

GENERAL SYNOD**LEGAL OFFICERS (ANNUAL FEES) ORDER 2021****THE ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES)
ORDER 2021****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.
4. The Commission accordingly now lays the two Orders for the year 2022 before the Synod for its approval. This Explanatory Memorandum explains the approach taken by the Commission to the drafting of the Orders this year.

THE LEGAL OFFICERS (ANNUAL FEES) ORDER 2021

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 the period leading up to 2014, retainer levels represented no more than approximately half the true cost of providing legal services across the Church. A wide-ranging consultation conducted by the FAC revealed serious concerns among registrars about the threat this posed to the ongoing provision of legal support in Church of England dioceses. Since then the FAC has introduced reforms to correct the damaging record of underpayment and improve the system in other ways.
6. As a result General Synod agreed exceptional phased uplifts over the transitional five-year period 2015-19 in order to achieve a level of remuneration for registrars 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. Thus 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 new 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%, in 2018 63%, in 2019 66%. In 2020 the national average reached 70%, which is the target implied in staged uplifts introduced by the Commission (full cost, nationally moderated, minus the 30% charitable discount). This is a welcome milestone and the Commission has remained of the view that the broad principles underlying the formula

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

which Synod approved in 2014 are well accepted and provide the most suitable basis for the calculation of the annual retainer. The Commission also considers that the annual reviews of work done between bishops and other senior staff and their registrar continue to prove valuable.

9. Nevertheless, in 2019 the Commission concluded that a charitable discount as high as 30% was continuing to cause undue financial difficulties for registrars and was not justified in today's circumstances. It therefore determined to reduce the discount from 30% to 10% over a period. The detailed reasoning is to be found in the Explanatory Memorandum to the 2019 Order (GS 2147X). Circumstances enabled it to make an immediate reduction from 30% to 20% for the year 2020 but with the understanding that the further reduction to 10% would be spread over the following five years. This approach was followed for the 2021 retainer, for which the charitable discount was reduced to 18%.

The Commission's proposals for the 2022 retainers

10. The position in 2020 was largely static with a slight increase in hours worked by registrars and little change in charge-out rates. Applying the Commission's established formula and retaining an 18% discount would result in retainers for 2022 virtually identical with those for 2021 with some dioceses receiving small reductions. This would recognise the strain on Church resources created by the Covid-19 pandemic but take no account of pressures on registrars. Omitting any phased uplift this time round would postpone tackling the problem of underpayment and result in higher uplifts later.
11. Accordingly, the Commission considers it right to maintain some momentum in the reduction of the charitable discount. It therefore proposes a further reduction in the charitable discount from 18% in 2021 to 16% in 2022, with the aspiration that the further reduction of 6% will be spread over the following three years. This is consistent with the approach set out in 2019 and mirrors the 2% reduction made last year.
12. The effect is that the total amount payable by way of retainer will increase from £3.73 million in 2021 to **£3.82 million** in 2022 (an increase of 2% nationally), with percentage increases in individual retainers ranging from 1% to 3%. The sums involved are relatively modest and as before the burden of the increase will not fall entirely on diocesan boards of finance: 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. 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. The Commission is in the process of further consultation as to where the burden of such costs should fall.

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

14. 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

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

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 2021 Order (though the holding of a hearing, which is likely to attract the highest fees, is an infrequent occurrence).

15. 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 2% from 2019/20 to 2020/2021 with effect from 1 April 2020.
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 a further amendment to the Order taking into account the provisions of the Church of England (Miscellaneous Provisions) Measure 2020 which allow for the Order to provide for reduction of, exemption from, and remission of fees which would be payable under the Order. The Commission has adopted the provisions which apply in secular courts, such that any person who would be entitled to reduction of, exemption from or remission of a fee in civil proceedings is entitled to an equivalent reduction of, exemption from or remission of a fee under this Order. As required under the 2020 Measure, the Order makes incidental provision for any remitted, reduced or exempt fees to be met by the relevant Diocesan Board of Finance. The Order makes further consequential provision for the DBF to cover the reasonable costs of diocesan registrars and their staff which arise from the processing of applications for remission, exemption or reduction, as the case may be, as work which is ancillary to the relevant proceedings.
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 2022 Order.

CHANCELLORS' INFORMAL RETAINERS

24. Finally, consistent with the approach set out in the Explanatory Memorandum for the Orders laid before the Synod for approval in July 2016³, which it has followed in subsequent years, the Commission considers it appropriate to benchmark Chancellors' informal retainers to 14% of the registrar's retainer in the relevant diocese. 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 that figure. Setting the retainer at 14% leads to an average 2% increase on the level of last year's

³ GS 2036-7X.

informal retainers, ranging between an increase of between 1% and 3% for individual dioceses.

25. The Commission will continue to keep the position under review as it prepares next year's Orders.

On behalf of the Commission

John Alpass
May 2021