

GENERAL SYNOD
LEGAL OFFICERS (ANNUAL FEES) ORDER 2016
ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES) ORDER
2016

Explanatory Memorandum

INTRODUCTION

1. The Fees Advisory Commission is a statutory body constituted under the Ecclesiastical Fees Measure 1986 ('the 1986 Measure'). Of its nine members, three represent the providers of legal services within the Church, three represent the users and funders of such services and three (from whom the Commission's Chair must be drawn) are independent.
2. In accordance with the terms of the 1986 Measure as amended, the Commission was reconstituted following the 2015 quinquennial elections to the Synod and its membership is now as follows:

Mr John Alpass (Chair) (nominated by the Appointments Committee);
Mr Niall Blackie (nominated by the Ecclesiastical Law Society);
One vacancy (to be filled by a member of the House of Bishops nominated by the Standing Committee of the House);
Mrs Carolyn Graham (nominated by the Appointments Committee);
The Revd Canon Joyce Jones (nominated by the Appointments Committee);
The Revd Canon John Rees (nominated with the agreement of the Provincial Registrar for York);
Mr Bill Husselby (nominated by the Inter-Diocesan Finance Forum);
Mr Geoffrey Tattersall QC (nominated by the Ecclesiastical Judges Association); and
The Revd Stephen Trott (nominated by the Church Commissioners).

3. The role of the Commission is to recommend to the General Synod the level of fees to be paid to ecclesiastical judges, legal officers and others for performing certain duties and functions, and to prepare annual orders in the form of Statutory Instruments to give effect to those recommendations (which require the approval of the Synod, prior to being laid before Parliament under the negative resolution procedure). The practice is for both Orders to be laid before the Synod for approval at its July group of sessions each year, with a view to their coming into force at the beginning of the following year.
4. The Commission accordingly now lays the two Orders for 2016 before the Synod for its approval. This Explanatory Memorandum explains the approach taken by the Commission to the drafting of the Orders this year.
5. The Commission also recommends informal retainers for diocesan chancellors. The final part of this Explanatory Memorandum reports to the Synod on the outcome of the Commission's recent review of those retainers.

LEGAL OFFICERS (ANNUAL FEES) ORDER 2016 (GS 2036)

6. Legal Officers (Annual Fees) Orders, made under section 5 of the 1986 Measure, prescribe the annual fee payable to each diocesan registrar for the professional services specified in Schedule 2 to the Order.

The rationale for the calculation of the retainer

7. At the February 2014 group of sessions, the Synod approved the Legal Officers (Annual Fees) Order 2014, which introduced changes to the method of calculating the annual retainer payable to diocesan registrars. These changes were recommended by the Commission following an independent review and consultation with users and providers of legal services.
8. The primary aim of the 2014 reforms was to promote a more effective dialogue and a sharper focus on value for money at local level between dioceses and registrars as, respectively, the users and providers of legal services. This was to be achieved through (a) the introduction of a more transparent methodology for calculating the retainer and (b) an annual review of the size and shape of each registrar's workload and related issues (including cost), involving the diocesan bishop (or his or her representative), other senior diocesan officials and the registrar.
9. The secondary aim was to begin to redress the substantial and longstanding underpayment of registrars, by introducing a staged uplift in the value of retainers over the period of five years to 2019. Research carried out by the Research and Statistics Department demonstrated that the median retainer as a percentage of the real value of work done had dropped from 71% in 2001 to 57% in 2012, representing a net reduction of 14% over that period. This assessment was confirmed by the independent reviewers, who warned that if the trend continued, the consequences for registrars, their firms and consequently the Church itself would be extremely serious: if the Church were to continue to be able to obtain the legal services it needed, there had to be a reasonable relationship between the value of the work done for the Church and what the Church paid for it.
10. The Commission's proposals were the subject of a consultation exercise in 2013. The responses revealed broad support for them, and in particular for the maintenance of a nationally determined annual retainer – but on a revised basis of calculation, involving direct local user-provider engagement on the key issue of value for money. However, some dioceses expressed concern about the affordability of the proposed uplift in the retainer given the difficult financial climate, and as a result the Commission modified its proposals in a number of respects.
11. The Explanatory Memorandum for the 2014 Order, GS 1938-9X, explained the principles on which the annual retainer would be calculated in future. The detailed methodology was set out in the Annex to GS 1938-9X. This involves:
 - arriving at a figure for the national cost of the work done by registrars under the retainer by aggregating the average number of hours recorded by them as having been spent on such work over the previous five years, divided as between solicitors and clerks, and then multiplying that process by average agreed rates;
 - dividing that cost between the dioceses to arrive at a figure for the retainer, by:

- allocating 30% of the national figure between the dioceses equally (to reflect the fact that every registrar’s practice attracts certain unavoidable overheads); and
 - dividing the balance between the dioceses by reference to the ‘size’ of the diocese (assessed by reference to the number of open churches and clergy of incumbent status and above), subject to:
 - capping the resulting figure so that the ‘largest’ diocese pays no more than three times what the ‘smallest’ pays; and
 - increasing the amounts payable by London and Southwark by an additional 10% to reflect the additional demands made on their registrars.
12. To enable dioceses to absorb the cost of the resulting increase in the retainer, the Commission decided to phase them in over the period 2015 to 2019.
13. The retainers proposed for 2017 on the basis of the approach previously proposed by the Commission and accepted by the Synod are set out in Table 1 in Schedule 1 of the Order.
14. The Commission notes that the total amount payable to registrars under the retainer in 2017 will increase from £2.56 million to £2.75 million – an increase of 7%. (Percentage increases for individual dioceses will range from 7% to 11%, as a result of the operation of the formula used for dividing the cost between dioceses according to the ‘size’ of the diocese.) That figure is higher than the projected increase of 6% per annum in each of the five years over which the new arrangements will be introduced, which the Commission predicted in GS 1938-9X - although that prediction could not take account of any variation in remuneration rates or workload. The additional cost is attributable to the increase in the hours recorded by registrars as having been spent on work falling within the retainer.
15. As in 2015 and 2016, the retainer payable to the registrar of the Diocese of Leeds has been set on a different, transitional, basis. The Commission reported in GS 1938-9X that, following the coming into force of the Dioceses of Bradford, Ripon and Leeds and Wakefield Reorganisation Scheme, the retainer for the new Diocese of Leeds would be set by reference to the sum that would otherwise have been payable in respect of all three former dioceses: whilst the creation of the single new diocese is expected to result in savings in the cost of legal services, they were not expected to be realised before 2016.
16. The Commission’s intention is that the new diocese should be put in the same position as that in which any other diocese would find itself from 2019, the level of its retainer being calculated by the usual formula from that point. To that end the retainer for 2016 was 7% less than that for 2015. Much of the legal work relating to the transition to the new diocese having been completed, the Commission now intends to take that process further by setting the 2017 retainer at the level now projected for 2019 and to maintain it at that level for the following two years (subject to the implications under the formula of changes to recorded hours / charging rates). The retainer for 2017 will therefore be 12% lower than that for 2016.

Discussions between the diocese and the registrar

17. As explained above, the national cost of the work done by registrars under the retainer is calculated by aggregating the average number of hours recorded by them as having been spent on such work over the previous five years. The figures for 2010 to 2013 have been taken from figures previously submitted to the Commission on their own account. But the figures for 2014 and 2015 have in each case been agreed by the diocese concerned, in accordance with the new arrangements described in GS 1938-9X.
18. As part of those arrangements the Commission asks dioceses annually to indicate that they are content that the annual data on hours worked and indicative fee levels provided by their registrars to the Commission provide an acceptable basis on which to calculate the value of the retainer. That confirmation should follow an annual review discussion between the registrar, the diocesan bishop (or his or her representative) and other diocesan users. The Commission encourages dioceses and their registrars to use that review as an opportunity to take a wide-ranging look at the size and shape of the legal workload, with a view to improving mutual understanding and support and identifying ways of achieving greater efficiency and effectiveness.

**ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES)
ORDER (GS 2037)**

19. Ecclesiastical Judges, Legal Officers and Others (Fees) Orders, made under section 6 of the 1986 Measure, prescribe fees for faculty proceedings and certain other proceedings in ecclesiastical courts, as well as the fees of the Provincial Registrars, the Vicars-General and other holders of legal offices. In practice the great bulk of the work remunerated under the terms of such Orders relates to faculty proceedings, for which provision is made in Table 1 of the 2016 Order (though the holding of a hearing, which is likely to attract the highest fees, is an infrequent occurrence).
20. In the Explanatory Memorandum for the Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2015, GS 2007X, the Commission reported that it had completed a review of the form and content of such Orders, in the course of which it had examined both their content and the principles to be applied in setting the fees for which they make provision. As a result, it proposed a number of changes, to be given effect from the 2015 Order onwards.
21. In addition to proposing that such Orders should take a different format, the Commission proposed a different approach to the setting of the fees prescribed by them. In particular, it proposed that the fees payable under them should in future, wherever possible, be broadly equivalent to those determined by the Ministry of Justice to be payable to secular judges when exercising similar functions, rather than being simply increased by reference to inflation.
22. Since that approach would not be possible in the case of registrars, because of the absence of comparators, the Commission proposed (following previous practice) that their fees should in general be set at roughly 80% of those for chancellors. In doing so it recognised that, even on that basis, the resulting hourly rate for registrars (£101) remained low in comparison to commercial rates.

23. However, the Commission also recognised that a particular issue arose as to the implications, from the fees point of view, of the changes to the operation of the faculty jurisdiction that were coming about as a result of recent legislation (culminating in the changes made by the Faculty Jurisdiction Rules 2015¹) and the introduction of the online system for processing faculty applications: although it would be some time for all the consequences of these changes to become apparent, the Commission's expectation was that, from the beginning of 2016, the number of petitions for faculties would decrease.² But it also recognised that those petitions that continued to be received would be the more complex ones - meaning that, on average, the work required of a registrar in processing a petition would increase.
24. The Commission explained in GS 2007X that that raised in its mind the question of whether the fee structure for lodgement fees for faculty applications should be changed in some way, given that the current structure had been devised on the basis that the fees would provide an acceptable average for the faculty work carried out by a registry as a whole. There could be a significant impact on the position of registrars, potentially increasing further the difference between the cost of the time they need to spend on dealing with faculty applications and the fee income they receive for doing so.³
25. The Commission found this a difficult issue. On the one hand, it recognised that registrars might face swift and significant changes to the funding of their work once the forthcoming changes to the faculty system took effect and that, as in the case of the retainer, it was right that they be remunerated fairly for their work, and should not be expected to work at a plainly uneconomic rate. On the other hand, it did not feel able to predict the impact of the changes to the faculty system with accuracy at that stage.
26. Against that background the Commission proposed that the flat rate fee payable on the submission of any petition for a faculty should rise to £200. And in addition to the fee payable on submission of a petition for a faculty, the 2016 Order provided for the possibility of an additional fee for the registrar, calculated at an hourly rate, payable only "in exceptional cases" if the chancellor so directed.
27. The Commission recognised that the increase it proposed for the fee payable on submission of a faculty petition was substantially above inflation. But, notwithstanding the level of the proposed increase, the Commission nonetheless expected the overall costs to dioceses of the fees payable on submission of faculty petitions to be lower under the new arrangements than previously, given the expectation that the number of faculty petitions submitted will decline significantly under those arrangements.
28. However, given the uncertainties as to how the recent changes would impact on the workloads of registrars, the Commission recognised that there was an unavoidable degree of provisionality about the provision made in the 2015 Order. It therefore indicated that it would be keeping the position under active review, consulting both registrars and

¹ The Rules came into force on 1st January 2016.

² The Commission had been informed by its registrar members that their colleagues expected the number of petitions to fall by between 30% and 50%.

³ Their representative body, the Ecclesiastical Law Association, had informed the Commission that in 2014 the median time spent on dealing with faculty petitions was 2.61 hours, split between registrars, solicitor colleagues and clerks, resulting in a cost - calculated at median charge-out rates - of £338, a sum significantly above what they typically received in fees.

dioceses over whether, as the position became clearer, further adjustments to the level of faculty fees would be appropriate. It also invited comment on both the revised form of the 2015 Order and the approach it had adopted to the quantum of the fees payable under it.

29. Following the approval of the 2015 Order by the General Synod at the November 2015 group of sessions, the Commission has continued to give thought to these matters. Since the fees payable to secular judges that have been used as a benchmark have been increased by 1% in 2016, the Commission proposes that the fees payable under the 2016 Order should all be increased by the same amount, but no further. In particular, so far as the fees payable in connection with the faculty process are concerned, the Commission considers that it is too early to be able to assess the implications of the recent changes to the system in terms of the impact on the work required of chancellors and registrars. However, it will continue to keep the position under active review, and reassess the case for any change when formulating proposals for the 2017 Order.

CHANCELLORS' INFORMAL RETAINERS

30. Finally, the Commission has also been giving consideration to the question of the informal retainers it recommends annually to dioceses for the remuneration of chancellors.
31. The practice of paying an informal retainer to chancellors was established some 30-35 years ago. Its objective was to make life more straightforward, by removing the need for a precise calculation of the various fees to which they became entitled during a year under the Ecclesiastical Judges, Legal Officers and Others (Fees) Order. At around the same time, many dioceses began paying faculty fees through the DBF in non-contentious cases, and it is probable that these two processes became aligned: the retainer was drawn to cover the work which was underwritten by the diocesan board of finance.
32. As a result of its review the Commission came to the conclusion that aspects of the arrangements relating to the informal retainer required corrective action. First, there has been inconsistency between dioceses as to the matters that the retainer is intended to cover. Secondly, for many years the retainers have simply been increased in accordance with the usual inflationary formula; and, whatever the rationale for the original figures set by the Commission's predecessors may have been, it is now very hard to see any rational basis for the relationship between them: the informal retainer for some large dioceses is considerably less than those for some of the smaller dioceses. Thirdly, while there is a strong tradition of generous service to the Church among chancellors, the Commission has been made aware that the low level of remuneration, in comparison with commercial rates, offered by the present arrangements could over time begin to act as a deterrent to the recruitment of suitable persons as chancellors, which would be highly damaging.
33. The Commission has addressed the first of these issues by providing dioceses with guidance, agreed in consultation with the Ecclesiastical Judges Association (EJA), explaining what the retainer is intended to cover and what additional fees a chancellor should therefore remain entitled to receive. This guidance, which is broadly in line with what most dioceses have always understood to be the case, explains that the informal retainer is intended to provide remuneration for non-contentious faculty cases; providing

advice to the bishop, registrar or Diocesan Advisory Committee; and other written work for which fees are not prescribed.

34. On the second and third issues, the Commission has given careful consideration, again in consultation with the EJA, on whether to adopt a new approach to setting the quantum of the informal retainers, with a view to linking their value more closely than appears to be the case at present to the amount of the fees that the chancellor could be expected, in the diocese concerned, to receive if he or she were remunerated solely by this means.
35. To that end the Commission has accepted a recommendation from the EJA that the informal retainers should in future be set at a level equivalent to a specified percentage of the retainer projected to be payable in 2019 under the Legal Officers (Annual Fees) Order to the registrar of the diocese in question: such an arrangement would reflect the basis on which the quantum of the informal retainer was originally set when first introduced and is justifiable in principle in that the value of the registrar's retainer has a direct relationship with the amount of work to which a particular diocese can be expected to give rise.
36. The Commission has accordingly set the recommended informal retainers for 2017 on this basis, setting chancellors' informal retainers at a level equivalent to 14% of the relevant registrar's retainer in 2019, but with the increase being phased in where necessary over the course of four years so that the increase in any chancellor's retainer in any one year does not exceed at 15%. This will deliver an eventual average increase in chancellors' retainers of 27%. Whilst that is significant in percentage terms, it only represents an increase of £86,499 on the total current cost of chancellors' informal retainers (£349,161) and is in any event justified in the Commission's view by the need to address a history of underpayment. However, the Commission will review the position further in 2017 in the light of any feedback from dioceses and chancellors on its approach.

On behalf of the Commission
John Alpass

May 2016

Published by the General Synod of the Church of England

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