

GENERAL SYNOD

**LEGAL OFFICERS (ANNUAL FEES) ORDER 2014
LEGAL OFFICERS (ANNUAL FEES) (AMENDMENT) ORDER 2014**

Explanatory Memorandum

LEGAL OFFICERS (ANNUAL FEES) ORDER 2014 (GS 1938)

1. The Fees Advisory Commission ('the Commission') is a statutory body, constituted under the Ecclesiastical Fees Measure 1986 as amended ('the 1986 Measure'). The Commission recommends to the Synod the level of fees to be paid to diocesan registrars and ecclesiastical judges for performing certain of their duties and functions.
2. The Legal Officers (Annual Fees) Order, made under section 5 of the 1986 Measure, prescribes the annual fee payable to each diocesan registrar for the professional services specified in Schedule 2 to the Order.
3. The current system of remunerating registrars by way of an annual retainer for specified legal services has been in place for over 40 years without any substantial change. This is despite periodic reviews which have identified a number of weaknesses. While it has some useful features the system affords the users of legal services no direct opportunity to influence the size of the retainers nor any encouragement to engage with registrars in the search for good value. At the same time it takes no direct account of the actual cost of providing legal services, with the consequence that it has failed over a long period to deliver a fair return to registrars for the work they do. When the Commission was reconstituted in 2012 there was a strong implication that it should take a fresh look at the issues.
4. In July 2013 the Commission therefore reported to the Synod (in GS 1910-11X) that it had commissioned an independent review conducted by Mr John Farr and Mr Keith Malcouronne, which had made recommendations for reform. In response to these recommendations, the Commission proposed a number of changes, which were summarised in paragraph 4 of GS 1910-11X.
5. The primary aim of these proposals was to promote more effective dialogue and a sharper focus on value for money at local level between dioceses as users and registrars as providers of legal services. This was to be achieved through the introduction of a more transparent methodology for calculating the retainer and an annual review, involving the diocesan bishop or representative, other senior diocesan officials and the registrar, of the size and shape of its registrar's workload and related issues including costs.
6. 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 a period of five years. Research carried out by the Archbishops' Council's Research and Statistics Department (reported to the Synod in GS 1910-11X) demonstrates that the median retainer as a percentage of the real value of work done

dropped from 71% in 2001 to 57% in 2012, representing a net reduction of 14% over that period.

7. The independent reviewers confirmed this assessment. Their report (in section D4), concluded that most registrars *“are not being properly remunerated for the work they are doing, even allowing for a certain amount of pro-bono work Clearly this trend cannot be allowed to continue because, unless they are fairly remunerated, they and their firms will no longer be able to do the work, with serious consequences for the Church.”*
8. It needs to be remembered in this connection that the annual retainer is not a salary: the costs of accommodation, equipment and staffing to support the registry function have to be met in whole or in part from the payment the registrar receives. It is also relevant that many dioceses now use other lawyers to transact certain types of business, for example property and education-related transactions. The retainer can no longer be regarded as a ‘loss leader’ for registrars on the assumption that they will acquire other church business.
9. The Commission’s proposals were the subject of a wide-ranging consultation exercise in the autumn of 2013. The consultation paper, together with the reviewers’ report, can still be found for reference at:

<http://www.churchofengland.org/about-us/structure/churchlawlegis/consultations.aspx>.

10. 31 submissions were received in response to the consultation. These came from both users and providers of legal services, including diocesan secretaries and diocesan bishops, registrars, chancellors, and also from the Ecclesiastical Law Association and the Ecclesiastical Judges Association.
11. Comments were also received from the Church Commissioners, which meets that part of the cost of retainers (43% of the total) which is attributable to the work carried out by registrars in their capacity as the bishop’s legal secretary. In their response, the Church Commissioners acknowledged that an increase in the retainer was a price that must be paid if the Church were to continue to receive good legal advice, and went on to say *“We note, as the body which sometimes gets involved in extremely costly litigation involving diocesan bishops, that ‘the cutting of corners’ in relation to the work done by registrars will be financially and reputationally counter-productive in the longer run.”*
12. The responses as a whole revealed broad support for the main thrust of the Commission’s proposals, in particular 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, especially in the current difficult financial climate.
13. The Commission has listened seriously to these concerns. As a result, it has modified its proposals in a number of respects, which are reflected in the draft Legal Officers (Annual Fees) Order 2014 (‘the draft Order’) now before the

Synod. The detailed methodology is set out in the Annex, but the most significant changes, in terms of financial impact, are summarised below.

- (a) In the interest of affordability, the Commission now envisages a more modest staged uplift in the average value of retainers. It originally proposed that they should rise by some 50% over five years. This has now been scaled back to around 30% - which would still mean asking registrars to apply a greater discount in respect of work for the Church than would generally be afforded to charities. The new proposals would mean an average rise in retainer values in 2015 of some 6%, with no diocese incurring an increase of more than 8%. In cash terms a 6% rise is on average just over £3,000, part of which would be borne by the Church Commissioners.
 - (b) While the Commission would envisage the need for further staged rises over the four subsequent years to bring the value of retainers up to the desired levels, the new arrangements for local review will for the first time afford dioceses the opportunity to influence retainer values.
 - (c) The original proposal for a two-tier regional fee rate has been reconsidered, because consultation responses indicated that this would have a disproportionately adverse impact on dioceses in the northern province. Instead, the Commission now proposes an additional 10% weighting, to be applied only to the dioceses of London and Southwark, to reflect the higher legal costs in Greater London. These dioceses already attract an additional weighting under the current system.
 - (d) The Commission acknowledges that an unintended consequence of its proposals would be to narrow unacceptably the differential between the size of the retainer awarded to the largest and smallest dioceses respectively. The Commission has always used numbers of churches and clergy as a broad indicator of a diocese's workload, whilst recognising that the relationship between the two is not linear and that economies of scale should be achievable in working with larger numbers. In recent years the retainer awarded to the largest diocese has been some 1.9 times bigger than that for the smallest. Taking everything into account the Commission has concluded that this continues to represent a reasonable ratio, notwithstanding the fact that on the basis of church and clergy numbers alone the largest diocese is arguably some four times larger than the smallest. It has adjusted its methodology to ensure this ratio is maintained for the future.
14. The proposal for an annual review discussion between the registrar, the diocesan bishop (or his representative) and other diocesan users was well supported by respondents to the consultation. The Commission encourages dioceses and their registrars to use the opportunity presented by the annual review discussion 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.

15. To that end, it will ask 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 are an acceptable basis on which to calculate the value of the retainer. In the absence of that endorsement the Commission could respond in a number of ways. Options could include freezing the retainer as an interim measure, or substituting a figure which it considered to be equitable, while the parties worked to resolve their differences. The Commission intends to issue further guidance on this aspect of the new arrangements before the first reviews take place in 2015.
16. Notwithstanding the fact that an uplift in the remuneration of registrars is envisaged in the short term, the Commission stresses that its proposals will provide effective means of controlling costs over the longer term:
- (a) For the first time, the users of legal services covered by the retainer will be able directly to influence the amount spent on them; if more efficient ways can be found of delivering registrar services the costs may be reduced.
 - (b) The Commission will maintain an independent check on the registrars' returns and will reserve the right to challenge any aspect of the data they provide if it gives cause for concern.
 - (c) Since the Commission recommends fees for only one year at a time, it will be able to monitor the situation closely and modify its approach if required; the Synod will continue to have the final say.
 - (d) As with the present system, the new method includes checks and balances designed to ensure that the spread of retainer values across dioceses does not become too wide.
 - (e) The Commission is actively seeking ways to reduce the legal burden on dioceses. It is exploring with the Ecclesiastical Law Association and the Ministry Division of the Archbishops' Council respectively the provision of more basic legal advice online and improved training in legal matters for ordinands and clergy.
17. As it indicated to the Synod last year, the Commission has decided to bring the draft Order to this group of sessions in order that Synod may have an early opportunity to debate its revised proposals. The Commission commends the draft Order as part of a balanced package, which seeks to introduce a more transparent and responsive way of setting retainers, while addressing the long-acknowledged need to remunerate registrars more fairly for the valuable work that they do, to the extent possible under the financial constraints currently experienced by dioceses.
18. As regards the detail of the Order, the Commission had originally proposed that sub-paragraphs (2), (3) and (11) of paragraph 1 of Schedule 2 to the draft Order should be deleted. Respondents to the consultation, however, indicated that the registrar's attendance on these occasions (particularly at meetings of the diocesan synod) was generally considered necessary or valuable, and should continue to be included in the retainer. These sub-paragraphs have therefore been retained.
19. Two additions have been made to the categories of work listed in paragraph 4 of Schedule 2 as falling outside the scope of the retainer. The Commission

considered that it would be helpful, in the interests of clarity, if this paragraph were to include advice or other work in connection with grievances brought or capability proceedings instituted under the Ecclesiastical Offices (Terms of Service) Regulations 2009 and also advice or other work in connection with the exercise of their powers by regulatory bodies. This latter provision would cover, for example, investigations by the Information Commissioner or the Charity Commission.

20. The draft Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2014, to which no major changes are expected, will be brought before Synod in July.

LEGAL OFFICERS (ANNUAL FEES) (AMENDMENT) ORDER 2014 (GS 1939)

21. This draft Order amends the Legal Officers (Annual Fees) Order 2013 (SI 2013 No.1918), which prescribes the annual fees payable to registrars for 2014, in order to take account of the coming into force on 20th April 2013 of the Dioceses of Bradford, Ripon and Leeds and Wakefield Reorganisation Scheme.
22. It provides that the retainers payable under that Order to the registrars of the three dioceses dissolved by the Scheme are to be apportioned on a daily basis and that the aggregate of the sums payable for the period from 20th April to 31st December 2014 shall be paid to the registrar of the diocese of West Yorkshire and the Dales. The Commission has been advised that, although the Scheme will eventually result in savings in the cost of legal services, these are not expected to be realised before 2016. Indeed, it seems likely that the new diocese will wish to retain the services of the three current registrars (acting jointly) for a transitional period.
23. The 2015 retainer for the new diocese has therefore been frozen at the aggregate 2014 figure for the three dissolved dioceses. Thereafter, the Commission will keep the situation actively under review.

On behalf of the Commission
J Alpass
January 2014

Methodology for the calculation of individual diocesan retainers

Overview

Previously the FAC has calculated annual retainers by adopting an inflation factor derived from established government inflation indices, applying it to the total sum of the previous year's retainers and then dividing it between dioceses on the basis of a 'size of diocese' factor reflecting numbers of clergy and churches.

The new method dispenses with inflation as a variable but draws instead on data indicating the actual workload of registrars and its cost. This is described under **Pillar 1** below. This data is combined with 'size of diocese' data, as before, and other mechanisms are operated in order to produce the final result (see **Pillar 2**).

Within this process a number of checks and balances are employed to ensure a fair and balanced outcome reflecting the interests of both the Church and the registrars themselves. In future the most important of these will be the requirement that dioceses scrutinise and approve the data provided by registrars on their workloads and costs.

Pillar 1

Step 1: For many years registrars have reported to the FAC the total number of hours they have recorded on work under the retainer, broken down between work by solicitors and clerks, and the rates these would have attracted if they had been charged normally. To smooth the effect of short-term peaks and troughs, the FAC each year calculates a rolling average of hours worked by each registry (solicitors and clerks counted separately) over the previous five years. It has used historic data on this occasion. Outliers were removed.

Step 2: The FAC then takes an average of the hourly rates reported for solicitors and clerks in the most recent year (in this case 2012). For this purpose the rates from the registries for London and Southwark dioceses are excluded, and a London weighting applied subsequently to them.

Using this method, the average rates indicated by the 2012 data are as follows:

	Average rate (exc. London rates)
Clerks	£103
Legal roles (Registrars and Solicitors)	£203

Step 3: The five-yearly average hours for each diocese are then multiplied by the appropriate rates to produce a total value of work done, which is aggregated nationally.



Step 4: A 30% reduction is then made to this national total, to reflect the fact that registrars would not generally expect to charge full commercial rates to the Church, as a charity, and in recognition of the long-term stability and reliability of the Church as client. On 2012 figures the gross national total value of work done was some £4.1m, which with the ‘charity’ discount becomes £2.9m.

Pillar 2

Step 1: In recognition of the irreducible basic cost of running a registry, 30% of the national total value of work (after the charity discount) is divided equally among all dioceses. On current data this amounts to some £21.6k per diocese.

Step 2: The FAC will continue to calculate afresh each year the ‘size of diocese’ factor, as it has hitherto. Available data indicates that the workload of a registry increases primarily on the basis of the number of churches open for worship in a diocese. The FAC therefore intends to adopt this yardstick rather than the number of parishes, which has been used hitherto, although the impact of the change will be minimal in the short to medium term.

There is also a positive correlation, but less strong, between the value of work done and the number of clergy of incumbent status and above, so this factor should continue to play a part. The number of all such clergy – whether stipendiary or self-supporting - will now be taken into account.

The FAC will calculate the ‘size of diocese’ on the basis of the number of churches open for worship and the number of clergy of incumbent status or above, in a ratio of 2:1 – the same ratio as has been used hitherto between parishes and clergy.

Step 3: ‘Size of diocese’ is expressed as a weighted score for the purpose of the final calculations, as under the previous system. The crude scores are ‘capped’ so that the highest is no more than three times the size of the lowest, the aim being to smooth out possible extremes at either end of the spectrum. This is a broader cap than that used previously to ensure that under the new method the retainer for the largest diocese is approximately twice that for the smallest diocese, as before.

Step 4: The remainder of the available national total (£2m) is distributed in proportion to the capped 'size of diocese' weighting score, but with an additional 10% weighting in favour of London and Southwark dioceses.

