

GENERAL SYNOD
LEGAL OFFICERS (ANNUAL FEES) ORDER 2016

Explanatory Memorandum

INTRODUCTION

1. The Fees Advisory Commission is 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);
One vacancy (to be filled by a member of the House of Bishops nominated by the Standing Committee of the House);
The Revd Canon Joyce Jones (nominated by the Appointments Committee);
One vacancy (to be filled by the Appointments Committee);
The Revd Canon John Rees (nominated with the agreement of the Provincial Registrar for York);
Mr Bill Hüsselby (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).
4. The practice is ordinarily 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. The Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2016 was duly approved in July last year and came into force on 1 January 2017.
5. However, the draft Legal Officers (Annual Fees) Order 2016 laid before the Synod in July was effectively withdrawn by the Commission from consideration by the Synod on it becoming apparent that the figures in the Order were incorrect, and the Explanatory Memorandum accompanying it had inadvertently misrepresented its effect.
6. The Commission accordingly now lays a revised draft Legal Officers (Annual Fees) Order 2016 before the Synod for its approval. If approved, the Order will prescribe the annual retainers payable for 2017. This Explanatory Memorandum explains the approach taken by the Commission in preparing the revised draft Order.

The rationale for the calculation of the retainer

7. 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 (that fee generally being known as ‘the retainer’).
8. 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.
9. 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 their representative), other senior diocesan officials and the registrar.
10. 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.
11. Research carried out by the Research and Statistics Department had demonstrated that the median retainer as a percentage of the real value of work done by registrars 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.
12. The Commission’s proposals to address this issue 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 calculated in a different way, and 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.
13. The Explanatory Memorandum for the 2014 Order¹ 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;

¹ GS 1938-9X

- 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.

14. 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) would be required, with a consequent increase of 6% in the first year of that period, if the target figure of £2.88 million were to be reached.

The Commission’s proposals for the 2017 retainers

15. In accordance with the formula agreed by the Synod in 2014, the Commission now feels that the time is right to update its calculation of the 2019 target (ie the projected total cost of the work done by registrars under the retainer) by (i) using the average of the total hours worked for the period 2011-15 and (ii) updating the average charge-out rates for 2015. The effect has been to increase that target to £3.22 million. To arrive at that target in equal stages will involve average increases of 9% in 2017, 10% in 2018 and 10% in 2019.

16. The retainers proposed for 2017, set out in Table 1 in Schedule 1 of the Order, have accordingly been calculated on that basis. The effect is that the total amount payable by way of retainer in 2017 will increase from £2.44 million in 2016 to £2.67 million in 2017, with percentage increases in individual retainers ranging from 9% to 12%. However, 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 payable² by the Church Commissioners.

17. The Commission recognises that, in percentage terms, this level of increase is higher than that it projected when the new arrangements were introduced. However, it was implicit in the basis of calculation approved by the Synod that, due to its being linked to both (i) the amount of time actually spent by registrars on work falling within the scope of the retainer and (ii) the charge-out rates for the work done, the total amount payable by way of retainers was potentially subject to change. And both have increased, leading to a corresponding increase in the total cost of the work done and thus the size of the retainers payable by dioceses. The average hours recorded by legal staff increased by 31% between 2008 and a high point in 2014 but were lower in 2015, making it more difficult

² Under section 8 of the Ecclesiastical Fees Measure 1986.

to discern any continuing trend. There have also been modest increases in charge-out rates.³

18. Even though these increases are larger than it expected to be recommending when it adopted the new approach to calculating the level of retainers, the Commission considers that the approach it adopted, and the Synod confirmed, in 2014 remains the right one and should not be departed from. A number of considerations support that view:

- registrars deserve to be remunerated fairly for the work they do under the retainer, and need to be if the sustainability of the legal services the Church needs in its day to day life is not to be put at risk (and some would argue that even under the new arrangements they are not properly remunerated, as the 30% charitable discount in respect of work under the retainer is larger than would generally be afforded to charities);
- the increase in the retainers is largely attributable to registrars spending more time on work under the retainer;
- the arrangements approved in 2014 include a process, in the form of an annual review, that enables dioceses to satisfy themselves that the level of hours recorded by their registrar is appropriate, to influence legal costs more directly than previously, and to address any particular issues of value for money that they have;
- the Commission understands that, following those reviews, the dioceses have all approved the hours recorded by their registrars; and
- the difference in cash terms in the 2017 retainer had the increase been maintained at 6% as opposed to 9% is only just over £2,000 for the median diocese.

19. The Commission therefore considers the proposed level of increase in the retainers to be one that it can properly commend to the Synod.

The Diocese of Leeds

20. Finally, 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 2014⁴ 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 was expected to result in savings in the cost of legal services, they were not expected to be realised before 2016.

21. 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 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

³ Between 2012 and 2015 average charge-out rates for clerks increased by 6% from £103 to £109 and charge-out rates for legally qualified staff increased by 0.5% from £203 to £204.

⁴ See paragraphs 21 to 23 of GS 1938-9X.

recorded hours and charge-out rates). The retainer for 2017 will therefore be 11% lower than that for 2016.

On behalf of the Commission
John Alpass

December 2016