

A supplementary report from the Deployment, Remuneration and Conditions of Service Committee

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Introduction

1. Weddings and funerals are occasions when the ministry of the church can make a real impact. For some it will be the first time they have been in contact with the church for years, for others the first time ever. Helping people at these life-changing moments is a privilege: it is also an opportunity, because if people feel well treated they often come back.

2. We pay tribute to the loving work of thousands of Church of England priests and lay ministers who year in year out provide pastoral preparation and continuing care to individuals and families up and down the country. That we have identified deficiencies in legal provisions and their practical out workings does not dishonour that work.

3. It is easy for us to fall into the trap of thinking that the subject of parochial fees is an internal one: that it is about us, our culture and our practical concerns. Our first concern should not be us but the people who come to us for support and advice - especially newcomers. How do we make sure we are treating them fairly and compassionately, and show them something they might want to be a part of?

4. We live in a world where information travels fast, people exchange notes in internet chat rooms, and inconsistencies of treatment are soon exposed. This can lead to individuals feeling confused and upset, but too uncomfortable to raise the matter with the vicar.

5. The dedication of local churches to maintaining local ministry is manifest in the effort that goes into the maintenance of church buildings. Of the £107m spent each year on maintaining churches, an astonishing 70% is raised by local people who fundraise tirelessly to keep these beloved buildings open. Naturally some see Pastoral Services, particularly weddings, as a reasonable opportunity to ask for an extra

contribution. We understand this, but believe that the Church of England must be consistent and clear about how parochial fees support ministry.

6. The valuable contribution made by retired clergy and other non-stipendiary ministers will be increasingly important in the future. The recommendations in this report and in GS Misc 877 are intended to facilitate and support this ministry.

7. The Deployment, Remuneration, and Conditions of Service Committee (DRACSC) and the Fees Review Group agree that it is time for us to take a long hard look at practice around the Pastoral Services and recognise that reform is needed if we are to “speak more effectively of God and to share God’s love through pastoral care”¹

Background

8. Following a consultation with dioceses and other stakeholders in 2005 the Archbishops’ Council asked its Deployment, Remuneration and Conditions of Service Committee to conduct a review of primary legislation and policy in relation to parochial fees. DRACSC invited the Rt. Rev’d James Langstaff, Bishop of Lynn to chair the Fees Review Group, a small working party of Synod members, to receive submissions and advice, in order to develop proposals which had had wide support in the 2005 survey.

9. The Fees Review Group’s work fell into three distinct categories:

- (a) proposals for fresh legislation;
- (b) policy to be adopted when preparing fees orders for Synod’s approval; and
- (c) suggestions for good practice.

10. In light of the Group’s report, *Four Funerals and a Wedding* (GS Misc 877), and legal advice on the need for fresh legislation to regularise the existing position and protect individual ministers and PCCs from legal challenge, the Archbishops’ Council brought draft legislation to Synod for first consideration in February 08. *Four Funerals and a Wedding* was presented as a miscellaneous paper. It was felt that the various recommendations and suggestions it contained in respect of fees orders and local practice could be reviewed and discussed as the legislation went through revision. None of these second and third order proposals would be put into effect by the legislation, but they would be possible under it.

11. However, Synod asked for first consideration of the legislation to be adjourned pending a fuller debate on *Four Funerals and a Wedding*. This supplementary report is intended to resource that debate by providing further information about the need for legislative reform, and the scope and ownership of decision-making in respect of the scope and level of parochial fees, their collection and disbursement.

12. The Fees Review Group, the Archbishops’ Council and DRACSC agree that there is a pressing need for reform of primary legislation, and for orders to make clear the scope of fees. It also necessary to strike an appropriate balance between setting

¹ Four Funerals and a Wedding GS Misc 877

national policy as required by law, and sharing good practice to inform local policy-making. **Recommendations are set out at paragraph 30.**

Summary of the legal position

(A more detailed explanation of the legal position appears in the annex.)

13. The law has never given the clergy a *general* right to require fees for the performance of ecclesiastical duties. Parochial fees began as payments made to parochial clergy, initially on a voluntary basis and subsequently in accordance with local custom. In order to establish a legal right to fees an incumbent had to show that a custom had existed in the parish in question from time immemorial that certain fees were payable in relation to the performance by the clergy of occasional offices. Other than what could be shown to be due by legally-recognised custom, it was not lawful (either under canon law or common law) for the clergy to require payment for the performance of their pastoral and sacramental duties. Difficulties could arise where local custom was unclear. The value of customary fees declined as inflation began to affect the value of money from the sixteenth century. New parishes, of course, had no ancient customs relating to fees. Legislation was enacted from the eighteenth century onwards to address some of these problems; however, it was not until the second half of the twentieth century that legislation provided for fees tables to be established on a national basis.

14. The first legislation that provided for nationally applicable fees was enacted in 1962. That was replaced by the Ecclesiastical Fees Measure 1986 which remains in force and under which Parochial Fees Orders continue to be made annually. Unfortunately, the legislative framework contained in the 1986 Measure is substantially defective, and the General Synod's Legal Advisory Commission, having examined the Measure in the light of a number of questions that frequently arise in practice, has called for fresh legislation. Particularly problematic is the definition of "parochial fees" contained in the 1986 Measure: it is difficult to make sense of that definition with the result that the scope of the power to prescribe – and therefore to charge – parochial fees is not as clear as it ought to be.

15. The defects of the current legislation mean (among other things) that –
- (a) it is not clear whether the 1986 Measure adequately covers funeral services that take place at crematoria rather than in parish churches;
 - (b) it is not clear that fees are payable at all in respect of services taken by non-parochial clergy, and the basis on which such clergy receive fees is not always readily apparent;
 - (c) it is doubtful whether a fee may lawfully be charged at all where no fee is fixed in a fees order (for example for a service of prayer and dedication after civil marriage);
 - (d) it is doubtful whether the making of "additional charges" over and above the statutory fees is lawful.

16. There is substantial doubt as to the range of matters in relation to which fees may be prescribed, and as to whether fees are payable at all in some circumstances where they are commonly charged. This doubt leaves some aspects of current practice in relation to fees open to the possibility of legal challenge.

Reforming legislation

17. A new legislative framework for parochial fees is therefore needed. That framework should deal with the deficiencies of the current legislation, in particular by making clear the range of matters for which fees may be prescribed and the circumstances in which they are payable. (In the light of observations made in February's debate, it is no longer proposed to omit the publication of banns from the list of matters in respect of which fees may be prescribed.)

18. A new legislative framework should also ensure that the *legal* recipients of parochial fees correspond to the bodies that are in practice already the effective beneficiaries of those fees. In the case of fees payable to PCCs there is no difficulty and the position can broadly remain as at present. However, the present position whereby fees are legally payable to incumbents does not reflect the reality of the situation. Incumbents either assign all their fees to the diocesan board of finance and receive the full stipend, or they declare the amount that they have received in fees and their stipend is reduced accordingly. In either case, it is the DBF (and in general the stipends fund), rather than the individual incumbent, who is effectively the beneficiary of these fees. It would be sensible and logical if the legislative framework reflected this position by providing that what are currently labelled "incumbent's fees" become fees payable to the DBF, even though it may make sense for them to be *collected* locally.

19. A new legislative framework should encourage and facilitate good practice, while leaving the setting of the level of fees to General Synod and the Archbishops' Council. The most appropriate way of collecting and distributing fees can be determined locally.

Policy for Fees Orders.

20. The Fees Review Group proposes that policy be to set parochial fees at a level which fairly reflects the actual cost of providing the ministry involved. Data is available on buildings costs, parish administration costs and the costs of training and paying the church's stipendiary priests. With this information, and in close consultation with dioceses and parishes the Archbishops' Council should set national fees which can be consistent from place to place, and provide PCCs with a proper contribution to parish costs. The fees should cover those elements that are essential for a service to take place. By making clear what the parochial fees cover it will also be made clear what they do not cover, and for what "extras" may be charged locally.

21. Reasonable charges for non-essential extras that people choose to have, such as bell ringing, choir or organist, will be lawful under the new legislation and will remain at local discretion.

22. Because parochial fees should in future include the costs of essential elements like basic lighting and heating, cleaning and administration, they are likely to rise. Any increase would be offset by a reduction in some of the "extras" currently being charged. (*Four Funerals and a Wedding*, paragraph 24). The implications of this recommendation will receive further consideration.

23. The Council would ask DRACSC to take forward the recommendations for setting the level of fees in consultation with the Council's Finance Committee so that Synod can examine the calculations, and their effect on the level of the fees, before the first order is made under the new Measure. In this way any new arrangements can

be considered in good time. If on closer examination Synod was not satisfied that this new approach was reasonable, alternatives could be suggested, or existing practice maintained.

24. Fees orders will remain subject to the approval of General Synod: if it feels that the level of fees proposed in any new order is too high or too low, it can make amendments or even reject the order.

Suggestions for good practice

25. During the course of consultations clergy, laity and funeral directors told the Review Group about arrangements that they felt were helping to improve the quality of the Church's ministry. The Group felt that it was worth sharing these and encouraging good practice. It would be up to dioceses and PCCs whether or not to adopt these suggestions, to try something similar but different, or keep things just as they are now.

26. Suggestions for good practice tended to fall into the following categories:

- local arrangements by which incumbents can ensure the availability of an authorised minister;
- open and efficient ways of accounting for fees;
- payment of fees to ministers who do not receive a stipend;
- provision of signing, braille text and other accessibility aids; and
- arrangements for continuing training in liturgical and ministerial practice.

27. DRACSC is keen that within a clear legal framework, the principle of local decision making be maintained. Local solutions are often the most responsive and efficient. The Review Group felt that information about arrangements that are working well in some dioceses or deaneries could be usefully shared with others. Since the Group's report was published others have come forward with their own examples of good practice and these too will be included in the guidance that DRACSC produces.

28. However, there is one aspect of the collection and disbursement of fees where a national policy may be considered desirable. This is the remuneration of retired clergy and other ministers who provide occasional offices but do not receive a stipend. As things stand the Review Group's suggestion that these ministers receive the full ministry fee less a small deduction for administration and training would be subject to diocesan discretion.

29. Despite there being current national guidance in this area, local practice varies widely in a way that is regarded as unfair by many clergy and laity. DRACSC suggest that national policy that encourages parity in the remuneration of these ministers, is agreed in the light of the Review Group's recommendations. It is recognised that many such ministers may prefer not to be remunerated, but this must be a matter of personal choice.

Recommendations

30. DRACSC welcomes the proposals contained in *Four Funerals and a Wedding* and asks General Synod to endorse the following recommendations.

In respect of legislation:

- a. **the replacement of the current, defective, definition of “parochial fees” with a definition based upon a list of services and other duties carried out by the clergy and authorised lay persons;**
- b. **that fees continue to be payable to parochial church councils, but that fees currently legally payable to incumbents become legally payable to the diocesan board of finance which currently has the benefit of those fees (subject to transitional provisions);**
- c. **that fees orders be capable of continuing for up to five years, with inbuilt increases;**
- d. **that incumbents, team vicars and priests in charge be given an express power to waive fees (subject to a requirement of consultation with a person appointed by the bishop for that purpose);**
- e. **that fees for the funerals of children under 16 be abolished;**
- f. **that the power to prescribe fees should expressly include the power to specify what a particular fee covers.**

In respect of fees orders:

- g. **that orders make it clear that parochial fees cover the essential elements required for a service to take place;**
- h. **DRACSC and the AC Finance Committee be asked to produce illustrative examples of how the recommendations of the Fees Review Group for setting the level of parochial fees would work in practice, for consideration before the first order is made under the new Measure.**

In respect of the collection and disbursement of fees:

- i. **that DRACSC work with dioceses, parishes and other stakeholders to develop good practice guidance;**
- j. **that the Archbishops’ Council produce national policy for the remuneration of retired clergy and other ministers not in receipt of a stipend, who conduct Pastoral Services at the request of the incumbent, and for which Parochial Fees are payable.**

Annex

THE LAW RELATING TO PAROCHIAL FEES

The Legal History of Parochial Fees²

1. The starting point is that the clergy have no *general* legal right to take fees for the performance of ecclesiastical duties³. The rule has always been that it is not lawful to make the celebration of the sacraments or the performance of other ministrations of the Church, such as solemnizing matrimony or burying the dead, conditional upon the payment of money⁴. It would not therefore be lawful for an incumbent to decline to marry or bury a parishioner on the ground of non-payment of fees⁵. Consistently with the general rule already referred to, it is an ecclesiastical offence for a member of clergy to demand illegal or excessive fees for performing any office of the Church⁶. The taking of illegal fees is a species of simony in that it amounts to “trafficking for money in spiritual things”⁷.
2. By virtue of the development of local customs, fees (often known as “surplice fees”) began to be recognised as payable to parochial clergy in relation to the performance of occasional offices. Because the common law recognises custom that has existed since “time immemorial”, the payment of parochial fees became a legally-enforceable obligation where such a custom could be shown to exist⁸. However, owing to the legal requirement that any such custom must have existed since time immemorial, and the eventual settlement by the courts upon the principle that “time immemorial” meant earlier than 1189, a claim for the payment of parochial fees (as indeed in the case of any other customary right) could be defeated if it could be shown that the custom in question did not exist, or could not have existed, prior to the year 1189.⁹

² See generally Halsbury’s *Laws of England*, vol. 14, para. 1194 ff upon which much of what is said here in relation to the history of fees relies.

³ *Burdeaux v Lancaster* cited in Phillimore’s *Ecclesiastical Law*, 2nd ed., at p. 509: per Holt CJ – “Nothing can be due of common right”. Fees are only payable either in accordance with local custom or, now, pursuant to statute: see below.

⁴ See the constitution of Archbishop Langton to this effect in Gibson’s *Codex* p. 431.

⁵ A member of the clergy who declined to carry out his/her duties in such circumstances could be proceeded against under the Clergy Discipline Measure 2003 for “neglect ... in the performance of the duties of his[her] office”. An incumbent’s remedy would be to sue for any unpaid fees in due course.

⁶ *Burgoyne v Free* (1829) 2 Hag Ecc 456 at 464-466, 493. Such an offence could be dealt with under the Clergy Discipline Measure 2003 on the basis that it amounted to “doing any act in contravention of the laws ecclesiastical”; or, probably more likely, that it constituted conduct unbecoming under the Measure.

⁷ See Halsbury’s *Laws of England*, vol. 14, para. 1359; Phillimore p. 509; and the legatine constitutions set out in Gibson’s *Codex* at pp. 432-3.

⁸ Canon law also recognised such customs. Baptismal fees (always of doubtful legality) were expressly abolished by the Baptismal Fees Abolition Act 1872 which makes unlawful the demanding of “any fee or reward for the celebration of the sacrament of baptism, or the registry thereof”.

⁹ Thus in the case of *Bryant v Foot* (1868) LR 3 QB 497 the Court of Exchequer Chamber held that a claim for a fee substantially greater than that which – owing to the change in the value of money in the meantime – could not conceivably have been taken as of right in the reign of Richard I could not be made out.

3. When new parishes came to be created – especially in the eighteenth and nineteenth centuries – it could not, for reasons that are obvious, be shown that there had been a custom relating to the payment of fees in such a parish since time immemorial. This situation was dealt with in some of the legislation that authorised the creation of new parishes by fixing fees under those enactments. In 1938 power was conferred on the Ecclesiastical Commissioners to establish a table of fees for any parish¹⁰. This was replaced in 1962 with a general power under which the Church Commissioners were to establish a table of parochial fees for all parishes in the provinces of Canterbury and York¹¹. For the first time there was a table of parochial fees that applied on a national basis. This was replaced by the power (now exercisable by the Archbishops’ Council, subject to the approval of the General Synod) contained in the Ecclesiastical Fees Measure 1986¹² which continues to provide for a nationally-applicable table of parochial fees.

Deficiencies of the current legislative framework

4. The Ecclesiastical Fees Measure 1986 defines “parochial fees” as follows¹³ –

“parochial fees” mean any fees payable to a parochial church council, to a clerk in Holy Orders, or to any other person performing duties in connection with a parish for, or in respect of, the solemnization or performance of church offices or the erection of monuments in churchyards or such other services or matters as may by law or custom be included in a Parochial Fees Order and such other services or matters for which, in the opinion of the Church Commissioners, the payment of fees is appropriate, except fees or other charges payable under section 214 of, and Schedule 26 to, the Local Government Act 1972 (burial fee) or fees payable under section 62 of the Cremation Act 1902 (cremation service fees).

5. The General Synod’s Legal Advisory Commission considered this definition in detail in 1999 and again in 2002. The Commission found it difficult to make sense of the definition. In particular the Commission raised the following issues and advised that fresh legislation was required.
 - (a) it is not clear whether the 1986 Measure adequately covers funeral services that take place at crematoria rather than in parish churches¹⁴;
 - (b) it is not clear whether fees are payable in respect of services taken by non-parochial clergy;
 - (c) it is not clear whether parochial fees are payable where marriages take place in non-parochial places of worship (pursuant to a special licence);

¹⁰ Section 1 of the Ecclesiastical Commissioners (Powers) Measure 1938 (now repealed).

¹¹ Section 2 of the Ecclesiastical Fees Measure 1962 (now repealed).

¹² Sections 1 and 2.

¹³ In section 10.

¹⁴ This is because it is not clear that such services necessarily amount to “duties in connection with a parish” – one of the elements of the current statutory definition of “parochial fees” which qualifies the other parts of that definition.

- (d) it is doubtful whether a fee may lawfully be charged at all where no fee is fixed in a fees order (for example for a service of prayer and dedication after civil marriage);
 - (e) it is doubtful whether the making of “additional charges” over and above the statutory fees is lawful; and
 - (f) it is not clear whether it is lawful to make a charge for travelling time and expenses over and above the statutory fees.
6. Other issues that have been identified (by the Legal Office) in relation to the existing legislative framework include the following –
- (a) the definition of “parochial fees” refers to “section 62 of the Cremation Act 1902”: no such section exists;
 - (b) it is doubtful whether an incumbent who has assigned his fees retains the discretion to waive them in particular cases;
 - (c) an incumbent who has assigned his fees cannot lawfully pass on any part of his fee to another minister who actually carries out a duty for him: all of his fees belong to the diocesan board of finance and are at the board’s disposal¹⁵;
 - (d) Assuming that fees are payable at all in respect of services taken by non-parochial clergy (see paragraph 5, second bullet), they are payable *to* incumbents and to PCCs, but to no-one else. Clergy other than incumbents should have recourse to the relevant incumbent or, where the fees have been assigned, to the DBF if they wish to receive remuneration. This does not appear to be adequately recognised at present.
7. Well over 90% of incumbents assign their fees to the diocesan board of finance and therefore receive the full stipend. The remainder who do not assign their fees are obliged to account to the diocesan board of finance for the fees that they receive and their stipend is reduced accordingly. The current position is, in effect, that the diocesan board of finance is the beneficiary of incumbents’ fees: it would appear logical therefore that it ought also to have the legal entitlement to those fees (irrespective of the mechanism used for fees to reach the DBF). Fees are already legally payable to the DBF during a vacancy in a benefice¹⁶.
8. There appear to be a significant (even if perhaps small) number of clergy who enter into “private arrangements” with funeral directors and receive and retain fees for themselves rather than accounting for them to the relevant incumbent/DBF. Such practices are already unlawful¹⁷. Fees belong in the first instance to the

¹⁵ As the law currently stands, the remuneration of retired clergy who take funeral services is a matter for the diocesan board of finance (or, where fees have not been assigned, the relevant incumbent).

¹⁶ Section 3(1) of the Ecclesiastical Fees Measure 1986.

¹⁷ See paragraph 6(d) above and note 14. It is not open to clergy of the Church of England to operate on a “freelance” basis. All clerks in holy orders are bound by the Canons of the Church of England (which are part of the general law). Canon C8 provides that the clergy may officiate in any place only

relevant incumbent, and ultimately to the DBF. However, the present legal framework appears to have resulted in this not being adequately recognised. In order for unbeneficed clergy (such as retired clergy, very many of whom provide significant and important pastoral ministry) to receive remuneration for their services lawfully, it is necessary for them to have recourse to the relevant diocesan board of finance (or the relevant incumbent in a case where fees have not been assigned). It seems desirable that the legislative framework for parochial fees should make this clearer than it appears to be at present. Making fees directly payable to diocesan boards of finance ought to facilitate the proper (and lawful) remuneration of unbeneficed clergy.

9. The law as it currently stands, if correctly implemented, would appear to place an unnecessary and undesirable burden on incumbents. Because funeral fees are legally payable to incumbents only, funeral directors should be paying fees for services at crematoria to the incumbent of the deceased's parish irrespective of who actually conducts the service. If the law in this regard is complied with, it would seem to place unreasonable responsibilities on the incumbent concerned.
10. Unpaid fees that have fallen due are recoverable as a debt¹⁸. As fees are legally payable to the incumbent, it is the incumbent who is legally responsible for collecting them, including – should it become necessary – suing for them in his/her own name. Whilst it may be thought unlikely that a single unpaid fee would be pursued by proceedings in the county court, there may be circumstances – for example the possibility of a funeral director owing substantial sums in fees – where it would be necessary to sue. Similarly, a funeral director might become bankrupt owing substantial fees and it become necessary to prove for unpaid fees in the bankruptcy. In such circumstances each of the incumbents who was owed fees would have either to sue in the first case, or to prove his debt in the second: the diocesan board of finance would not be able to act in its own name because the fees in question are legally payable to the various incumbents involved. If substantial sums were owed, involving various parishes, the need for each of them to act in their own names would place an unreasonable burden on the incumbents concerned. If the law were amended to make what are currently incumbents' fees directly payable to DBFs the DBF would be able to pursue the total sum owed in fees in its own right.

Proposals for fresh legislation

11. In the light of the foregoing it is proposed that the legal framework relating to parochial fees (i.e., the law establishing the legal recipients of fees, the definition of “parochial fees”, and the *power* to set fees, as distinct from the setting, collection or distribution of the fees themselves) should be rationalized as follows.
12. The current definition of “parochial fees” should be abandoned on the basis that it is too uncertain to be of continuing use (and may leave the door open to legal

if they have the authority of the bishop of the diocese to do so. This leaves no scope for independent ministry by the clergy of the Church of England. An Anglican clergyman/woman could not, therefore, lawfully claim to be taking a funeral in a private, unofficial capacity, and accept payment for their services on that basis, rather than as a member of the clergy of the Church of England.

¹⁸ Section 7 of the Ecclesiastical Fees Measure 1986.

13. challenges to the charging of some fees). It should be replaced with a definition that makes clear beyond doubt the range of matters in respect of which parochial fees may be set. That should be done by way of a list setting out the various duties (such as taking services) that may attract a fee where the duty in question is carried out by a member of the clergy, or an authorised lay minister, of the Church of England. Such a list should be contained in primary legislation (i.e. a Measure), but should be amendable without the need to have recourse to further Measures to allow account to be taken of developments in pastoral practice over time.
14. Parochial fees should continue, as at present, to be payable to PCCs (where a fee for the PCC is prescribed in a fees order), but should be payable to diocesan boards of finance, rather than incumbents, for the reasons given above. Transitional provisions should be put in place allowing existing incumbents who wish to do so to retain any fees that they have not already assigned to the DBF. The stipends of incumbents who opted to retain unassigned fees would continue to be reduced accordingly. (The remuneration of retired, and other non-parochial, clergy would remain – as at present – a matter for dioceses, in the light of national policy).
15. Incumbents and priests in charge should be given an express power to waive fees in individual cases, following prescribed, but limited, consultation. This should clarify the present, uncertain position in this regard. For pastoral reasons, fees should cease to be payable at all in respect of the funeral of children under 16.
16. Fees orders (the instruments that set out the sums payable as parochial fees) should be capable of being made so as to continue for up to five years, with inbuilt increases in the fees prescribed (for example, by reference to the average earnings index). There should be power to revisit a fees order within the five year period if necessary. This would ensure that General Synod had the opportunity of approving (or otherwise) a draft fees order at least once in each quinquennium, but remove the need to spend the time and money involved in making fees orders annually, as at present.
17. Although the current legislation probably already allows for it, it should be made clear that the power to prescribe fees includes a power to specify the matters that are included within the prescribed fee. Such a power would not need to be used in all cases, and could be used sparingly if desired; but it would assist in dealing with the issue of “additional charges” referred to above – some of which may be unlawful at present.
18. If the above proposals were implemented they should provide a clear but flexible general legal framework for parochial fees. Much of the present legal uncertainty would be removed and good practice thereby encouraged; at the same time the new framework should provide very wide scope for the setting of fees in accordance with such policies as General Synod and the Archbishops’ Council may develop. It would also leave the “mechanics” of fee collection and distribution very much for local decision.

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