

GENERAL SYNOD

LEGAL OFFICERS (ANNUAL FEES) ORDER 2020

**THE ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES)
ORDER 2020**

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);
Ms Anna Spriggs (nominated by the Ecclesiastical Law Association);
The Rt Revd David Williams, Suffragan Bishop of Basingstoke, Diocese of Winchester (nominated by the House of Bishops);
The Revd Canon Joyce Jones (nominated by the Appointments Committee);
Ms Josile Munro (nominated by the Appointments Committee);
Mrs Louise Connacher (nominated with the agreement of the Provincial Registrar for Canterbury);
Mr Bill Hussey (nominated by the Inter-Diocesan Finance Forum);
Mr Geoffrey Tattersall QC (nominated by the Ecclesiastical Judges Association); and
The Revd Christopher Smith (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). Both Orders require to be laid before the Synod for approval, with a view to their coming into force at the beginning of the following year. They would ordinarily be laid at the July group of sessions which was not possible this year as a result of Covid-19 disruption.
4. The Commission accordingly now lays the two Orders for 2021 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. From a low base (where in the period leading up to 2014, retainer levels represented no more than approximately half the true cost of providing legal services across the Church), in the years between 2015 and 2019 the FAC has worked to correct that substantial and damaging record of underpayment. Prior to these reforms, 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, and designed to lead to remuneration at a level comparable with wider legal rates but with a 30% charitable discount. 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 were driven 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. It has resulted in 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%. In 2019 the figure rose to 66%, a welcome improvement but still short of the target figure of 70% (full cost, nationally moderated, minus the 30% charitable

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

discount). The annual reviews of work between bishops and other senior staff and their registrar have also proved valuable.

Approach taken to the 2021 retainers

9. The Commission remains of 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 concluded last year, however, (see the Explanatory Memorandum to the 2019 Order (GS 2147X)) that, despite the welcome progress made, diocesan registrars' remuneration still stood at an unacceptably low level given the complex and specialist nature of the work involved, creating some anxiety about the long-term viability of the registrar function. The Commission acknowledged that many registrars valued the vocational element of the work and believed 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 took the view that a discount as high as 30% risked 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 had never been more needed. The Commission therefore determined to reduce the discount from 30% to 10% over a period.
10. Last year, the data indicated that if the standard formula were used to calculate the 2020 retainer, the sums awarded would be lower than those for 2019. The Commission took advantage of this to make a sizeable reduction in the discount from 30% to 20% in one year, while explaining that the subsequent further reduction from 20% to 10% would be phased in gradually over the ensuing five years.
11. This year, as a result of the slight reduction in the average reported hours (averaged over five years) and a slight increase in the reported average rates, the standard formula would produce a very modest increase in the total value of the retainer for 2021 across the Church (approximately 0.3%). The Commission is aware of the strained financial climate created by the Covid-19 pandemic, and the sizeable increase in the sums paid over the last two years. It considers it right, however, to maintain some momentum of discount reduction: not to do so risks creating problems for the future. It has therefore decided to reduce the charitable discount from 20% in 2020 to **18%** in 2021, with the aspiration that the further reduction of 8% will be spread over the following four years. This is in line with the plan outlined to Synod last year.
12. The effect is that the total amount payable by way of retainer will increase from £3.63 million in 2020 to **£3.73 million** from 2020 to 2021 (an increase of **3%** nationally), with percentage increases in individual retainers ranging from 2% to 4%. As before 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.
13. Following a request from a member of General Synod, the Commission has made additional provision for secretaries of deanery synods to take advice from registrars (in addition to rural deans and lay chairs), on the basis that the secretary may be required to

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

give advice on procedure and upon the interpretation of standing orders. The Commission is satisfied that this change will not lead to a material increase in registrars' workloads.

14. 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.
15. The Commission is in the process of further consideration as to where the burden of such costs should fall.

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16. 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 2020 Order (though the holding of a hearing, which is likely to attract the highest fees, is an infrequent occurrence).
17. 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 approximately 1% from 2018/19 to 2019/20 with effect from 1 April 2019.
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. The Commission has made provision for an increase in the level of the annual fees payable to the President and Deputy President of Tribunals (see article 13(1) and table 9). The work of the President and Deputy President has steadily increased over the past five years but the fees for which the Order provides have not increased to reflect that work. Consistent with its approach to legal fees generally, the Commission considers that it must ensure that judicial fees reflect the office holders' workload. The Commission emphasises that it is important that the Church can attract candidates of suitable calibre given the complex nature of the work.

23. The President and Deputy President have considered an average of approximately 32 cases per year but cases are on the increase (there were 42 in 2015 but 88 in 2019)³. There is no secular benchmark on which the Commission can draw when it assesses the appropriate level of fee. On the basis that each may need to decide up to 40 cases per year (each case with a differing degree of complexity/reading material/hours required), and allowing for a fee of £200 for each such case, the Commission has concluded that it is appropriate to increase the fee allowed to £8,000 annually for each of the President and Deputy President⁴.
24. Separately, and as a function of the increase in cases, the President and Deputy President have more frequently been required to call on delegate judges to act in their place (on at least four occasions so far this year)⁵. Thus far, those judges have acted on a *pro bono* basis, which the Commission considers is not sustainable. Taking the above figures into account, the Commission has provided for a fee of £200 to be payable per delegated matter on a flat rate basis.
25. 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 2021 Order.

CHANCELLORS' INFORMAL RETAINERS

26. Finally, in its Explanatory Memorandum for the Orders laid before the Synod for approval in July 2016⁶ 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%.
27. The Commission considers it appropriate to retain the 14% target across dioceses. Taking into account the Commission's proposal regarding the charitable discount (see above), there is an adjustment required to the level of informal retainers so that they meet the target figure. Setting the retainer at 14% leads to an average 3% increase on the level of last year's informal retainers, ranging between an increase of between 2% and 4% for individual dioceses.
28. The Commission will continue to keep the position under review as it prepares next year's Orders.

On behalf of the Commission

John Alpass
October 2020

³ Over the last five years the President and Deputy President of Tribunals have undertaken a total of 316 cases, i.e. an average of 63 per year. Allowing for rounding up that is 32 cases each per year on average. However, there has been linear growth in the number of cases 2015 – 42; 2016 – 46; 2017 – 59; 2018 – 81; 2019 – 88.

⁴ The Commission understands that it is the present practice of the current President and Deputy President of Tribunals, who are serving members of the judiciary, not to draw down the fees. That is not to say that future holders of the office may not wish to take a different approach.

⁵ Under the power for which provision is made by section 4(4), Clergy Discipline Measure 2003.

⁶ GS 2036-7X.