

**GENERAL SYNOD**

**LEGAL OFFICERS (ANNUAL FEES) ORDER 2017**

**THE ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES)  
ORDER 2017**

**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's membership is as follows:

Mr John Alpass (Chair) (nominated by the Appointments Committee);  
Mr Niall Blackie (nominated by the Ecclesiastical Law Society);  
The Rt Revd Richard Blackburn, Bishop of Warrington (nominated by the Standing Committee of the House of Bishops);  
The Revd Canon Joyce Jones (nominated by the Appointments Committee);  
Ms Josile Munro (nominated by the Appointments Committee);  
The Revd Canon John Rees (nominated with the agreement of the Provincial Registrar for York);  
Mr Bill Hesselby (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 rôle 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 2017 before the Synod for its approval. This Explanatory Memorandum explains the approach taken by the Commission to the drafting of the Orders this year.

**THE LEGAL OFFICERS (ANNUAL FEES) ORDER 2017**

5. 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*

6. 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 retainer. These changes were recommended by the Commission following an independent review and consultation with users and providers of legal services.
7. 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 is currently being 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 their representative), other senior diocesan officials and the registrar.
8. The secondary aim of the 2014 reforms 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.
9. The Explanatory Memorandum for the 2014 Order<sup>1</sup> explained the principles on which the retainer would be calculated in future and set out (in its Annex) the detailed methodology. 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 for a diocese, 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), but subject to:
      - capping the resulting figure so that the 'largest' diocese pays no more than three times what the 'smallest' pays; and
      - applying an additional 10% weighting in the case of London and Southwark to reflect their higher costs.
10. To enable dioceses to absorb the cost of the resulting increases in the retainers, the Commission decided to phase them in as evenly as possible over the period 2015 to 2019. It was originally envisaged that an increase of 30% over the transitional period of five years (2015-2019), with a consequent increase of 6% in the first year of that period would be required, to reach the target figure of £2.88 million.

*The Commission's proposals for the 2018 retainers*

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<sup>1</sup> GS 1938-9X

11. In accordance with the formula agreed by the Synod in 2014, the Commission has been phasing in these uplifts. For the calculation of the 2017 retainers, the Commission updated its calculation of the 2019 target (i.e. the projected total cost of the work done by registrars under the retainer) by using the average of the total hours worked for the period 2011-15 and updated average charge-out rates for 2015. The effect was to increase that target to £3.22 million, requiring average increases of 9% in 2017, 10% in 2018 and 10% in 2019. The retainers for 2017 were therefore set on that basis, and were approved by the Synod in February 2017.
12. The proposed retainers for 2018, set out in Table 1 in Schedule 1 of the Order, have also accordingly been calculated this year based on the most recent data available, including updated figures for the average total hours worked for the period 2011-16 and charge-out rates for 2016. The effect is that the total amount payable by way of retainer in 2018 will increase from £2.67 million in 2017 to **£2.94 million** in 2018 (an increase of **10%**, in line with the estimated increase last year), with percentage increases in individual retainers ranging from 9% to 13%. As previously, the full cost will not of course fall on the diocesan board of finance of the diocese concerned: only 58% will do so, since that part of the retainer that is expressed by the Order to represent a liability of the diocesan bishop is payable<sup>2</sup> by the Church Commissioners.

#### **THE ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES) ORDER 2017**

13. Ecclesiastical Judges, Legal Officers and Others (Fees) Orders, made under s.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 2017 Order (though the holding of a hearing, which is likely to attract the highest fees, is an infrequent occurrence).
14. In the Explanatory Memorandum for the Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2015<sup>3</sup>, 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.
15. 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.
16. 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 that for chancellors. In doing so it recognised

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<sup>2</sup> Under section 8 of the Ecclesiastical Fees Measure 1986.

<sup>3</sup> GS 2007X

that, even on that basis, the resulting hourly rate for registrars remained low in comparison to commercial rates.

17. Since the approval of the 2015 Order by the General Synod at the November 2015 group of sessions, the Commission has continued to use the fees payable to secular judges as the benchmark against which fees should be set. The Ministry of Justice had not at the time the Commission made the 2017 Order published details of increases in the year 2017/8 in the rate of remuneration payable to secular judges but the pattern in recent years has been for annual 1% increases and it is unlikely that this year's figures will depart from that trend. The 2017 Order has, therefore, been prepared on that assumption.
18. The Commission explained in the Explanatory Memorandum which accompanied the two Orders for 2016<sup>4</sup> 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 which culminated in the changes made by the Faculty Jurisdiction Rules 2015<sup>5</sup> and the introduction of the online system for processing faculty applications. As the Commission suggested at that time, it would take some time for all the consequences of these changes to become apparent. The Commission considers that it is not yet possible to reach a concluded view on the consequences of those changes and, as a result, the Commission does not at this time propose any significant adjustment to the approach followed in the 2016 Order in relation to fees in the faculty jurisdiction.
19. The Commission has, however, continued to review the form of the Ecclesiastical Judges, Legal Officers and Others (Fees) Order and proposes a number of small changes arising from that review which are set out below.

#### *Intervention by Provincial Court*

20. Under the revised Faculty Jurisdiction Rules, a matter may be referred to the Provincial Court for directions in cases where there has been a delay in a lower court. At present, where a matter has been so referred, and directions are given, no appropriate fee is payable under the Order. Accordingly, to fill that lacuna, the Commission proposes that article 5 should apply the fees set out in Table 2 "in relation to proceedings on an appeal from a consistory court *and where a provincial court gives any directions for the further conduct of proceedings which are pending in a consistory court*".

#### *Preparation/ancillary fees*

21. The 2016 Order (as the 2015 Order did) provides that registrars may recover administrative and preparation fees "in exceptional circumstances" only. At present the same test applies to proceedings under the faculty jurisdiction as to the other courts and tribunals for which the Order provides, particularly tribunals convened under the Clergy Discipline Measure ("CDM") 2003.
22. When it presented the 2015 Order the Commission proposed that the flat rate fee payable on the submission of any petition for a faculty should rise to £200 (a deliberate increase beyond that for other first instance jurisdictions, in order to make amends for the historic underpayment of registrars for preparatory work related to faculties). And in addition to

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<sup>4</sup> GS 2037-7X.

<sup>5</sup> The Rules came into force on 1<sup>st</sup> January 2016.

the fee payable on submission of a petition for a faculty, the 2015 and 2016 Orders have 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 directs. The same high threshold applies at present in all other courts and tribunals.

23. Following representation from the provincial registrars of tribunals under the CDM 2003, the Commission notes that the high threshold has caused some practical difficulties, particularly in relation to fees for the preparation and administration of tribunals held under the CDM 2003. Where a tribunal is held, article 10 and Table 7 of the 2016 Order provide that a registrar may seek to recover £101 per hour but only in “exceptional circumstances and if the judge so directs”.
24. The Commission considers that preparation/ancillary work in relation to CDM tribunals is, however, routine, rather than exceptional, in nature. The Commission also notes that the hourly rate for servicing CDM tribunals is lower than for other courts (other than the Courts of the Vicars-General).
25. Accordingly, a provision which restricts the recovery of such costs to exceptional circumstances is anomalous. In light of the above, the 2017 Order removes the requirement for a registrar to make out “exceptional circumstances” before they may recover preparation/administrative fees, so far as that requirement relates to proceedings other than in the faculty jurisdiction. The Commission considers that the difference in treatment between the faculty jurisdiction, on one hand, and other courts and tribunals, on the other, is justified given the relatively recent inflation in consistory court fees.

*Hourly rates: preparation and ancillary work*

26. Following representations from the provincial registrars of tribunals under the CDM 2003, the Commission considers that the hourly rate for preparatory/ancillary work in connection with courts and tribunals other than consistory courts ought to be increased to £255 an hour. In the Commission’s view fees at this level provide fair and transparent remuneration for the relevant registrar given the ordinary commercial rates at which registrars are able to charge. Registrars’ fees (which have until now been set at the level of the relevant judge’s fee discounted by 20%) should, in the view of the Commission, be set in relation to the appropriate commercial fee, subject to a modest discount. The rate proposed meets these criteria.
27. While the Commission proposes that this rate should apply to preparatory and ancillary work in connection with all proceedings other than those in consistory courts, its impact will in practice be limited to tribunals held under the CDM 2003 because the other courts specified in the Order very seldom sit. Moreover, the effect of this increase is mitigated by the very small number of tribunals held under the CDM 2003. Since 2007, only 20 matters have reached a final tribunal hearing with three appeals. In addition there have been a modest number of other matters which never reached a full tribunal because, for example, a penalty was imposed by consent. Furthermore, the increase in cost (which will be modest for the reasons set out above), will be met by the Archbishops’ Council, not individual dioceses.
28. The Commission will continue to keep the operation of the Order under active review, and reassess the case for any change when formulating proposals for the 2019 Order.

## CHANCELLORS' INFORMAL RETAINERS

29. Finally, in its Explanatory Memorandum for the Orders laid before the Synod for approval in July 2016<sup>6</sup> the Commission set out the approach which it proposed to take on the question of the informal retainers it recommends annually to dioceses for the remuneration of chancellors.
30. As the Commission explained there, following a review of its approach to the remuneration of chancellors, the Commission accepted a recommendation from the Ecclesiastical Judges Association 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. The Commission has continued to follow this approach.
31. Under this approach, adopted in 2016, the Commission has set 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 15%. This will deliver an eventual average increase in chancellors' retainers of 27%. Whilst that is significant in percentage terms, the cost increase in each year is relatively modest 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 2018 in the light of any feedback from dioceses and chancellors on its approach.

*On behalf of the Commission*  
John Alpass

May 2017

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<sup>6</sup> GS 2036-7X.