

GENERAL SYNOD**ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES) ORDER 2015****Explanatory Memorandum****Background**

1. The Fees Advisory Commission is a statutory body constituted under the Ecclesiastical Fees Measure 1986 as amended. The Commission recommends to the General Synod the level of fees to be paid to diocesan and provincial registrars and ecclesiastical judges for performing certain of their duties and functions.
2. In furtherance of that function the Commission now lays before the Synod for approval the Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2015.
3. 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. They also provide for the fees of the Provincial Registrars and the Vicars-General and others.
4. In past years, the Commission has restricted increases in the fees payable under Ecclesiastical Judges etc Orders to the same amount (calculated by reference to an inflation-related formula) as the increases in the retainers payable to registrars under Legal Officers (Annual Fees) Orders, without any additional upgrade.
5. In the Explanatory Memorandum for the Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2014 (GS 1963X) the Commission reported that it intended, in the coming year, to take a fresh look at the form that Ecclesiastical Judges etc Orders have taken in recent years. It proposed to examine both the content of such Orders – the matters for which fees are prescribed – and the quantum of fees, and to make any recommendations for change when it brought the next Order to the Synod for approval in 2015. Pending that review, the 2014 Order followed the practice of recent years in proposing an uplift in the prescribed fees calculated in accordance with the usual inflationary formula.

The Commission's proposals

6. The Commission has now completed its review, considering both the content of Ecclesiastical Judges etc Orders and the principles to be applied in setting the fees for which they make provision.
7. In consequence, it proposes a number of changes – both of form and substance, including changes both in the structure of the fees payable under the Order and in the quantum of those fees.
8. By way of context it should be understood that while for the sake of completeness the Order specifies in detail fees payable across the whole structure of ecclesiastical courts, in practice the overwhelming majority of proceedings are in connection with faculty petitions and are settled by the consistory court without appeal to higher courts. Other proceedings, for example in

respect of clergy discipline, are rare. The great bulk of work remunerated by the terms of the 2015 Order is therefore likely to be incurred under the provisions of Table 1, as in the past. And within Table 1 the holding of a hearing, which is likely to attract the highest fees, is an infrequent occurrence.

9. The Commission firstly proposes that the 2015 Order should take a different format from its predecessors. In part this is to bring it into line with modern Statutory Instrument drafting practice. But, more significantly, the 2015 Order will identify more fully and accurately the matters in respect of which fees are prescribed (including by describing them rather than by referring to particular statutory provisions under which they will be carried out - the references to which are likely to become outdated over time).
10. As to the nature and level of the fees payable under Ecclesiastical Judges etc Orders, the Commission has given careful consideration to two issues of importance: the underlying rationale of the fees structure; and the implications for that fee structure of the forthcoming changes to the operation of the faculty jurisdiction.

The rationale for the fee structure under Ecclesiastical Judges etc Orders

11. It would appear that, at some stage in the past, some at least of the fees prescribed by Ecclesiastical Judges etc Orders had been set by reference to fees paid to secular judges for undertaking similar functions; but over the years that linkage has been lost, with the result that the fees payable under such Orders have fallen behind those payable to secular judges.
12. The Commission therefore proposes that, with a view to putting the quantum of fees on to a basis which is demonstrably fairer to the interests of both the Church and those who serve it in a judicial capacity, the fees specified in Ecclesiastical Judges etc Orders 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.
13. Thus in the case of the 2015 Order it proposes that the daily sitting rates for a chancellor should correspond to those for a Recorder (currently £629) and the daily sitting rates for the Dean of the Arches and other ecclesiastical judges exercising an appellate jurisdiction should correspond to those for Deputy High Court Judges (currently £848). Benchmarking the sitting fees in that way allows the calculation of an hourly rate, on the basis of which the Commission have set fees for a number of matters in addition to hearings.
14. Although it would involve an initial uplift of some 10% in the chancellor's fee for a day's hearing (which was set at £570 in 2014), reintroducing a clear and direct link with Ministry of Justice rates is right and principle, since those who undertake to serve the Church in this important area should be entitled to receive remuneration (should they wish to claim it) calculated at a rate that is demonstrably fair. The Commission also takes account of the fact that, as explained above, in practice hearings take place very infrequently, so that the financial impact of its proposals will be very small.
15. There is no similar comparator for registrars, as the equivalent service in the secular courts is provided by the court office. In the past, hearing fees for registrars have been set at 75% of the relevant amount for ecclesiastical judges. Whilst the Commission has followed this practice in relation to the fees payable to registrars in connection with appellate courts, in the case of courts and tribunals of first instance it proposes a slightly more generous approach, involving registrars being paid at an hourly rate at a figure closer to 80% of that for chancellors. In doing so it recognises that, even on that basis, the hourly rate for registrars (£100 in most cases; £140 in the

case of the exceptional additional fee for the most complex faculty applications) remains low in comparison to commercial rates.

The implications of the reform of the faculty jurisdiction

16. The Commission recognises that a particular issue arises as to the implications, from the fees point of view, of the changes to the operation of the faculty jurisdiction that will come about as a result of recent legislation – culminating in the changes made by the Faculty Jurisdiction Rules 2015, which will come into effect at the beginning of January 2016. The introduction of the online system for processing faculty applications is a further element in the surrounding context.
17. Although it will be some time for all the consequences of these changes to become apparent, the firm expectation must be that, from the beginning of 2016, the number of petitions to the chancellor for faculties will decrease. (The Commission is informed by its registrar members that their colleagues expect the number of petitions to fall by between 30 and 50%.) But at the same time those petitions that continue to fall to the chancellor for decision will be the more complex ones, meaning more work per petition on average for registrars.
18. That raises the question of whether the fee structure for lodgement fees for faculty applications should be changed in some way, given that the current structure was 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. (Their representative body, the Ecclesiastical Law Association, has 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 receive in fees.)
19. The Commission has found this a difficult issue. On the one hand, it recognises that registrars may face swift and significant changes to the funding of their work once the forthcoming changes to the faculty system take effect and that, as in the case of the retainer, it is 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, the impact of the changes to the faculty system cannot be predicted with accuracy at this stage. Nevertheless the Commission believes it right to take some account now of the expected changes when setting fee levels for 2015.
20. Against this background the Commission proposes that the flat rate fee payable on the submission of any petition for a faculty (for which provision is made at item 1 in Table 1 of the 2015 Order) should rise to £200. That represents an increase of 23% on the amount to which registrars are currently entitled - namely £163, being the aggregate of a fee of £114 payable on submission of a petition and a further fee of £49 for preparatory and ancillary work. (Under the new fee structure the latter fee will be abolished, so that only the single fee of £200 will be payable.)
21. In addition to the fee payable on submission of a petition for a faculty, the 2016 Order provides (at item 18 in Table 1) 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. That will maintain the position that existed under previous Ecclesiastical Judges, etc Orders, under which an additional fee could be paid if the chancellor agreed - which in practice he or she did only

exceptionally, where the work involved in a particular application was such as to justify that, on account of its weight and/or complexity.

22. The Commission recognises that the increase it proposes for the fee payable on submission of a faculty petition is substantially above inflation. But, notwithstanding the level of the proposed increase, the Commission nonetheless expects the overall costs to dioceses of the fees payable on submission of faculty petitions to be lower under the new arrangements than at present, given the expectation that the number of faculty petitions submitted to chancellors will decline significantly under those arrangements.
23. However, given the uncertainties as to how the recent changes will impact on the workloads of registrars, there is an unavoidable degree of provisionality about the provision made in this year's order. The Commission will therefore be keeping the position under active review, consulting both registrars and dioceses over whether, as the position becomes clearer, further adjustments to the level of faculty fees would be appropriate. It will also welcome comment, from registrars and others, on both the revised form of the 2015 Order and the approach it has adopted to the quantum of the fees for which it provides.

On behalf of the Commission

J Alpass

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