

GENERAL SYNOD

LEGAL OFFICERS (ANNUAL FEES) ORDER 2023

**THE ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES)
ORDER 2023**

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:

The Venerable Robert Cooper (Chair) (nominated by the Appointments Committee);

Ms Anna Spriggs (nominated by the Ecclesiastical Law Association);

The Rt Revd David Williams, Bishop of Basingstoke, Diocese of Winchester (nominated by the House of Bishops);

Ms Josile Munro (nominated by the Appointments Committee);

Mr Carl Fender (nominated by the Appointments Committee);

Mrs Louise Connacher (nominated with the agreement of the Provincial Registrar for Canterbury);

Ms Philippa Hopkins KC (nominated by the Ecclesiastical Judges Association);

The Revd Christopher Smith (nominated by the Church Commissioners); and

Mr Stephen Roberts (Chair of the Guildford Diocesan Board of Finance and (nominated by the Inter-Diocesan Finance Forum)

3. The Commission notes its gratitude to former members Mr Geoffrey Tattersall KC and Mr Bill Hesselby for their service.
4. 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.
5. The Commission accordingly now lays the two Orders for the year 2024 before the Synod for its approval. These Explanatory Notes explain the approach taken by the Commission to the drafting of the Orders this year.

THE LEGAL OFFICERS (ANNUAL FEES) ORDER 2023

6. 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.
7. 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.
8. 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);
 - (prior to 2019) 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%², in 2018 63%, in 2019 66%. In 2020 the national

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

² The figures are rounded figures.

average reached 70%, which was the target implied in staged uplifts introduced by the Commission (full cost, nationally moderated, minus the 30% charitable discount). Having fallen back to 66% in 2021, in 2022 the national average rose to approximately 70% of the reported value of work undertaken, though masking some significant variance between dioceses, which indicates that there is more to be done to raise average income levels. Having reached the milestone implied under the formula in 2020, the Commission has remained of the view that the broad principles underlying the formula which Synod approved in 2014 are well accepted and provide the most suitable basis for the calculation of the annual retainer at the present time. 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. 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 Notes 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 has been followed in the retainers agreed for 2021, 2022, and 2023, in each of which years the charitable discount has reduced by 2% and now stands at 14%.

The Commission's proposals for the 2024 retainers

A. Data collection

10. For the 2024 retainer calculations, the most recent data are from 2022.
11. As set out above, the established formula provides for the calculation of a figure for the national cost of the work reported and takes into account two key variables: the average number of hours recorded over a rolling five-year period, and average agreed rates.
12. The moving average hours were 28,243 hours in 2022, up 2% from 27,581 hours in 2021.
13. Rates changed relatively little from 2021 to 2022, particularly when compared with the large change in rates from 2020 to 2021. The average rate for non-London clerks was £126 in 2022, up from £121 in 2021; the average rate for non-London solicitors was £236 in 2022, slightly down from £238 in 2021.
14. Schedule 1 to these notes sets out a summary of the median and mean hourly rates for solicitors and clerks reported in 2022 (in part A), and a summary of the total hours of work reported from 2008 to 2022 (in part B).

B. Options

15. The Commission was satisfied that the approach agreed, and subsequently re-endorsed, by the General Synod should continue to be followed. The Commission considers that any material change from that approach would require proper

consultation amongst interested parties. They also noted that on the available evidence the factors which justified the approach agreed in 2019 continue to remain valid (see below).

16. The collected data show the following:

- 1) The changes in moving average total hours and in rates mean that if the charitable discount were to remain unchanged at 14% the total cost of the 2024 retainer would increase by 2.6% (or £111,000), when compared with the 2023 retainer.
- 2) If a charitable discount of 12% were to be applied, the total cost would increase by 4.9% (or £215,000) compared with the 2023 retainer.
- 3) If a charitable discount of 10% were applied, the total cost would increase by 7.3% (or £319,000) compared with the 2023 retainer.
- 4) Every one percentage point reduction in the charitable discount increases the total 2024 retainer by approximately £52,000.

C. Consultation

17. The Commission has taken into account the calls made during the July 2022 group of sessions for greater consultation with dioceses about its proposed recommendation for 2024.

18. While the Commission recognises that it has no legal obligation to consult any particular interested parties, consistent with the assurance made in 2022, the Commission has undertaken proportionate informal consultation with diocesan representatives before reaching a decision on what recommendation to bring forward. Having put the options before dioceses, the Commission had responses from 39 individuals (including diocesan secretaries and DBF chairs) across 27 dioceses (seven in the Province of York, 20 in the Province of Canterbury). The Commission had responses from more than one representative from nine dioceses, of which in four cases the diocesan representatives differed in their opinions.

19. The Commission consulted on the two choices which seemed in its view most realistic: either retaining the charity discount at 14%, or making a further reduction to 12%.

20. The respondents in favour of a further reduction supported the further gradual decrease to 10% implied by the approach agreed in 2019. They also argued that this would be fair given the increase in the cost of living across the board. Other respondents gave a view that a 5% increase in overall costs would be fair (the national increase in costs of a further 2% reduction in the charitable discount would be 4.9%). Some of those who argued for continuing with the agreed approach noted that the retainer needs to be representative of the proper cost of the hours of the support provided, and agreed with the requirement for fair remuneration.

21. Those respondents who favoured no further change made a number of arguments which are summarised below:

- i) The calculation methodology is insufficiently transparent;
- ii) The headline hourly rates include a “substantial” element of profit, and a “significant discount” is appropriate for charities. Another commented that the amount of the retainer is “generous” for the scale of work generated. Others said that it should be a loss leader to take account of the additional work which a registrar may receive outside the retainer;
- iii) Some respondents argued that a further reduction is unnecessary, inappropriate, and unaffordable, though others called for a pause in further reductions. Others commented that the retainer constitutes a large amount for the services usually supplied in a year and thought that there was doubt that registrars would not provide services if the discount were pegged at the current level. Others commented on the “very secure” position of registrars and the “very rare” changes in the firms which supply registry services. This security was said to be valued;
- iv) One respondent commented that their registrar is attracted by the “kudos” and privilege of the work, and is not attracted to the work by the remuneration. Another commented that willingness to undertake the work should be the proxy as to whether the retainer is set at the right level;
- v) One respondent argued that the annual retainer leads to “much more” diocesan work being instructed at negotiated rates;
- vi) Some argue that a larger discount (say 20%) would be appropriate for “repeat” business, particularly because dioceses cannot competitively tender for services on price. It is argued that legal firms offer discounts in other parts of the third sector in the order of 15-20% (another said 30%);
- vii) Several respondents indicated that parish share could not stand a “substantial” increase in uncertain times, pointing to inflation, and Living in Love and Faith. Others pointed generally to the pressure on diocesan budgets, particularly in smaller and rural dioceses. Another suggested that the increase in the retainer (should the discount be reduced to 12%) was likely to be greater than inflation; and
- viii) A minority of respondents also queried the level of service provided by the registrar and whether or not it amounted to value for money. Others praised the “exceptional quality” of service but said that it would be “perverse” to inflict an increase in costs on dioceses when the registrar had not requested an increase.

D. Recommendation

22. The Commission is very grateful to the representatives of dioceses who responded to its consultation. The Commission has debated and considered those responses, along with other relevant material, carefully and at length.
23. The Commission notes the call from some for a review of the calculation of the retainer, and for greater transparency in the methodology. The Commission can see that there is some force in the request for more detail but, for the reasons outlined above, considers that the best approach is to apply the existing methodology. The Commission, however, accepts the challenge that it should provide further details about the application of the methodology, and has sought to provide further detail in these notes.
24. The Commission also recognises the strongly held views about the affordability of any further reduction, particularly given the calls on dioceses, and the size of the charitable discount (the two headline arguments which came out of consultation). However, the Commission considers that there are persuasive, and compelling, countervailing factors to which they should have regard:
- (1) The Commission considers that it is prudent to keep in view the long-term objective of making sure that the specialism of ecclesiastical law remains attractive for law firms as part of their succession planning;
 - (2) There is some misconception about the extent of the charitable discount. It is not the case that the application of the formula means that in each diocese the charitable discount which is offered against a firm's commercial rate is only 14% in 2023. The calculations are based on the work being done at a 30% discount. This is the consequence of the fact that the retainer covers 70% of the value of the work done;
 - (3) The calculation of the retainer is based upon the most recent average rates charged by non-London clerks and non-London solicitors. A summary of the 2022 rate data is set out in Schedule 1. The Commission had before it evidence of rates for senior solicitors outside London, with a commercial hourly rate being approximately £335 ex VAT, and with a charity hourly rate being in the region of £285 ex VAT. Compared with that, the 2022 hourly rate used to calculate the retainer is £235 ex VAT (a very substantial discount on a reasonable commercial hourly rate, and a further discount on a charity discount);
 - (4) As a helpful cross-check, the Commission compared these rates against the effective average rate (the total retainer paid in 2022 divided by the total number of recorded hours). In doing so, the Commission took into account the important factor that the retainer often supports the work of both legal clerks as well as legal officers. Comments from diocesan representatives did not fully take into account that the retainer needs to support an office, not simply the services of a single person. Taking into account the total retainer in 2022 (£3.8M) and the recorded number of hours across both clerks and legal officers (28,581), **the effective annual hourly rate is £134**. The Commission considers that such a rate is very low and is likely to be a substantial discount on a usual hourly rate offered in the charity sector. In other words, in the present circumstances, the retainer is offering an average hourly rate at a

substantial discount on fees which are already likely to be discounted against a registrar's usual rate. It follows that the true discount is much higher than the figure of 20 or 30% to which diocesan representatives referred;

- (5) Adopting a "steady state" approach would lead to a national increase in the cost of the retainer of 2.6% (or £111,000). This, however, would make no further progress towards the objective which Synod has endorsed of achieving proper remuneration for registrars, and ensuring that it remains a sufficiently attractive area of legal practice for the future;
 - (6) The Commission did not accept that the work was necessarily "repeat" work. The Commission considers that the work is not repetitive, but very varied, requiring a significant breadth of knowledge. Further, there is no cap on the work. The Commission considered it reasonably likely that if work were chargeable on a "piece work" basis, the overall cost could be higher than the retainer;
 - (7) The Commission challenged the view that the tenure of registrars was very secure. They noted that one year's notice could be given. The Commission had before it evidence that there had been recent changes in the firms providing registry services in a number of dioceses;
 - (8) The data demonstrates that the retainer still only covers a national average amount of 70% of the work done by registrars; and
 - (9) The burden of any increase would, as before, not fall entirely on diocesan boards of finance: only an average of 58% nationally would do so, since that part of the retainer that is expressed by the Order to represent a liability of the diocesan bishop remains payable by the Church Commissioners.
25. Taking those factors into account, applying the Commission's established formula the Commission considers that it is right to continue momentum in the reduction of the charitable discount. The Commission recognises the continued strain on Church resources but considers that omitting any phased uplift this time round would postpone tackling the problem of underpayment and result in higher uplifts later. The Commission did consider whether to recommend a further 1% reduction (to 13%) but rejected this option for this same reason.
26. The Commission therefore proposes a further reduction in the charitable discount from 14% to 12%. This is consistent with the approach set out in 2019 and mirrors the 2% reduction made in the last few years.
27. The effect is that the total amount payable by way of the retainer will increase from £4.36 million in 2023 to **£4.58** million in 2024 (an average increase of **4.9%** nationally), with percentage increases in individual retainers ranging from 4% to 6%.
28. 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 has identified a proposal for consultation with registrars regarding the time recording of safeguarding-related work, which it hopes will provide a sound evidence base from which it can bring forward recommendations.

29. The Commission notes that it is required to inform itself of the duties of the offices of legal officers and to that end notes its expectation that registrars will endeavour to keep an accurate record of their work in order that the Commission can make properly informed recommendations.

THE ECCLESIASTICAL JUDGES, LEGAL OFFICERS AND OTHERS (FEES) ORDER 2023

30. 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 2023 Order (though the holding of a hearing, which is likely to attract the highest fees, is an infrequent occurrence).
31. 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. The Commission notes that the Ministry of Justice has agreed that secular judicial fees should increase by 3% in the year 2022-3. The Commission continues to be of the view that this is an appropriate benchmark for judicial fees under the Order in 2024. Although the Commission understands that the recommended rise for 2023-24 is 3.5%, this remains a recommended, rather than agreed, rate. The Commission considers that it would be prudent to adopt the most recent agreed rate, i.e. 3%.
21. The Commission explained in the Explanatory Notes 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 will continue to keep the operation of the Order under review and reassess the case for any change when formulating proposals for the 2024 Order.

CHANCELLORS' INFORMAL RETAINERS

23. Finally, consistent with the approach set out in the Explanatory Notes 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 a commensurate adjustment required to the level of informal retainers so that they meet that figure.
24. The Commission will continue to keep the position under review as it prepares next year's Orders.

On behalf of the Commission

The Venerable Robert Cooper
June 2023

³ GS 2036-7X.

Schedule 1

A. Rates in 2022

Median and mean hourly rates for solicitors and clerks

The mean figures for clerks and solicitors based outside London, shown in bold in the table below, are used in the calculation of retainers. For comparison, the mean figures from 2021 for Clerks and Solicitors based outside London were £121 and £238 respectively.

	Median	Mean
Clerks based in London	£175	£173
Solicitors based in London	£295	£271
Clerks based outside London	£120	£126
Solicitors based outside London	£230	£236

B. Hours worked, 2008-2022

Average hours vary from year to year. A 5-year moving average is therefore used in retainer calculations. The table below shows the available data. The moving average total hours worked by clerks and solicitors, shown in bold in the table below, are combined with the rates charged to produce a calculated value of work done. General Synod is asked to note that although the total hours fell from 2021 to 2022, the moving average rose. This is because the total hours for 2022 was larger than that for 2017 – the relevant comparison in a 5-year moving average. Similarly, because historically a smaller number of hours worked were reported than is now the case, even if the total hours changes little over the next few years, the moving average (and therefore its contribution to the total retainer) will continue to increase.

	Average hours per diocese			Total hours			Moving average of 5 years, hours per diocese			Moving average of 5 years, total hours		
	Clerk	Legal	Total	Clerk	Legal	Total	Clerk	Legal	Total	Clerk	Legal	Total
2008	379	327	707	15,177	13,086	28,263						
2009	371	354	726	14,112	14,179	28,291						
2010	328	357	685	13,109	14,277	27,386						
2011	345	365	710	13,793	14,617	28,410						
2012	380	386	766	14,066	15,449	29,515	361	358	719	14,051	14,322	28,373

2013	405	387	791	14,969	15,474	30,443	366	370	736	14,010	14,799	28,809
2014	313	400	712	12,506	15,984	28,490	354	379	733	13,689	15,160	28,849
2015	345	382	727	13,810	15,263	29,073	357	384	741	13,829	15,357	29,186
2016	292	356	648	11,694	14,245	25,939	347	382	729	13,409	15,283	28,692
2017	276	356	632	11,023	14,250	25,273	326	376	702	12,800	15,043	27,844
2018	335	332	667	13,420	13,285	26,705	312	365	677	12,490	14,605	27,096
2019	337	358	695	13,465	14,328	27,794	317	357	674	12,682	14,274	26,957
2020	332	375	707	13,299	14,989	28,288	314	355	670	12,580	14,219	26,800
2021	341	405	746	13,652	16,195	29,847	324	365	689	12,972	14,609	27,581
2022	351	363	715	14,045	14,536	28,581	339	367	706	13,576	14,667	28,243