Role and responsibilities of the Archbishop of Wales

1. Introduction and background

The Governance Reform Working Group was asked by the Monmouth Review Implementation Group to consider the role and responsibilities of the Archbishop of Wales as part of work to implement the recommendations contained within the Monmouth Review report. The Monmouth Review considered the complex events and circumstances which led to the early retirement of the former Bishop of Monmouth, the Right Reverend Richard Pain in 2019.

Two of the report's 28 recommendations related to the role and responsibilities of the Archbishop – recommendations 2.2 and 6.1:

Recommendation 2.2

We recommend that provision is made in the Constitution for the Archbishop to make arrangements for appropriate episcopal leadership in a diocese if the bishop is away from his or her duties for a prolonged period through sickness or some other cause but is not suspended.

and

Recommendation 6.1

We recommend that a full review of the role and powers of the Archbishop of Wales in the Constitution is conducted.

The purpose of this report is to facilitate the Church in Wales's response to these two recommendations. The Monmouth Review Implementation Group is the group commissioned in January 2022 jointly by the Standing Committee, the Representative Body and the Bench of Bishops to lead the work necessary to address the 28 recommendations and advise on their implementation.

The recommendations within the Monmouth Review report are clearly conceived from the perspective of the particular set of circumstances and sequence of events which were subject to the Review. The recommendations' purpose is to allow the Church in Wales to reform itself structurally and culturally as well as in terms of legislation, policy and procedure so it is in the best position possible to ensure those events, or ones similar, could not be repeated. A significant cause of complication and confusion during the events subject to the Monmouth Review was a lack of clarity of what the Archbishop was and was not able to do in order to seek to resolve the situation.

The recommendations within the Monmouth Review report invite the Church in Wales to rectify this situation and the Governance Reform Working Group's own recommendations set out within this report seek to do this.

2. Governance Reform Working Group

This report has been prepared by the Governance Reform Working Group, a group initiated by the Standing Committee to consider governance-related matters within the structures of the Church in Wales, as well as considering and advising the Standing Committee on amendments to some areas of the Constitution.

The Governance Reform Working Group tends to arrange its work into individual workstreams and has adopted the practice of appointing some of its members (usually two) to act as *rapporteurs* for each workstream. The *rapporteurs* undertake work on the working group's behalf prior to discussing the outcomes of that work with the whole working group.

As such, two *rapporteurs* - Sir Paul Silk and Llyr Williams - undertook background work accordingly and reported the outcomes of their work to the full working group on 31 August 2023 for discussion.

3. Methodology

As part of their work, the *rapporteurs* conducted a series of interviews with a number of people and groups of people to explore the matter of archiepiscopal authority in the Church in Wales and what authority and responsibilities the Archbishop of Wales should have. Those interviewed were:

- The Bench of Bishops
- The Provincial Secretary, Canon Simon Lloyd
- The (former) Chair and (current) Vice-chair of the Standing Committee, Dr Siân Miller and Dr Heather Payne
- The Chair of the Representative Body, Professor Medwin Hughes
- The former Archbishop of Wales, the Right Reverend John Davies
- A representative group of archdeacons:
    - The Venerable Andy Grimwood, Archdeacon of St. Asaph
    - The Venerable Andrew Jones, (former) Archdeacon of Meirionnydd
    - The Venerable Mike Komor, Archdeacon of Margam
    - The Venerable Stella Bailey, Archdeacon of the Gwent Valleys
    - The Venerable Alan Jevons, Archdeacon of Brecon.

These interviews explored a wide range of matters and have allowed the recommendations within this report to be formed.

From an early stage of the *rapporteurs*' work it became evident that two matters would dominate this area of work and be fundamental to any recommendations:

a) Incapacity of bishops – the *rapporteurs* gave careful thought to the concept of incapacity and the various guises it could take. How incapacity could be identified or defined; by whom judgements as to incapacity should be made; what could be done if a bishop were to be considered 'incapable'; and the

Archbishop's role and authority in relation to incapacity, were considered at length.

b) The metropolitical powers of the Archbishop of Wales. These are not codified within the Constitution of the Church in Wales, or elsewhere, and relate to a variety of matters - including the Archbishop's role in disciplinary matters relating to diocesan bishops, and the authority of the Archbishop to intervene in a diocese and exercise episcopal ministry where the diocesan bishop is incapacitated or absent for any reason.

The recommendations formulated within this report centre particularly around these two matters.

4. Other developments

Additionally, there have been two other developments relevant to the preparation of this report and which have been significant to the work of the *rapporteurs*.

a) Medical incapacity of bishops

An occurrence of significant importance happened in April 2023, when the Governing Body was presented with a private members' motion which proposed that specific provision was inserted within the Constitution to expressly permit the Archbishop to intervene in circumstances where a diocesan bishop was absent on certificated medical grounds, and therefore unable to perform their duties.

The Governing Body discussed this proposal and approved the insertion of the following two clauses within Section 14 of Chapter V of the Constitution:

1) *If a Bishop is unable to perform the duties of their office due to sickness or other medical reason for a continuous period of more than sixty days, then the Archbishop may perform any duty and exercise any right belonging to that Bishop within the Bishop's diocese whilst they remain unable to perform their duties.*

2) *Statements in accordance with the provisions of the Statutory Sick Pay (Medical Evidence) Regulations 1985 that the Bishop is not fit for work shall be conclusive evidence for the purposes of this Section 14 that the Bishop is unable to perform their duties of office due to sickness or other medical reason for the duration of the period covered by that statement.*

This move by the Governing Body relates to both of the Monmouth Review's recommendations relevant to this report. In relation to recommendation 2.2 it makes the provision necessary for the Archbishop to make arrangements for appropriate episcopal leadership in a diocese if the bishop is away from their duties for a prolonged absence due to sickness. Also, in relation to recommendation 6.1, it clarifies, to an extent, the role and powers of the Archbishop of Wales.

As helpful as this provision is, it relates only to the *medical* incapacity of a bishop: incapacity can take other forms which are less easily defined and less easily addressed. This will be explored later within this report.

b) Visitatorial powers of the Archbishop of Wales

From an early stage of the *rapporteurs*' work the Archbishop's ability to intervene in a diocese if systemic difficulties were identified – to undertake an archiepiscopal visitation – was a point of particular interest and discussion. While the Constitution makes passing reference to the ability of the Archbishop to undertake a visitation of a diocese it is not expanded in any detail. Visitatorial powers form a key component of the Archbishop's ability to act should a situation considered sufficiently serious arise within a diocese.

Considering the complexity of this area, the Bench of Bishops was asked to commission the Legal Sub-committee to produce a formal legal Opinion on the nature and extent of the visitatorial powers of the Archbishop of Wales. The Legal Sub-committee completed this work in June 2023.

The Opinion is highly detailed and is appended in full as annex 2 of this report.

The Legal Sub-committee concludes that the Archbishop's powers of visitation remain unaltered from those held by the Archbishop of Canterbury at the time of the disestablishment of the Church in Wales on 30 March 1920, as provided within Part VIII of Chapter IX of the Constitution. The Opinion sets out in detail what those powers were and the basis for them.

The Opinion concludes that:

1. The Archbishop of Wales has the power to undertake general visitations (to visit each diocese in turn on a rota basis) and special visitations (to visit a specific diocese in a targeted way following the identification of a need to do so). However, the law as to when a special visitation may take place is not as clear as it might usefully be.
2. A visitation will automatically inhibit all inferior clergy (and some diocesan roles, including the diocesan chancellor) from their roles – no separate suspensions will be necessary. However, the terms of reference of the visitation can make exceptions as appropriate.

The Opinion also sets out what an ecclesiastical visitation (be it archiepiscopal, episcopal or archidiaconal) is understood to be. A visitation is:

1. To inquire into the lives and behaviour of the clergy, their qualifications, and the manner in which they discharged their duties with respect to the cure of souls.
2. To inspect church buildings, ornaments and utensils for divine service, and to correct any defects found.
3. To search out and punish crimes generally.
4. To check on the practical administration of the parish.

5. To obtain information about the state of the diocese *etc*.
6. For the purpose of preaching and teaching.
7. To exercise the ministerial duty of admitting churchwardens to office.

The Opinion also makes the important observation that an archiepiscopal visitation may be undertaken by the Archbishop personally or undertaken by one or more commissaries on the Archbishop's behalf.

The Opinion also considers the Archbishop's disciplinary powers, if any disciplinary action were to be considered necessary following the discharge of a visitation. The Legal Sub-committee's view is that, if this were to arise, the proper course of action as per the Constitution should be for the matter to be referred to the Disciplinary Tribunal.

5. The Archbishop of Wales as metropolitan

The working group's first recommendation is that the powers of the Archbishop of Wales as metropolitan are codified – either within the Constitution or elsewhere – so the powers and authority as conferred at disestablishment in 1920 are clear. In this context the Church of England's canon C17, which sets out in some detail the role, powers and responsibilities of its archbishops, is relevant and may be considered as a possible model for the implementation of this recommendation. In particular, that canon provides that 'the archbishop has throughout his province at all times metropolitical jurisdiction, as superintendent of all ecclesiastical matters therein, to correct and supply the defects of other bishops.' The full text of canon C17 is set out within annex 1 to this report.

Though the working group is conscious that secular practices are not necessarily transferrable to the Church, it is also aware that it would be very unusual in a secular context for a person with a titular leadership position not to be able to exercise authority in the organisation they lead. This means that, if an issue of wider public concern were to arise anywhere in the Church in Wales, the Archbishop is the person who is expected to have both authority and responsibility.

Recommendation I

The powers and authority of the Archbishop of Wales as metropolitan should be codified.

6. Visitatorial powers

The Legal Sub-committee's Opinion is a very helpful document and its conclusions are supported by the Governance Reform Working Group. It establishes that the Archbishop may undertake a visitation and that visitations may be arranged on the basis of a general visitation (a planned series of visits to all dioceses) or a special visitation (visiting a specific diocese in response to the identification of a particular instigation).

The working group recommends that the visitatorial powers of the Archbishop of Wales as articulated within the Legal Sub-committee's Opinion are formally expressed. This could possibly form part of the expression of the wider metropolitical powers of the Archbishop as referred to within recommendation I of this report, or via the passing of a separate canon similar to the Church of England's canon G5 which provides a short definition of visitations and their conduct. The full text of canon G5 is set out within annex 1.

Recommendation II

The visitatorial powers of the Archbishop of Wales are codified, on the basis of the Opinion of the Legal Sub-committee dated June 2023.

One of the more complex areas to have occupied the *rapporteurs* during the course of their work, however, has been how a special visitation would be instigated – what should be the trigger for this action?

Nowadays the concept of a special archiepiscopal visitation could be considered a difficult one, mainly because the principle of an archbishop, in effect, asserting their authority over another diocesan bishop – and exercising that authority within the jurisdiction of that other bishop - may feel to be an imposition. But the fundamental principle of an archbishop being senior to the other bishops within a province has not historically been a controversial concept. Also, when the *rapporteurs* discussed this concept as part of the series of interviews conducted as part of their work, surprise was expressed by some of the respondents that this was not already reflected within the Constitution and the general ordering of the Church in Wales.

Therefore, the working group recommends that the Archbishop's authority to instigate a special visitation of a diocese should be expressly set out as a fundamental principle. A special visitation can be undertaken by the Archbishop at their instigation. It would however be expedient for such authority to be subject to checks and balances in line with modern safeguards: while the Archbishop has the authority to instigate a special visitation, this authority should not be exercised without reference to the views of the wider Church.

The working group therefore suggests that the Archbishop proceeds following consultation: the working group also suggests there is a subtle distinction made between the Archbishop having a *duty* to consult some constituencies and to *have regard* for the views of others.

The working group feels the Archbishop should have a *duty* to consult the cathedral dean and archdeacons of the diocese in question and the Bench of Bishops prior to any articles of inquiry being set up for a special visitation. This would mean the other bishops had the opportunity to challenge the Archbishop and the action being proposed – action possibly arising in response to perceived failings on the part of one of their episcopal colleagues. Consulting the dean and archdeacons of the diocese concerned would mean that the prevailing feeling and morale of the wider

diocese would be considered: the dean's and archdeacons' views would be formed by their interactions with the people of the diocese as they went about the exercising of their own roles.

Additionally, the working group suggests that the *Archbishop should have regard to* the views of the clergy and laity of the diocese concerned.

The distinction of language here is both significant and important. The Archbishop 'having regard' for the views of the clergy and laity of the diocese in question, rather than having a duty to consult them, guards against circumstances arising where the clergy and laity could in effect petition against a bishop as a result of an unpopular decision, their leadership style or their theological perspective. The working group is very keen to ensure that the codification of visitatorial powers does not inadvertently create the opportunity for the authority of the bishop in their own diocese to be undermined and their freedom to exercise that authority and leadership in the way they reasonably wish to do so to be blunted. The working group is clear that resistance to leadership decisions made by a bishop, a bishop's theological position or a bishop's Church background are not matters that merit the instigation of a special visitation – unless of course there are clear additional and more serious reasons.

The initiation of a visitation would be the decision of the Archbishop following the consultations recommended. However, the working group recognises that this course of action would undoubtedly reflect a pattern of concern within a diocese recognised by the Bench of Bishops and the dean and archdeacons of the diocese as well as by the diocesan clergy and laity. The instigation of a special visitation would be a significant move and such action would be taken only in very rare circumstances. It should also be recognised that a special visitation will undoubtedly be stressful for the bishop concerned and that they will need to be supported and cared for through the whole process of the visitation.

Recommendation III

It should be clarified that the Archbishop of Wales has express authority to instigate special visitations within dioceses.

Before this authority is used the Archbishop should have a duty to consult with the cathedral dean and archdeacons of the diocese concerned and the Bench of Bishops. The Archbishop should also have regard for the views of the clergy and laity of the diocese in question.

If the Archbishop wished to undertake further and more detailed consultation with a particular constituency or professional advisers as part of these preparations, the Archbishop should at their discretion be able to do so.

If a special visitation were being undertaken the Archbishop should ensure appropriate pastoral care and support are provided to the bishop concerned.

The working group makes no specific comment on how the Archbishop should undertake an archiepiscopal visitation (whether general or special), other than to acknowledge the detail expressed by the Legal Sub-committee as part of its Opinion of June 2023.

As noted above, the working group anticipates the visitatorial powers being used extremely seldom, but it wishes to set out the general circumstances where it would envisage them being used. Clearly it is not possible to foresee all eventualities and to provide an exhaustive list, but it was around the following areas that the *rapporteurs*' discussions gravitated:

- **Medical reasons**

Section 4a of this report makes reference to a motion passed by the Governing Body in April 2023 which provided within the Constitution the ability of the Archbishop to assume episcopal leadership in a diocese if the bishop of that diocese were to be absent for more than 60 days for medical reasons. This provision is limited to certificated medical grounds. The working group is keen to ensure the eventuality is not ignored where a bishop is clearly not functioning properly, yet is not willing to undergo a medical assessment in order for a sickness certificate to be provided. There may be circumstances where a bishop is not well yet is reluctant to acknowledge this and seek medical support.

If this were to arise, and erratic behaviour by a bishop become a matter of concern, the Archbishop should have the ability to intervene via a special visitation, subject of course to the safeguards expressed in recommendation III above.

- **Mismanagement of the diocese**

Clearly this has the potential to be a subjective and sensitive area and one where claims of mismanagement could be orchestrated vexatiously in response to a difficult or unpopular leadership decision. But there are circumstances which could be foreseen where, for instance, financial resources were misappropriated or decisions made which were not in line with the principles of good governance - circumstances which could lead to serious consequences for the stability, solvency or good standing of the diocese.

In any circumstances within this particular area the working group's recommendation (within recommendation III) for the Archbishop to consult with the Bench of Bishops and the dean and archdeacons of the diocese in question (and others at discretion) would be particularly pertinent before any action in the form of a special visitation was taken.

- **Misconduct**

The Archbishop already has jurisdiction to refer a bishop to the Disciplinary Tribunal if there is evidence that the bishop has done any of the things that may lead to disciplinary action under the Constitution. However, the working group feels that the Archbishop having the opportunity to act via a special visitation on the grounds of

alleged misconduct may be a useful one in some situations. This would of course not prevent a bishop being referred directly to the Disciplinary Tribunal without a visitation, but a visitation in order to investigate a particular allegation of misconduct may be a valuable precursor to a referral to the Disciplinary Tribunal – or it may demonstrate that there is no cause for such a referral. The working group would reiterate here the observation within the Legal Sub-committee's Opinion that an archiepiscopal visitation may be undertaken by an appointed commissary (or commissaries) on the Archbishop's behalf.

- **Other reasons**

The above reasons for undertaking a special visitation are not intended to be comprehensive or exhaustive. There may be a number of other reasons why such action might be required – for example if a bishop were experiencing a crisis of faith. In cases such as that pastoral and spiritual interventions would need to be made, but the working group believes that should such interventions not be successful it could be appropriate and reasonable for the Archbishop to intervene, using visitorial powers.

7. Bishops returning to work following medical incapacity

Section 4a of this report refers to the Constitutional provisions which now exist in relation to the prolonged absence of a bishop on certificated medical grounds. This provision is a very important and helpful development. However, the working group would like to make some specific additional comments in relation to medical incapacity.

First, it must be noted that the Church in Wales has defined processes and guidance in place in the Clergy Handbook for the medical absence of clergy and if a bishop were to be declared to be unfit for work on medical grounds the same processes would apply. The working group supports this process. Similarly, defined processes also exist to ensure any return to work following a period of medical absence are safe and proper with any provisions crafted in consultation with human resources and occupational health professionals, as necessary. Again, these processes apply to a bishop returning to work as well as any other member of the clergy and the working group supports the continuation of this.

However, if was less clear to the working group that clergy and bishops are treated equally in deciding when it is appropriate to come back to work following a period of medical absence. For a parish cleric, the Clergy Handbook puts in place detailed provision for liaising with the archdeacon *to ascertain whether any assistance can be afforded* [in the cleric's return to duties]. The working group believes that this should apply to bishops too (with the Archbishop taking the role of the archdeacon). In the rare case that the bishop was planning to return to work against medical advice and could not be persuaded otherwise, the Archbishop would have the power to impose a special visitation (which would legally prevent a return to duties).

The working group also feels it is important that whenever a bishop is absent on medical grounds the Archbishop should ensure appropriate pastoral care and support for the bishop are arranged and provided.

Recommendation IV

Existing human resources processes to manage the medical absence and subsequent return to work of bishops, processes which include consultation with human resources and occupational health professionals, are appropriate.

The return to work of bishops following medical absence should be in consultation with and under the oversight of the Archbishop.

Whenever a bishop is absent on the grounds of ill health the Archbishop should ensure appropriate pastoral care and support are provided accordingly.

8. Other matters

During the course of their interviews referred to within section 3 of this report, the *rapporteurs* discussed medical incapacity at some length. As part of these discussions an interesting idea was presented whereby, upon the confirmation of their election, incoming bishops should prepare a document which sets out their wishes for the conduct of the diocese should they become incapacitated on a long-term basis – perhaps as a result of a catastrophic accident or the onset of a chronic mental illness.

This document would have a similar function to a power of attorney and would be held by the Archbishop's Registrar for use if such circumstances were to arise. The bishop would have the opportunity to review and update the document, perhaps at regular, prescribed intervals.

This document could include preferred commissaries and an expression of wishes for the ongoing strategic direction of the diocese.

To a certain extent the addition of the new Constitutional provision permitting the Archbishop to provide episcopal leadership if a bishop were to be absent on certificated medical grounds for more than 60 days, has reduced the relevance of such an arrangement.

The working group feels this idea has some merit but, recognising it also has drawbacks, it does not wish to make any formal recommendations in relation to it. However, there is nothing to prevent bishops – whether new in post or established – committing to writing their wishes for the ongoing ministry of the diocese in the event of their incapacity, which the Archbishop may take into consideration when exercising episcopal leadership during the period of incapacity.

9. Conclusion

This report was brought about by the two recommendations within the Monmouth Review report which relate to the role and responsibilities of the Archbishop of Wales. It is hoped the working group's recommendations, together with other work concerning the medical incapacity of bishops and a review and clarification of the Archbishop's powers of visitation, have addressed the detail and spirit of those recommendations. The working group is confident that should a situation similar to those subject to the Monmouth Review arise in future the Church in Wales would have in place a more defined Constitutional environment allowing effective, swift and timely action to be taken and it commends this report to the wider Church.

The Governance Reform Working Group
September 2023

Annex 1

Church of England – canon C17

Of archbishops

1. By virtue of their respective offices, the Archbishop of Canterbury is styled Primate of All England and Metropolitan, and the Archbishop of York Primate of England and Metropolitan.

2. The archbishop has throughout his province at all times metropolitical jurisdiction, as superintendent of all ecclesiastical matters therein, to correct and supply the defects of other bishops, and, during the time of his metropolitical visitation, jurisdiction as Ordinary, except in places and over persons exempt by law or custom.

3. Such jurisdiction is exercised by the archbishop himself, or by a Vicar-General, official, or other commissary to whom authority in that behalf shall have been formally committed by the archbishop concerned.

4. The archbishop is, within his province, the principal minister, and to him belongs the right of confirming the election of every person to a bishopric, of being the chief consecrator at the consecration of every bishop, of receiving such appeals in his provincial court as may be provided by law, of holding metropolitical visitations at times or places limited by law or custom, and of presiding in the Convocation of the province either in person or by such deputy as he may lawfully appoint. In the province of Canterbury, the Bishop of London or, in his absence, the Bishop of Winchester, has the right to be so appointed; and in their absence the archbishop shall appoint some other diocesan bishop of the province. The two archbishops are joint presidents of the General Synod.

5. By ancient custom, no Act is held to be an Act of the Convocation of the province unless it shall have received the assent of the archbishop.

6. By statute law it belongs to the archbishop to give permission to officiate within his province to any minister who has been ordained priest or deacon by an overseas bishop within the meaning of the Overseas and Other Clergy (Ministry and Ordination) Measure 1967, or a bishop in a Church not in communion with the Church of England whose orders are recognised or accepted by the Church of England, and thereupon such minister shall possess all such rights and advantages and be subject to all such duties and liabilities as he would have possessed and been subject to if he had been ordained by the bishop of a diocese in the province of Canterbury or York.

7. By the laws of this realm the Archbishop of Canterbury is empowered to grant such licences or dispensations as are therein set forth and provided, and such licences or dispensations, being confirmed by the authority of the Queen's Majesty, have force and authority not only within the province of Canterbury but throughout all England.

Church of England – canon G5

Of visitations

1. Every archbishop, bishop, and archdeacon has the right to visit, at times and places limited by law or custom, the province, diocese, or archdeaconry in question, in a more solemn manner, and in such visitation to perform all such acts as by law and custom are assigned in that behalf for the edifying and well-governing of Christ's flock, that means may be taken thereby for the supply of such things as are lacking and the correction of such things as are amiss.

2. During the time of such visitation the jurisdiction of all inferior Ordinaries shall be suspended save in places which by law or custom are exempt.

YR EGLWYS yng NGHYMRU THE CHURCH IN WALES

Legal Sub-Committee

OPINION ON THE NATURE AND EXTENT OF THE VISITATORIAL POWERS OF THE ARCHBISHOP OF WALES

June 2023

THE OPINION OF THE LEGAL SUB-COMMITTEE ON THE NATURE AND EXTENT OF THE VISITATORIAL POWERS OF THE ARCHBISHOP OF WALES

OPINION

Introduction and Summary

1. The Bench of Bishops has asked the Legal Sub-Committee to give its opinion on the question, "What are the visitatorial powers of the Archbishop of Wales in nature and extent?"

2. This is the Opinion of the Legal Sub-Committee, to which all its members have contributed. The Legal Sub-Committee wishes to express its gratitude to Mr Matthew Chinery, Head of Legal Services, for his provision of relevant materials and a helpful briefing note.

3. The opinion of the Legal Sub-Committee, more fully explained below, is as follows:

    1) The Archbishop's powers of visitation remain unaltered from those that were held by the Archbishop of Canterbury on 30 March 1920.

    2) Both the nature and the extent of those powers are to some degree uncertain.

    3) The Archbishop clearly has a power to make a general visitation of the Province, visiting the dioceses in turn.

    4) It is probable that the Archbishop has the power to make a special visitation of a particular diocese (that is, one perceived to be in need of intervention) without making a general visitation. There is limited authority for the existence of such a power. This is at least partly due to the infrequency of the exercise of archiepiscopal visitatorial powers in England and in Wales in recent history.

    5) The effect of a visitation is automatically to inhibit (suspend) the authority of inferior jurisdictions in the place of visitation for the duration of the visitation. For this reason, it will generally be necessary for the visitor to make such express exemptions from the inhibition as are necessary for the continued exercise of necessary ecclesial functions. In particular, therefore, it will be necessary to limit the inhibition to the minimum necessary to ensure that the visitation may be properly conducted.

    6) The essential nature of a visitation is an inquiry.

7) It has historically been a recognised power of an archbishop to correct abuses found upon the visitatorial inquiry. In general, this power is part of the Archbishop's visitatorial powers and is exercised by giving directions and orders for future conduct. The power to discipline inferior clergy (that is, by sanction for ecclesiastical offences) is not itself a visitatorial power.

8) The former archiepiscopal (non-visitatorial) power to discipline clergy has probably not been preserved in the Constitution of the Church in Wales but has been ceded to the Courts of the Church in Wales.

9) Even if, as is arguable to the contrary, the power to discipline inferior clergy, including diocesan bishops, remains in theory exercisable by the Archbishop, it would be imprudent to purport to exercise such a power, both because the existence of the power is at best uncertain and because it would be regarded as inappropriate to purport to exercise it in the light of the extensive disciplinary provisions of the Constitution of the Church in Wales. The proper course would be to make a referral to the Disciplinary Tribunal of the Church in Wales.

The Constitution of the Church in Wales

4. The Constitution of the Church in Wales (the "Constitution") provides in Chapter IX, Part VIII, section 43:

> "(1) Archiepiscopal Visitations shall be held as heretofore, and the law and practice relating thereto shall be that prevailing on 30 March 1920.
>
> (2) Episcopal Visitations shall be held at such intervals as the Bishop may decide, and the form of such a Visitation shall be determined by the Bishop.
>
> (3) Archdeacons shall conduct regular Visitations of all Parishes in their archdeaconries, and subject to any direction by the Governing Body the form of such a Visitation shall be determined by the Archdeacon."

Accordingly, the law and practice relating to Archiepiscopal Visitations remains precisely that which applied on 30 March 1920.

5. Certain other provisions of the Constitution are relevant to be noted. Chapter I, section 5 provides:

> "The ecclesiastical law as existing in England on 30th March 1920, with the exception of:
>
> (a) The Clergy Ordination Act, 1804;
> (b) The Church Discipline Act, 1840;
> (c) The Ecclesiastical Commissioners Act, 1840;
> (d) The Clerical Subscription Act, 1865;

(e) The Clerical Disabilities Act, 1870;
(f) The Colonial Clergy Act, 1874;
(g) The Public Worship Regulation Act, 1874;
(h) The Sales of Glebe Lands Act, 1888;
(i) The Clergy Discipline Act, 1892;
(j) The Benefices Act, 1898;
(k) The Pluralities Acts;
(l) The Incumbents' Resignation Acts;

shall be binding on the Members (including any body of Members) of the Church in Wales, and shall be applied to the determination of any question or dispute between them as such Members, in so far as it does not conflict with anything contained in the Constitution or in any special contract as to glebe between the Representative Body and an Incumbent, provided that the Courts of the Church in Wales shall not be bound by any decision of the English Courts in relation to matters of faith, discipline or ceremonial."

Accordingly, the limitations on the archiepiscopal and episcopal disciplinary powers introduced by the Church Discipline Act 1840 are not, in general, imported into the Church in Wales. However, if and insofar as those limitations relate specifically to the archiepiscopal visitatorial powers, they are part of the law that applied in 1920 and is expressly preserved by Chapter IX, Part VIII, section 43.

6. Subject only to the provisions of the Constitution, the exercise of inherent powers is preserved and protected by Chapter II, section 37, which provides:

> "Subject to the Constitution, no proceeding of the Governing Body shall interfere with the exercise by the Archbishop of the powers and functions inherent in the Office of Metropolitan, nor with the exercise by the Diocesan Bishops of the powers and functions inherent in the Episcopal Office."

7. Also important is Chapter IX, entitled "The Tribunal and the Courts of the Church in Wales". Part I contains general provisions. Part II comprises section 8, which provides:

> "(1) There shall be a Disciplinary Tribunal of the Church in Wales which shall be constituted as provided in Part III.
>
> (2) The Courts of the Church in Wales shall be:
>
> (a) a Diocesan Court in each diocese, constituted as provided in Part IV and
>
> (b) the Provincial Court, constituted as provided in Part V.
>
> (3) Subject to the provisions of the Constitution, the power of the Archbishop, a Diocesan Bishop, and the Provincial Court shall include

> that of passing sentence of monition, suspension or expulsion from office in the Church in Wales."

Part III of Chapter IX establishes the Disciplinary Tribunal, which has jurisdiction over clerics, as well as over specified categories of lay persons, and has the power to impose a range of sanctions including deposition from Holy Orders and expulsion from office (section 18). Part IV relates to the Diocesan Court. Part V relates to the Provincial Court, which has power to hear and determine appeals from the Disciplinary Tribunal (section 32). Part VI establishes the Rule Committee. Part VII, "Miscellaneous powers and provisions relating to Diocesan Bishops and the Archbishop's Registrar", confers certain powers of suspension on Diocesan Bishops and the Archbishop's Registrar. Part VIII, "Visitations", comprises only section 43, which has been set out above. Part IX concerns the Archbishop's Registrar's List.

8. The following points may be noted with regard to Chapter IX:

1) None of its provisions derogate from the archiepiscopal visitatorial powers as they existed on 30 March 1920, as these are expressly preserved unaltered by Chapter IX, Part VIII, section 43.

2) Therefore, section 8(3) ("Subject to the provisions of the Constitution, …") cannot be read as qualifying the archiepiscopal visitatorial powers.

3) Section 8(3) expressly confirms the power of the Archbishop (and, indeed, of Diocesan Bishops) to pass sentence of monition suspension or expulsion from office. This is made "[s]ubject to the provisions of the Constitution". That in turn raises the questions of (i) the nature and extent of such power apart from the provisions of the Constitution and (ii) the extent, if any, to which the Constitution limits, qualifies or removes such power of sentence.

4) The jurisdiction of the Disciplinary Tribunal is not expressly stated to be an exclusive jurisdiction. While the Disciplinary Tribunal now has power to suspend or expel from office a Diocesan Bishop, it is not said that *only* the Disciplinary Tribunal (or, on appeal, the Provincial Court) has such power.

The law and practice as at 30 March 1920

9. *Halsbury's Laws of England* (1st edition, 1910), in the volume on Ecclesiastical Law, states[1]:

> "726. An archbishop is that minister of the Word who within that province whereof he is archbishop has, next and immediately under the King, supreme power, authority and jurisdiction in all causes and things ecclesiastical. …

[1] Here and elsewhere in this Opinion, citations from texts will generally omit footnoted references. Where such references are included, they will be shown in square brackets.

> 728. The powers and duties conferred by law on an English archbishop beyond those conferred on a bishop are as follows: An archbishop has authority to visit and inspect the bishops and inferior clergy of his province and to deprive bishops for notorious cause, and he sitting alone can try a bishop [*Lucy v St David's (Bishop)* (1699), Carth. 484; *Ex parte Read* (1888), 13 P.D. 221, O.C.]. But in the case of the inferior clergy the proceedings must take the due legal form directed by the various Church Discipline and Public Worship Regulation Acts, or by the general ecclesiastical law for the time being in force [*Re York (Dean)* (1841), 2 Q.B. 1, where the Archbishop of York was prohibited from summarily depriving the Dean of York at a visitation without due process under the Church Discipline Act 1840 (3 & 4 Vict. c. 86); *Sanders v Head* (1843), 2 Notes of Cases, 355; and see p. 410, *post*].
>
> When an archbishop visits his province it is usual for him first to visit his own cathedral and diocese, then in every diocese, to begin with the cathedral and proceed thence as he pleases to the other parts of the diocese, but the manner of a visitation is not so material as to be a ground for prohibition, as any defect in the manner of a visitation may be remedied by appeal [*Kildare (Bishop) v Dublin (Archbishop)* (1724), 2 Bro. Parl. Cas. 179].
>
> All deans and chapters are subject to the visitation of the archbishop of the province *jure metropolitico,* in addition to the bishop's visitation [Stephens' Laws relating to the Clergy, p. 1379]. …"

10. Three questions of practical importance arise:

    1) Can the Archbishop make a special Visitation (that is, a Visitation limited to one or more particular dioceses) or must a Visitation be general (that is, a Visitation of the entire province, taking the dioceses in turn)?

    2) What is the immediate effect of a Visitation?

    3) What if any are the Archbishop's Visitatorial powers in respect of disciplinary sanctions?

    The primary sources mentioned by *Halsbury's Laws* provide a basis for considering these questions.

Lucy v Bishop of St David's 88 E.R. 1287 [1558-1774] All ER Rep 349

11. *Lucy's* case is remarkable for its procedural complexity (which is simplified and abridged below) and for the uncertainties to which it gives rise. The background to the case is not without relevance or interest. Dr Thomas Watson was appointed as Bishop

of St David's by James II, seemingly for political reasons. It appears[2] that in 1694 the registrar of the diocese of St David's, Robert Lucy, having purportedly been deposed by Bishop Watson, prevailed upon Archbishop Tillotson to make a special metropolitical visitation of the diocese. The visitation did not find any wrongdoing on the bishop's part; however, for granting an institution after receipt of the archbishop's inhibition (see paragraph 33 below), the bishop was found to be in contempt of the archbishop's authority and was suspended from office for some months.

12. Subsequently, Mr Lucy promoted articles for simony and other offences against Bishop Watson before the next Archbishop of Canterbury, Thomas Tenison, who cited the Bishop to appear before him, or his vicar general, at his hall at Lambeth House. In the event, Archbishop Tenison sat in person, assisted by several other Bishops as assessors. In 1699, in the course of the proceedings, Bishop Watson moved in the Court of King's Bench for a prohibition on the ground *inter alia* that the case should have been tried in the Court of Arches. On his behalf it was submitted that the hall of Lambeth House, at which he had been cited to appear before the Archbishop, was "not a court whereof the law takes notice" and that, although the Archbishop had the same power over his suffragan (that is, inferior) bishops as every bishop had over the clergy of his diocese, yet "no bishop can cite the clergy before himself but in his court" and that therefore the citation ought to have been "to appear in the Court of Arches, or some other court of the archbishop." The Court of King's Bench refused a prohibition on that ground. The Lord Chief Justice, Sir John Holt, is reported as holding,

> "that to admit this point of jurisdiction to be disputed, was to dispute fundamentals; for the archbishop had, without doubt, provincial jurisdiction over his suffragan bishops, which he may exercise in what place of his province he pleases, for it is not material to be in the Arches any more than in any other place; for the Arches is only a peculiar consisting of twelve parishes within London, exempt from the Bishop of London, and that is properly the Arches; and though the provincial and metropolitan jurisdiction be exercised there also, yet it may be exercised elsewhere; for the citation is to appear before the archbishop, or his vicar general, who is an officer the law takes notice of; for the vicar general in the province is the same as the chancellor in a particular diocese; and the Dean of the Arches is also a vicar general of the archbishop over all his province, and acts in the Arches sometimes as vicar general, and sometimes as Dean of the Arches."

13. The archbishop, with the concurrence of the majority of his assessors, proceeded to find Bishop Watson guilty of various ecclesiastical offences, including simony, and pronounced sentence of deprivation upon him. The bishop attempted to reverse or suspend the sentence by a number of routes. First, he appealed to the Court of Delegates. Second, when it became apparent that the Delegates would uphold the archbishop's sentence, he sought to assert his privilege as a peer to be tried by the House

[2] This information is taken from Ruth Paley, "A Matter of Judgment: Politics, Law and the Trial of Bishop Thomas Watson", Parliamentary History, vol. 34, pt. 2 (2015), pp. 181-200. The article contains a great deal of fascinating detail and historical analysis.

of Lords; however, the House rejected his plea, because he had originally waived his privilege. Third, he moved again in the Court of King's Bench for a prohibition to stay the appeal proceedings in front of the Delegates.

14. This second motion for a prohibition was again refused by the Court of King's Bench, Lord Chief Justice Holt presiding. Bishop Watson's argument rested on two grounds: first, that the archbishop alone had no jurisdiction to deprive a bishop but could do so only in a synod of the bishops of the province; second, that the Delegates on appeal refused to admit the bishop's allegations. It appears[3] that Holt CJ was "fully satisfied" that the first ground was wrong but rested his actual decision on his rejection of the second ground, holding that the correctness or otherwise of the first ground was a matter properly for consideration by the Delegates upon the appeal and that there was no proper basis for prohibiting them from proceeding. Thus the Court did not formally decide the first ground, but Phillimore states:

> "As to the first [ground], Holt, Chief Justice, and the rest held, that an archbishop hath power over his suffragan bishops, and may deprive them; that though there may be a co-ordination amongst the bishops *jure divino,* yet there is a subordination *jure ecclesiastico qua humano;* not of necessity from the nature of their offices, but for convenience: and for what other purpose have archbishops been instituted by ecclesiastical constitutions? The power of an archbishop was very great here in England anciently; and he had the same jurisdiction of supremacy, as the patriarchs of Constantinople and other places. The pope used to call him *alterius orbis papam,* and he exercised the same jurisdiction with him. Theodore, who was archbishop not long after Austin, deprived Winifred, Bishop of York, for the said see was not then metropolitical, but subject to the Archbishop of Canterbury; and yet at the same time there was a council held, and Beda commends Theodore for it. But afterwards, in the time of Henry I and King Stephen, the pope usurped the authority of the archbishops; in exchange for which, they became *legati nati* of the pope. And that is the reason why this practice[4] cannot be found to have been put in use for so long a time. But at this day, by the act of Henry VIII this jurisdiction is restored. It was always admitted that the archbishop had metropolitical jurisdiction, and the bishops swear canonical obedience to him; and where there is a visitatorial power, there is no reason to question the power of deprivation; for the same superiority, which gives him power to pass ecclesiastical censures upon the bishops, will give him power to deprive, it being only a different degree of punishment for a different degree of offence. And to question the authority of the archbishop is to question the very foundations of the government."

[3] From Phillimore, The Ecclesiastical Law of the Church of England, (2nd edition, 1895), ("Phillimore"), pp. 68ff, which has an extensive account of the case.
[4] By "this practice" it is assumed that what is meant is the deprivation of a bishop by an archbishop acting alone.

This reasoning, as recorded by Phillimore, appears to distinguish the power of deprivation from a strictly visitatorial power but to ground both on the same basis, namely the metropolitical jurisdiction of the archbishop. Gould J, concurring, said:

> "There is no case, where a person hath power of visitation, but he hath also power of deprivation."

This may imply that the power of deprivation is an incident of the visitatorial power, but it is consistent with the two powers having merely a common ground.

15. The appeal then proceeded in February 1700 in front of the Delegates, who held that the Archbishop of Canterbury had had jurisdiction in the cause and upheld his sentence. The Legal Sub-Committee does not know of any record of the reasoning of the Delegates or indeed whether any reasons were given.

16. Bishop Watson petitioned the House of Lords to have the denial of a prohibition set aside, but the petition was refused in March 1700. After the sentence of deprivation had been confirmed, the Crown, as having custody of the temporalities of the see during vacancy, brought proceedings in the Court of Exchequer against Dr Watson for possession of the bishop's palaces and lands. Dr Watson defended the action on the ground that being a peer he could not be deprived by the archbishop. That plea was rejected by the Court of Exchequer and, on appeal in 1704, by the Exchequer Chamber. An appeal to the House of Lords was dismissed on the ground that it had been filed out of time.

The Church Discipline Act 1840

17. The Church Discipline Act 1840 ("the 1840 Act") effected substantial change to the law of the Church of England relating to the discipline of clerks in holy orders, other than bishops. In general terms, its provisions in force in 1920 were not imported into the law of the Church in Wales: see Chapter I, section 5, of the Constitution. However, to the extent if any that the 1840 Act limited the archiepiscopal visitatorial powers, those limitations do form part of the law of the Church in Wales: see Chapter IX, Part VIII, section 43, of the Constitution.

18. For present purposes, the following provisions of the 1840 Act are the most relevant and sufficiently show how the discipline of clerics was henceforth to be dealt with in the Church of England.

> 2. … the Word "Bishop", when used in this Act, shall be construed to comprehend "Archbishop"; and the Word "Diocese", when used in this Act, shall be construed to comprehend all Places to which the Jurisdiction of any Bishop extends under and for the Purposes of an Act passed in the Second Year of the Reign of Her present Majesty intituled

> An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy[5].
>
> 3. And be it enacted, That in every Case of any Clerk in Holy Orders of the United Church of England and Ireland who may be charged with any Offence against the Laws Ecclesiastical, or concerning whom there may exist Scandal or evil Report as having offended against the said Laws, it shall be lawful for the Bishop of the Diocese within which the Offence is alleged or reported to have been committed, on the Application of any Party complaining thereof, or if he shall think fit of his own mere Motion, to issue a Commission under his Hand and Seal to Five Persons … for the Purpose of making Inquiry as to the Grounds of such Charge or Report: …
>
> 5. And be it enacted, That the said Commissioners or any Three of them shall transmit to the Bishop under their Hands and Seals the Depositions of Witnesses taken before them, and also a Report of the Opinion of the Majority of the Commissioners present at such Inquiry whether or not there be sufficient prima facie Ground for instituting Proceedings against the Party accused; …
>
> 6. And be it enacted, That in all Cases where Proceedings shall have been commenced under this Act against any such Clerk it shall be lawful for the Bishop of any Diocese within which such Clerk may hold any Preferment, with the Consent of such Clerk and of the Party complaining, if any, first obtained in Writing, to pronounce, without any further Proceedings, such Sentence as the said Bishop shall think fit, not exceeding with Sentence which might be pronounced in due Course of Law; and all such Sentences shall be good and effectual in Law as if pronounced after a Hearing according to the Provisions of this Act, and may be enforced by the like Means.

Accordingly, a bishop or archbishop could hold an Inquiry, conducted by Commissioners, into allegations of clerical misconduct and, with the consent of the cleric, could proceed to sentence upon any misconduct that was found. Where such consent was not given, or the bishop or archbishop so chose, sections 7 to 12 provided for a hearing before the bishop or archbishop sitting with Assessors. In the alternative, section 13 provided that the bishop or archbishop might instead send the case for determination by the Court of Appeal of the Province. There followed provisions concerning procedure and appeal; then the following:

> 23. And be it enacted, That no Criminal Suit or Proceeding against a Clerk in Holy Orders of the United Church of England and Ireland for any Offence against the Laws Ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or provided.

[5] The Pluralities Act 1838

> 25. And be it enacted, That nothing in this Act contained shall be construed to affect any Authority over the Clergy of their respective Provinces or Dioceses which the Archbishops or Bishops of England and Wales may now according to Law exercise personally and without Process in Court; and that nothing herein contained shall extend to Ireland.

19. Section 25 had the effect, therefore, that so far as disciplinary powers over inferior clergy (that is, other than bishops) were exercisable by the archbishop in court they were removed and replaced by the new statutory jurisdiction of the courts under the Act, but that so far as the disciplinary powers were exercisable by the archbishop personally and apart from a court they remained unaffected.

20. The provisions of the Constitution, set out above, have the combined effect (it is thought) that any disciplinary powers that were exercisable by the archbishop before the 1840 Act were imported into the law of the Church in Wales except (1) so far as they were strictly visitatorial powers—in which case, the limitation or removal of those powers effected by the 1840 Act was imported into the Constitution by Chapter IX, Part VIII, section 43—or (2) so far as they were limited or removed by the provisions of the Constitution itself.

In Re a Visitation of the Archbishop of York to the Dean and Chapter of York (1841) 2 Q.B. 1

21. In this case ("the *Dean of York's* case"):

> "The Archbishop of York, after the passing of stat. 3 & 4 Vict. c. 86 [the Church Discipline Act 1840], cited the dean and chapter of York … to appear at a visitation of the dean and chapter, canonically to receive and submit to the archbishop's intended 'metropolitical visitation, examinations, due corrections,' &c., to exhibit their statutes, &c. if required, pay the due procurations, and further to do and receive what the business and nature of such a visitation require. He also appointed a commissary[6] for holding the visitation in his absence, for correcting and punishing by ecclesiastical censures whoever should be contumacious, for administering articles in writing to the dean and chapter, and receiving their presentments and answers, and for adjourning and proroguing such visitation from time to time and place, and completing and dissolving the same, and for doing every thing else appertaining to the nature and quality of the said visitation."

The visitation was a special rather than a general visitation and was in response to concerns about the financial affairs of York Minster. However, the specific visitatorial jurisdiction being exercised is not wholly clear—a point raised in argument before the

[6] Dr Joseph Phillimore, Regius Professor of Civil Law at the University of Oxford and father and grandfather respectively of the authors of the first and second editions of Phillimore, The Ecclesiastical Law of the Church of England.

Court of the Queen's Bench. The Lord Chief Justice, Lord Denman, stated that the Archbishop visited as Ordinary[7], but the citation referred to a "metropolitical visitation". Further, *Halsbury's Laws*, in the passage already cited, states, "All deans and chapters are subject to the visitation of the archbishop of the province *jure metropolitico*, in addition to the bishop's visitation."

22. At first the visitation proceeded by way of a normal inquiry. Then, however,

> "in answer to an interrogatory respecting the actual state of repair of several churches and chancels, the reverend Mr. Dixon, one of the canons, made a statement which was considered as a direct charge of simony against the dean. The dean was requested to attend in order to meet this charge: and he did attend. The commissary required him in the first place to purge himself of the contempt [for failing to appear at a prior stage of the visitation]; which he declined to do, and again absented himself, protesting against the proceedings, and saying, not by way of consent but of defiance, that Mr. Dixon might go on to prove his charge in his absence. The learned commissary, himself satisfied with the proofs which were then adduced, pronounced the charge established in several cases, and gave judgment that the dean should be for that offence, as well for contumacy, deprived of his office. Sentence to the like effect was afterwards solemnly pronounced by the archbishop."

23. The Dean moved for a prohibition. Two of the grounds of the motion are relevant: first, that the Archbishop had no visitatorial jurisdiction to deprive; second, that if a charge of simony were raised, it ought to have been dealt with by proceedings under the 1840 Act. The following submissions, recorded in the report, are set out at some length as they bear on the issues identified above.

> "The charge of simony is of ecclesiastical cognizance; but the archbishop had no authority to try and sentence upon it on this visitation. No stress can be laid upon authorities affirming generally a visitor's power to deprive. The objection here is that there has been no regular assertion of such an authority. The visitor must proceed in his proper Court; if he assume an authority to act in any other way, he is acting wholly without jurisdiction. … It is a fallacy to represent the present complaint as merely a point raised on a question of practice of a particular Court: the complaint is that the tribunal is not a legitimate tribunal at all. No such Court is known to the law of England.
>
> …

[7] Phillimore's Ecclesiastical Law states: "The archbishop has two concurrent jurisdictions, one as ordinary or bishop within his own diocese, the other as superintendent throughout his whole province of all ecclesiastical matters, to correct and supply the defects of other bishops."

The visitatorial Court seems, in fact, to be a mere Court of inquiry; the power of deprivation belonging to the bishop as Ordinary, not as visitor. … The Act of Uniformity, 1 Eliz. c. 2, s. 23, provides that archbishops, bishops, &c., shall have full power by virtue of this Act 'to inquire in their visitation, synods, and elsewhere within their jurisdiction at any other time and place, to take accusations and informations,' &c., 'and to punish the same by' 'deprivation,' &c.: but this must be understood reddendo singula singulis; to inquire at their visitations, and to hear accusations and punish in their Courts: the object of this Act being to restore the law to the state in which it was before the reign of Mary.

… The manner of constituting the Court in the present instance shews how (probably from long disuse) the business of a visitation has been misunderstood. The archbishop in his citation announces that he will hold a 'metropolitical visitation' for the purpose of visiting the dean and chapter. If this had been a proper metropolitical visitation, the archbishop would have visited first the cathedral and diocese of York, and then the other dioceses of the province; and in the mean time all the inferior ecclesiastical jurisdictions would (in strictness) have been inhibited. The commission authorizing the commissary states the appointment of a "Metropolitan visitation over the dean and chapter," and puts the commissary in place of the archbishop for doing all things 'appertaining to the nature and quality of our said visitation.' What can be said to appertain to the nature of such a visitation as this? The authorities shew that the archbishop could no more visit the dean, metropolitically, than he could so visit a rector. He could visit the dean only in his triennial visitation. All intermediate authority of this kind is, in modern times, made over to the archdeacon.

… In the last century Bishop Gibson failed in an attempt to revive the power of proceeding summarily: and the proceedings must now conform to the rules of the established Courts. Cases have arisen in which the summary and personal exercise of jurisdiction now contended for would have removed much difficulty in acting against offenders; but no such course has been attempted.

That deprivation takes place by regular sentence in Court appears from all the authorities. …

Then, as to stat. 3 & 4 Vict. c. 86 [the 1840 Act]. This is clearly a 'proceeding' for an 'offence against the laws ecclesiastical': the language of the archbishop's sentence so treats it: and it therefore comes within sect. 23. Nor does it fall within the reservation in sect. 25, since the archbishop could not exercise this kind of authority personally, that is, individually, the presence of others being necessary to form his Court. Nor could he adjudicate here without 'process in Court.' It may be asked what this clause was meant to include, if not

> cases like the present: but it may well apply to more ordinary subjects of discipline, such as residence and preaching. Simony is one of the causes termed by the writers on ecclesiastical practice 'plenary': Cockburn's Practice, 7, c. 2, s. 5 (4th ed.); 1 Oughton's Ordo, 21, tit. 7. And 'plenary' causes 'are those in which the order and solemnity of the law are exactly observed; so that if there is the least infringement, or omission of that order, the whole proceedings are annulled:' 'summary are those in which such order is dispensed with'; Cockburn's Practice, 6, c. 2, s. 2. The forms resorted to in this case, though imperfect, are an admission that some regular process was necessary. The proceeding in question is sufficiently the act of a 'Court' to fall within sect. 23, and to be the subject of prohibition. …"

24. The Archbishop of York relied, among other matters, on *Lucy's* case, on the basis that "an archbishop has the same power over a dean within his diocese as over a bishop in his province". As for the 1840 Act, it was submitted that it did not affect the visitatorial powers.

25. The judgment of the Court was delivered by Lord Denman C.J. He considered first whether the case involved a "criminal suit or proceeding" within the meaning of the Act and for the purposes of section 23:

> "But is this a criminal proceeding, or is it merely an incidental fact arising out of the visitation, in the course of which it is brought to the Ordinary's knowledge, and, properly, in the discharge of that duty, inquired into by him, but not instituted as a criminal proceeding? The answer appears to be that, as soon as the visitor proceeds to examine the proofs of an ecclesiastical offence committed by a clerk for the purpose of punishment by deprivation, more especially, as in this case, at the instance of an accuser who avails himself of the aid of a professional advocate, a criminal proceeding is undoubtedly instituted and in full progress."

Lord Denman considered next whether the matter fell within the proviso in section 25, that is, whether the Archbishop was exercising personal powers that were exercisable without process in a court. Having remarked on the lack of clear authority for such a personal power, he continued:

> "We are aware that the jurisdiction of visitors has been described in most comprehensive terms by common lawyers of high authority. Lord Holt himself is cited as allowing them an arbitrary power, in his often reported judgment on the case of *Philips v. Bury* (1 Ld. Raym. 5). … Scarcely any other remark upon it requires to be made, than that the case arose out of the visitation of a charitable foundation. Holt's strong language is all applied to that case. The founder might do as he would with his own: the parties deriving benefit from his endowment must abide by the conditions which he has annexed. *Cuius est dare ejus est*

> *disponere*. *The Bishop of St. David's v. Lucy,* where the Archbishop of Canterbury gave sentence of deprivation against one of his suffragan bishops for simony and other ecclesiastical offences, was supposed to shew that power to reside in the breast of the archbishop without any rules or forms. Prohibition was claimed, on the ground that the citation was to appear at Lambeth, not in the usual place of holding the Metropolitan Court, and it was answered here by Lord Holt and his brethren, that the archbishop 'may hold his Court where he pleases'; that 'the Spiritual Court might proceed to punish him for any offence done against the duty of his office as bishop', adding, 'as the clergy are under different rules and duties, it is but reasonable that if an ecclesiastical person offend in his ecclesiastical duty, he should be punishable for it in the Ecclesiastical Court.' These expressions all occur in Salkeld's report (1 Salk. 134). The bishop was called by citation to answer for his delinquency. The form and mode of proceeding were objected to in no other particular than the place of sitting. We scarcely need say that this case supplies no evidence of the right to proceed personally without process in Court**.** [emphasis added]"

Lord Denman observed that another case much cited in the books, *The Bishop of Kildare v The Archbishop of Dublin* (1724) (1 Bro. P.C. 179, 2d ed., was not authority for the proposition that the archbishop as visitor had lawful power to deprive personally, and without process in Court. He suggested that the language used in that case and in *Phillips v Bury* might have led to the belief that the bishops' power of deprivation consequent on a visitation was personal, and he continued, "The opinion is thus accounted for; but the law can only be established by practice and precedent. Both are wanting here." The Court's conclusion on this point was as follows:

> "Some of the books speaks of a Court of visitation; and the phrase is not incorrect. It is an authority acting with certain forms of procedure and inquiry, suspending its proceedings from time to time by adjournment, making certain orders and decrees. Whether or not these acts are of necessity judicial, those done in the course of establishing a charge against a party accused bear that undoubted character.
>
> The authority now challenged declared the party in contempt for withdrawing himself after citation, and required him to purge his contempt before he could be heard in his defence against charges preferred. It proceeded then with the examination of witnesses in support of those charges, and finally adjudged him guilty, and awarded sentence of deprivation. All these are assuredly the acts of a Court. It is admitted that they may be appealed against; and we are at a loss to conceive an appeal against any proceedings but those of a Court. That Court, however, the late statute has divested of all such jurisdiction. It is not within the saving clause, which leaves untouched the Ordinary's power over his clergy as it might then be exercised by law without process in

> Court, because this power does not appear to have been ever exercised by law. We are constrained to conclude that the most reverend prelate, in so far as he proceeded at his visitation to deprive the dean, has acted without jurisdiction. [emphasis added]"

26. The Court dealt, finally, with the argument that, as sentence had already been passed, there were no subsisting proceedings that could be prohibited. This argument was rejected. Among the reasons given by Lord Denman CJ was the following:

> "The dean could not apply [for a prohibition] before sentence; for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the archbishop. Up to that point he had unquestionably power; for it was his duty to inquire with a view to ulterior proceedings …"

Writing of this case and of another, Phillimore states at p. 1049:

> "The joint result of these two cases seems to be that the bishop may visit and may inquire and may make orders; and that contumacy at the visitation or disobedience to the orders of the visitor will be the ecclesiastical offence of disobedience to the lawful orders of the ordinary, which will have to be punished by separate and substantive proceedings."

27. The following observations are made on and arising from the *Dean of York's* case.

1) The case evidences the confusion that existed even then as to the visitatorial jurisdiction. This appears from the submissions for the Dean (whether they were right or wrong) and from the manner in which the court treated the visitation as that of the Ordinary. The visitation was purportedly metropolitical. The bishop of the diocese, though ordinary of the diocese, is not the ordinary of the cathedral, but he or she has rights of visitation of the cathedral as of other churches in the diocese and is said to visit *jure ordinario*. In *Phillpotts v Boyd*[8] (1875) 6 L.R. 435, Lord Hatherley, delivering the judgment of the Privy Council, said at 450:

> "It is not, and indeed it could not be, disputed that, according o the General Ecclesiastical Law, 'all deans and chapters are subject to the visitation of the bishop, *jure ordinario,* and of the archbishop of the province, *jure metropolitico*' (*Burn's* Eccl. Law, [*Phillimore's* Ed. 1842], vol. ii. p. 93)."

Dr Peter Smith adverts to the distinction[9]:

[8] The case concerned a visitation of Exeter Cathedral by the Bishop of Exeter. The actual decision in the case was that, although the bishop, in the exercise of his visitatorial powers, could not *in his discretion* order an alteration in the fabric of the cathedral, it was within his jurisdiction to find that sculptures (in the reredos) had been unlawfully erected and *on that definite legal ground* to order their removal.

[9] "Points of Law and Practice Concerning Ecclesiastical Visitations", (1991) 2 Ecc LJ 189

> "[A]n archbishop visiting *jure metropolitico* has the same visitatorial powers that any visitor possesses in right of his office, though his jurisdiction stemming from the superior nature of his position may encompass persons and places not subject to an inferior jurisdiction. An archbishop, however, may be content to exercise his visitatorial powers as diocesan ordinary, and in that case, though he is an archbishop, he will not be visiting *jure metropolitico,* but *jure ordinario.*"

2) The visitatorial power is one of inquiry and includes the power to give orders for the correction of abuses and for the good management of the place visited.

3) However, the visitor's power to discipline for ecclesiastical offences was exercisable only in court proceedings: either by a trial of offences discovered on the visitation or by way of separate and substantive proceedings for the offence of disobedience to the lawful orders given by the visitor. Thus the *Lucy* case was considered to involve a decision of the Archbishop of Canterbury's court.

4) That power, as regards inferior clergy, was removed by the 1840 Act. As the 1840 Act has no application to the Church in Wales, the question is whether the Archbishop of Wales retains a curial jurisdiction under the Constitution.

5) Although the proviso in section 25 of the 1840 Act preserved any power exercisable by the archbishop or bishop personally and otherwise than through a court proceeding, no such *personal* power of deprivation was proved to have been ever exercised by law. The reasoning in the case is consistent with the limitation of the power to non-contentious cases. The visitatorial power to make inquiry and to give orders was unaffected by the Act.

Conclusions

(1) Must a Visitation be general, or may it be specific?

28. Phillimore speaks of archiepiscopal visitations as being general. At pp. 1045-6 it states:

> "By a constitution of Otho, archbishops and bishops shall go about their dioceses at fit seasons, correcting and reforming the churches, and consecrating and sowing the word of life in the Lord's field. And, regularly, the order to be observed therein is this: In a diocesan visitation, the bishop is first to visit his cathedral church; afterwards the diocese. In a metropolitical visitation, the archbishop is first to visit his own church and diocese; then in every diocese to begin with the cathedral church and

> proceed thence as he pleases to the other parts of the diocese. Which appears from abundance of instances in the ecclesiastical records, as well of papal dispensations for the archbishop to visit without observing the said order, as of episcopal licences for the visitor to begin in other parts of the diocese than in the cathedral church.
>
> And this sprang from the precept of the canon law, which requires that the archbishop willing to visit his province shall first visit the chapter of his own church and city, and his own diocese; and after he has once visited all the dioceses of his province, it shall be lawful for him (having first required the advice of his suffragans, and the same being settled before them, which shall be put in writing that all may know thereof) to visit again, according to the order aforesaid, although his suffragans shall not assent thereunto. And the like form of visiting observed by the archbishops shall be observed also by the bishops in their ordinary visitations."

29. Consistently with this, again with clear reference to general visitations, the same text states at p. 66:

> "Our own Ecclesiastical History furnishes several instances of metropolitical visitations in the times which immediately followed the Reformation. Archbishop Cranmer was the first to exercise this '*jus metropolitanum*'. In 1560, Archbishop Parker visited the dioceses within the province of Canterbury. In 1576, Archbishop Grindal, and in 1583 Archbishop Whitgift, held similar visitations."

30. That an archiepiscopal visitation was necessarily general was the basis of the Dean's submissions in the *Dean of York* case: see paragraph 23 above. The Court of Queen's Bench did not address that submission, because it treated the visitation as made by the Archbishop as Ordinary. The case does not provide any clear support for the existence of an archiepiscopal power to make special visitations. The Legal Sub-Committee has not found unequivocal legal authority for the existence of such a power.

31. Nevertheless, it is considered probable that such a right does exist.

    1) The archiepiscopal duties and powers, as summarised in *Halsbury's Laws of England,* seem to require a power to visit in order to make inquiry of any particular "trouble-spots". In particular, archbishops of the Church of England had a long-established power to summon diocesan bishops to answer charges in an archiepiscopal court; it makes little sense to suppose that an archbishop, having such a power, could not first make inquiry, if convenient by commissaries. The fact that a visitation of the province will usually involve going around the dioceses in turn need not preclude such a power of special visitation.

    2) A precedent for such a special visitation appears to exist in the facts that eventually gave rise to the case of *Bishop of St David's v Lucy*. It appears that

the Archbishop of Canterbury had made a special visitation of the diocese of St David's in response to concerns that had been expressed concerning the conduct of the bishop.

3) Dr Peter Smith, in the article cited, states:

> "In addition to the regular visitation undertaken by an ordinary of the parishes and churches of his territory, he may make a special or extraordinary visitation to inquire into a particular matter which has come to his attention. He may do this either in his own person or by means of an official or commissary. Such a special visitation may be in addition to his regular visitation."

The authority cited for the power of the ordinary to make a special visitation is *Phillpotts v Boyd,* cited above, which did indeed concern a special (episcopal) visitation, in that case of Exeter Cathedral. The Legal Sub-Committee considers that the same necessity, namely to inquire into particular matters, applies equally to archiepiscopal oversight and therefore indicates that archiepiscopal visitatorial powers are unlikely to be more limited than episcopal visitatorial powers.

4) Although it does not constitute a binding authority, it is of interest to note that in December 2011 the Archbishop of Canterbury, The Most Revd Dr Rowan Williams, commenced a (special) visitation of the Diocese of Chichester to inquire into safeguarding matters. The Archbishop's authority was exercised in accordance with Canons C17 and G5. Canon C17 provides in part:

> "2. The archbishop has throughout his province at all times metropolitical jurisdiction, as superintendent of all ecclesiastical matters therein, to correct and supply the defects of other bishops, and, during the time of his metropolitical visitation, jurisdiction as Ordinary, except in places and over persons exempt by law or custom."

Canon G5 provides:

> "1. Every archbishop, bishop and archdeacon has the right to visit, at times and places limited by law or custom, the province, diocese or archdeaconry in question, in a more solemn manner, and in such visitation to perform all such acts as by law and custom are assigned in that behalf for the edifying and well-governing of Christ's flock, that means may be taken thereby for the supply of such things as are lacking and the correction of such things as are amiss.
> 2. During the time of such visitation the jurisdiction of all inferior Ordinaries shall be suspended save in places which by law or custom are exempt."

Those Canons reflect the general law that was applicable in 1920 and remains applicable in the Church in Wales. The Archbishop of Canterbury clearly understood the law as reflected in Canon G5, paragraph 1, to permit a special visitation, and this indicates that his interpretation of the implications of the law as reflected in Canon C17 accords with that of the Legal Sub-Committee.

32. It is thought that any archiepiscopal visitation, other than a general (provincial) visitation, will only be of a diocese (or, rarely, of a dean and chapter). A visitation of any lesser institution will be a matter for the diocesan bishop. If the diocesan bishop is unable or unwilling to take necessary action, an archiepiscopal visitation of the diocese, suitably limited if need be, will be appropriate. For the avoidance of doubt, the Legal Sub-Committee does not consider that any difficulty arises from the fact that the province contains entities that did not exist as at 30 March 1920 (such as, for example, two of the six dioceses) and therefore could not have been visited by the Archbishop of Canterbury: the law is general, relating to the scope of the metropolitical jurisdiction, though its application is contingent, varying with the particular entities to which that law falls to be applied from time to time.

(2) What is the immediate effect of a Visitation?

33. The effect of an archiepiscopal visitation is to inhibit (suspend) all inferior jurisdictions. As this will usually be inconvenient, an exemption will ordinarily be appropriate, so as to limit the effects, or even the scope, of the visitation. Phillimore states at p. 1050:

> "In the bishop's triennial, as also in regal and metropolitical, visitations, all inferior jurisdictions respectively are inhibited from exercising jurisdiction, during such visitation. …
>
> However, it has not been unusual, especially in metropolitical visitations, to indulge the bishops and inferior courts, in whole or in part, in the exercise of jurisdiction, pending the visitation. Thus, we find relaxations granted, pending the visitation, by Archbishop Abbot; and by others, an unlimited leave or commission, to exercise jurisdiction, or proceed in cases, notwithstanding the visitation; and elsewhere, a leave to confer orders, confirm, grant fiats for institution, institute, or correct, whilst the inhibition continued in other respects."

34. A modern example is provided by the Archbishop of Canterbury's visitation of the Diocese of Chichester. The Instrument of Visitation provided in part:

> "The Archbishop of Canterbury hereby:
>
> …
>
> 2. Directs that during the period of the Visitation, all issues relating to Safeguarding within the Diocese shall be dealt with solely by those

persons to whom the Archbishop may from time to time make delegation in writing, and by no other

3. Mandates that the Visitation shall be limited in its scope to

3.1 Examining progress made in implementation of and actions taken upon the Diocesan Safeguarding Guidelines … [etc]; and

3.2 Making such further recommendations as may appear necessary and expedient

4. Directs that during the period of such Visitation the inhibition provided by Canon G5 Paragraph 2 shall have effect only in relation to the matters referred to in Articles 2 and 3 above.

35. The consequence of automatic inhibition is that, upon the commencement of an archiepiscopal visitation of a diocese, all inferior clergy *including the diocesan bishop* are, subject only to exemption granted by the citation, inhibited from performing their duties and functions. (So, too, are other functionaries, such as diocesan chancellors.) No "suspension" of such persons is required.

(3) What are the Archiepiscopal Visitatorial powers?

36. The essential nature of a visitation is that of an inquiry. Dr Peter Smith, in the article cited, has summarised the traditional aims of ecclesiastical visitations as follows:

"1. to inquire into the lives and behaviour of the clergy, their qualifications, and the manner in which they discharged their duties with respect to the cure of souls;

2. to inspect church buildings, ornaments and utensils necessary for divine service, and to correct any defects found;

3. to search out and punish crimes generally;

4. to check on the practical administration of the parish;

5. to obtain information about the state of the diocese, etc;

6. for the purpose of preaching and teaching;

7. to exercise the ministerial duty of admitting churchwardens to office."

See also Principle 23.1 of the Principles of Canon Law Common to the Churches of the Anglican Communion (Anglican Consultative Council, 2nd edition, 2022): "Visitation enables the exercise of a supervisory jurisdiction or a pastoral ministry, including enquiry into and assessment of the condition of an ecclesiastical entity."

37. The scope of the inquiry will usually be set out clearly in Articles of Inquiry. Although the Archbishop may visit personally, he will generally delegate the conduct of the visitation to one or more commissaries. (In the visitation of the Diocese of Chichester, the visitation was conducted by a bishop and a chancellor as commissaries. See also the *Dean of York's* case.)

38. The remaining question concerns the Archbishop's disciplinary powers.[10]

40. The effect of the *Dean of York's* case is to confirm that the power to discipline clergy is not to be regarded as a visitatorial power. It was, rather, a power to be exercised by the archbishop in court proceedings distinct from the visitation. After the coming into force of the 1840 Act, that power could be exercised only over bishops, all other clergy being subject only to the ecclesiastical courts established by the 1840 Act. As the 1840 Act does not apply to the Church in Wales, that limitation also does not apply. The question is therefore what, if any, <u>non-visitatorial</u> disciplinary powers the Archbishop has over inferior clergy.

41. It is considered that the answer to this question is provided by section 8 of Chapter IX of the Constitution. This establishes the Disciplinary Tribunal and two Courts, namely the Diocesan Court of each diocese and the Provincial Court. Chapter IX does not expressly confer *exclusive* jurisdictions on the Disciplinary Tribunal and those two Courts. However, the terms of section 8(2) do not admit of the existence of any other Court. Therefore the archiepiscopal powers that would formerly have been exercisable by the archiepiscopal courts, including disciplinary powers, can no longer be so exercised. This is consistent with the remark of Archbishop Green in *The Constitution of the Church in Wales* (1937), p. 211, that "the Welsh Bishops covenanted with the Clergy and Laity of the Church in Wales to delegate their judicial functions as far as possible to legal experts". (The qualifications he appends to this remark, relating to the words "as far as possible", do not affect this point.)

42. It is true that a question remains as to the meaning and application of section 8(3) of Chapter IX. Any power, as therein mentioned, that was exercisable by the Archbishop in a court is, in our opinion, caught by the words, "Subject to the provisions of the Constitution", for those provisions do not preserve any such archiepiscopal court. It is possible that the powers mentioned in the subsection can be exercised personally by the Archbishop and Diocesan Bishops with the consent of those subject to the sentence. Beyond that, the existence of a purely personal power (that is, other than one exercisable in court) may be treated with circumspection, as it was by the Lord Chief Justice in the *Dean of York's* case.

43. In any event, and even if (contrary to our view) the Archbishop has a subsisting power to impose disciplinary sanctions on inferior clergy, we are clearly of the opinion that it would be inappropriate to purport to exercise such a power. The correct course is clear. If, upon a visitation or otherwise, it appears to the Archbishop (or, indeed, to a Diocesan Bishop) that there are grounds for prosecuting a cleric for an ecclesiastical offence, the matter ought to be referred to the Disciplinary Tribunal.

[10] As has been observed, no powers of suspension are required, as the visitation automatically inhibits the exercise of inferior functions.

Professor Norman Doe
His Honour Judge Andrew Keyser KC (Chair)
The Revd Canon Rebecca Stevens
The Very Revd Nigel Williams

26 June 2023