

GENERAL SYNOD

LEGAL OFFICERS (ANNUAL FEES) ORDER 2019

**THE ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES)
ORDER 2019**

Explanatory Notes

INTRODUCTION

1. The Fees Advisory Commission (“the Commission”) is a statutory body constituted under the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (“the 2018 Measure). Of its nine members, three represent the providers of legal services within the Church, three represent the users and funders of such services, and three (from whom the Commission’s Chair must be drawn) are independent.
2. In accordance with the terms of the 2018 Measure, the Commission’s membership is as follows:

Mr John Alpass (Chair) (nominated by the Appointments Committee);
Mr Niall Blackie (nominated by the Ecclesiastical Law Association);
The Rt Revd Alistair Magowan, Suffragan Bishop of Ludlow, Diocese of Hereford (nominated by the House of Bishops);
The Revd Canon Joyce Jones (nominated by the Appointments Committee);
Ms Josile Munro (nominated by the Appointments Committee);
The Revd Canon John Rees (nominated with the agreement of the Provincial Registrar for York);
Mr Bill Hussey (nominated by the Inter-Diocesan Finance Forum);
Mr Geoffrey Tattersall QC (nominated by the Ecclesiastical Judges Association); and
The Revd Stephen Trott (nominated by the Church Commissioners).

3. The role of the Commission is to recommend to the General Synod the level of fees to be paid to ecclesiastical judges, legal officers and others for performing certain duties and functions, and to prepare annual Orders in the form of Statutory Instruments to give effect to those recommendations (which require the approval of the Synod, prior to being laid before Parliament under the negative resolution procedure). The practice is for both Orders to be laid before the Synod for approval at its July group of sessions each year, with a view to their coming into force at the beginning of the following year.
4. The Commission accordingly now lays the two Orders for 2020 before the Synod for its approval. This Explanatory Memorandum explains the approach taken by the Commission to the drafting of the Orders this year.

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5. Legal Officers (Annual Fees) Orders, made under section 86 of the 2018 Measure, prescribe the annual fee payable to each diocesan registrar for the professional services specified in Schedule 2 to the Order.

Calculation of the retainer since 2015

7. In recent years the FAC has worked to correct a substantial and damaging record of underpayment, with retainer levels in the period leading up to 2014 representing no more than approximately half the true cost of providing legal services across the Church. At that time, as part of a wide-ranging consultation, registrars made plain their concerns about the effect of this shortfall and the threat it posed to the ongoing provision of legal support in Church of England dioceses.
6. As a result General Synod agreed exceptional phased uplifts over the transitional five-year period 2015-19 in order to reach new target levels. In addition the Commission introduced a more transparent basic formula for calculating the annual retainer as well as improving accountability by requiring diocesan bishops to conduct annual reviews of the provision of legal services with their Registrar. In the period 2015-19 annual movements in the national cost of the retainer have therefore been affected both by changes in reported hours worked and average charge-out rates, as required by the basic formula, and by the application of the phased uplifts.
7. Since 2014 the basic formula, agreed by Synod,¹ has involved:
 - arriving at a figure for the national cost of the work done by registrars under the retainer by aggregating the average number of hours recorded by them as having been spent on such work over the previous five years, divided as between solicitors and clerks, and then multiplying that process by average agreed rates;
 - dividing that cost between the dioceses to arrive at a figure for the retainer for a diocese, by:
 - allocating 30% of the national figure between the dioceses equally (to reflect the fact that every registrar's practice attracts certain unavoidable overheads);
 - applying a 30% charitable discount to this national figure; and
 - dividing the balance between the dioceses by reference to the 'size' of the diocese (assessed by reference to the number of open churches and clergy of incumbent status and above), but subject to:
 - capping the resulting figure so that the 'largest' diocese pays no more than three times what the 'smallest' pays; and
 - applying an additional 10% weighting in the case of London and Southwark to reflect their higher costs.
8. The five-year transition period ended with General Synod's agreement of the 2019 retainers as specified in the 2018 Order. For the calculation of the 2019 retainers, the Commission used the most recent data available, including updated figures for the average total hours worked for the period 2012-7 and charge out rates for 2017. The total amount payable in 2019 will be £3.33 million.

¹ For a fuller description, see the Explanatory Memorandum to the 2014 Order (GS 1938-9X)

The Commission's proposals for the 2020 retainers

9. Now that the five-year transitional period is at an end, the Commission has taken stock. The basic formula set out above has worked well over the last five years in that it ties registrars' retainers into as fair a national approach as possible, with checks and balances, while taking proper account of the cost of providing services and the size of each diocese. The annual reviews of work between bishops and other senior staff and their registrar have also proved valuable.
10. The programme of phased uplifts has raised income levels: in 2016 the total retainer paid across all dioceses amounted to 53% of the value of work undertaken; in 2017 57%; and in 2018 63%. It is expected that the figure will rise further in 2019 towards the target figure of 70% (full cost, nationally moderated, minus the 30% charitable discount).
11. The Commission takes the view that the broad principles underlying the formula which Synod approved in 2014 are now well accepted and provide the most suitable basis for the calculation of the annual retainer. It would be possible henceforth simply to apply the formula each year. But the Commission is concerned that, despite the welcome progress made, diocesan registrars' remuneration still remains at an unacceptably low level given the complex and specialist nature of the work involved. This view is shared by the registrars themselves in their responses to a survey conducted by the FAC. While appreciative of the recent steps taken to improve their income levels they are unanimous in regarding a charitable discount of 30% as unreasonable in today's world. They point out that for some registrars the actual discount amounts to more than 30% given that fee rates are already averaged nationally under the formula before the discount is applied. Many argue that a discount on that scale is out of kilter with what the legal profession might offer to other charities and question whether the Church expects to receive such large discounts from other professionals whose services they procure. They draw attention to the increasing difficulty registrars working in large law practices find in justifying their low fees to colleagues, and report continuing difficulties in identifying younger lawyers prepared to take on registrar work. In short, they remain anxious about the long-term viability of the registrar function.
12. The Commission acknowledges that many registrars value the vocational element of the work. It believes that some discount should continue to be built into the formula to reflect the charitable status of the Church and the fact that it is a reliable long-term client. But it now considers that a discount as high as 30% is unjustified and risks jeopardising the provision of good quality legal advice at a time when, with the continuing emergence of new legislation affecting Church business (for example on data protection) and the increased tendency in society to resort to litigation, it has never been more needed. The Commission therefore plans to reduce the discount over a period to 10%.
13. There was a reduction in the average reported hours over the period 2013-18; and also a slight reduction in reported average charge out rates in 2018. This means that if the existing formula were used to calculate the 2020 retainers their total value would go down. This situation provides in the Commission's view some headroom in which to front-load the reduction in the discount while limiting the increase in retainer levels involved. The Commission has therefore decided to reduce the charitable discount to 20% in 2020 and then to spread the further reduction to 10% over the following five years on a gradual basis.

14. The effect is that the total amount payable by way of retainer will increase from £3.33 million in 2019 to **£3.63 million** from 2019 to 2020 (an increase of **9%** nationally), with percentage increases in individual retainers ranging from 7% to 10%. This increase is lower than the staged increases that have been applied in recent years (from 2018 to 2019 – 13%, 2017 to 2018 – 10%). As in previous years the burden of the increase will not fall entirely on the diocesan board of finance of the diocese concerned: only an average of 58% nationally will do so, since that part of the retainer that is expressed by the Order to represent a liability of the diocesan bishop remains payable² by the Church Commissioners.
15. In line with the practice adopted last year, the Commission has excluded the provision of advice in relation to safeguarding matters from the scope of the retainer. (The relevant provision is paragraph (18) of Schedule 2.) The Commission had previously agreed that such work should be remunerated otherwise than by the retainer. In that respect, it is treated in the same way as work in connection with clergy discipline, which is already excluded from the scope of the retainer.
16. The Commission is in the process of further consideration as to where the burden of such costs should fall.

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17. Ecclesiastical Judges, Legal Officers and Others (Fees) Orders, made under s.86 of the 2018 Measure, prescribe fees for faculty proceedings and certain other proceedings in ecclesiastical courts, as well as the fees of the Provincial Registrars, the Vicars-General and other holders of legal offices. In practice the great bulk of the work remunerated under the terms of such Orders relates to faculty proceedings, for which provision is made in Table 1 of the 2019 Order (though the holding of a hearing, which is likely to attract the highest fees, is an infrequent occurrence).
18. As previously, the Commission has set the fees, wherever possible, so as to be broadly equivalent to those determined by the Ministry of Justice to be payable to secular judges when exercising similar functions, rather than being simply increased by reference to inflation. From the last data made available publicly the Ministry of Justice has increased its rates by 2% from 2017/18 to 2018/19 with effect from 1 April 2018.
21. The Commission explained in the Explanatory Memorandum which accompanied the two Orders for 2016 that a particular issue arose as to the implications, from a fees point of view, of the changes to the operation of the faculty jurisdiction which culminated in the changes made by the Faculty Jurisdiction Rules 2015 and the introduction of the online system for processing faculty applications. As the Commission suggested at that time, it would take some time for all the consequences of these changes to become apparent. The Commission considers that it is not yet possible to reach a concluded view on the consequences of those changes and, as a result, the Commission does not at this time propose any significant adjustment to the approach followed in the 2017 Order in relation to fees in the faculty jurisdiction.
22. As a result of General Synod's approval of the Church of England (Miscellaneous Provisions) Measure 2018, a fee order may provide for a relevant fee to be determined by

² Under section 86(6) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.

a court, Chancellor or registrar in the exercise of their discretion. Accordingly, article 2 of the 2019 Order provides that a Chancellor or registrar (as appropriate) may determine that a fee should be payable up to a specified value.

23. The Commission will continue to keep the operation of the Order under active review and reassess the case for any change when formulating proposals for the 2020 Order.

CHANCELLORS' INFORMAL RETAINERS

24. Finally, in its Explanatory Memorandum for the Orders laid before the Synod for approval in July 2016³ the Commission set out the approach which it proposed to take to the payment of the informal retainers it recommends annually to dioceses for the remuneration of chancellors. This involved setting the rate of chancellors' informal retainers at a level equivalent to 14% of the relevant registrar's retainer to be payable for that year, but with the increase being phased in where necessary over the course of four years so that the increase in any chancellor's retainer in any one year did not exceed 15%, delivering an eventual average increase in chancellors' retainers of 27%.
25. Whilst recognising that this was significant in percentage terms, the Commission considered the cost increase in each year to be relatively modest and in any event justified in the Commission's view by the need to address a history of underpayment. The Commission agreed to review the position further in 2018 and 2019 in the light of any feedback from dioceses and chancellors on its approach. No such feedback has been received, and so the Commission considers it appropriate to continue with the phased increases to 2020 as planned.
26. The Commission notes that 2018 figures suggest that increases in informal retainers were on track to reach 14% of the relevant registrar's retainer across all dioceses by 2020, with some to meet that threshold in 2019. Those figures, however, assumed that registrars' retainers would remain at broadly the same level in 2020 as in 2019. In light of the Commission's proposal regarding the charitable discount (see above), there is an adjustment to the target figure which the informal retainers should meet. In those dioceses where the informal retainer is already at 14%, an increase in the informal retainer from 2019 to 2020 to match the increase in the registrar's retainer will maintain this percentage and in all such cases the increase in the informal retainer is expected to be 10% or less.
27. However, the Commission notes that there are 11 dioceses where the informal retainer was not at 14% by 2019. The Commission notes that to meet the 14% target in 2020 might require – in some of those dioceses – an exceptional increase in the informal retainer from 2019 to 2020 of more than 15% however we expect that the overall impact on the cost of the informal retainers in that event would be very modest and affordable. The Commission therefore considers it appropriate to retain the 14% target across all dioceses. The Commission will keep the position under review as it prepares next year's Orders.

On behalf of the Commission

John Alpass
May 2019

³ GS 2036-7X.