

**LEGAL OFFICERS (ANNUAL FEES) ORDER 2003
ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS
(FEES) ORDER 2003**

Explanatory Memorandum

1. The constitution of the Fees Advisory Commission (“the Commission”) is laid down by section 4 of the Ecclesiastical Fees Measure 1986, as amended by section 16 of the Church of England (Miscellaneous Provisions) Measure 2000. The membership of the Commission for the current quinquennium is:

Appointed by:

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| The Rt Hon Lord Justice Laws (Chairman) Geoffrey Tattersall QC* | The Lord Chancellor The Chairman of the Bar Council |
| Mrs Heather Morgan* | The President of the Law Society |
| Shaun Farrell (Financial Secretary) | The Archbishops’ Council |
| Andreas Whittam Smith (First Church Estates Commissioner*) | The Church Commissioners |
| Timothy Allen* | The Appointments Committee |

* Members of Synod

2. The Commission is assisted by four consultants: one from the Ecclesiastical Judges Association (representing diocesan chancellors and other ecclesiastical judges), one from the Ecclesiastical Law Association (representing the diocesan registrars), one of the provincial registrars and a member of the Research and Statistics Department of the Archbishops’ Council.

(a) *Legal Officers (Annual Fees) Order 2003*

Background 1990 - 2002

3. The Legal Officers (Annual Fees) Orders made under section 5 of the 1986 Measure fix the annual fee payable to each diocesan registrar for the work specified in Appendix to the Order (much of

which they are required by law to carry out). As members of the Synod will be aware, the evidence supplied to Commission over a substantial period consistently demonstrated that the amount paid to the registrars by way of annual fees fell some way short of what would be reasonable remuneration for their work. In 1996 the Commission therefore informed the Synod that it proposed:- “that in 1997 and in subsequent years if the information which registrars supply annually....continues to reveal a substantial shortfall, it will ask the Synod to agree to an increase of 2% on top of that which is calculated in accordance with the usual inflationary formula.” (GS 1225X).

4. The “usual inflationary formula” referred to, which had been used since 1990, is calculated as a combination of the increases in RPI (25% weighting) and AEI (75% weighting) for the previous year (both published by the Government).
5. Each year between 1997 and 2000 when the Commission presented the Annual Fees Order to the Synod at the respective July Groups of Sessions, the increase to be applied was proposed on that basis and accepted by the Synod. However in 2001 and 2002, because of the financial constraints facing the Church, and with the support of the Registrars’ consultants, the increase on top of inflation applied each year was 1%. Each year, in support of these proposals, the Commission has set out a sequence of supporting statistics that have been gathered and analysed by the Statistical Unit of the Central Board of Finance (now a Department of the Archbishops’ Council).

Background to the 2003 Order

6. Members of Synod will recall from the debate on the Legal Officers (Annual Fees) Order at last July’s Group of Sessions that the Church Commissioners (“the Commissioners”) independently announced that they would be undertaking a pilot exercise to examine the work being carried out by diocesan registrars and bishops’ legal secretaries. The Commissioners completed this review earlier this year and has shared the results with the Commission. In response to that review, the Commission set up its own Working Party to make recommendations to the Commission on a response to the Commissioners’ review. The report of this Working Party is annexed in full to this explanatory memorandum as appendix I.

7. The Commission has considered the report of its Working Party and has agreed (by majority) to receive, welcome and endorse the recommendations of Working Party's report and to use it as the basis for consultation later this year with stakeholders – i.e. registrars, chancellors, chairmen of diocesan boards of finance, bishops and the Commissioners – before recommendations for legislative change are brought to General Synod.

8. Specifically, the Commission agreed (by majority) on -

- (a) Recommendation 1 of the Working Party report, that the national retainer should be abolished and replaced by local negotiation in each diocese. It was noted that this recommendation went beyond the suggestion made in the Commissioners' consultative report, which recorded that "most of the users of the legal services paid through the current nationally agreed retainer system have a preference for it" and concluded that they were persuaded that there were advantages in deploying a nationally determined retainer system and thus did not recommend its abolition; however the Working Party had been persuaded by the responses to the Commissioners' report that the climate was changing and that there was widespread recognition that the retainer system was not working satisfactorily for its stakeholders. The Working Party recognised, as did the Commission, that the abolition of the nationally set retainer for registrars, which currently manifestly failed to fairly remunerate registrars for the services they provided, might lead to an increase in the sums to be paid to the registrars.

Mr Whittam Smith gave an undertaking that the Commissioners would continue until 2007 to pay 42% of the total amount of the annual fees paid to registrars (however determined). He could not commit the Commissioners' funds beyond that date but he envisaged that they would continue to make a substantial financial contribution in the future. A means whereby the Commissioners could play an appropriate part in local negotiation would need to be found, perhaps by way of an annual meeting with regional representatives from the dioceses. The Commission noted that the dioceses would probably be reluctant to change the present system, under which the Commissioners are obliged

to meet the costs of the bishop's legal secretary, without the assurance of a long-term financial commitment from the Commissioners.

The Commission noted the views of the Registrars' consultants that the retainer system offered registrars the certainty of a guaranteed income, which made the fact that they were not receiving a full commercial return more acceptable than it would otherwise be, that registrars would respond to the prospect of change in different ways: there would be both winners and losers if local negotiation were to be introduced and that without the guaranteed income provided by the national retainer it would be more difficult for registrars to recruit and retain staff.

- (b) Recommendation 2 of the Working Party report – that, during such time as the national retainer remains in force, it should be upgraded by reference to RPI alone. The Commission noted that a calculation for the 2003 Fees Order based on the average rise in RPI for 2002 would produce an increase of 1.6%, as opposed to an increase of 3% if the existing combined formula (which gives a 75% weighting to the Average Earnings Index) were used.

The Commission noted the points made by Canon Hemingray in the Working Party's report, where he questioned the rationale for calculating a sum that is primarily used to pay wages by reference to an index which relates to the price of goods. It noted, however, that RPI is based upon services as well as goods and is frequently used as a reference point in pay negotiations. It was noted that staff of the NCIs and in diocesan offices were receiving salary increases above RPI but there had also been significant job losses at national level, within an overall policy that administrative expenditure would be frozen for the three year period 2002-04.

It was further noted that the Working Party's report encouraged registrars to negotiate additional payments from their dioceses, where appropriate, during the period of transition to local negotiation and that an RPI-based increase in the national retainer would preserve its 'buying power' in the interim.

- (c) The remaining recommendations in the Working Party's report as they followed logically upon Recommendations 1 and 2. There could be no justification for the continued existence of a Fees Advisory Commission in its present form if the national retainer were to be abolished and it was logical that, in this eventuality, the Archbishops' Council should assume responsibility for the preparation of the Ecclesiastical Judges, Legal Officers and Others (Fees) Order.

It was acknowledged that the setting up of a group to formulate and disseminate best practice guidance to registrars would be dependent upon the availability of resources to support it. The Commission took the view that this, and the other matters referred to in paragraphs 4(c) and (d) of the Working Party's terms of reference, would best be taken forward by Mr Whittam Smith and Mr Farrell in consultation with interested parties within the NCIs and other bodies as appropriate

9. In the light of these decisions, the Commission agreed, with the support of the Registrars' consultants, to recommend that the fees in the Legal Officers (Annual Fees) Order 2003 should be increased from those in the 2002 Order by inflation with **no** additional upgrade. In accordance with the Commission's decision (see paragraph 8(b) above), the Commission agreed (with the Registrars' consultants dissenting) that inflation as measured by the Retail Prices Index **alone** would be applied. The level of increase is therefore **1.6%**. As in previous years, this increase is applied to the **total** sum payable which is then divided amongst the dioceses in accordance with a weighted formula which takes account of both the number of parishes in a diocese and the number of clergy of incumbent status and above (excluding cathedral clergy).
10. The annual statistical analysis of the value of work done by registrars and the fees they received by way of remuneration has not been annexed to this explanatory memorandum as in past years. As this report had previously been provided to the Synod in order to support an above-inflation increase, and no above-inflation increase is being sought this year, the Commission agreed that there was no need for a full report this year. However the Commission felt that there should still be some indication given to

Synod members of the gap between the retainer and the value of hours worked and this is provided in appendix II.

(b) *Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2003*

11. The Ecclesiastical Judges, Legal Officers and Others (Fees) Order fixes fees for faculty proceedings and some other proceedings in ecclesiastical courts, and also provide for the fees of the Provincial Registrars and the Vicars-General and certain fees for Synod elections.
12. In past years, the Commission has restricted the increase in the Ecclesiastical Judges, Legal Officers and Others (Fees) Order to one calculated on the basis of its usual formula for inflation (i.e. the weighted formula of RPI and AEI), but without the additional upgrade. Following the Commission's decision to increase the Legal Officers (Annual Fees) Order this year by RPI alone – the same decision has been applied in calculating the Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2003, namely the fees in the 2002 Order have been increased by **1.6%**, that is the RPI inflation figure alone.

The future

13. As referred to above, the Commission will be consulting with stakeholders on the recommendations of its Working Party report. The Synod will be kept fully informed of these consultations as they progress. Also, of course, before any change can be made to the present national retainer system, the Synod and Parliament will have to agree to amend the 1986 Measure. Nevertheless, in accepting its Working Party's report the Commission has endorsed the principle of moving to local negotiation. It would be prudent therefore for dioceses, as we enter this "interim period", to both individually and collectively consider the implications of a move away from a nationally set retainer to a system of local negotiation.

11 June 2003

Appendix I - Report of the Commission's Working Party

A SUMMARY OF RECOMMENDATIONS

- 1. The nationally set retainer for registrars should be abolished as soon as practicable to be replaced by local negotiation in each diocese.**
- 2. In the interim, the national retainer should remain, to be upgraded annually by reference to RPI alone, while the dioceses start the process of local negotiation.**
- 3. The duties of the registrar and bishop's legal secretary should be merged into a combined post of registrar.**
- 4. The Church Commissioners should be asked to continue to pay the same proportion as now of the upgraded national retainer until it is abolished and thereafter the Commissioners should be encouraged to continue to contribute on the same basis.**
- 5. With assistance from the Fees Advisory Commission in identifying the core statutory duties of the registrar, each diocese should individually identify the scope of the duties that they require their registrar to undertake.**
- 6. A group to be established under the auspices of the Archbishops' Council to work on and disseminate best practice and other guidance material.**
- 7. The statutory duty on the Fees Advisory Commission to prepare the Ecclesiastical Judges, Legal Officers and Others (Fees) Order to be transferred to the Archbishops' Council.**
- 8. The Fees Advisory Commission to be abolished.**

BACKGROUND

1. At its meeting on 11th December 2002 the Fees Advisory Commission (“the Commission”) gave a first consideration to the Church Commissioners’ (“the Commissioners”) review of the present arrangements for calculating the registrars’ annual retainers, with the First Church Estates Commissioner, Mr Andreas Whittam Smith, present. At that meeting the Commission agreed that a Working Party should be set up to move forward on the issues raised by the Commissioners’ report.
2. The membership of the Working Party:

Mr Tim Allen (General Synod and FAC member) (Chairman)
Canon Raymond Hemingray (Peterborough Diocesan Registrar)
Mr Keith Robinson (London Diocesan Secretary)
The Right Reverend Christopher Hill (the Bishop of Stafford)

and its terms of reference (as contained in Annex I to this paper) were agreed by the Commission at its meeting on 13th February 2003.
3. The Working Party has met once and the contents of this report represent its consideration of points 1 to 4(b) of its terms of reference. The Working Party has a second meeting scheduled for September when it will be considering the remainder of its terms of reference.

SUGGESTED PRINCIPLES TO GUIDE REFORM

4. The Working Party identified the following:
 - (i) **Quality of legal services**: the Working Party affirmed the high quality of legal service that the registrars currently provided to the Church. It recognised that it was essential for the just and efficient administration of the Church that the dioceses should all continue to receive high quality legal advice and services – in relation not only to ecclesiastical law but also to general legislation concerning property, employment, health and safety, discipline and human rights. Any reduction in the quality of legal services received by the Church would only prove to be a false and illusory economy. However, the Working Party recognised that it was unreasonable to expect one lawyer holding the office of diocesan registrar to be an expert in every field of non-ecclesiastical law. It was therefore expected, and indeed recognised practice in many dioceses, that the legal services of specialist lawyers outside of the diocesan registry would be sought when required to advise on particular matters.
 - (ii) **Fair remuneration**: if, in anything but the short term, this necessary high quality legal advice and service is to be secured by all the dioceses, the Working Party concluded that it must be paid for in a fashion which reflects fairly and adequately the work done by each registrar for each diocese. This the current arrangements had manifestly failed to do. Despite the difficulties in gauging accurately the general level of under-remuneration of the registrars, it was clear from even a general reading of the Commission’s own statistics and evidence provided by the registrars themselves through the Ecclesiastical Law Association and as part of the Commissioners’ review, that the majority of registrars remain underpaid for the legal services they

provide.¹ The Working Party recognised that ultimately it would be for the diocesan boards of finance, hopefully to be assisted still by the Commissioners, to address this disparity, under whatever system of payment was devised for the future. But the Working Party was convinced that it must be addressed, otherwise, if the registrar's remuneration remained consistently too low, there would be a danger that properly qualified lawyers would not in future be found to do the work.

- (iii) **Subsidiarity and local negotiation**: The Working Party noted that it is clear that there is no uniformity in the way in which dioceses organise their administration and choose to use the services of their registrars. The Working Party was of the view that this was neither surprising or necessarily wrong as it was surely the case that each diocese was the best judge of its own needs and the best manner in which to secure cost effective legal services to meet them. The hours worked, the hourly rates notionally charged, the variety of hourly rates across the country and the range of duties undertaken vary greatly between the dioceses. This variation between the dioceses made nonsense of the present system of centrally determined retainers.

Rather, the Working Party concluded, the principle of subsidiarity should be applied and each diocese and registrar should be allowed and encouraged to negotiate and agree bilaterally upon the size of a retainer or the level of direct payment for services which was appropriate and fair in the light of local circumstances (including the extent to which other Church legal work is given to the registrar's firm) and, in particular, of the work which each particular diocese required of its registrar.

This process should be approached in an open and transparent manner. Indeed, this sort of negotiation on fees would be novel neither to the dioceses (who as a matter of routine negotiate fees with their other professional advisers, accountants for example) nor to most of the registrars (who will be used to negotiating fees with other clients). The Working Party was therefore not convinced by the arguments of some that bilateral local negotiation of fees would significantly damage the professional relationship between diocese and registrar. Most importantly, local negotiation, rather, would ensure fair remuneration for professional legal services and better value for money.

In short, the Working Party agreed with the conclusions in paragraphs 54 and 55 of the Commissioners' report on the need for cost-effective legal services and the problems inherent in the current national retainer system in providing this, but disagreed with the Commissioners' conclusion in paragraph 56 that the national retainer system should be retained. It seemed to the Working Party that only each diocese and its registrar could accurately determine what is the fair and appropriate remuneration to be paid, having due regard to all the local circumstances in each case.

- (iv) **The role of the Church Commissioners**: the Working Party felt that the Commissioners were on strong ground in opposing annual increases in the

¹ It was suggested by Mr Keith Robinson that this deficit was often, to varying extents, offset by other commercial work which dioceses took to the registrar's firm or practice. Canon Hemingway however did not agree, pointing out that some registrars did not do other work for their dioceses and that those who did other work would be charging normal commercial rates which would not necessarily offset losses on the registry work.

retainers greater than the rise in retail prices. The Commissioners' resources are now much diminished and they, quite reasonably, want to concentrate their remaining resources in a targeted way on aspects of the Church's work where they will achieve most. However, the Working Party took the view that it would be inappropriate for the Commissioners to play no part in the remuneration of registrars. It was important to appreciate that many issues dealt with initially at a local level had national implications and that the legal support provided by registrars to their bishops related to national as well as diocesan episcopal responsibilities.

Nevertheless, the Working Party concluded that the continuation of the distinction between the duties of registrar and bishop's legal secretary would serve no useful purpose, unless the Commissioners' continuing contribution were to be founded upon an accurate calculation of the percentage of time incurred by registrars in acting for the bishop. (This did not mean, of course, that the holder of the combined post of registrar would not still be available to advise the bishop). The basis of any continuing apportionment of costs between the Commissioners and the dioceses needed to be addressed, but the Working Party felt that this would perhaps be best done as part of an overall settlement on bishops' costs and without the need for splitting the registrars' time between the two notional roles of bishops' legal secretary and registrar. In the short term, it would be helpful if (as the First Estates Commissioner has indicated) the Commissioners were prepared to continue to pay their (roughly) 40% share of the statutory retainer so long as it is not increased by a sum greater than the annual uplift in RPI. The Working Party expressed the hope that the Commissioners would continue to contribute the same amount to each diocese as they do currently (upgraded each year by RPI) when the statutory retainer was abolished to be replaced by local negotiation. If so, the Commissioners would not need to be a party to each diocesan negotiation.

- (v) **Diocesan finances**: this national contribution from the Commissioners would leave the remainder of the registrar's remuneration to be found by the diocese concerned. The Working Party was fully conscious that the dioceses themselves face grave financial difficulty and are under great pressure to reduce their costs, not least their legal costs. Also, as explained above, if local negotiation became the norm, the responsibility for addressing the significant underpayment of registrars would fall mainly on the dioceses. However, it was noted, that one way that this problem might be addressed would be for each diocese to take steps, having regard to local conditions, to ensure that work which can be done safely and more economically by diocesan non-lawyer staff is removed from the registrar's responsibilities. Registrars should also be encouraged to identify further savings that could be made by the better use of IT.

5. To summarise, the Working Party concluded that the complex, arcane and time-consuming way in which the duties and remuneration of each diocesan registrar are recommended by the Commission, approved by the General Synod and laid before Parliament, now makes no sense and fails to deliver the appropriate level of remuneration to reflect the work which each diocese requires of its registrar. Therefore, there should be a move to local negotiation as soon as is practicable, with appropriate continuing financial support from the Commissioners. This shift of emphasis away from the centre would cause each diocese seriously to examine (perhaps for the first time) the legal services it needs, who should provide them, how they can be provided in a cost-effective way and what is a fair and equitable remuneration for those duties that the diocese requires of its registrar.

IMMEDIATE ACTION

Inflation

6. The background to the current inflation formula used by the Commission is provided in Annex II.
7. The Working Party noted that the ELA accepts that the Commission's recent practice of 'topping-up' the annual increase by adding a further 2% (latterly 1%) to the index-linked figure can no longer be justified in the present financial climate.
8. The Working Party concluded (by a majority) that the level of statutory retainers (i.e. those laid down in the Legal Officers (Annual Fees) Order made under the Ecclesiastical Fees Measure 1986 and therefore including the contribution paid by the Commissioners) for the years 2004-06 should be increased by no more than price inflation (RPI) each year. This was on the basis that each diocese should be encouraged by the Commission in that period to negotiate bilaterally with its registrar to agree the normal duties of the role in that diocese and a fair level of remuneration for that work. Should that agreed level of remuneration exceed the amount of the annual retainer determined by the statutory process, the excess should be paid by the diocese to the registrar by way of a 'supplementary annual fee' (as already provided for in the Fees Order) except to the extent that the registrar may voluntarily choose to waive all or part of the excess.
9. This preliminary arrangement would be a precursor to the statutory retainer eventually being abolished provided that the necessary legislative changes are approved.
10. It was the view of a majority of the Working Party's members that the statutory retainer for the next three years should be increased by RPI only, it being the universally recognised and most widely used measure of inflation. It was the majority's view that it was appropriate to use RPI alone in upgrading the registrars' retainers, just as it was used to calculate wage increases in other occupations and professions. There was some discussion of the possibility of a phased move from the current mix of RPI (price inflation) /AEI (earnings inflation) to RPI alone, but it was the universal view of the Working Party that this would be unnecessarily complicated.
11. Canon Raymond Hemingray dissented from the majority view on moving to RPI alone, it being his contention that an effective argument had not been made on the intrinsic value of using RPI over AEI – or a mix including AEI - to calculate a retainer, a large part of which was used to meet wages. He recognised that, with RPI currently being lower than AEI², there was an attractive case on short-term cost grounds for opting for RPI alone but he suggested that a principled argument on why the Commission should abandon its mix of RPI/AEI (which it had used since 1990) would need to be made to the Synod (as well as those who in response to the Commissioners' review had come out in favour of the retention of AEI in the calculation). Canon Hemingray said that, so far, he had not heard such an argument put forward.
12. The Working Party agreed that both the majority and minority view should be put before the Commission and all agreed that it would be valuable to the Commission's

² The average for 2002: RPI – 1.6% AEI – 3.6%

discussion if the Commissioners were willing to provide a more detailed explanation of the rationale for their recommendation that reference should be made to RPI alone.

Scope of the retainer

13. The Working Party agreed the list of duties set out in the appendix to the Legal Officers (Annual Fees) Order should not be changed in the immediate future. However, as part of the move to local negotiation as already recommended, each diocese should be encouraged by the Commission to review bilaterally with its registrar what exactly the latter's duties should be, in the light of the particular circumstances of each diocese. To assist in this, the Working Party recommended that the Commission provide to dioceses an annotated version of the appendix showing the "core" tasks that the registrar was under a statutory obligation to undertake.³ The Commission should then urge each diocese to examine the remainder of the duties listed in the appendix to identify aspects of its registrar's present work which could be safely and more economically done in house by diocesan non-lawyer staff (or not done at all) and to remove such work (if any) from the registrar's responsibilities.

Role of the Commission

14. The Working Party came to the conclusion that since, it was recommending that the registrars' remuneration and related duties should no longer be determined centrally, it was questionable whether, in those circumstances, there would be any continuing role for the Commission.
15. However, the Working Party was agreed that, if the Commission did continue, it would need to be reconstituted so that its membership (presently dominated by lawyers) would also include representatives of the users of the registrars' services – e.g. diocesan secretaries, DBF chairmen, and bishops. It was recognised that the role of the member currently nominated by the Archbishops' Council was, in part, to represent the interests of the dioceses, but it was agreed that it would be more appropriate for the dioceses to nominate their own representatives.
16. The Working Party fully accepted that in a new era of local negotiation there would be a useful role to be played nationally in monitoring best practice and issuing guidelines for dioceses (though it was envisaged that such guidance would be advisory rather than mandatory). This role could be undertaken by a reconstituted Commission or by a reconstituted Legal Advisory Commission (with the necessary amendments to its constitution); however, the Working Party did not favour either approach. Rather it saw no reason why a permanent Commission of the General Synod was needed for this task and favoured a lighter touch, namely, the setting up of an informal group under the auspices of the Archbishops' Council to deal with the preparation and dissemination of best practice material.
17. The Ecclesiastical Law Association and the Ecclesiastical Law Society would no doubt assist in nominating members of any *ad hoc* group, which could also include representatives of the diocesan secretaries, the Commissioners (so long as they continued to make a financial contribution to the remuneration of registrars) as well as practitioners. It could meet as and when needed, i.e. when new legislation came into force or major difficulties were encountered, and the Working Party felt confident that the suggestions in paragraph 64 of the Commissioners' report would be brought within the remit of such a group.

³ The Legal Adviser to the Commission is in the process of producing this.

18. If this role of producing best practice guidance were dealt with in this way, the Commission could be abolished, with its remaining statutory duties in relation to the Ecclesiastical Judges, Legal Officers and Others (Fees) Order being transferred to the Archbishops' Council. It was thought that this duty would sit quite comfortably with the Council's existing responsibility for setting the level of Parochial Fees. The dioceses themselves could take on the calculation of the 'Chancellor's informal retainer' (if this is to be continued) as it is already simply upgraded annually by reference to the RPI.

National Insurance and VAT

19. The Working Party considered that its overall conclusions addressed the points raised in paragraph 64 of the Commissioners' report, with the exception of the concerns raised about NI and VAT. Canon Raymond Hemingray explained that, although technically there was a double charge to both NI and VAT, certain dioceses had negotiated relief from one or the other. He suggested that any attempt to clarify the position might challenge these locally negotiated arrangements and could result in individual registrars having to face large demands for unpaid NI or VAT. The Working Party therefore agreed that this point should not be pursued without further expert consideration. If the national retainer were to be abolished, the problem would in any event cease to be a matter of concern at the centre.

On behalf of the Working Party

Tim Allen

Chairman

28th April 2003

Annex I

TERMS OF REFERENCE

As an immediate priority

1. To consider the recommendation that the level of retainers in 2004-06 should increase by no more than price inflation (RPI) each year⁴.
2. To undertake a review of the duties covered by the retainer as included in the Schedule to the Legal Officers (Annual Fees) Order.
3. To formulate recommendations to the Fees Advisory Commission (“the Commission”) on points 1 and 2 above by early April 2003.

In the longer term

4. To examine:
 - (a) Whether the Commission’s constitution and role (as provided in the Ecclesiastical Fees Measure 1986) should be changed (and if so, how) to allow the Commission to ensure “that legal services provided within the retainer system meet the needs of those using it but within a financial framework that the Church can afford”⁵ and to further ensure that “the customers of the service have a greater say on its membership and it is given more specific statutory terms of reference which include the principle of cost-effectiveness”⁶.
 - (b) Whether the following recommendations⁷ should be pursued, and if so, consider the priorities for their implementation.

That the Commission should–

- undertake a review of the duties set out in the Fees Orders to see if the work is necessary and to ensure lawyers are clear what is required of them;
- provide guidance as to what work should normally be done by administrators as opposed to lawyers;
- prepare guidelines of ‘best practice’ for use in dioceses (e.g. in relation to effective routing and sifting of legal queries within the diocese);
- seek to make the calculation of the retainer simpler, more transparent and based on consistent information with the purpose of making it as fair as possible;
- express its decisions regarding increases in the level of the retainer by reference to the retail price index;

⁴ Paragraph 64 of the Commissioners’ report

⁵ Ibid., paragraph 63

⁶ Ibid., paragraph 68 – second recommendation

⁷ Ibid., paragraph 64

- seek to make the calculation of the split of costs between the Commissioners and the dioceses more transparent;
 - review the NI and VAT arrangements in relation to the retainer fees;
 - review the benefits of employing registrars whose firms undertake significant amounts of other work for dioceses vis-à-vis those dependent upon the retainer;
 - encourage dioceses, when they are required to make a change of registrar or are considering such a change, to consider sharing a registrar (or the firm thereof) with another diocese or dioceses in their region;
 - encourage the use of IT to gain greater efficiency and develop more sharing of information and best practice.
 - in its next report to General Synod, obtain from Synod a specific mandate to oversee the provision of cost-effective ecclesiastical legal services to the Church.
- (c) In consultation with the Commissioners and the Legal Office, whether the following recommendations⁸ could be implemented, firstly that “all the users of legal services should consider combining forces to make the necessary investment so that the NCI’s Legal Office can develop its IT to provide resources (e.g. a website) which will guide users on ecclesiastical legislation” and secondly that “the users should consider making the necessary investment to increase the staff resources of the NCIs’ Legal Office to enable it to provide a ‘consultancy service’ in respect of complex issues which arise in relation to current legislation and to smooth the introduction of new Church legislation.”
- (d) With the Chief Legal Adviser, Clerk to the Synod and the Legal Advisory Commission, the practicality, the means, and cost implications of implementing the recommendation that “the Church should consider the scope for repealing and simplifying current ecclesiastical legislation”⁹ and with the Ecclesiastical Law Association and the Diocesan Secretaries’ Consultative Group how the recommendation that “the deployment of registrars moves to a more regional basis in line with the pooling of administrative resources by dioceses”¹⁰ might be taken forward.
5. To formulate recommendations to the Commission on point 4 above by the end of 2003 at the latest.

⁸ Ibid., paragraphs 65 and 66

⁹ Ibid., paragraph 68 – first recommendation

¹⁰ Ibid., paragraph 68 – third recommendation

Annex II

THE CURRENT CALCULATION OF INFLATION USED BY THE COMMISSION

1. The “usual inflationary formula” used by the Commission to annually upgrade the diocesan registrars’ retainer (as contained in the Legal Officers (Annual Fees) Order) and the fees payable under the Ecclesiastical Judges, Legal Officer and Others (Fees) Order has, since 1990, been calculated as a combination of the increases in RPI (25% weighting) and AEI (75% weighting) for the previous year (both published by the Government).
2. In each year between 1997 and 2000 when the Commission presented the Legal Officers (Annual Fees) Order, the increase applied by the Commission and accepted by the Synod was the usual inflationary formula plus 2%; whilst in the last two years, the figure above inflation has been 1%. The fees payable under the Ecclesiastical Judges, Legal Officer and Others (Fees) Order have always been upgraded by the usual inflationary upgrade alone.

Background to current formula

3. Legal Officers Fees Orders were made periodically between 1964 and 1980. The Clark Report of 1982 noted that “in 1980 an assurance was given to the Ecclesiastical Law Association that the fees of their members would be reviewed annually”¹¹, and as a result of inflation, fees orders have been made annually since 1980.
4. The Clark Report also noted that it is submission the ELA had asked “that the retainer should bear relation to the overheads involved in providing the services required and include some recognition of the cost to his firm of the registrar’s time and some element to reflect a degree of “profit” upon that cost in recognition of the responsibilities placed on the registrar. Accordingly, some boards of finance have been prepared to make a payment to the registrar – as registrar – in addition to the prescribed retainer, in recognition that the legal firm of which the registrar is a partner is providing a hidden subsidy for the provision of the office accommodation, staff, and services.”¹² This seemed to reflect a growing concern amongst registrars that upgrading the retainer by inflation calculated by RPI alone was not accurately reflecting the real costs incurred by registrars.
5. This theme re-appeared in 1989, when the Commission undertook a consultation exercise with all dioceses (except Sodor and Man and Europe) and one of the issues raised was how the retainer should be calculated. A significant number of the thirty-three dioceses that responded wished to see a change in the way that the Commission increased the retainer to take account of inflation. A sub-group of the Commission under Chancellor Tom Coningsby examined this issue in detail and reported that – “it was recognised that an annual increase based solely on the Retail Price Index did not take sufficient account of other factors, such as earnings, which affected the costs of operating a registry; a blend of RPI and Average Earnings is recommended. It is also proposed that the figures should relate to the previous year rather than a forecast for the next year.”¹³ The sub-group's recommendations were accepted by the Commission and implemented in the 1990 Annual Fees Order.

¹¹ GS Misc. 165, para. 29.

¹² Ibid., para. 38.

¹³ FAC(90)1, para. 3 (e)

6. In its explanatory memorandum to the 1990 Order, the Commission explained “moreover, it is clear that in general, increases in the RPI do not accurately reflect many of the increases in the costs of running a diocesan registry, in particular staff costs.”¹⁴ In his speech to Synod, introducing the draft 1990 Order, Chancellor Coningsby said - “we are going over to a system which is not based on RPI but based as to 75 per cent on the Government’s figures for increases in annual earnings and as to only 25 per cent on RPI because we believe that the annual earnings figure is a better guide to the sort of inflation that registrars have to cope with.”¹⁵
7. No one spoke against this proposal in the debate, and the only reference to it came from a member (who was a solicitor in private practice and a chairman of the management committee of that practice) who spoke in favour. He said – “the problem in the past has been that RPI does not measure the substantial increases that there have been both in salaries and in office rents, which are a very large part of the overheads that the registrar has to pay. In addition, the registrar has to pay rates – and do not forget the business rate – telephone, postage and professional indemnity insurance which is the largest single overhead after salaries and rent of most practices.”¹⁶

¹⁴ GS 936X and GS 937X, para. 5.

¹⁵ Reports of Proceedings, Vol. 21, No.2, page 771.

¹⁶ Ibid., page 775.

Appendix II - 2002 Diocesan Registrars' Retainers – a Statistical Report

Introduction

Each year since 1994 the Archbishops' Council's Research and Statistics Department (formerly the CBF Statistics Unit) has presented a report to the Fees Advisory Commission based on figures supplied by registrars for the work carried out in the previous year. Each year the data have shown a wide gap between the size of the overall retainer and the monetary value of the work covered by the retainer.

Median Diocese

The concept of a 'median diocese' has been used in each report. The median of a set of values is defined as the middle point when the values are arranged in order of size and is used as a measure of "average" that is not unduly affected by extremes. For this analysis a median diocese is defined as one where the registrar and his/her staff worked the median number of hours for the median rate of pay.

The table below shows the median hours worked, the value of work done in a 'median diocese' and the median retainer since 1993.

| Year | Median hours worked | Monetary value of work done in median diocese | Median Retainer | Median Retainer as percentage of value of work done in a median diocese |
|------|---------------------|---|-----------------|---|
| 1993 | 587 | £39,800 | £23,000 | 58% |
| 1994 | 572 | £41,200 | £24,100 | 58% |
| 1995 | 549 | £39,400 | £24,700 | 63% |
| 1996 | 532 | £40,200 | £25,400 | 63% |
| 1997 | 582 | £42,400 | £26,600 | 63% |
| 1998 | 633 | £49,200 | £28,000 | 57% |
| 1999 | 540 | £45,700 | £29,700 | 65% |
| 2000 | 498 | £47,800 | £31,000 | 65% |
| 2001 | 532 | £48,500 | £32,800 | 68% |
| 2002 | 491 | £54,800 | £34,500 | 63% |

Note: The 'monetary value of work done in a median diocese' is defined as the sum of: a) the median hourly rate for clerks multiplied by median hours worked by clerks; and b) the median hourly rate for registrars and solicitors multiplied by the median hours worked by registrars and solicitors.

Conclusion

The above analysis shows there continues to be a wide gap between retainers and the monetary value of work carried out by diocesan registrars. Although the median hours worked has decreased over the last ten years, it must be noted that this does not take into account the nature of the work or the level of personnel performing it. The gap between the monetary value of the work and the median retainer has closed since 1993 but in recent years has remained as a proportion at approximately two-thirds.

Research and Statistics Department

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