete discretion”: (i) to decide whether to issue a Schedule; (ii) as to the terms of the Schedule (which may specify maximum and minimum number of matter starts); and (iii) to determine a practitioner’s application for a variation to the bespoke information in the Schedule.</p> <p>It appears that, other than a right of practitioners to make representations (within 14 days of the LSC’s decision), neither of these clauses is subject to an obligation on the LSC to consult. TLS’S request that these provisions be deleted or that practitioners be given longer notice of changes and periods in which to make representations was not accepted by the LSC.</p>
<b>13. AMENDMENTS TO CONTRACT DOCUMENTS</b>	
13.1	<p>The LSC has the right to amend any Contract Document in any way at any time provided that: (i) it considers it necessary or desirable to do so in order to facilitate such reform as the LSC wishes to implement in order better to comply with its statutory duties or fulfil its statutory functions (including, but not limited to, the Carter reforms); or (ii) TLS and the Advice Services Alliance have approved the amendments; or (iii) the amendments are permitted by any other provision of the Contract.</p> <p>Although denied by the LSC, in the opinion of TLS, this clause gives the LSC a profound and unilateral power to amend the Contract and therefore raises the possibility that the Contract is fundamentally lacking in certainty and, possibly even lacks a real intention between the parties to be legally bound. If TLS’S opinion is correct, the Contract, or certain provisions of it, may be unenforceable for lack of certainty. The substantial and extensive powers of amendment exercisable by the LSC also deprive practitioners of any real degree of commercial certainty</p>

	<p>which potentially undermines their ability to undertake planning with regard to property, personnel or resources. TLS'S requests for substantial amendment to this provision, including to limit its unilateral application and that the LSC act reasonably in taking any decision to amend, were not accepted by the LSC.</p>
13.2	<p>The LSC is entitled to make such amendments to the Contract as it considers necessary in the circumstances to comply with, or take account of, any legislation or case law.</p> <p>The LSC has agreed to TLS'S request that this right to amend the Contract be subject to the same consultation and notice periods as the other rights of amendment but not to TLS'S request that the LSC act reasonably in relation to the necessity of amendment on such grounds.</p>
13.5, 13.7 and 13.8	<p>The LSC is entitled to make amendments which it considers urgent following a 21 day consultation and a 28 day notice period. If the LSC does not consider the amendment to be urgent the amendment may be made after a 42 day consultation and 42 day notice period.</p> <p>TLS'S requests that the LSC act reasonably in considering whether an amendment is urgent and to limit the automatic application of the amendments were not accepted by the LSC.</p> <p>The effect of these consultation and notice periods in conjunction with clause 13.1 is that the LSC is entitled to amend the Contract in any way that it considers necessary to implement reform (any "reform", not limited to Carter reforms) on 7 weeks' notice (21 days' consultation and 28 days' notice). For example, if the LSC considered it necessary to terminate every (or some) Contracts on 21 days' notice in order to facilitate such reform as it wished to implement in order better to comply with its statutory duties or fulfil its statutory functions it would have the contractual right to do so. Any challenge to such action would, therefore, lie in a judicial review claim or arbitration to assess whether the action of the LSC was reasonable on a legal basis which is unclear in clause 33.12 (see comments on clause 33.12 and 33.14 below).</p>
13.7	<p>After consultation, the LSC has complete discretion to amend the Contract Document as originally proposed, or in a modified form, or leave it unamended and "any amendment made by [the LSC] shall be binding on [the practitioner]."</p> <p>TLS'S requests that this discretion be limited by a requirement to act reasonably and that the LSC considers fully matters raised in consultation prior to making the amendment, were not accepted by the LSC.</p>
13.12	<p>The LSC is entitled to amend the Contract Documents that affect all or some practitioners.</p> <p>It would, therefore, be possible for the LSC to discriminate amongst</p>

	categories of practitioners in relation to the types of amendments they were required to accept.
13.13	The LSC has introduced a new provision enabling practitioners to terminate the Contract following an amendment (presumably if the practitioners find that amendment sufficiently prejudicial). Assuming that such notice would be given, at the earliest, at the end of the consultation period (and the announcement of the amendment that the LSC intends to make) the maximum notice which a practitioner can therefore give is 28 days (i.e. the minimum length of the notice period). Practitioners are, therefore, faced with the dilemma of either accepting an amendment which is so prejudicial they would wish to terminate the Contract or terminating the Contract (presumably with prejudice to their business) on 28 days' notice.
	TLS'S request that additional provisions be included in respect of the LSC's entitlement to make amendments to Contract forms and the manuals and the notice period for doing so was not accepted by the LSC.
<b>15. CLAIMS</b>	
15.2	From 1 October 2007, unless the LSC agrees otherwise, practitioners must submit all Controlled Work Claims via the LSC's website.  The LSC accepted TLS'S request that this provision be amended to entitle practitioners to submit claims in writing in the event that the LSC website is unavailable for certain periods of time.
Former clause 15.5 (now deleted)	The LSC accepted TLS'S request to delete the provision that from 1 April 2008 any Controlled Work Claim not submitted in accordance with clause 15.2 is not payable by it.
<b>16. PAYMENTS AND ASSESSMENTS</b>	
	TLS'S requests for additional provisions and amendments to the existing provisions to limit the period by which Assessments and claims by the LSC for repayment must be carried out and to entitle practitioners to be able to pay any money owed to the LSC by cheque or BACS were not accepted by the LSC.
<b>17. HOW AND WHEN WE PAY FOR CONTRACT WORK</b>	
17.3	"Because [the LSC] have to live within a budget for Controlled Work" where a practitioner's Claims for Controlled Work exceed the Schedule Payment Limit, the LSC, at its discretion, may pay any balance due in a subsequent Schedule.  The LSC has "complete discretion" to decide whether or not to issue a Schedule (see above in relation to clause 11). It is not clear, therefore,

	how payment is made in the event that a subsequent Schedule is not issued or, if a practitioner or the LSC terminates the Contract prior to the issue of a subsequent Schedule.
	TLS'S requests that interest be payable and/or that practitioners be entitled to suspend all Contract Work in the event of late payment by the LSC were not accepted by the LSC.
<b>18. SET OFF AND REPAYMENT</b>	
	TLS'S request for amendments to limit the period in which claims by the LSC for recovery of monies must be made was not accepted by the LSC.
	TLS'S request that the set-off provisions become reciprocal was not accepted by the LSC.
<b>21. CONFIDENTIALITY AND DATA PROTECTION</b>	
21.11	<p>The LSC is entitled to disclose any confidential information concerning a practitioner, its affairs and business if the LSC considers that the public interest in making the disclosure outweighs the obligation of confidentiality. Although this reflects the provisions of the Freedom of Information Act 2000 (<b>FOIA</b>) in the event that the public body has received a request for information, this clause is not limited to an FOIA context.</p> <p>TLS'S requests to delete this provision or to give notice of intended disclosure to a practitioner to enable the practitioner to take other action to prevent disclosure were not accepted by the LSC.</p>
21.12 to 21.15	<p>The LSC has accepted TLS'S request that the data protection provisions become reciprocal.</p> <p>However, the amendments made to clause 21.14 appear to apply only to personal data made available by the LSC to practitioners under clause 21.13 and not to any personal data moving in the other direction.</p>
<b>23. INDEMNITY</b>	
23.1	<p>Practitioners are required to indemnify the LSC in respect of any loss incurred by the LSC as a result of any claim brought by a third party arising out of any act by the practitioner in connection with the provision of Contract Work by that practitioner. TLS'S request that this clause be deleted was not accepted by the LSC.</p> <p>It appears, therefore, that the indemnity would apply even if the act was required by the Contract or at the express instruction of the LSC. It further appears that this provision is based on the presumption that practitioners have a greater degree of control than the LSC over Clients and that the risk arising, for example, from any frivolous, vexatious and/or misconceived claims brought by a Client against the LSC should,</p>

	<p>therefore, belong to practitioners.</p> <p>The Contract does not contain any indemnities in favour of practitioners for loss caused as a result of the LSC's acts or omissions.</p>
<b>25. THINGS YOU MUST TELL US ABOUT</b>	
25.1	<p>Practitioners must notify the LSC as soon as possible before any change in the identity of its Key Personnel.</p> <p>TLS'S request that this information may be provided following, rather than before a change, was not accepted by the LSC.</p>
<b>27. PROHIBITED GIFTS, FRAUD AND UNETHICAL BEHAVIOUR</b>	
	<p>TLS'S request that the provisions relating to prohibited gifts, fraud and unethical behaviour become reciprocal was not accepted by the LSC.</p>
<b>28. GENERAL</b>	
28.1	<p>The entire agreement clause has been extended to require practitioners to acknowledge that they have not entered into the Contract in reliance on nor have they been given any warranty, statement, promise or representation by or on behalf of the LSC. This clause is designed to defeat a misrepresentation claim and would, for example, apply to any public statements made by the LSC (which are not repeated in the Contract Documents) that it would not enforce certain provisions of the Contract.</p>
28.4 to 28.6	<p>TLS'S request that the waiver provisions become reciprocal was not accepted by the LSC.</p>
28.7	<p>TLS'S request that the force majeure provisions be extended beyond severe physical damage caused by storm, fire or flood and criminal acts (unless caused by a practitioner's own personnel) was not accepted by the LSC.</p>
28.11 to 28.13	<p>TLS'S request that the severability provisions in the event that a term of the Contract is invalid, illegal or unenforceable become reciprocal was not accepted by the LSC.</p>
28.15	<p>The LSC is entitled to request information held by practitioners in relation to FOIA; if so requested, practitioners must provide such information without delay. The reference to information is unlimited. The FOIA relates to information which is held by a person on behalf of the public body only; it does not extend to information belonging to and held by a person contracting with a public body. TLS'S request to amend the provision to limit it to information belonging to the LSC held by a practitioner on behalf of the LSC was not accepted by the LSC.</p>
28.18	<p>By virtue of performing Contract Work practitioners do not obtain any</p>

and 28.19	<p>rights in the work or documents relating to matter files. All rights in any product of Contract Work (other than those owned by the Client or a third party), including legal research or other legal work, vest in the LSC.</p> <p>TLS'S request that this provision be deleted was not accepted by the LSC. However, the LSC have amended clause 28.19 to provide that the LSC will licence practitioners to use any work and/or information generated by them in the course of performing the Contract. It is not clear from the amendment to clause 28.19 what the terms of this licence would be and, therefore, whether it is acceptable to practitioners.</p>
28.26	<p>Clause 28.26 states: "No matter what sum is assessed by a court as costs incurred under a Certificate, [the LSC has] no obligation to pay [a practitioner] for any work that is outside the scope of a Certificate, or which is in excess of that covered by a limitation on a Certificate, and if any such payment is made to [a practitioner] an equal sum is repayable by [the practitioner] to [the LSC]".</p> <p>The effect of clause 28.26 appears to oust the jurisdiction of the court relating to payments under Certificates. TLS'S request that this provision be deleted was not accepted by the LSC.</p>
<b>29. CONTRACT SANCTIONS</b>	
29.1 and 29.3	<p>In the original draft of the Contract this provision had stated that the LSC was entitled to apply any of the Sanctions if a practitioner breached the Contract (with no limit by reference to materiality or proportionality). TLS requested that this provision be limited by reference to materiality and proportionate.</p> <p>TLS'S request has been accepted and in the revised draft of the Contract the LSC is entitled to apply any of the Sanctions (ranging from barring a practitioner from performing certain types or any new matters to suspending payment for undefined periods of time or refusing to pay for Contract Work) if a practitioner has materially or persistently breached the Contract. The LSC will now, however, apply a Sanction only to the extent that it is proportionate to the circumstances or, in the case of persistent breaches, to the extent that it is appropriate for the LSC to apply it, having regard to the wider concern that the LSC may have as to a practitioner's capability as a result of the number and/or range of those breaches.</p> <p>TLS also requested a grace period in respect of breaches capable of remedy, which was not accepted by the LSC.</p>
29.2	<p>The LSC is entitled to suspend payment for such period of time as it specifies in the event that a practitioner's financial situation is such that the LSC considers there is a risk to Clients or to public funds. TLS'S requests that the LSC be required to act reasonably in its consideration</p>

	and that the risk be material were not accepted by the LSC.
<b>30. HOW THE CONTRACT CAN BE ENDED</b>	
30.1	Practitioners are entitled to terminate the Contract on 3 months' notice.
30.2	See comments on clause 13.13 above.
30.3 and 30.4	<p>The LSC is entitled to terminate the Contract on 6 months' notice but will exercise such right only when it considers it necessary or desirable to do so in order to facilitate such reform as the LSC wishes to implement in order better to comply with its statutory duties or fulfil its statutory functions (including, but not limited to, the Carter reforms).</p> <p>TLS'S requests that the notice be extended to 2 years and that the LSC act reasonably in its consideration were not accepted by the LSC. The notice period has been increased to 6 months (from three). However, it remains a relatively short period of time if the consequence of the termination is the closure of a business. No compensation will be payable by the LSC.</p>
30.8	The original draft of the Contract entitled either party to terminate the Contract in the event of a breach of the warranties given in clause 22. TLS requested that this clause be limited by reference to material breach. The revised Contract now includes a reference to material breach.
30.9	<p>In the original draft of the Contract the LSC is entitled to terminate the Contract on the date it specifies (including immediately) in certain circumstances, including if a practitioner has failed to provide documents or access to premises in accordance with clauses 8 and 9 (see above) (clause 30.9(d)). TLS'S request that this provision be deleted was not accepted by the LSC but in the revised draft of the Contract a period of 7 days within which to remedy the breach has been included.</p> <p>However, the LSC's amendment does not address the possibility that practitioners will not have kept certain records (because they have found it difficult to judge what documentation they are required to retain in order to satisfy their obligations pursuant to the Contract). In addition, clause 30.9(d) is not limited by reference to materiality in respect of a breach of clauses 8 and 9 (but see our comments on clause 30.14 below).</p> <p>TLS made a number of requests in relation to clause 30.9 to require that the LSC act reasonably and to include references to materiality, which (save for one amendment in clause 30.9 (f)) were not accepted by the LSC.</p>
30.14	This is a new provision which appears to be designed to address TLS'S concerns about clause 30.9 above. The introduction of the concept of proportionality in relation to the clauses specified is to be welcomed.

## 31. CONSEQUENCES OF TERMINATION

31.12 The LSC is entitled to make such amendments to the Contract as it may regard as desirable if at any time it considers that TUPE may apply on any termination of the Contract (subject to its obligation to consult and notify in accordance with regulation 13 of TUPE). The nature of the amendments which the LSC may make pursuant to its rights under this clause is indicated by the provisions which it has now deleted from the previous draft, namely, the right to introduce provisions under which practitioners are required: (i) to provide to the LSC and other practitioners such information about its personnel as the LSC may request; (ii) to indemnify the LSC and other practitioners in relation to any inaccuracy in such information; (iii) not to make any changes to its personnel or to the terms of their employment during the 12 month period prior to expiry of the Contract unless the LSC agrees that such changes are necessary for the practitioner's performance under or compliance with the Contract or necessary for the practitioner's organisation to operate effectively; (iv) to indemnify the LSC and other practitioners against any liabilities arising through the operation of TUPE which arise directly from any act or omission of the practitioner before the Transfer Date.

The fact that specific requirements have been deleted does not remove the potential threat of the imposition of onerous requirements on practitioners should the LSC choose to exercise its rights accordingly.

31.13 In the event that the LSC terminates the Contract neither the practitioner nor any of its partners, shareholders, directors, members, trustees, executive officers or personnel whom, the LSC determines, were responsible (in whole or part) for the circumstances leading to the termination may apply for a contract under the Access to Justice Act 1999 for such period as the LSC may prescribe (which in most cases will be at least two years but may be shorter if a shorter period is justified).

There is no contractual requirement on the LSC to exercise its discretion reasonably; no limit of materiality in respect of the level of involvement of a person in the circumstances giving rise to termination; and no limitation on the period of time for which the ban may apply. TLS'S request that this provision be deleted was not accepted by the LSC.

## 32. RECONSIDERING DECISIONS AND THE REVIEW PROCEDURE

32.1 and 32.2 The Contract has a two stage review procedure: an informal request for reconsideration via a practitioner's Account or Relationship Manager; and a formal review by the LSC's Legal Director or the Contract Review Body (a body with a majority of LSC nominees (see our comments on clause 32.13 below)). Both procedures require the LSC to re-consider the decision it has taken.

32.10 and There are strict time limits in respect of the periods for applying for a formal review. The formal review will be conducted by either the LSC

32.11	Legal Director or the CRB. The LSC Legal Director has wide powers to determine a range of issues.
32.13	The composition of the CRB guarantees a built-in majority for the LSC as the LSC is entitled to nominate two members (of the 3 person board) one of whom may be the LSC Legal Director. The CRB does not, therefore, appear to be an entirely independent body.
32.19 and 32.20	<p>If a practitioner has informed the LSC that it considers the matter as urgent, the LSC's Legal Director or the CRB will use reasonable endeavours to determine the matter within 28 days of receiving notice from the practitioner; provided that in notifying the LSC that the matter is urgent, the practitioner has acted reasonably. If the practitioner does not notify the LSC that the matter is urgent, determination by the LSC's Legal Director or the CRB will be within a "reasonable period".</p> <p>The formal review procedure in respect of an urgent matter may be deemed to have expired and the practitioner may be entitled to invoke the dispute resolution procedures under clause 33, where no determination has been made by the LSC's Legal Director or the CRB within 28 days of notice.</p> <p>If the practitioner does not notify the LSC that the matter is urgent, the formal review procedure cannot be considered to have expired and the practitioner will not be entitled to invoke the dispute resolution procedures under clause 33 until the practitioner has received a response from the LSC's Legal Director or the CRB.</p>
<b>33. DISPUTE RESOLUTION</b>	
33.1	<p>The dispute resolution procedures (of mediation, early neutral evaluation and arbitration) are available only if the matter is a "Formal Dispute". A Formal Dispute occurs where:</p> <ul style="list-style-type: none"> <li>• the practitioner has exhausted its rights to a formal review pursuant to clause 32; or</li> <li>• the matter is not exempt from the formal review procedure under clauses 32.5 and/or 32.6, does not otherwise fall within the formal review procedure and the 28 day period within which an informal review must take place has expired.</li> </ul> <p>TLS'S request that the exemptions to dispute resolution be removed was not accepted by the LSC. Accordingly, it appears that there is no contractual mechanism for the review or resolution of a dispute which relates to the above matters.</p>
33.12	In any arbitration the sole question for the arbitrator shall be to determine whether the LSC's decision was one that a public body, required to discharge its functions under the Act, might reasonably have made. If the arbitrator decides that the LSC acted reasonably that shall be the end of

	<p>the matter.</p> <p>The wording of this clause is tortuous and complex. The wording appears to indicate that the reasonableness which the arbitrator must assess applies to the process of decision making rather than to the decision itself.</p>
33.14	<p>The parties irrevocably waive any right of appeal under the Arbitration Act 1996 in relation to any award made by the arbitration tribunal, save for any right of appeal to the High Court under the Arbitration Act 1996 on any question of law.</p> <p>No explanation has been given by the LSC as to why the right of appeal on other grounds permitted under the Arbitration Act 1996, such as serious irregularity (causing substantial injustice), should be excluded.</p> <p>In addition, the right of appeal to the High Court is limited to appeals on questions of law. It is difficult and daunting for a practitioner to have to assess whether in relation to the role given to the arbitrator under clause 33.12 (above) such a right of appeal would arise. A practitioner might even have to make an application to the court for a declaration as to whether the arbitrator's decision was one of fact or law before being able to assess his rights of appeal. This appears to be unnecessarily complex.</p>