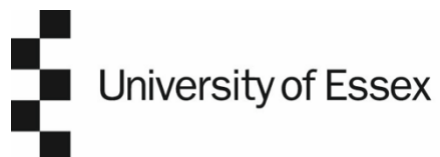


The Role of Mediation in the Court of Protection: A Roundtable Report

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I also thank all of the participants who attended the stakeholder roundtable, who cannot be named here as the event was held under the Chatham House Rule. However, they contributed to an interesting, varied and valuable discussion which has formed the basis of this report.

Finally, I want to thank Lee Marsons for his research assistance for the event and in the preparation of this report, as well as Margaret Doyle for her ongoing support and feedback on various aspects of my work related to mediation and the Court of Protection.

1. Introduction

On 18 June 2020, I hosted a roundtable on the role of mediation in Court of Protection (CoP) proceedings. Originally, this event was meant to be held in person but, due to the coronavirus pandemic, we moved online instead. The aim of the roundtable was to get a range of stakeholders with expertise in mental capacity law, the CoP and/or mediation together to discuss the key issues arising where mediation is used in the context of CoP proceedings.

The roundtable included discussion of the role of mediation in improving P's participation (P being the subject of the proceedings). Evidence suggests that P's participation in CoP proceedings is limited¹ and so part of the aim of my ongoing research is to consider whether mediation provides more opportunities for participation and, if so, why. The roundtable also included discussions of wider issues, including mediation's various advantages and disadvantages, and discussions about the use of virtual mediations during the pandemic and beyond. Despite the limitations of holding a roundtable by Microsoft Teams, the event was a success; we managed to bring together a range of perspectives including members of the judiciary, policy makers, lawyers, mediators, academics and others.

This report provides some background information about the use of mediation in the CoP, summarises the roundtable, identifies key themes that arose from the roundtable as well as more specific issues that were raised by participants. It concludes with an outline of areas in which further research is needed, specifically:

- 1.1. Evaluative research comparing mediated cases against litigated CoP cases, including in relation to outcome and longer term impact on relationships;
- 1.2. Issue specific research, exploring mediation's use in particular types of case;
- 1.3. Research on the use of virtual mediations as an alternative to face-to-face settings.

¹ See P Case (2019) 'When the judge met P: The rules of engagement in the Court of Protection and the parallel universe of children meeting judges in the Family Court', 39 *Legal Studies* 302; J Lindsey (2019) 'Testimonial injustice and vulnerability: A qualitative analysis of participation in the Court of Protection', 28 *Social and Legal Studies* 450; A Ruck Keene, NB Kane, SYH Kim and GS Owen (2019) 'Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection' 62 *International Journal of Law and Psychiatry* 56.

2. Background

In light of growing concerns about access to justice and the limited participation of vulnerable groups in legal proceedings, it is possible that mediation could help to improve access to justice for some vulnerable participants.² The aim of this roundtable was to understand the views of relevant stakeholders on mediation in the CoP before further research was undertaken.

The Mental Capacity Act 2005 (MCA) does not specifically address the use of mediation in proceedings. However, the Code of Practice to the MCA makes some reference to the use of mediation, stating:³

A mediator helps people to come to an agreement that is acceptable to all parties. Mediation can help solve a problem at an early stage. It offers a wider range of solutions than the court can – and it may be less stressful for all parties, more cost-effective and quicker. People who come to an agreement through mediation are more likely to keep to it, because they have taken part in decision-making.

The Court of Protection rules 2017 (COPR) state that active case management by the court includes ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate’.⁴ Other than these references, there is no mention of mediation within the COPR or the MCA.

Case law may also provide an insight into the extent to which mediation is used in this jurisdiction. A review of all reported CoP cases on the British and Irish Legal Information Institute (BAILII) from 1 January 2010 – 28 February 2020 shows that 21 cases refer to the concept of mediation.⁵ That represents 4.45% of all of the reported case law (n=472) on BAILII during that period of time. Given that there is no requirement for the judge to even be informed that the case was mediated, this figure

² Ibid; M Burton, R Evans and A Sanders (2007) ‘Vulnerable and intimidated witnesses and the adversarial process in England and Wales’ 11 International Journal of Evidence and Proof 1.

³ Mental Capacity Act Code of Practice, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf, para 15.7.

⁴ COPR 1.3(3)(h).

⁵ ‘Mediate’, ‘mediation’ and ‘mediator’ were all search terms in compiling this list of cases using the BAILII search function available at: <https://www.bailii.org/ew/cases/EWCOP/>. This search came up with 29 cases, but on further investigation many of these cases were not referring to the concept of ‘mediation’ as used in this report. For example, one inclusion of the word ‘mediation’ appeared to be a typo and the correct word was ‘medication’, see *Re AG* [2016] EWCOP37. The irrelevant cases were removed from the database of cases, leaving 21 cases that mentioned ‘mediation’ as used here.

is likely to significantly under report the true number of cases that have some engagement with mediation over that time period. Analysing reported case law alone does not provide a complete account of what is happening because you might expect successfully mediated cases not to even reach a judgment. In any event, 4.45% of all reported case law referencing the concept of mediation shows that it is at least on the radar the parties involved in proceedings.

There is very little research, and no published independent academic research, about mediation's use in the specific context of the CoP. The evidence that we do have is practitioner led and includes the Office of the Public Guardian's (OPG) pilot mediation scheme (which has not yet reported its findings), a report by mediator and solicitor Charlotte May, and an ongoing practitioner led pilot CoP mediation scheme (also not yet reported). This latter scheme will be independently evaluated, albeit the success of this evaluation will depend on the uptake of mediation under the scheme which has so far been limited.

The OPG pilot analysed the role of mediation in pre-issue mental capacity disputes. The OPG scheme applied to cases where there was a lasting power of attorney (LPA), an enduring power of attorney (EPA) or a court-appointed deputy and is therefore much narrower than the scope of the CoP's work more generally. The aim of the use of mediation by the OPG was to 'identify whether OPG safeguarding investigations can safely be scaled down because the issue is a dispute, rather than a matter concerning abuse or neglect'. The point being that the latter requires further OPG investigation and potentially an application to the CoP, whereas the former can be resolved through mediation and agreement between the parties. As far as I understand it, the full findings of that pilot scheme have not yet been released, but it highlights that mental capacity disputes are being mediated, irrespective of whether this has been formally incorporated into a court authorised scheme.

May's report on mediation and the CoP in the UK was the result of her involvement in a working group on the use of mediation in the CoP, which originated in the South West of England. May used a two stage survey of 25 professionals (lawyers, mediators and one social worker) to ask their views about CoP mediation.⁶ The key findings from that research included that 72% of respondents thought that lack of awareness of CoP mediation was a major obstacle to the parties engaging in CoP mediation, in

⁶ C May (2019) 'Court of Protection mediation research: Where are we in the UK?', available at: http://www.adultcaremediation.co.uk/Court_of_Protection_Mediation_Research_190531.pdf (accessed: 16 July 2020).

79% of cases P did not attend or participate in the mediation, and in 78% of cases an agreement was reached as a result of the mediation.⁷

Building on May's research, a practitioner-led mediation pilot scheme was set up for issued proceedings in the CoP.⁸ The scheme, set up by a working group of practitioners, is seeking to gather evidence on the use of mediation in CoP proceedings and is currently expected to run until at least April 2021. I will be carrying out the independent evaluation of that scheme and the roundtable discussion and this report will feed into that evaluation, although the two pieces of research are separate.

There was also an additional discussion section in the roundtable about the use of virtual mediations due to the response to Covid-19 meaning that mediations are now routinely being held 'online'. Participants in the roundtable, and in many other contexts, typically refer to virtual processes as 'remote', e.g. 'remote mediations' or 'remote hearings'. However, I use the term 'virtual' rather than 'remote' in this report because it better captures what it is that we are discussing here. First, mediations are carried out using computer software such that they are not taking place in a face-to-face, physical setting. The mediation process is therefore happening virtually, through a screen, connecting people in remote settings through the internet and their chosen software. Conversely, describing this process as 'remote' implies distance and separateness – that the mediation (and *mediator*) are in some distant space. While this may accurately reflect that there is greater physical distance between people in virtual mediations, the language of remoteness can also serve to reinforce that separation and make people feel even more remote. Therefore describing the mediation as virtual is both more accurate and more inclusive than the term 'remote' mediations.

3. Structure of the event

The session began with three presentations to identify the core issues which would frame the roundtable. These presentations covered: an overview of the current evidence on mediation in the CoP; vulnerability and the values of participation in mediation; and, reflections on the use of virtual mediations during the pandemic. After a number of questions and a short break, we then moved on to the roundtable, whereby participants engaged with a multitude of topics ranging from the extent

⁷ Ibid, 5-6.

⁸ See Court of Protection Mediation Scheme, available at: <https://www.courtofprotectionmediation.uk> (accessed: 15 July 2020).

to which P participates in mediation; which issues are most appropriate for mediation; the values underpinning mediation; and who should fund mediation.

4. Themes identified

In section 4.1 below I set out five overarching themes that I have identified from the roundtable. In sections 4.2-4.3 I then move on to consider some of the more specific points raised in more detail.

4.1. Overarching themes

4.1.1. Professional perspective conflict

One clear overarching theme that emerged from the roundtable was the differing perspectives from the attendees dependent on their professional background.⁹ While there was agreement between attendees on many issues, the areas on which there was disagreement appeared to be profession-based, which meant attendees tended to prioritise different things dependent on their professional approach. For example, legal professionals (specifically those who were not also mediators) appeared to prioritise a clear outcome or decision at the mediation and independence between the mediator and the parties. Mediators, on the other hand, prioritised informality, flexibility, communication, person-centredness, and emotional connection to the parties. This tension is clear in the literature from other areas of law,¹⁰ but it was interesting to see this reflected with CoP practitioners too. It suggests that there may still be a disconnect between the views of legal professionals and mediators about the potential of mediation. Bridging these opposing perspectives will be important to ensuring that CoP mediation is effectively implemented into practice.

4.1.2. Process benefits

Participants at the roundtable identified that there were clear process benefits to mediation including: flexibility, accessibility, and improved working relationships. This was particularly so if mediation was

⁹ All attendees attended in a professional capacity.

¹⁰ V Bondy, L Mulcahy, M Doyle, M and V Reid (2009) 'Mediation and judicial review: An empirical research study', available at:

<https://www.nuffieldfoundation.org/sites/default/files/files/MediationandJudicialReview.pdf>, 41; H Genn (2010) 'Civil mediation: a measured approach?' 32 *Journal of Social Welfare and Family Law* 195; C Irvine (2020) 'What do 'lay' people know about justice? An empirical enquiry' 16 *International Journal of Law in Context* 146.

practiced as a process over time, rather than as a one-off event. Overall, participants noted that major benefits were to be found in the process of mediation by fostering thinking, reflection, and better relationships (considered in more detail below).

4.1.3. Nature of the agreement

Participants focused on the nature of the agreement reached at mediation (or lack thereof) and it was in this area where there was most concern about the role of mediation in the CoP. This included discussion of the substance of the agreement itself as well as the implications of reaching agreement or the failure to reach agreement, for example on costs or the direction of proceedings.

As has been written in the context of family mediation '[w]ithout an evaluation of the agreement, it will be unclear whether the settlement is practical, viable, workable or consistent with legal norms in the long-term.'¹¹ This was a clear theme of the roundtable, with participants noting that for mediation to be successful in the long run (in respect of process benefits as well as outcome) then the discussions, and ultimate settlement, at mediation had to be realistic as well as in the interests of P.

Several participants working as mediators argued that person-centred¹² mediation resulting in nuanced agreement reflective of the different values and priorities is possible, and that agreements are not, in their experience, entirely focused on one party's outlook. This is an important theme to consider further in the CoP because of the potential for safeguarding issues and power imbalances to arise.

4.1.4. Voice/participation

A number of participants raised the issue of voice and/or participation in mediations. However, views were split on whether mediation could improve voice and participation of P in particular, albeit noting that the voices of others (such as P's family members, supporters, friends and carers) are also important. As Martin explains 'it is discriminatory if a person's access to justice is limited because a mediator has not facilitated a collaborative support process to include participants with impaired

¹¹ R Blakey, (2020) 'Cracking the code: the role of mediators and flexibility post-LASPO' 53 Child and Family Law Quarterly, 4.

¹² Highlighting the need to have a clear understanding of what 'type' of mediation we are referring to here as being most appropriate for the CoP, for further on this see T Tallodi (2019) *How parties experience mediation : An interview study on relationship changes in workplace mediation*, 21.

decision making in the mediation process.¹³ Therefore it was unsurprising to see this come out as a clear theme of the discussions and will require careful consideration if CoP mediation is to be expanded.

4.1.5. Accessibility

A final overarching theme of the roundtable related to issues of accessibility, specifically the platforms through which the mediation is conducted and how accessible the mediation is to participants. In the virtual mediations this raised issues of technology, but in relation to face-to-face mediations, issues may arise in relation to the accessibility of the mediation itself, particularly for disabled participants and in ways that secure their participation.

4.2. Opportunities of CoP mediation

In interrogating the above themes and their component parts in more detail below, I set out the views of roundtable participants on the opportunities that mediation provides for resolving CoP proceedings. Positive reflections on the opportunities of mediation included: mediation's potential to improve relationships, mediation's flexibility and informality, and mediation's potential for better resolution.

4.2.1. Mediation's potential to improve relationships

Several participants explained that, compared with litigation, mediation had the advantage of improving relationships between the parties. This included that, in giving parties the time and space to think, reflect, listen, and communicate, it fostered and promoted improved relationships. This was exemplified in the comments by one legal professional attendee who argued that he was, 'a big fan of mediations where there had been a breakdown of trust' or 'where something had gone wrong in the relationship, where the parties had lost the ability to talk to each other but needed to maintain working relationships in relation to P.'

One participant also gave the example of mediations involving the withdrawal of life sustaining healthcare treatment and the disputes that can arise between professionals and families in healthcare environments. The participant noted that resolution had been reached in these cases over a period of

¹³ J Martin (2015) 'A strengths approach to elder mediation' 32 Conflict Resolution Quarterly 481, 490.

weeks and several meetings with families and clinicians, which gave medical professionals and family members the time and space to think through the challenges in the case with mediators, which may not be possible via court hearings. There was a concern that in litigation the parties conceive of each other as adversaries in a purely win or lose situation.

One legal professional attendee from a local authority observed that the relationship between P and a local authority can often continue for many years. Therefore, where the same issue was ‘swinging round and round for years, relationships can sour.’ He said that the local authority was not necessarily only thinking about the end of the case but also next year and the year after: it wanted better relationships in the long-term between the local authority and the parties.

Ultimately, several participants made the point that one major benefit is that mediation is better than adversarial court proceedings in resolving fractured relationships which do not assist P. This is a benefit which also appears to be reflected in the literature and is an important area for further research in the CoP context.¹⁴

4.2.2. Mediation as more flexible and informal than litigation

There was significant agreement that one major process benefit of mediation is that, compared to court proceedings, it is a relatively informal and flexible approach to dispute resolution. While there was widespread agreement on this, it was something that was particularly emphasised by mediator attendees.

In the move to virtual mediation during the coronavirus pandemic, several mediators suggested that this had a number of procedural benefits for parties. This was because individual parties were often more comfortable in their own environment, for example by mediating virtually from their own home. Therefore, virtual mediation provided the advantage that participants could be more emotionally at ease, which could encourage more effective communication, more attentive listening, and foster better relationships. One mediator suggested that this was especially important for more vulnerable

¹⁴ DG Pruitt, RS Peirce, NB McGillicuddy, GL Welton and LM Castrianno (1993) ‘Long-term success in mediation’ 17 *Law and Human Behavior* 313; RA Peeples, S Reynolds and CT Harris (2008) ‘It’s the conflict, stupid: An empirical study of factors that inhibit successful mediation in high-conflict custody cases’ 43 *Wake Forest Law Review* 505; H Pincock (2013) ‘Does Mediation make us better? Exploring the capacity-building potential of community mediation’ 31 *Conflict Resolution Quarterly* 1.

participants, who did not have to endure the stress of going to a physical mediation location and could communicate and listen digitally in familiar surroundings.

Nevertheless, one legal professional participant said that mediation and litigation did not need to be an either/or situation. For instance, during a court process, there will also often be best interests meetings and roundtable meetings to discuss the issues. These flexible meetings can happen within the litigation process too, which should not be forgotten.

4.2.3. Mediation can be a better form of resolution

Discussion developed around the use of mediation as a valuable tool to reach better resolution of disputes. This can be split between process benefits (which have already been discussed above) and outcome benefits. An outcome benefit means that mediation may have the potential to lead to better agreements between the parties than litigation allows for. For example, one participant said that court proceedings can often start from a 'static position', whereas the process of mediation is more reflective and, therefore, allows parties to be more reflective when determining what outcome they are willing to agree upon. This encourages parties to think creatively about potential solutions and compromises which litigation may obscure or ignore.

In addition, because mediation could be a flexible multi-event process rather than a singular event, it was suggested that mediation can increase the chances of resolution and agreement in ways that a court hearing may not. Indeed, giving the example of cases involving the withdrawal of life sustaining healthcare treatment, one participant said that it is unreasonable to think about resolution in a one-off event given the stakes in those cases – a person's life. In these circumstances, the most reasonable approach towards resolution was a flexible, multi-event process. This was not a view shared universally by all attendees, with some concern being raised about agreement being reached that was not in P's best interests (see section 4.3.5 below). However, with that caveat in mind, mediation may have the potential to contribute to improved, or at least more sustainable, outcomes.

4.3. Challenges in CoP mediation

In addition to the above opportunities provided by mediation, a number of potential and actual challenges of mediation in the CoP were identified. Some of these challenges are procedural in nature and others relate to the substance of the mediation agreement and/or outcome of the case.

4.3.1. Involving disabled participants

Mediators who attended the roundtable tended to say that mediation had the potential to be more facilitative of the participation of disabled people, especially if mediation was conceived as a process in which they could engage flexibly and ways that support the person's needs. However, mediators also conceded that mediation was not a panacea to encourage participation. One mediator gave the comparative example of mediations involving parents, children, and local authorities, where parents could often 'benevolently' crowd-out their child's voice. This was because parents are ultimately the gatekeepers to their children and were in a position of power because they normally contacted mediation services, were paying for the service, and decided when and where the child could be contacted, if at all.

Comparisons can be made in this regard with CoP mediation in that it will, more often than not, be legal representatives, family members of P, or professionals (such as local authority social workers) who will initiate the mediation process, rather than P herself. This means that the mediator will, initially at least, be engaging with others, rather than P, about the mediation. Mediators will need to be aware of the importance of involving the person at the centre of proceedings and have a clear understanding of disability and accessibility issues.

Several participants were concerned that there were some forms of disability or impairment where participation from P in the mediation would either be difficult or impossible. Cases of impossibility included incidents where P may be in a coma and where there was no reasonable possibility of asking P's opinion and involving them in the discussions. On the matter of impairment, one mediator gave the example of a non-verbal person, where – wrongly in her view – non-verbal communication was often taken as a proxy for inability to communicate or participate at all. In the mediator's view, while it was comparatively difficult to involve a person with communication difficulties in a mediation, there ought to be resources, assistance, and professionals available to enable the person to communicate their views and wishes so far as possible. Nevertheless, these resources were often not available. As a result, mediation cannot yet be seen as a solution to participation of lesser-heard voices, albeit the flexibility of mediation means that it provides some potential for improvement in this regard if accompanied by appropriate and well-funded support.

4.3.2. Delay/no resolution

Concerns were raised, particularly by legal professional participants, about the possibility of mediation contributing to a delay in proceedings. For example, if advantages can be gained from mediation as a multi-event process, then there is a corresponding risk that mediation could lead to a delay in resolving a case. Even where mediation is a one-off event, that could still lead to delay if, for example, a hearing date is moved as a result. One legal professional participant noted that the CoP 'did not have six weeks to play with' and that 'delay would be inimical to P's best interests' in some cases. However, there was agreement among mediators that a multi-event mediation process would not be appropriate in every case, especially where this 'would impose delays on something which is clinically urgent'.

One related challenge of CoP mediation is the often contested and challenging issues in litigated CoP cases, which means that sometimes mediation leads to no resolution. This can be a challenge where the parties incur additional costs as a result of the mediation which may not lead to agreement.

These perspectives make clear that 'one size fits all' mediation in the CoP is unlikely to be appropriate and some degree of flexibility or screening of case suitability for mediation may be necessary.

4.3.3. Suitability of cases

There was some discussion about the suitability of mediation for different types of CoP cases. This breaks down into a number of sub-categories which require further consideration and research before any conclusions can be drawn, but the categories may include: the legal issues (e.g. capacity versus best interests); subject matter of the case (e.g. whether any allegations of abuse, urgency and nature of application); party specific features (e.g. P's ability to participate, whether there is a working relationship between the parties).

One participant noted that certain legal issues might be better pursued in mediation (such as ongoing welfare disputes about where a person should live or the care they need), whereas other matters (such as distribution of property or financial assets) might be better resolved by a court.

Participants appeared to agree that mediation would not be appropriate to resolve a question about P's capacity. This was partly because of the belief that the Mental Capacity Act 2005 does not allow

capacity to be mediated but also partly because issues of capacity are so intimately bound-up with basic rights and liberties that the matter should never be resolved by agreement between other parties, but only by a court. One participant stated that mediating capacity would be ‘fundamentally wrong as a matter of law. A doubt or disagreement about capacity could only be resolved by a judge.’ This raises further questions, though, as to the role of mediation in comparison to other informal ways of resolving CoP matters. For example, if, as some participants suggested, roundtable meetings are used to resolve certain aspects of the dispute or parties come to court already in agreement that P lacks capacity in a particular area, then why are those forms of resolution about capacity any different from resolving capacity through a mediation process (which arguably has more safeguards than a roundtable meeting)? This was not answered during the roundtable and requires further consideration.

In relation to the subject matter of the dispute, some participants emphasised mediation’s particular utility in medical treatment disputes and in cases where there needs to be an ongoing relationship between the parties, rather than in emergency or one-off applications. As noted further in the safeguarding section below, many attendees believed that mediation is not appropriate in cases where allegations of abuse have been made. Another participant also suggested that there might be an issue when a matter was not raised and discussed in mediation but ultimately proves to be important, if not decisive, for the judge. This inevitably limits the usefulness and point of the mediation.

In relation to the suitability of mediation dependent on the specific features of the parties involved, this concern appeared to relate to 1) the ability of P to participate in the mediation (and the perception that a mediation should not take place without some form of participation by P) and 2) the pre-existing relationship between the parties. On this latter point, while the attendees generally acknowledged that mediation can help to improve relationships, this may depend on the particular individuals involved in the case and their willingness to engage.

4.3.4. Safeguarding concerns

Several participants agreed that mediation would not be suitable in cases where there were pre-existing allegations of abuse against potential parties to a mediation and cases which involve allegations of abuse are excluded from the CoP mediation scheme.¹⁵ It was not discussed in further

¹⁵ See n8 above.

detail what a safeguarding allegation would cover or what level of severity of abuse should be excluded. However, safeguarding concerns also link with wider concerns about substantive justice, based on an agreement being reached which may be in the parties' interests, rather than P's.

4.3.5. Agreement not in P's best interests

One concern that permeated the discussions at the roundtable was the outcome of the mediation not being in P's best interests. This is a concern about substantive justice as well as potentially, although not always, the presence of safeguarding issues. Issues of substantive justice were raised repeatedly as a challenge of mediation by legal professional attendees, which reflects wider concerns about mediation in the academic literature beyond the CoP context.¹⁶ However, that this was predominantly raised by (non-mediator) legal professionals is noteworthy.

One clear example was given during the roundtable of where it would be inappropriate for a court to approve an agreement reached at mediation because it was not in P's best interests. The example concerned siblings in dispute about the best interests of their mother in relation to her property and finances. The siblings agreed to mediate the case and came to an agreement to split the mother's assets 50/50 between themselves, without regard for their mother's best interests. This is a clear illegitimate use of their mother's assets because it is not in their mother's best interests to have them dispersed in this way. Should the matter go before a judge, it was suggested that it was highly unlikely that any judge would approve an order that reached an agreement that was patently not in P's best interests.

This example raises a number of issues. First, that there is potentially little value in mediating where there are concerns about abuse or concerns that the parties are not acting in the best interests of P. The mediation would, it was said, be a waste of time because an agreement that was demonstrably not in P's best interests would not be approved by the CoP. Second, and more generally, one participant questioned the usefulness of agreements reached by the parties given that the court was not going to be bound by the result of mediation. For this reason, the participant noted that there is always a limitation on what mediation can accomplish. Third, this discussion highlighted that, during proceedings at least, any mediation agreements reached would be subject to judicial scrutiny if the agreement is to be reflected in a court order.

¹⁶ H Genn at n10 above; C Irvine at n10 above.

On the one hand, this judicial scrutiny was perceived by some attendees to be necessary to avoid the risk of agreements being enacted that are not in P's best interests. On the other hand, one participant noted that there was a risk that a judge would be unlikely to challenge an agreement reached between the parties at mediation and that there would be a fiction that the judge was making the order but, in fact, it was only the 'endorsed consent' of the party's agreement, rather than an independent judicial order.

Some attendees also made the point that parties involved in proceedings routinely reach agreement between themselves about the issues and/or the best way forward, for example, at a roundtable meeting. Therefore this concern about judicial scrutiny is potentially unfounded because this already happens in agreements reached between parties during CoP proceedings. The point being that mediation may simply formalise a process that already happens, but in ways that provide more safeguards than a conventional roundtable meeting allows (for example by having an independent third party mediator involved).

4.3.6. Technology

Many participants noted concerns about the unreliability of virtual platforms. Loss of Wi-Fi connection, poor signal, and unfamiliarity with technology were especially noted. One mediator further observed that, in a face-to-face mediation, when one party abruptly leaves by walking out of the room, there is the possibility for the mediator to follow them and to negotiate their return to the mediation forum. This option is lost in virtual mediation, as when a party leaves a Zoom meeting or refuses to answer their phone, there is not much the mediator can do to encourage their continued participation. Once the party leaves, the mediation is lost unless the party chooses to return.

4.3.7. People observe emotion and do not participate in it

Several mediators commented that, in a virtual mediation, observing and detecting the emotions of the parties was more difficult, as the face could be more easily concealed and parts of the body which were ordinarily communicative and visible – such as the hands and arms – were rendered potentially invisible. This meant that mediators had fewer visual cues about what emotional state each party was in, which made it more difficult to predict and pre-emptively manage outbursts of anger or frustration, for example.

4.3.8. Participants take it less seriously

Some participants perceived that the advantage of mediation that it promoted flexibility and informality was something of a double-edged sword. On the one hand, this informality meant that some participants perceived the process as less important, meaningful, and serious, because it had the character of a discussion rather than a potentially legally binding experience. However, this was balanced by the views of others at the roundtable who suggested that participants listened more attentively in a virtual mediation because they were afraid of missing something significant via the virtual platform.

4.3.9. Security of platform

One legal professional participant noted that while there may be security concerns in physical locations, the security of virtual platforms such as Zoom, Microsoft Teams, and Skype was a new issue that had to be addressed. This was especially significant as many matters discussed during a mediation would be confidential or at least personal and sensitive, so it was imperative that third-parties did not gain access to the information illegitimately or unwittingly.

5. Further research needs identified

The roundtable was an important starting point for discussion of mediation in the CoP among relevant stakeholders and it has helped to identify the key areas in which further information, analysis and research is needed.

Evaluative research comparing mediation and litigation in the specific context of the CoP is necessary to address a number of the challenges identified in this report. This would include procedural and substantive justice issues, albeit procedural justice issues related to participant experience of mediation may be easier to draw conclusions about and research into this area is currently underway.¹⁷ Evaluating outcomes of mediation compared to litigation, which has not yet been undertaken in the CoP, was seen as necessary, particularly by some legal professional participants who appeared concerned about the substance of the agreement reached at mediation and whether or not it is in P's best interests. However, such research is conditional on access to comparative data

¹⁷ For example, I am currently undertaking SLSA funded research into the role of mediation in improving P's participation in CoP proceedings.

on mediated and litigated CoP cases. Until reliable comparative data is accessible, it will be difficult to answer some of the questions identified in this report, particularly questions that relate to the substance of the agreement and the impact on long term resolution of the dispute (for example, through being able to follow up with participants in CoP proceedings what the long term success of mediation agreements was compared to non-mediated cases).

There would also be value in researching this topic at a more granular and qualitative level, for example in relation to specific types of dispute, in areas where the roundtable participants identified that mediation might have real potential. The two legal issues that were identified as having most potential for mediation were medical treatment disputes and ongoing welfare issues involving local authorities. Relevant organisations, such as local authorities or NHS Trusts, may consider conducting or supporting such research to explore in depth participant experiences in these types of cases.

Research on the differences and similarities between virtual and face-to-face mediation might also be beneficial. We may be able to draw on research done on this in other areas to identify the implications for CoP work. This is something that can also be done more generally in relation to understanding how mediation might work in the CoP. For example, there are areas including elder mediation and guardianship mediation where there is already extensive evidence of mediation's use,¹⁸ as well as family law mediation¹⁹ within England and Wales with which some similarities may be drawn.

6. Conclusion

Participants at the roundtable came from a range of backgrounds, but all with some experience of either mediation and/or the Court of Protection/mental capacity law. While the range of participants contributed to a rich and interesting discussion, there was also considerable agreement between participants. Specifically in relation to the flexibility and informality of mediation and its potential for improving relationships and moving away from an adversarial approach. However, as identified above, participants at the roundtable highlighted issues which suggest further analysis of mediation's appropriate role in the CoP is necessary before mediation is expanded.

¹⁸ C May (2012) 'Elder and guardianship mediation: A review of the Canadian EGM report and its relevance in the UK', 4 Elder Law Journal 12; Canadian Center for Elder Law (2012) Elder and guardianship mediation report, (CCEL, Vancouver); D Bagshaw, V Adams, L Zannettino and S Wendt (2015) 'Elder mediation and the financial abuse of older people by a family member' 32 Conflict Resolution Quarterly 443; L Barry (2015) 'Elder mediation: What's in a name?' 32 Conflict Resolution Quarterly 435; J Martin at n13 above; A Crampton (2016) 'Escape from the laboratory: Ethnographic methods in the study of elder and family court mediation' 32 Negotiation Journal 191.

¹⁹ R Blakey at n11; C Irvine at n10; RA Peeples, S Reynolds and CT Harris at n14 above.

I hope that the themes and issues identified at the roundtable, and summarised above, will help to shape the future direction of this area and will facilitate further discussion on this important issue between stakeholders who attended and the wider community of mediation practitioners, mental capacity law professionals and those directly affected by CoP proceedings.