University of Essex

Evaluation of Mediation in the Court of Protection

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Gillian Loomes-Quinn is a disabled scholar-activist with a background in disability advocacy. Her ongoing PhD research at the School of Law, University of Leeds is entitled "The Mental Capacity Act 2005 and Disabled 'Voice': A Socio-Legal Exploration". It is concerned with the operation in practice of the Mental Capacity Act 2005; focusing particularly on its socio-legal and practical impact on the individual and collective 'voice' of disabled people. Her key areas of interest include: the views of disabled activists on advance care planning; participation in research of adults lacking the capacity to consent; and the work of the Court of Protection. Gill is also proud to be Co-Director (with Professor Celia Kitzinger) of The Open Justice Court of Protection Project and a convener of the Participatory Autism Research Collective (PARC). She tweets @GillLoomesQuinn.

Dr Lindsey carried out the evaluation for this project. She was provided with research assistance from Gillian Loomes-Quinn, who is also a co-author of this report. We are grateful to the ESRC Impact Acceleration Account for funding the research for this report as well as the School of Law at the University of Essex for their funding support. We are also grateful to all of those who provided feedback on the report at various stages.

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1. Executive Summary

This report provides an independent evaluation of a practitioner-led Court of Protection ('CoP') mediation scheme (the 'Scheme'), which commenced on 1 October 2019 by a Working Group of practitioners on Mediation in the CoP (the 'Working Group'), with the knowledge and support of the senior judiciary of the CoP, albeit the Scheme is not court-authorised. The Scheme came to an end on 2 July 2021 and this report outlines the key findings of the evaluation of the Scheme. The Working Group are experts in mental capacity law and the CoP, which is the court that deals with disputes under the Mental Capacity Act 2005 ('MCA'). Many Working Group members also have experience of or an interest in mediation. The Scheme covers post-issue cases in the CoP.

The initial aim was for the Scheme to run for 12 months. However, due to difficulties in increasing awareness of the Scheme and then the Covid-19 pandemic, it continued for 21 months. The aim of the Scheme was to provide an evidence base for the use of mediation in the CoP. The Scheme was not a formal Office of the Public Guardian, Ministry of Justice, or HMCTS project, but was designed and led by practitioners and independently evaluated. The CoP, Office of the Public Guardian, the National Mental Capacity Forum, and the Ministry of Justice were all aware of the project and had varying degrees of involvement with it at different stages.

The Scheme offered participants:

- A suitably qualified and experienced mediator to conduct the mediation at a reduced fee of £100.80 per hour (plus travel costs), in line with legal aid rates.
- Use of the Scheme process and Scheme documentation.
- The opportunity to be a participant in important research.

The Scheme was not prescriptive of the types of cases that could be mediated, but the guide did provide suggestions that the following cases would be suitable:[1]

[1] See scheme guide, available at: https://www.courtofprotectionmediation.uk/scheme-documentation/, para 22.

- Health and welfare disputes, including disputes about medical treatment, residence, care and support, and deprivation of liberty.
- Serious medical treatment disputes.
- Property and financial affairs disputes.
- Mixed health and welfare, and property and affairs disputes.

This report outlines some background information on the current evidence on CoP mediation, as well as a summary of key comparable areas in which mediation has been implemented in England and Wales, including public law, family law, clinical negligence and the Court of Appeal. Following an outline of this background information, the report sets out the methods used for the evaluation of the Scheme, which included a database of the six cases mediated under the Scheme, a survey of participants, and an observation of one mediation. The key findings are set out in summary below:

- Six cases were mediated under the Scheme, five virtually and one face to face.
- Some data were collected from participants in all six cases and one mediation was observed by Dr Lindsey and used as a case study.
- The cases covered: property and financial affairs, deputyship, and welfare matters. No medical treatment cases were mediated under the Scheme.
- In all six cases, full or partial agreement was reached at the mediation.
- The response rate to the participant survey was 63% (n=19).
- The subject of proceedings (referred to as ‘P’ throughout) did not attend any of the mediations under the Scheme but did participate in other ways in some of them.
- 68.75% (n=11) of respondents indicated some degree of improvement in working relationships.
- 93.33% (n=14) of respondents answered that it was cost effective to take their case to mediation and 64.29% (n=9) of respondents indicated that they would be prepared to pay for mediation.
- 62.50% (n=10) of respondents indicated that cases were resolved sooner via mediation than if the case had gone to a judicial hearing.

- 93.33% (n=14) of respondents said they would be prepared to use mediation again for CoP cases.

Overall, the evaluation shows that CoP mediation has the potential to save costs, time and enhance working relationships between participants. Furthermore, satisfaction with the Scheme itself was very high. Recommendations are set out in the final section of this report. In summary, we recommend that:

- The CoP should develop a mediation information scheme to provide participants with general information about mediation and how it might be used in different cases to improve awareness and understanding of mediation in this jurisdiction.

- A court-authorised mediation scheme should be piloted with authorisation from the CoP.

- Capacity can be explored at mediation, provided that any belief that P lacks capacity is then brought before the CoP.

- P's participation should be a requirement of any future court-authorised scheme, with a broad definition of participation to include direct and indirect forms.

- The senior judiciary of the CoP should amend procedural rules to clarify how they desire mediated agreements to be dealt with in issued proceedings.

- Any scheme documentation should be made available in Microsoft Word format, with Easy Read and otherwise accessible versions.

- The requirement that the mediator must ensure the best interests test is applied should be changed to an obligation on the parties to do so.

- The statement regarding P's capacity to participate as being a facet of litigation capacity should be amended so that P is able to take a simple decision regarding attending a mediation meeting even where they lack capacity to make decisions about the more complex issue of conduct of litigation.

- Research should be carried out to gather further evidence on the use of mediation in the CoP, including comparative research analysing mediated and non-mediated CoP cases, analysis of the use of mediation in welfare and medical treatment cases, research into the impact of mediation on participation and working relationships.

2. Introduction

This evaluation is carried out independently of the Working Group and with funding only from the ESRC Impact Acceleration Account and the School of Law, University of Essex. The independent evaluation of the Scheme was carried out by reference to several objectives (set out in more detail in the research methods section below), in summary covering mediation's impact on participation, judicial time, costs, other resources and working relationship of the parties. Although there is no official court-authorised mediation scheme in the CoP, mediation has been used in an ad hoc way but without consistent data collection to analyse its use. The Scheme therefore represents an opportunity to evaluate the use of mediation in an area of law which poses additional challenges relating to the potential vulnerability of participants and the role of fundamental rights. Full details of the Scheme are explained in more detail in section 3 below.

2.1. The Legal Framework

By way of background to this jurisdiction, the MCA is a comprehensive statutory framework which sets out the relevant legal criteria for assessing whether or not a person lacks the mental capacity to make particular decisions and, if so, when, by whom, and what decisions can be made in their best interests. Under the MCA, a person must be assumed to have mental capacity and a decision can only be made on that person's behalf in their best interests once they have been found to lack capacity.[2] Capacity is assessed by reference to whether a person has a disturbance or impairment in the functioning of their mind or brain and whether or not they can understand, use or weigh, and retain information relevant to the decision.[3] They must also be able to communicate their decision and have an understanding of the reasonably foreseeable consequences of the decision.[4] While the nature of the cases vary, they almost always involve disabled adults who may, in various ways, be seen as vulnerable. One important aspect of the evaluation is therefore to analyse the extent to which mediation impacts on the participation of participants who may be vulnerable

[2] S 1 MCA.
[3] SS 2-3 MCA.
[4] S 3(4) MCA.

and, more specifically, in ways that are caused or exacerbated by their impaired mental capacity. It is also important to state here that the Scheme only permitted mediations over best interests disputes. Disputes about whether or not the person had capacity were not mediated. While we do not have data on this point given that capacity was not mediated, we address the legal position behind this approach in section 6.5.1 below.

Mediation is not well known or well established as a tool for dispute resolution in the CoP. The MCA does not specifically address the use of mediation in CoP proceedings. However, the Code of Practice states:[5]

> 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.

Chapter 15 of the Code sets out the role of mediation in settling disagreements and disputes relating to issues covered in the MCA. It references the types of case in which mediation may be particularly useful - suggesting that mediation can help solve problems in decision-making at an early stage, and that it offers a wider range of solutions than the court can – perhaps being less stressful for the parties involved, more cost-effective and quicker.[6] The chapter also includes a case study concerning "Mrs Roberts" – a person with Dementia, whose son and daughter engage in mediation regarding a best interests decision to determine where Mrs Roberts should live and the care she should receive. 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".[7] These are the only direct references to mediation within the COPR or the MCA.

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[5] 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.
[6] ibid, 260.
[7] COPR 1.3(3)(h).

As explained elsewhere,[8] case law may provide some limited insight into mediation's use in the CoP. A review of reported CoP cases on the British and Irish Legal Information Institute ('BAILII') from 1 January 2010 – 28 February 2020 showed that 21 cases refer to the concept of mediation,[9] which is 4.45% of all of the reported case law (n=472) on BAILII during that period of time. As noted on a preliminary roundtable report on CoP mediation:[10]

> Given that there is no requirement for the judge to even be informed that the case was mediated, this figure 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 of the parties involved in proceedings.

While mediation is not specifically addressed in the existing legal framework, there is a comparable form of "judge-led" mediation which is worth outlining in this introductory setting, as it may account for some of the limited use of mediation under the Scheme. The Dispute Resolution Hearing ('DRH') is a judge-led process designed to ascertain if a case can be resolved without litigation. It has parallels in the family court system in the context of divorce, as paragraph 19 Practice Direction 12B (Child Arrangement Programme) provides for Dispute Resolution Appointments ('DRAs') in relation to child custody and residency arrangements;[11] and paragraph 6 Practice Direction 9A (Application for a Financial Remedy) includes the Financial Dispute Resolution framework.[12] In the CoP, the relevant procedural framework is found in Part 3.4 Practice Direction 3B COPR 2017, which sets out the court's case pathways.[13] The DRH is only applicable to the property and affairs case management pathway, where the DRH is the third of four stages in the procedure for a contested application. Key

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[8] J Lindsey, (2020) The Role of Mediation in the Court of Protection: A Roundtable Report, available at: www.repository.essex.ac.uk/28658/1/Mediation%20roundtable%20report_2020.pdf.
[9] ibid. "Mediate", "mediation" and "mediator" were the 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, irrelevant cases were removed from the database, leaving 21 cases that mentioned "mediation" as used here.
[10] 3-4.
[11] 12A PD 19.
[12] 9A PD 6.
[13] 3B PD 3.4.

features of the DRH include[14] that it must be attended by all parties unless the court determines otherwise. The DRH takes place before a district judge,[15] who is different from the one before whom any final hearing in the proceedings will be listed.[16] In order to ensure the DRH is as effective as possible, it is stated that parties must approach the process "openly and without reserve"[17] and that the contents of the hearing shall not be disclosed, nor be admissible in evidence.[18]

A DRH is not an "attended hearing" for the purposes of Part 2.2 of Practice Direction 4C that deals with the transparency framework in the CoP. This marks them out as distinct among most proceedings before a court that places much value on the principle of open justice – including during the unprecedented pandemic in 2020.[19] It is the centrality of transparency to the philosophical underpinnings of the court that is indicative of the importance of confidentiality in DRH proceedings, as confidentiality trumps transparency – arguably due to the comparison with the underpinning principles of mediation, which is similarly confidential.

One key difference between a DRH and mediation is that the process of a DRH involves the court giving its view on the likely outcome of proceedings, whereas an independent mediator, in theory at least, ought not to do this in facilitative mediation. In the event that the parties agree to settle the case, the court will then make an order if it determines this to be in the best interests of P. Or, if the parties do not reach an agreement, the court will give directions for the management of the case and for a final hearing. The DRH concludes with an order, a precedent form for which is provided in the Court of Protection Handbook.[20]

Another key difference between the DRH and mediation, as the MCA Code of Practice indicates, is the informal nature of the mediation process, which is seen as one of its particular advantages.[21] This may be contrasted with the judge-led DRH where all parties are compelled to participate.[22] This significant formal distinction between

[14] Part 3.4(1) PD 3B.
[15] Part 3.4(2) PD 3B.
[16] Part 3.4(7) PD 3B.
[17] Part 3.4(3)(a) PD 3B.
[18] Part s.3.4(3)(b) PD 3B.
[19] Hayden J, 'Remote Access to the Court of Protection' (*Judiciary of England and Wales*, 31 March 2020), available at: https://www.judiciary.uk/wp-content/uploads/2020/04/20200331-Court-of-Protection-Remote-Hearings.pdf.
[20] A Ruck Keene, K Edwards, A Eldergill, N Mackintosh and S Miles, *Court of Protection Handbook* (Legal Action Group 2020).
[21] Mental Capacity Act Code of Practice, n5, 260.
[22] Part 3.4(1) PD 3B.

mediation and DRH processes means that they are likely to have different strengths and weaknesses in different contexts and therefore the DRH alone ought not to be viewed as a direct alternative which negates the need for mediation in the CoP. The informality of mediation proceedings, and the equal status shared by all participants are strengths in circumstances where relationships between parties are likely to need to be maintained following the conclusion of proceedings. By contrast, it is possible that the formal nature of the DRH framework, along with the compulsion on parties to attend and participate, and the production on conclusion of a court order detailing outcomes and agreements may be appropriate where proceedings are impacted by animosity.

2.2. Evidence on Mediation in the CoP

One of the core reasons that the Scheme was implemented was to provide an evidence base for mediation's use in this jurisdiction. This is because there is very little current evidence about mediation's use. The aim was to have the Scheme independently assessed by an academic to minimise any potential bias in favour of mediation from practitioners. There is existing evidence regarding mediation in mental capacity law, primarily from two sources, and with a further interview study due to be published later this year: [23] 1) the Office of the Public Guardian's ('OPG') pilot mediation scheme and 2) a report by mediator and solicitor Charlotte May. As part of this research, we have sought data to be shared by the OPG, but this has not been provided to us. We do know that the OPG pilot analysed the role of mediation in pre-issue mental capacity disputes and therefore had a different focus from the Scheme. 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 second source of background information is Charlotte May's report, which was the result of her involvement in a working group on the use of mediation in the CoP in the Southwest of England. May used a two stage survey of 25 professionals (lawyers,

[23] I have also separately carried out an interview study on mediation's use in the Court of Protection, see J Lindsey, *Reimagining the Court of Protection: Access to Justice in Mental Capacity Law* (Cambridge University Press *In Press*).

mediators and one social worker) to ask their views about CoP mediation.[24] May's key findings 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 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.[25]

There are currently several uncertainties surrounding mediation's use in the CoP. We address some of the preliminary questions below, which will impact upon any implementation of mediation within the CoP framework. We also provide an outline of some of the other mediation schemes from which we might be able to learn lessons in developing recommendations from this report.

2.3. Mediation in Other Areas of Law

There is an increasing trend towards the use of mediation in civil and family justice. Mediation is a way of resolving disputes that can be more informal than court proceedings and has been used in a variety of court contexts in the UK for more than 20 years.[26] In this section we analyse the use of mediation in comparable areas in English law, which will then help to guide our analysis, interpretation and recommendations flowing from the data gathered as part of the evaluation.

[24] 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.
[25] ibid, 5-6.
[26] H Genn, 'Civil Mediation: A Measured Approach?' (2010) 32 *Journal of Social Welfare and Family Law* 195; V Bondy, L Mulcahy, M Doyle and V Reid, (2009) Mediation and Judicial Review: An Empirical Research Study, (The Public Law Project London), available at: www.nuffieldfoundation.org/sites/default/files/files/MediationandJudicialReview.pdf.

2.3.1. Public law mediation

The use of mediation in public law proceedings is relatively recent, for example in judicial review.[27] There has been a strong policy shift towards ADR and particularly mediation during the past two decades in certain areas of public law, such as Special Educational Needs,[28] which has some similarities with CoP mediation given the potential vulnerability of participants and power imbalances. In England there is also currently a requirement to attend a Mediation Information and Advice Service ('MIAS') session and a requirement for LAs to mediate if parents/families choose to.[29]

While both mediation and the more adversarial route of appeal to tribunal are available as methods of dispute resolution in this area, the policy preference for mediation as a way of avoiding lengthy, costly, and stressful court proceedings is well-established.[30] In Northern Ireland, for example, the policy-shift towards the promotion of mediation as a pre-emptive strategy ahead of appeal to tribunal in cases of dispute in relation to Special Educational Needs support provision is enshrined formally into statute as s 10 Special Educational Needs and Disability Act (Northern Ireland) 2016.[31] It specifies that a person intending to bring an appeal to tribunal must first seek and be provided with independent information and advice about the pursuit of mediation. Notably, a very different policy agenda has been associated with the statutory promotion of mediation as a mechanism for dispute resolution in Northern Ireland, as mediation is part of a legal framework that has been described as enshrining new participative rights to children and young people of compulsory school age in a process reflective of international obligations under the United Nations Convention on the Rights of the Child ('UNCRC') and the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD').[32] Similar procedural rights may be considered appropriate for

[27] Bondy et al. n26.
[28] ibid; V Bondy and M Doyle, *Mediation in Judicial Review: A Practical Handbook for Lawyers*, (The Public Law Project London 2011); M Doyle, (2019) *A Place at the Table: A Report on Young People's Participation in Resolving Disputes About Special Educational Needs and Disabilities*, available at: www.repository.essex.ac.uk/24546/1/A%20Place%20at%20the%20Table%20final%20/report%20March%202019.pdf.
[29] We are grateful to Margaret Doyle for highlighting this.
[30] S Riddell, N Harris, E Smith and E Weedon, 'Dispute Resolution in Additional and Special Educational Needs: Local Authority Perspectives' (2010) 25(1) *Journal of Education Policy*.
[31] Similar provisions apply in England under the Children and Families Act 2014.
[32] O Drummond, 'Potential Barriers to the New Child's Right to Appeal to Special Educational Needs and Disability Tribunals in Northern Ireland' (2016) 67(4) *Northern Ireland Legal Quarterly*.

CoP mediation, particularly given the participation issues that we outline later in this report.

2.3.2. Family mediation

Mediation is also used alongside judge-led approaches in family law disputes an area that arguably has the most overlap with CoP cases given the conceptual similarities with the best interests test and the overlap in personnel across these jurisdictions. Family mediation is a process concerned with helping separating or divorcing couples to make arrangements regarding their children and/or finances and reviewing and amending such arrangements over time.[33] It is overseen and regulated by a consortium of member organisations known as the Family Mediation Council ('FMC'). It has been relatively recently incorporated into the statutory framework of family law with a requirement in s 10(1) Children and Families Act 2014 that parties applying for a court order in "relevant family proceedings" demonstrate that they have attended an initial Mediation Information and Assessment Meeting ('MIAM') before such an application is made.

The MIAM is not itself mediation. It involves individuals discussing mediation and other forms of alternative dispute resolution with a mediator and exploring how such processes may relate to their situation. There are some valid exemptions to the statutory requirement to attend a MIAM prior to an application to the family courts - including where there is evidence of domestic abuse, where there are child protection concerns, where mediation is not practically possible due to distance between parties and mediators, or lack of contact information for the individual against whom an application is to be made - as well as several other reasons.[34] This model is most closely related to the recommendations we set out below, in stipulating that participants in proceedings engage with an information session regarding mediation and its application to their case, rather than with mediation itself. In this sense, our recommendation departs from the provision of a mediation scheme and endorses the information-provision model incorporated in family mediation through the MIAM.

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[33] Family Mediation Council, (2021) About the FMC, available at https://www.familymediationcouncil.org.uk/us/

[34] GOV.UK (undated), Valid Reasons Not to Attend a MIAM, available at https://apply-to-court-about-child-arrangements.service.justice.gov.uk/about/miam_exemptions.

Mediators registered with the FMC are trained to a set standard, and: (1) follow the FMC Code of Practice; (2) hold relevant insurance; (3) are required to carry out training and continuing professional development; (4) receive appropriate supervision and support; and (5) are required to have a complaints process in place.[35] This has some similarities with the design of the Scheme here, see section 3 below. According to Paragraph 3.1 of the Code of Practice for Family Mediators, mediators registered with the FMC are required to be qualified to the standard of FMCA ('Family Mediation Council Accredited') status, or to have completed an approved foundation training qualification and be registered with the FMC as working towards FMCA status.[36] A more stringent requirement is set out in Paragraph 3.4 of the Code of Practice for mediators undertaking publicly funded work who must hold FMCA status,[37] something that could be incorporated comparably in the CoP.

Article 26 of the Family Mediation Council articles of association also provides that the FMC must establish a Family Mediation Standards Board ('FMSB') as one of its committees – with delegated responsibility for the design and implementation of the FMC standards and self-regulation framework.[38] The FMSB operates registration and accreditation processes for family mediators, as well as complaints and disciplinary procedures on behalf of the FMC, again, a potential point of comparison for the COP in considering the development of a similar framework.

2.3.3. Clinical negligence mediation (NHS Resolution Scheme)

NHS Resolution is the body that deals with "expenses arising from any loss of or damage to their property, and liabilities to third parties for loss, damage or injury arising out of the functions of the bodies concerned".[39] Mediation is a key aspect of the NHS Resolution framework ('NHSR'). The context of this framework is one of rising costs

[35] n33.
[36] Family Mediation Council (2018), Code of Practice for Family Mediators Family Mediation Council, November 2018, available at https://www.familymediationcouncil.org.uk/wp-content/uploads/2018/11/FMC-Code-of-Practice-v1.3-November-2018.pdf, 3.
[37] ibid.
[38] Family Mediation Council (2017), Family Mediation Standards Board: Terms of Reference, available at https://www.familymediationcouncil.org.uk/wp-content/uploads/2019/08/Terms-of-Reference-for-the-Family-Mediation-Standards-Board-August-2017.pdf.
[39] S 71(1) National Health Service Act 2006.

for clinical negligence claims.[40] In recognition of this, and the strain that such costs place on the health service, alternative dispute resolution is built into the strategic plan of the NHS infrastructure for resolving claims – this involves an operational commitment with specific reference to mediation, stating that "we will work in partnership with participants to evaluate the effectiveness of our mediation service in order to improve outcomes and experience".[41] Success in this domain is set out in the strategy as including "use of formal processes such as litigation are reduced" by 2022.

In July 2014, NHS Resolution launched a pilot to test the effectiveness of mediation and its role in claims handlers' "toolkits" – the findings from this pilot are set out in a more recent evaluation of mediation in healthcare disputes,[42] which explains that in the 12 months between July 2014 and July 2015 mediation was offered under the scheme to a small cohort of cases involving either a fatality or elderly care. Offers of mediation were made in 91 such cases and 49 were accepted onto the pilot. One case settled prior to mediation, and one was withdrawn. There were therefore 47 completed mediations of which 81% settled – 61% on the day of the mediation, and 20% shortly after. It is therefore reported that 74% of cases mediated are settled on the day of mediation, or within 28 days subsequently.[43] The NHS has subsequently continued its commitment to mediation, and the most recent contract for the NHS claims mediation service was retendered, with four providers being successful.[44]

A recent Heath and Social Care Committee report on NHS litigation addressed the use of Alternative Dispute Resolution ('ADR'), including mediation, in cases of clinical negligence against the NHS.[45] It found general support for the use of ADR, especially mediation in this context, highlighting particularly the scope it provides for outcomes within the context of a financial settlement, for example, improvements in practice and closure for patients and their families. It found that mediation, in contrast with other forms of proceedings, such as meetings with only lawyers, "puts the patient/claimant

[40] NHS Resolution (2020a), Our Refreshed 2019 to 2022 Strategic Plan: Delivering Fair Resolution and Learning from Harm NHS Resolution, February 2020, available at https://resolution.nhs.uk/wp-content/uploads/2020/02/Our-refreshed-2019-2022-strategic-plan.pdf.
[41] ibid, 10.
[42] NHS Resolution (2020b), Mediation in Healthcare Claims – An Evaluation February 2020, NHS Resolution, available at https://resolution.nhs.uk/wp-content/uploads/2020/02/NHS-Resolution-Mediation-in-healthcare-claims-an-evaluation.pdf.
[43] ibid, 4.
[44] NHS Resolution (2021), Alternative Dispute Resolution, available at https://resolution.nhs.uk/services/claims-management/alternative-dispute-resolution/.
[45] Health and Social Care Committee, *NHS Litigation Reform* (HC 2021-2022, 740-13) available at: https://committees.parliament.uk/committee/81/health-and-social-care-committee/publications/.

at the heart of the claim".[46] Notably, the report documented the success of mediated cases of clinical negligence – with 74% of cases reaching a settlement either on the day of mediation or within 28 days thereafter.[47]

A question arising for the Health and Social Care Committee was whether to recommend mandatory engagement with ADR ahead of issuing proceedings in clinical negligence cases, drawing on precedents for inquisitorial Ombudsman frameworks.[48] Despite arguments from NHSR that mediation is intrinsically a process best entered into voluntarily, the Committee recommended compulsory use of ADR before the bringing of proceedings in clinical negligence cases, and that the government should consult on the format of ADR most appropriate to this context – either mediation or an inquisitorial, Ombudsman-style process.[49]

There were no cases under this CoP Scheme that concerned serious medical treatment, and there are, of course, numerous differences between the types of cases addressed by NHSR and those brought before the CoP (e.g., the role of litigation capacity of claimants, the significance of a financial settlement to wider proceedings, the circumstances of the claimant, and the role of liability in proceedings). However, such distinctions notwithstanding, it is likely that the NHS would be involved in mediation in the CoP if this were to be expanded. Therefore, it may be useful to consider the NHS Resolution scheme in more detail to develop recommendations that might be appropriate in similar mediated CoP cases.

2.3.4. Court of Appeal mediation scheme

The Court of Appeal Mediation Scheme began as a voluntary pilot scheme in 2003 and was extended and formalised in 2012.[50] The scheme is administered by the Centre for Effective Dispute Resolution ('CEDR'), which is an independent non-profit organisation and registered charity. Participation in the scheme by parties involved in proceedings where permission to appeal has been granted is voluntary; however, the

[46] ibid, para 165.
[47] ibid, para 166.
[48] ibid, para 169.
[49] ibid, para 193.
[50] Fenwick Elliot (2012), The Court of Appeal Mediation Scheme – The Way Forward? Insight 15, September 2012, available at https://www.fenwickelliott.com/sites/default/files/insight_issue_15.pdf.

way in which the scheme operates, and the proactive, persuasive approach of the judiciary mean that it could be described as a quasi "opt-out" scheme with strong incentives for cooperation and participation built in. This could potentially be a useful model on which to develop a CoP mediation scheme if the CoP wants strongly to encourage the use of mediation.

In the Court of Appeal scheme, unless a judge exceptionally directs otherwise, papers relating to cases meeting the eligibility criteria for mediation are automatically referred to CEDR by the courts.[51] The parties must then indicate whether they are willing to participate in mediation. While mediation will only go ahead with the agreement of all parties, the responsibility of parties to agree to mediation is enforced through the rule that the court may make an order as to costs where "…it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper".[52] This means in practice that the court may take account of any refusal of mediation deemed unreasonable when allocating costs in an appeal – including where a party has been successful at appeal. So, while participation in mediation under the Court of Appeal Mediation Scheme is voluntary, strong financial motivation is built into the relevant policy.

As explained on the CEDR website,[53] the scheme allows for an initial nine hours of mediators' time – of which four are set aside for preparation and five for the mediation itself. Cases eligible for the scheme are those concerning contractual claims up to £500,000, personal injury and clinical negligence, all inheritance disputes, and all boundary disputes. Costs are paid by the parties at a rate of £950 plus VAT per party for cases where the claim or judgment involved amounts to less than £1 million, and £1900 plus VAT per party where it is greater. Where the parties agree to continue mediation beyond the five hours initially allocated, this is invoiced at a rate of £125 plus VAT per hour per party. Consideration of mediation by parties prior to appeal is also part of the responsibility placed on parties and on advocates by the overriding objective of the Civil Procedure Rules (Part 1 CPR 1998 – Dealing with a case justly and at proportionate cost). The Court of Appeal scheme appears to be very well run

[51] Centre for Effective Dispute Resolution (2021), Court of Appeal Mediation Scheme, available at https://www.cedr.com/commercial/mediationschemes/courtofappeal/.
[52] Part 44 Civil Procedure Rules.
[53] n51.

and provides a good model on which to base aspects of a CoP scheme if desired by the senior judiciary of the CoP.

3. The Practitioner-Led CoP Mediation Scheme

The Scheme was set up by a Working Group of experts in mediation and mental capacity law. Membership of the Working Group included:

Andrew Hannam, Enable Law (Chair)

Holly Mieville-Hawkins, Michelmores (Secretary)

Katherine Scott, 39 Essex Chambers

Chris Danbury, Consultant ICU Intensivist, Trust Mediation

Charlotte May, Wiltshire Council

Polly Sweeney, Chair of the Law Society's Mental Health and Disability Committee

Hannah Taylor, Bevan Brittan

The Scheme was created following discussions with the judiciary and practitioners in the Southwest of England, building on May's research (see above). It commenced on 1 October 2019 and ended on 2 July 2021. The initial aim was for the Scheme to run for 12 months. However, due to difficulties in increasing awareness of the Scheme and then the Covid-19 pandemic, it continued for 21 months. The aim of the Scheme was to provide an evidence base for the use of mediation in the CoP. The Scheme was not a formal Office of the Public Guardian, Ministry of Justice, or HMCTS project, it was designed and led by practitioners and independently evaluated. The CoP, Office of the Public Guardian, the National Mental Capacity Forum, and the Ministry of Justice were all aware of the project and had varying degrees of involvement with it at different stages. The Scheme offered participants:

- A suitably qualified and experienced mediator who will conduct the mediation at a reduced fee of £100.80 per hour (plus travel costs). This is in line with legal aid rates.
- Use of the scheme process and scheme documentation.
- The opportunity to be a participant in important research.

In designing the Scheme, the practitioners made a range of useful documents and guidance available free of charge on the Scheme website.[54] This included a:

- Participant information sheet regarding evaluation.
- Checklist for parties.
- Checklist for mediator.
- Acknowledgement letter for participants.
- Draft agreement to mediate.
- Declaration of confidentiality for mediation participants.
- Mediation questionnaire for participants.
- Evaluation document for mediators.
- Draft mediation agreement.

In addition, the following materials were also provided: a flowchart for mediators; a flowchart for parties; a complaints handling procedure; a pre-mediation Court Order checklist; and a post-mediation Court Order checklist. This suite of documentation will be incredibly valuable for taking mediation forward in this area. Where feedback was received on specific aspects of the Scheme documentation which may require amendment, we have addressed this below.

The Scheme also included detailed requirements for being listed as a mediator on the Scheme website, including:[55]

- A qualification from a reputable mediation training organisation together with evidence of having mediated at least two cases in the last twelve months.
- 5 years of mental capacity or COP experience. For non-lawyers this includes training in the assessment of mental capacity and best interests together with experience of applying this training in practice; appearing as witnesses or expert witnesses in COP cases; applying knowledge of mental capacity law in mediations

[54] https://www.courtofprotectionmediation.uk/.
[55] ibid.

or in teaching. For lawyers it includes advising and representing parties in COP cases.

- Alternatively, 2 years of COP experience together with attendance on the Law Society's Mental Capacity and Welfare Training Course run by City University (which is open to non-lawyers).

- Knowledge of safeguarding (which can be evidenced by taking an online training module such as the Social Care Institute for Excellence's Safeguarding Adults training or IHASCO's training).[56]

- Suitable Professional Indemnity Insurance.

- Is compliant with GDPR.

These requirements were carefully drawn and highlight the consideration that had been given to the need to be cautious before expanding mediation in this area. While we do not have evaluation data regarding the qualifications of the mediators, we do note below some recommendations regarding mediator training drawing from the evidence currently available.

The Scheme itself was broadly in-keeping with the wider approach to mediation outside of the CoP. The Scheme guide explained that:[57]

> Everything that is said in the mediation is without prejudice, or confidential and cannot be referred to in Court unless the parties agree that it can be. This is however subject to the mediator's and the parties' obligations to report any safeguarding concerns that arise out of information disclosed during a mediation.

If the parties reach an agreement, this becomes legally binding once it is signed by both parties. The agreement is not confidential and can be enforced like any other contract.

It was also a requirement of the Scheme that the mediator must "ensure first that P can participate appropriately in the mediation" and that the parties have applied the

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[56] iHASCO is an online course provider of health and safety and HR compliance, see https://www.ihasco.co.uk.
[57] Paras 4-5.

best interests test in any agreement reached.[58] The first will be subject to analysis based on the evaluation of data below, but we recognise that it was important to include this requirement. The second point regarding best interests is perhaps more controversial as it makes it part of the mediator's role to assess whether the best interests test was applied, without any real guidance as to how a mediator is expected to achieve that.

The Scheme was not prescriptive on the types of cases that could be mediated, but did provide suggestions that the following cases would be suitable:[59]

- Health and welfare disputes, including disputes about medical treatment, residence, care and support and deprivation of liberty.
- Serious medical treatment disputes.
- Property and financial affairs disputes.
- Mixed health and welfare, and property and affairs disputes.

The Scheme guide also suggested that the following cases may be unsuitable for mediation:

- DOLS[60] Re X type cases which would otherwise be using the streamlined process. These are by definition agreed and require a Court order.
- DOLS challenges where P is the only one challenging the deprivation of liberty.
- Any best interests decision where P is objecting.
- Cases where there may be an overlap with the Inherent Jurisdiction (including wardship cases), and where there are issues around forced marriage. These cases require High Court orders.
- Disputes about whether P has the capacity to make the decision in question.
- Disputes about what the law is.

[58] Para 7.
[59] Para 22.
[60] Refers to Deprivation of Liberty Safeguards under the MCA.

- Disputes in which serious allegations of abuse (save for allegations of financial abuse – see paragraph (h) below) have been made against one party or where there is a dispute about whether abuse (save for allegations of financial abuse - see paragraph (h) below) has taken place.

- Disputes in which serious allegations of financial abuse have been made against one party which if substantiated would be likely to result in civil or criminal proceedings or where there is a dispute about whether such serious financial abuse has taken place.

- Disputes in which there are allegations of substance abuse with respect to one of the parties rendering them unsuitable to take part in a voluntary process.

- Disputes in which a party other than P lacks capacity to litigate, unless that incapacitated party has a litigation friend/accredited legal representative or rule 1.2 representative.

- Cases in which there is no way of securing P's participation in the mediation in whatever form that may take.

The participation of P was also considered as part of the Scheme guidance and forms part of the data analysis below. The Scheme guide states that "[i]f P has capacity to conduct COP proceedings, P will also have capacity to engage in the mediation."[61] However, it goes on to state:

> If P lacks capacity to conduct COP proceedings (as almost all Ps do), then capacity to engage in the mediation is just one facet of this. P will therefore be considered to lack the capacity to make the decision as to whether to engage in the mediation. However, if P wishes to participate in the mediation (s)he should in most circumstances, be facilitated to do so.

In the analysis and recommendations section below we outline why we think this is an inappropriate approach to participation and make specific recommendations in this regard. In addition to the above, the Scheme guide includes a range of practical advice

[61] Para 32.

and steps regarding the conduct of a CoP mediation, which has only been subject to review where relevant issues were raised through the data collection.

4. Research Methods

The overarching aims of this research were to:

- Obtain an evidence base regarding the use of mediation in CoP proceedings.
- Provide data to complement existing evidence about mediation in mental capacity cases.
- Consider ways that the use of mediation in CoP proceedings might be improved.

Evaluation of the Scheme was carried out by reference to the following research questions, which were developed by Dr Lindsey and discussed with the Working Group:

Research question 1: What is mediation's effect on P's participation in the decision-making process as compared to judicial hearing?

Research question 2: What is mediation's effect on judicial time as compared to legal proceedings, including judicial hearing?

Research question 3: What is mediation's effect on costs, including parties' legal costs and the costs to public bodies, as compared with legal proceedings including judicial hearing?

Research question 4: What is mediation's effect on other resources of those involved in CoP disputes?

Research question 5: What is mediation's effect on the working relationship between the parties as compared with legal proceedings?

A summary of the methods, and how they were used to answer each research question, is set out below. In summary, a mixed methods socio-legal approach was adopted, drawing on quantitative and qualitative data to triangulate information to answer the research questions.

Survey: An online survey (using Qualtrics software) was sent by email to participants in mediations in the Scheme on completion of their mediation. This means that any individual who attended a mediation under the Scheme parameters was eligible to take part in the survey. The aim of the survey was to obtain primarily descriptive quantitative data regarding each of the research questions. There were 30 questions (see Appendix).

Any participant in the mediation was able to complete the survey and demographic questions were asked to identify the various roles of each participant. A survey was selected as the primary data gathering method for this research to enable the researchers to collect data from as many participants in the Scheme as possible. Furthermore, it enabled detailed data to be collected on each of the research questions.

Observations: The original aim of the research was to observe as many mediations under the Scheme as permitted by the parties. However, as can be seen from the data below, only one mediation was observed. We think this was predominantly due to the small total number of mediations under the Scheme but recognise that observational research of confidential processes such as mediation is always challenging to access and so the insights from this one observation are particularly valuable.

Contact was made with participants via the mediator to request observation. Participants were sent participant information sheets and consent forms in advance of the mediation going ahead. The mediator informed the research team of the date, time, and location of the mediation. The researchers sought informed consent from participants on the day of the mediation (and this was also requested in advance). The level of information required to participate in observational research is relatively low. It simply requires understanding that the researcher(s) will be sitting and watching, while taking notes of what is said.

The aim of observing mediations as part of this project was to obtain detailed qualitative data to complement the survey findings. Observation was chosen because it allows the researcher to become immersed in the setting and to understand better the workings of the phenomenon being studied,[62] in this instance mediation. Mental capacity law, particularly the CoP, has long been viewed as a relatively concealed

[62] M-A Jacob, *Matching Organs with Donors: Legality and Kinship in Transplants* (University of Pennsylvania Press 2012).

court. It has only recently opened up access to the public and to date very little empirical research has been carried out in this area. Therefore, the aim of observing mediations was to enable the researchers to provide a detailed account of the types of cases that arise and how they are dealt with, which is done through the presentation of one case study here.

Other data sources and desk-based review: There are several existing data sources that we have also reviewed for this report, including existing literature on mediation and the CoP as well as literature on mediation in other areas. In addition, analytic comparison of reported CoP cases was carried out. We sought data on judicial time to contrast with whether or not mediation resulted in less judicial time being used. However, this data has not been supplied by the Ministry of Justice following our requests.

5. Research Findings

5.1. Types of Cases

Six cases were mediated under the Scheme. For a summary of key information about these cases, see Table One below. The data in this table is based on a summary provided by the mediator and/or parties. The issues addressed in the six mediations under the Scheme covered a broad range of subject matter – the most common of these were property matters, with deprivation of liberty and welfare also being well-represented. As can be seen in Table One, serious medical treatment cases were not represented in the mediations that took place under the Scheme. Further, the majority of the agreements described by respondents were financial in nature, suggesting mediation may still be viewed as a commercial dispute resolution tool most suitable for financial rather than welfare matters. It is unknown whether any of the agreements were approved by the CoP.

Table 1: Mediation cases summary

	Issue	P's attendance	Outcome	Format
Mediation 1	Property and finances	None	Agreement reached at mediation	Face to face
Mediation 2	(i) Whether P's funds should be applied towards the purchase of accommodation for father to facilitate contact visits P's father's request triggered breakdown in relations between P's mother and the existing professional deputy (ii) Whether the existing deputy should be replaced by P's mother and a new professional deputy acting jointly	None	Agreement reached at mediation	Virtual

Mediation 3	(i) Whether professional deputy to remain in place (ii) Dispute over P's care and residence Background: P's niece did not want professional deputy and instead wanted to be deputy for P. P in care home with dementia and no known family until P's niece (by marriage) made contact. Concerns about P's niece wanting the house. DRH and directions to consider mediation	None	Agreement reached at mediation. Agreement that the professional deputy would be discharged, providing the care bills and other outstanding expenses paid	Virtual
Mediation 4	Application by P's father and sister for joint and several deputyship for welfare, and for a statutory will in relation to P. Dispute about who should be involved in P's welfare and the agreement in the will	None	Agreement reached at mediation	Virtual

Mediation 5	The terms of a statutory will	None	Agreement reached at mediation	Virtual
Mediation 6	The arrangements for trial contact at P's mother's home Disclosure of information to P's mother. Improving the relationship between P's mother and i) the CCG and ii) the provider	None, but mediator had a Zoom call with him and his solicitor before the mediation	Partial agreement reached at mediation. Full agreement in relation to the trial contact, and in relation to the disclosure to P's mother. Parties agreed initial steps towards improving the relationship between the CCG and P's mother	Virtual

5.2. Survey Summary

A total of 30 surveys were distributed by email to participants in the mediations under the Scheme. 19 respondents completed the survey, albeit not all questions were answered by all participants and references in this report to 'respondents' refers to those who answered individual questions. There was a good response rate to the survey of 63%. As Table 2 below shows, the majority of respondents were either mediators (n=6), family members of parties (n=6) or solicitors (n=5).

Table 2: Responses to Question 2 'What was your role in the case?'

Answer	%	Count
Mediator	31.58%	6
Solicitor for other party	26.32%	5
Barrister for P	0.00%	0
Barrister for other party	0.00%	0
Advocate for P	0.00%	0
Public body representative (i.e. attending on behalf of the local authority or NHS Trust)	0.00%	0
Family member	31.58%	6
Carer	0.00%	0
Other professional (please explain)	0.00%	0
Other (please explain)	5.26%	1
Solicitor for P	5.26%	1
Total	100%	19

In addition, the responses show that 73.68% (n=14) of respondents had been involved in CoP proceedings before and 57.89% (n=11) of respondents had been involved in a mediation before. This highlights that respondents were experienced in CoP matters, albeit they may have had less prior knowledge about mediation.

5.3. Themes From Data

5.3.1. Awareness of mediation

Respondents became aware of the CoP Mediation Scheme mostly through recommendations from participants in proceedings, see Table 3 below.

Table 3: Responses to Question 7 'How did you find out about the Court of Protection mediation pilot scheme?'

Answer	%	Count
Recommended by my advisor/lawyer	10.53%	2
Recommended by the other side	26.32%	5
Friends/family	0.00%	0
Colleagues	15.79%	3
Other (please explain)	47.37%	9
Total	100%	19

In addition to recommendations from within proceedings, several respondents answered "other" and indicated that they were made aware of the Scheme through broader networks. Examples include the respondent working as a mediator themselves, as well as membership of professional and regulatory bodies such as the Court of Protection Practitioners' Association ('CoPPA'), the Court of Protection Rules Committee, and the Law Society (as well as the Mental Health and Disability Committee of the Law Society). "Research" and "consultation" regarding the Scheme

and its inception were also cited as having raised awareness of the Scheme. It therefore seems that awareness-raising has been a notable secondary outcome of such information gathering activities.

It appears that mediation has a positive reputation among legal actors. For example, one respondent (a former chancery barrister) indicated that "I was keen to mediate as the likelihood of reaching a settled position through mediation is high". Another respondent suggested that awareness that the case was "suitable" for mediation was a relevant factor – alluding also to resource issues in stating that the case "could [therefore] be resolved without trial"; a sentiment also found in another response indicating that the reason for deciding to attempt mediation was "[b]ecause I wanted to avoid a court hearing". Principally, it seems that "word of mouth" is the catalyst for engagement in mediation. Of those respondents involved in the decision to mediate (five respondents were themselves mediators and therefore did not initiate mediation) the most common trigger was a request from others involved in the case.

5.3.2. Participation of 'P'

Of the six mediations under the Scheme, P did not attend the mediation in any. However, in one mediation the mediator reported that she had a Zoom call with P and his solicitor before the mediation, suggesting that he participated indirectly in advance. This is comparable to, or arguably worse than participation data in the CoP,[63] where procedural rules deal with P's participation in Proceedings,[64] and case law provides that case management decisions concerning the securing of P's attendance in court and the tendering of P to give evidence rest with the Litigation Friend.[65] However, there is no comprehensive statistical data on P's attendance across a broad range of hearing types so any such comparison is not likely to be reliable as an indicator of which method is more facilitative of participation.

[63] In one study P attended 3 out of 11 hearings, see J Lindsey, 'Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection' (2019) 28 *Social & Legal Studies*, 450. See also P Case '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' (2019) 39 *Legal Studies*, 302; A Ruck Keene, NB Kane, SYH Kim and GS Owen 'Taking Capacity Seriously? Ten Years of Mental Capacity Disputes Before England's Court of Protection' (2019) 62 *International Journal of Law and Psychiatry*, 56.
[64] Para 1.2 COPR 2017.
[65] *A County Council v AB & Ors (Participation of P in Proceedings)* [2016] EWCOP 41.

Turning to the responses regarding participation, only three respondents indicated that P participated in the mediation. Given that we know that P did not *attend* any of the six mediations, this must have involved other forms of participation. The three respondents who indicated that P participated stated that this was through representation by a lawyer, through representation by the Official Solicitor, and through the mediator meeting P remotely prior to the mediation. This highlights that clearer guidance on what it means for P to participate in a mediation is needed, as participation may be understood to mean different things to different people.

Various reasons were given for P's lack of participation by those who indicated that P did not participate, including that: P was unwell (n=3), P was not invited (n=2), and P did not wish to participate (n=1). However, in the majority of cases, P's lack of participation was attributed to a lack of capacity. This ignores the possibility for Ps to lack capacity in respect of the subject matter of the case but retain capacity to engage in mediation. Furthermore, two respondents expressly stated that P lacked the capacity to "express…views, wishes, or feelings", whereas even incapacitated Ps should be provided with an opportunity to have the best interpretation of their wishes and feelings ascertained.

These statements further suggest an assumption among respondents that P's participation is concerned with the contribution of knowledge about P's wishes and feelings to the proceedings, omitting consideration of other reasons for participation, such as P's right to be 'heard'. It is not discernible from the data set whether the right to be 'heard' would have any significance for the relevant P, or whether, and to what extent, participation would be meaningful, but reference purely to the contribution of views, wishes, and feelings limits the construction of the parameters of participation.

Respondents (n=4) also indicated that alternatives to P's participation were implemented, including meeting with the mediator in advance of the mediation and being represented by the Official Solicitor as Litigation Friend. These are ways of ensuring that P can contribute their views, wishes, and feelings and that their procedural rights are upheld during the course of the mediation.

5.3.3. Time spent on mediation

All six mediations took place over the course of one day and five out of six took place virtually, with only the first mediation (pre-pandemic) taking place face to face. The majority of respondents (n=11) spent over 12 hours on the mediation, including

preparation – these responses ranged from 12 hours 50 minutes to 25 hours, with a mean duration of approximately 18 hours.

As Table 4 below shows, a majority of respondents indicated that cases were resolved sooner via mediation than if the case had gone to judicial hearing (62.50%, n=10). This is a strong indicator that the use of mediation may be able to speed up the resolution of cases. However, views on whether mediation was more or less time-consuming were more mixed. Table 5 below shows that 46.67% of respondents (n=7) thought the mediation was less time consuming than cases that go to judicial hearing but 40% (n=6) thought that the mediation was more time consuming.

Table 4: Responses to Question 22 – 'Did the mediation lead to the case being resolved sooner than it would have been had you gone to a judicial hearing?'

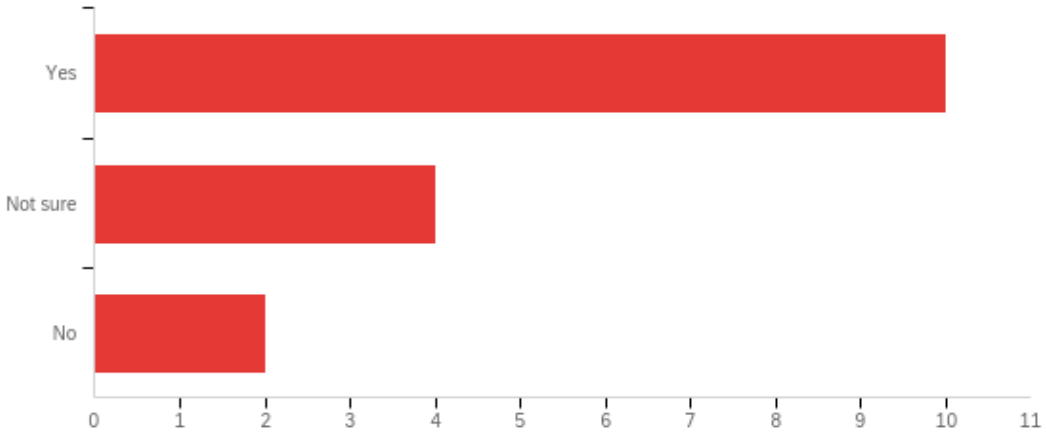
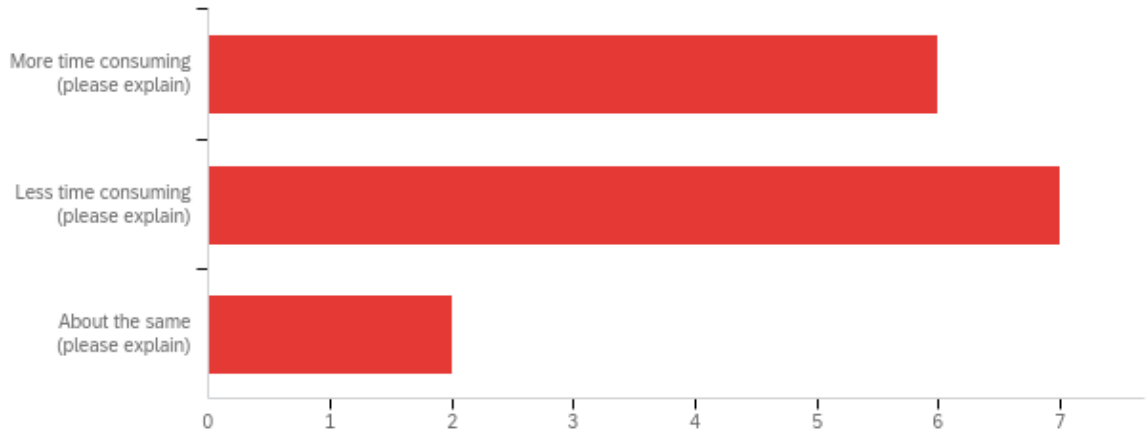


Table 5: Responses to Question 21 – 'Do you think the mediation was more or less time consuming than a judicial hearing, why?'



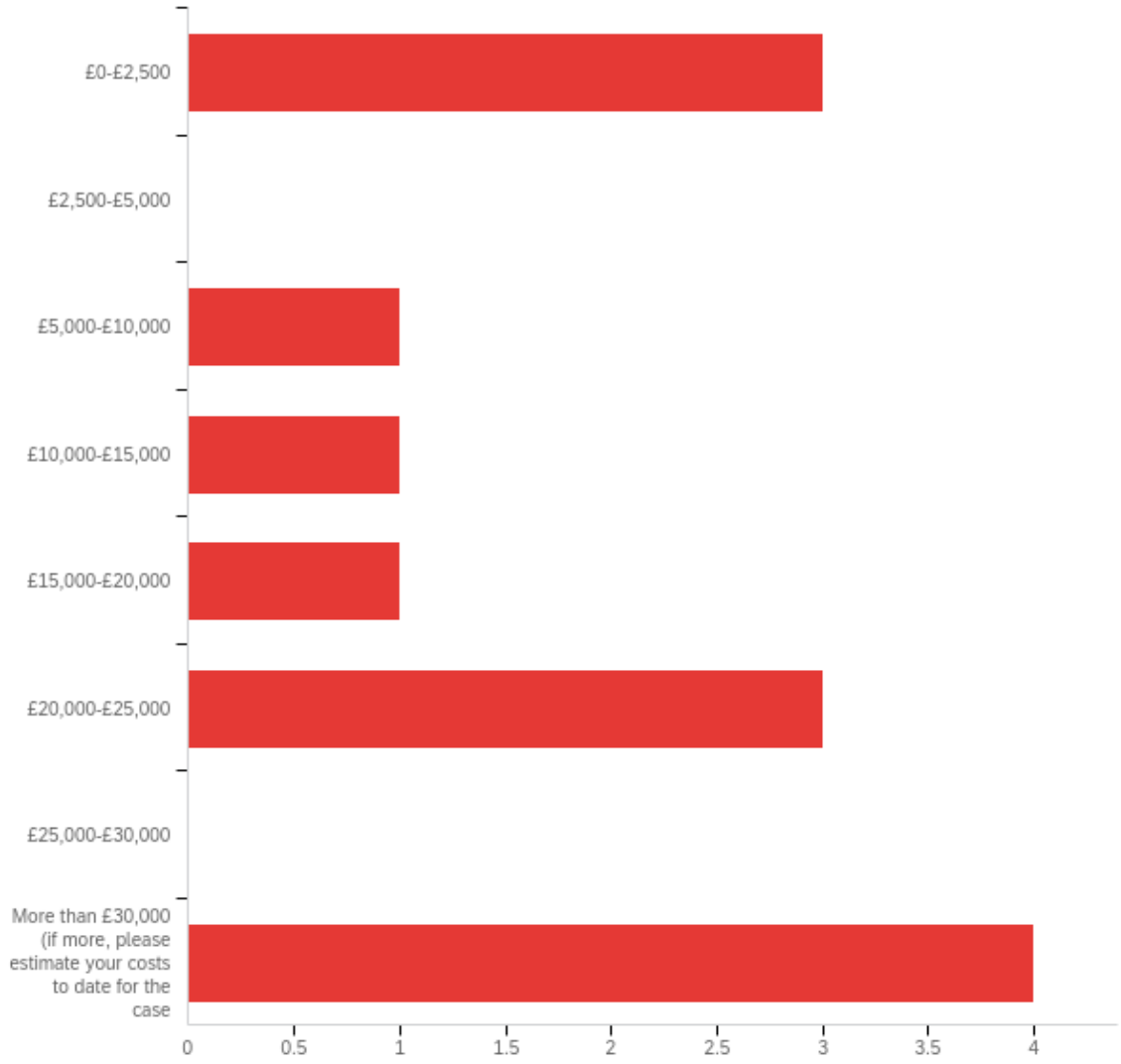
The active, participatory nature of mediation may have contributed to some respondents finding that the mediation was more time-consuming than a judicial hearing. The “length of discussions between parties” was cited by one respondent as a reason for proceedings lasting a full day. Another respondent described “waiting around time while waiting for the other parties to consider offers and respond” and contrasted this with court proceedings in which “a judge would have made a decision”. Such active participation obviously also requires preparation, and one respondent explained “I had to prepare to actively take part rather than rely on legal representatives”. What is unclear from these responses, however, is the extent to which the more time-consuming nature of mediation was problematic for respondents – as one explained “there was some waiting around, but this is to be expected”, with the fact they entered into proceedings where “waiting around” is “expected” suggesting this is not perceived as an insurmountable problem among at least some users of the Scheme.

Where respondents found mediation less time-consuming than a judicial hearing, this was consistently attributed to the informality of the proceedings and avoidance of requirements such as the instructing of counsel, disclosure, formal submissions, live evidence, and the cross examination of witnesses, all of which are time-consuming and (therefore) costly. Interestingly, given that the time required to reach agreement is given by several respondents as a reason why mediation was more time-consuming than a judicial hearing one respondent suggested to the contrary that their mediation was in fact less time-consuming as it was “unlikely the parties would have reached agreement on the aspects they did without a longer hearing”. Similarly contradictory accounts were provided by the two respondents who suggested their mediation took around the same amount of time as a judicial hearing would have taken. One respondent suggested that this was because both the preparation and the hearing/mediation time themselves were comparable in the two types of proceedings, and the other because while preparation time may be more extensive for a judicial hearing, this is counter-balanced by the fact that a hearing itself may take less time than mediation. To some extent this disparity may be attributable to limited experience of mediation or unrealistic expectations about how mediation operates.

5.3.4. Cost of mediation

Turning to the cost implications of mediation in CoP proceedings, the survey indicates a notable breadth of costs of proceedings: ranging from £0-£2500 (n=3) to "in the order of £117,000" in one instance, see Table 6 below.

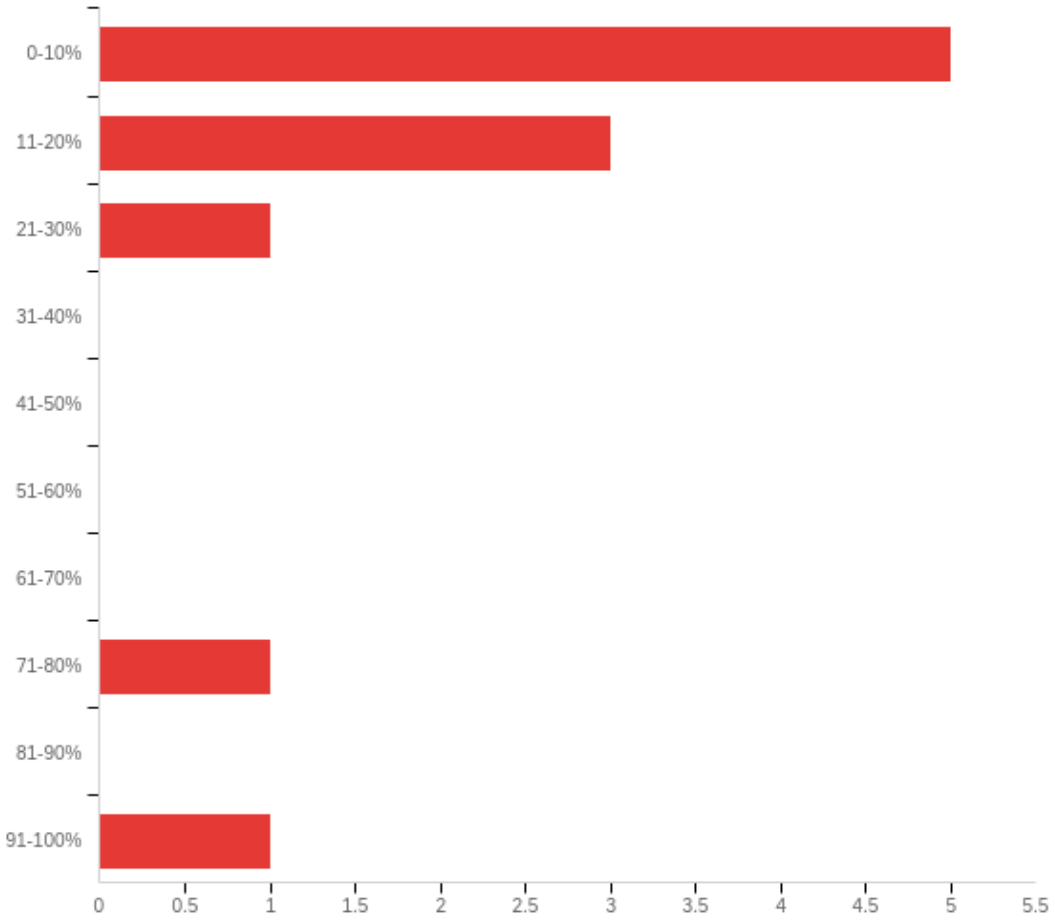
Table 6: Responses to Question 23 – 'What were the costs incurred by your side during the course of this case? (please estimate the costs for ALL aspects of the case to date, including costs for the mediation and costs for any court hearings/applications, travel etc)'



The wide range of costs could be attributed to the wide variety of issues that come before the CoP, and the differences, for example, between welfare proceedings and those concerning financial settlements of significant financial estates.

In the majority of cases included in the survey, the proportion of the total costs attributed to the mediation itself was minimal, see Table 7 below.

Table 7: Responses to Question 24 – 'What proportion of the costs identified in the previous question were for the mediation part of the case only?'



In 45.45% of responses (n=5) this was estimated at between 0 and 10 % of total case costs, and 27.27% (n=3) put it at between 11 and 20 percent, meaning that in 8 of the 11 cases reported the proportion of total costs spent on mediation is 20% or less of the total cost of proceedings. By contrast, in one case the mediation was reported as costing between 71 and 80 percent of the total cost of the proceedings and in a final response the cost of mediation represented between 91 and 100 percent of the total cost. It is not clear from the survey data the reason for these higher proportions of costs being attributed to mediation compared to the other cases, but it may be that the parties were not involved in the other aspects of the litigation or that they only took part in the mediation (for example if they were not a party to proceedings).

Participants in mediation appear to be satisfied with the cost of using the Scheme, with 93.33% (n=14) answering that it was cost effective to take their case to mediation. In

several instances this was because the cost of mediation was significantly less than those that would have been incurred taking the case to trial, with counsel fees and the preparation of witnesses being referenced as additional costs of trial. One respondent suggested that their case may have involved 11 witnesses. And in another instance, a respondent surmised that the case may not have settled without mediation. There was just one response suggesting that mediation may not be as cost-effective as taking a case to court, although in fact the respondent said more accurately that they did not know, but that “it feels very expensive, but I am not a contentious lawyer and do not know what the cost of a hearing would be”.

64.29% of respondents (n=9) indicated that they would be prepared to pay for mediation, and the current scheme is described by one respondent as representing “very good value”. Fees ranging from £100.80 to £150 per hour were suggested as appropriate and it is possible that the relatively wide range is due in part to the differences between cases subject to mediation, with some cases involving large sums of money and others focusing on welfare issues where P is a person of limited means. One respondent explained that “[i]n the current dispute P's estate is valued at £1.45m so the hourly rate and overall cost under the scheme was much lower than had we engaged in a commercial mediation” suggesting that the CoP mediation scheme represents good value for money in comparison with commercial mediators.

The oversight and regulation of fees seemed an important factor for several respondents, with some expressing that the amount charged was “approved by the Legal Aid Agency”, and another indicating willingness to pay “the hourly amount allowed by the court”. While some respondents referenced hourly fees, one indicated concern with such a fee structure and a preference for a fixed cost, as potential anxiety over mounting costs can have “a bearing on the mediation”. 21.43% of respondents (n=3) indicated that they would “maybe” be prepared to pay for mediation, but for each of them cost was the determining factor, with one respondent suggesting that if the cost of the scheme were more than that of a private mediation then the parties would be better off arranging their own mediation and avoiding the CoP mediation fees.

Overall, mediation costs represent a small part of the costs of litigation in the CoP. Furthermore, participants were broadly satisfied with the costs of mediation under the Scheme.

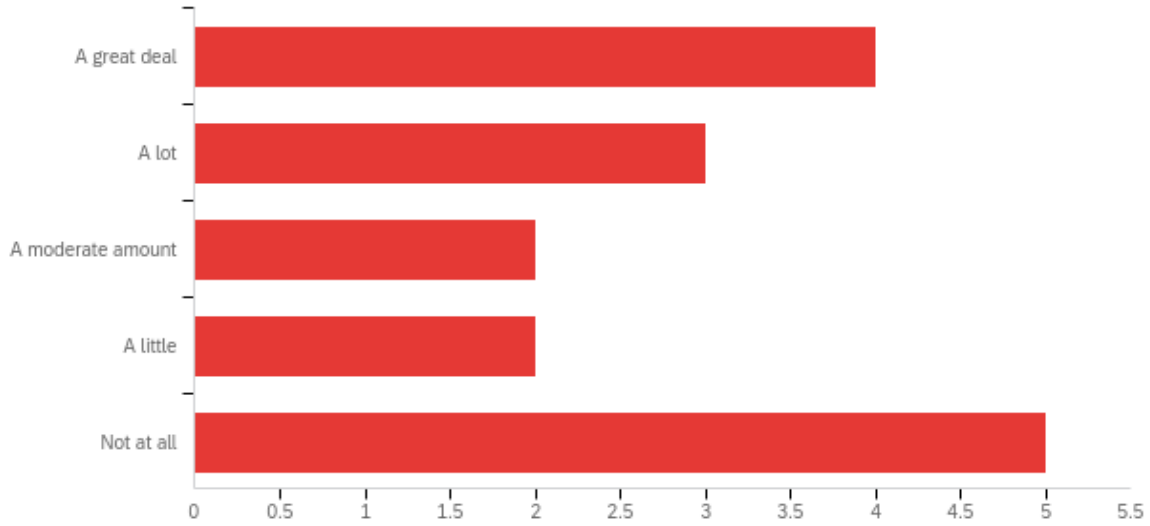
5.3.5. Working relationships and other resources

Mediation is shown by these findings to be highly successful at aiding parties to reach a settlement, with 89.47% (n=17) of respondents indicating that an agreement was reached. This suggests that mediation does provide resource savings because it ensures faster resolution of the dispute.[66] We also understand from information provided by the mediators to the research team that partial agreement was reached in all 6 mediations (see description of mediation 6 in Table 1 above), showing that mediation is highly effective in the CoP, albeit based on this small sample.

A specific area in which mediation appears to have been successful, and which was tested through these data, is in the improvement of relationships between parties, with 68.75% (n= 11) of respondents indicating some degree of improvement in such relationships, see Table 8 below.

[66] See various studies on the effectiveness of mediation: H Genn, 'Civil Mediation: A Measured Approach?' (2010) 32 *Journal of Social Welfare and Family Law*, 195; H Pincock, 'Does Mediation Make Us Better? Exploring the Capacity-Building Potential of Community Mediation' (2013) 31 *Conflict Resolution Quarterly*; C Irvine, 'What Do 'Lay' People Know About Justice? An Empirical Enquiry' (2020) 16 *International Journal of Law in Context*, 146.

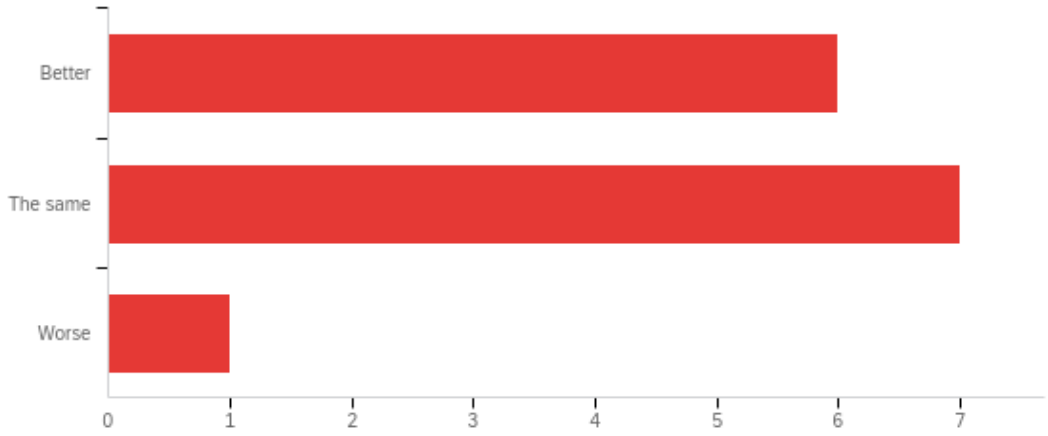
Table 8: Responses to Question 26 – 'Did the mediation improve your working relationship with the other parties?'



Of these 11, the largest single category (n=4) indicated "a great deal" of improvement, followed by three responses indicating "a lot" of improvement, and two responses each for "a moderate amount" and "a little" improvement. It seems that where some improvement in relationships is discerned by the parties, the degree of this improvement is likely to be considerable. It is also important to bear in mind that while five of the 16 respondents indicated that their relationships with the other parties did not improve "at all", no baseline for the initial quality of relationships is given in the survey, without which it is difficult to ascertain what (if any) improvement in relationships was desired or sought between parties. It would therefore be advantageous for future research in this area to explore in more depth using qualitative and longitudinal methods the changes in relationships between parties following CoP mediation.

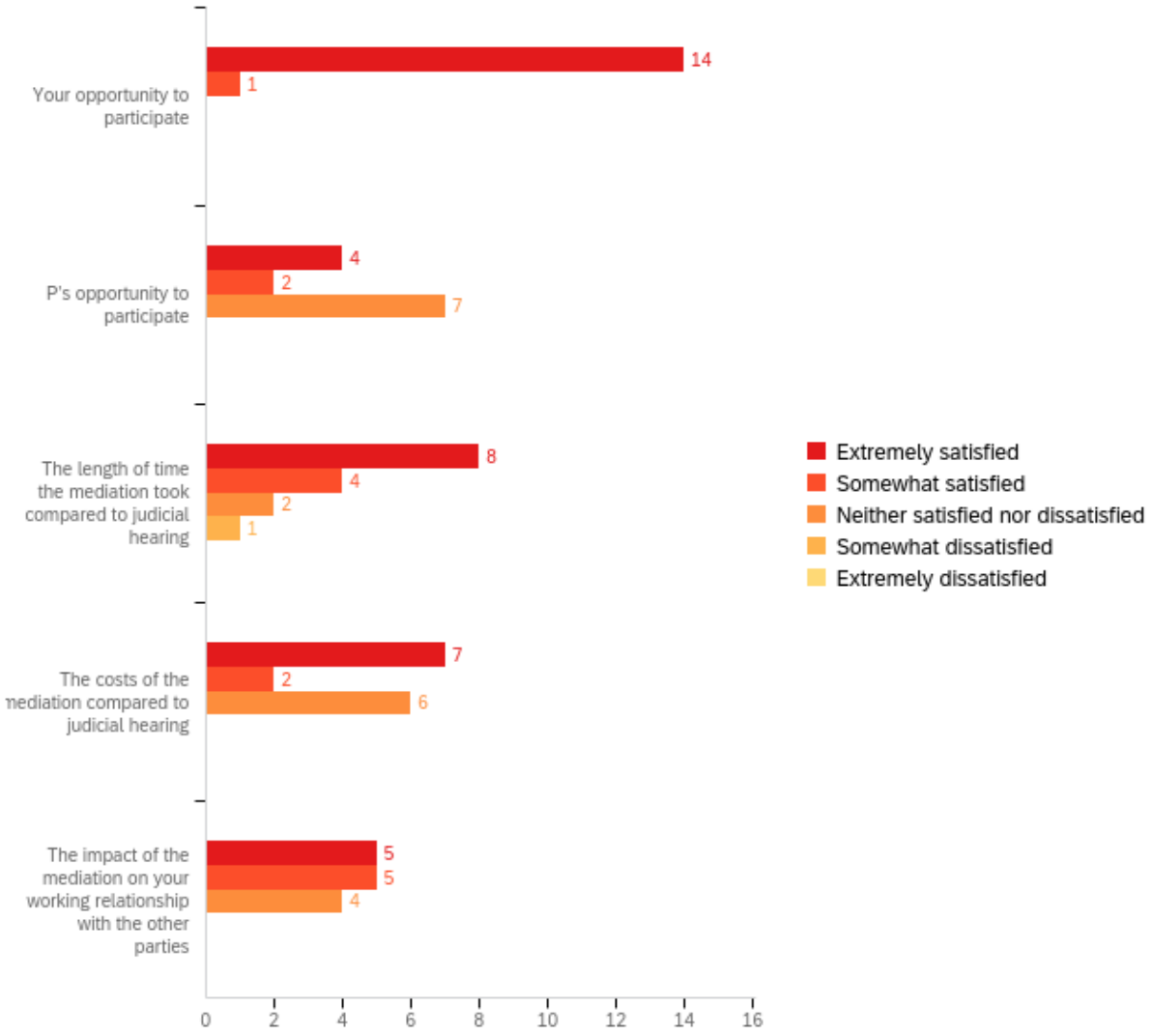
The success of mediation at enabling parties to reach a settlement and the common conceptualization of mediation as a process of compromise could perhaps plausibly give rise to concern as to the *quality* of the agreement and level of satisfaction on the parts of respondents. However, this is not borne out in the findings of this survey as 42.86% of respondents (n=6) indicated that the agreement reached following mediation was better than they had expected (Table 9 below), with only one suggesting their outcome was worse than expected. 50% of respondents (n=7) indicated that the settlement was the same as expected.

Table 9: Responses to Question 11 'Was the settlement reached in the case better or worse than you expected?'



Respondents were generally satisfied with their experience of mediation, see Table 10 below. They were surveyed on the following aspects of their experience: (1) their opportunity to participate; (2) P's opportunity to participate; (3) the length of time the mediation took compared to a judicial hearing; (4) the costs of the mediation compared to a judicial hearing; and (5) the impact of the mediation on working relationship with the other parties.

Table 10: Responses to Question 12 'How satisfied were you with the following aspects of the mediation?'



In general, responses indicated that satisfaction with the Scheme was widespread. For example, 93.33% of respondents were extremely satisfied with their opportunity to participate (n=14), with the remaining response being "somewhat satisfied" (n=1). The only domain in which a negative response was recorded was for the time the mediation took compared to a judicial hearing, where one respondent indicated that they were "somewhat dissatisfied". Interestingly, given the association of mediation with positive relational outcomes for parties, respondents indicated diverse views regarding their level of satisfaction on the impact of the mediation on their relationship with the other parties in the proceedings: while no dissatisfaction was recorded, 71.42% of respondents (n=10) were either "extremely satisfied" or "somewhat satisfied", with 28.57% (n=4) suggesting they were "neither satisfied nor dissatisfied".

The success of mediation for respondents is further borne out in an overwhelming willingness to consider using mediation again, with 93.33% (n=14) of respondents indicating such a willingness. The remaining one respondent would “maybe” be prepared to use the mediation scheme again in future, meaning that none of the respondents indicated a total unwillingness to consider CoP mediation in the future, which is a major success of the Scheme.

Indeed, there was overall widespread support for the use of mediation across the breadth of issues that fall within the scope of mental capacity legislation, with five substantive responses indicating that “anything” or “any best interests decision” would potentially be suited to mediation. While most mediations reported in this survey dealt (at least partially) with matters concerning property and affairs, several respondents indicated a belief that these are not the only matters for which mediation may be appropriate. 13 respondents expressed a perspective as to which issues may be appropriate for mediation, which are outlined in full below in Table 11.

Table 11: Question 28 – ‘Which issues do you think are most appropriate for mediation?’

Residence, care, contact, property and affairs
Most best interests disputes (both welfare and property and affairs).
Heath & Care
When you have two parties whose relationship has totally broken down, the formal framework of mediation offers a way to understand the views of the other party without the adversarial atmosphere of a court.
Anything
Anything
I suspect no area wouldn't benefit from mediation. I didn't think we would settle because of the other sides approach but the mediation questionnaire completed in advance was very helpful in unlocking relevant issues
Everything except disputes about capacity

Residency/ contact/ financial disputes/
This is difficult to be specific about as the range of issues the COP considers is so wide
Potentially all issues but property and finance issues do lend themselves towards a negotiation
Property and affairs. Certain welfare applications e.g. contact or residence.
Issues of factual dispute / Where parties have entrenched positions /

As the data show, in general, there was support for the use of mediation across the range of issues dealt with by the CoP. However, given the above comments regarding the relations between the parties, it is likely that any criteria or other descriptors of the types of cases that may be suitable for mediation in future consider not only the substantive decision before the CoP in a given case, but also wider circumstances such as relationships between the parties in order to make the best, most efficient use of the resources of CoP mediation.

5.3.6. Case study

Dr Lindsey was able to observe Mediation Two, with the consent of the parties. Data collected from this observation forms one case study of the operation of mediation within the Scheme. The observation took place with the written consent of all of the parties and the mediator in attendance at the mediation. In total, there were nine participants including the mediator, plus the researcher. The mediation took place virtually over Zoom on a weekday in 2020 and lasted around seven hours. The mediation formally commenced at just before 10am and ended in agreement around 5pm. Those in attendance at the mediation in addition to the mediator and Dr Lindsey were P's mother and her two solicitors, P's father and his solicitor and barrister, the existing deputy for P and the deputy's representative.

Due to the small numbers of cases under the Scheme and the risk of identification of participants, some factual detail is omitted from this case study. However, the case study is included here to draw out some further themes in addition to the above data sources. In summary, the observed case concerned a dispute over who should be P's

deputy, the level and extent of contact between P and his father, and the purchase of a property for the father from P's estate.

Proceedings commenced because of an application made by P's father. The case was mediated a few days after a final hearing had been scheduled, which had been adjourned with the consent of the CoP to allow the mediation to go ahead. The mediation resulted in an agreement between the parties, which was to be put to the court for approval. However, it is not known whether the court did, in fact, approve the mediated agreement. The agreement reached between the parties was, in summary, that a property would be purchased for P's father up to an agreed total price cap that was acceptable to all parties, a new deputy would be appointed, and contact arrangements were also agreed in full.

The legal representatives clearly acted as gatekeepers in this mediation and some of the observations made in other contexts were also present.[67] For example, there was evidence in this mediation of a legalised approach, with an adversarial culture being clear. This was apparent through the mediator's own style, being a practising barrister in addition to a mediator. It was, for example, disappointing that the parties were not in the same room together at any point during the mediation. Instead, it was a shuttle mediation with the focus entirely on settlement at the lowest cost and highest speed possible, while also being an agreement that satisfied the parties. However, this style felt much more adversarial and comparable to a settlement meeting, with offers being put forward by one party to be scrutinised by the other, with the odd steer from the mediator. This was also surprising considering the mediation literature which points towards facilitative mediation being the norm rather than a more evaluative approach.[68] It appeared that the mediator in this case study drew on his own legal experience to even provide an opinion at one stage. Yet, interestingly, this was responded to positively by the parties and they requested his opinion at one point.

One other important observation was that the mediation was very focused on legal issues. This means that there was a strong focus throughout, from the mediator and the parties, on how the issues might be resolved by a judge. This meant that some of the wider benefits of mediation, such as getting people together and developing creative settlements, appeared to be lost in this mediation. On the flip side though,

[67] Bondy et al., n26.
[68] Irvine, n66; R Blakey, 'Cracking the Code: The Role of Mediators and Flexibility Post-LASPO', (2020) 53 *Child and Family Law Quarterly*.

there was no evidence of so-called “profit-motive” by lawyers in this case study. The lawyers would have been paid significantly higher costs if the matter had not settled and had instead proceeded to a final court hearing; something acknowledged in the mediation itself at numerous points.

It was clear in advance that the mediator had put his mind to the issue of P’s participation, which was a positive observation from an outsider’s perspective. However, the mediator determined that P was not able to participate. P did not attend, and P’s attendance was not to be expected given P’s functional ability and the subject matter of the dispute being focused primarily on the deputy appointment and financial matters rather than P’s direct welfare. However, P was also not effectively represented at the mediation. The deputy did not attend the majority of the mediation and instead was available should anything need to be raised with her, which was only done late in the day when agreement was close to being reached.

One of the difficulties was that P’s voice was rather lost in the dispute between the parents. It was implicit that P’s wishes and feelings were that he would want to see his father and so that should be facilitated, with the dispute centring on how best to facilitate that. Often, though, P’s best interests got lost in the detail of the parental dispute. This is not a criticism of the mediator for not including P. It is clear that P could not attend the mediation and may have struggled to participate directly. However, it could have been made clearer that P’s participation could have taken a different form, such as through an indirect method. For example, the mediator could have arranged to gather a statement of P’s wishes and read it out at the mediation or within specific discussions with the parties. This would have made P’s voice more prominent and reminded the parties of the centrality of the best interests question to any resolution.

A more positive theme from the mediation case study is that there was a clear awareness of the cost-saving benefits of mediation and a related focus on getting agreement and avoiding court. The pressure and prospect of a court hearing appeared to be a major factor throughout the day, particularly as the final hearing had been adjourned to facilitate the mediation going ahead. This clearly encouraged the parties to try and come together to resolve matters and given that the dispute was resolved without the need for a hearing, it seems reasonable to conclude that the mediation saved time and costs compared to a judicial hearing. When coupled with the survey findings discussed above, it seems likely that CoP mediation has the potential to save costs and provide time-saving benefits for parties and the court. However, the mediator’s approach did feel overly time-pressured, and it was not clear why there had to be such a strong emphasis placed on resolving the matter that day. A more flexible approach was arguably needed too, such as facilitating breaks for parties to reflect, or

even a multi-day mediation, although there is also question of proportionality in taking such an approach, particularly when the costs are being paid out of P's estate. To some extent, this mediation felt like a more typical commercial mediation, rather than a CoP mediation, with a strong focus on compromise, costs, and settlement. This was surprising as the driving factor expected in advance was the best interests of P.

6. Interpretation of Research Findings

6.1. Participation of P

It is evident from the data above that P's participation was not effectively secured in the mediations under the Scheme. Only in Mediation Six is there evidence of effective indirect participation, and the mediator is to be commended for taking these steps. Any expansion of mediation in the CoP therefore requires more careful consideration of the participation issue.

The key issue that arises from the data on participation is a lack of clarity regarding its meaning, with confusion over whether participation means only attendance or whether it can be secured in other ways. Expanding the parameters of what is understood by P's participation beyond a focus on personal presence is necessary to secure P's effective engagement, but this should be done with care, ensuring that P's right to equity in the exercising of legal capacity is retained. While it should, of course, also be borne in mind that there are many possible reasons why it would not be appropriate for P to attend mediation via physical presence (or virtually), this should not be the automatic response to concerns about P's capacity. Instead, consideration ought first to be given to whether P can attend, and only when it has been agreed that this is not possible should other forms of participation be considered. While parallels may be drawn with case law addressing the matter of P's participation in CoP proceedings, where it is asserted that decisions concerning such participation should fall under the "wide breadth of discretion" afforded to the Litigation Friend as part of the conduct of litigation,[69] it may also be possible to distinguish mediation. Mediation is a less

[69] *A County Council v AB & Ors (Participation of P in Proceedings)* [2016] EWCOP 41.

complex process to engage with and may also take place without a Litigation Friend's involvement, for example, in pre-issue proceedings.

Should it be deemed that P can and should participate (whether directly or indirectly), a fundamental mechanism for securing this is with the provision of adjustments and adaptations to facilitate P's participation. In the mediations covered in the survey discussed above, there was one instance reported of the need for accommodations to facilitate P's participation in the mediation, which included access to email and telephone contact with P's counsel. No instances were reported of accommodations being required and not provided. Nor were any instances reported of necessary adjustments not being provided. However, it is important to bear in mind that the availability and requesting of disability-related adjustments and adaptations relies on awareness and understanding of such adjustments and adaptations among those in a position to request them. We therefore recommend that stronger requirements regarding participation are set out in the guidance for any future scheme, including requirements to consider whether any adaptations or adjustments would better secure P's participation. The onus in this regard ought to be on the parties and the mediator. Furthermore, we suggest that disability awareness training should be a requirement for CoP mediators.

Further research may also usefully investigate evidence of such knowledge among mediators and other legal actors, as well as the policies and procedures in place to ensure not only the availability of adjustments and adaptations, but the ongoing development of knowledge, policy, and resources in this area. This represents a key potential practical strategy to embed and strengthen equity of the exercising of legal capacity through active participation in mediation proceedings for disabled users of the CoP, particularly for P and other protected parties. Alongside upholding individual rights to the exercising of legal capacity for P, a further important consideration in the evaluation of P's participation in mediation proceedings is the various forms of impact this has on both the substantive outcome and procedural aspects of the proceedings.

6.2. Costs

Overall, the evidence on the costs of mediation was positive, with parties confirming the perception that mediation is likely to provide some cost savings compared to judicial hearings. However, we were unable to obtain sufficient data to compare the cost of mediation under this Scheme to the cost of comparable CoP proceedings. We can see, though, that the proportion of costs allocated to mediation is relatively small,

meaning that if mediation takes place earlier in CoP proceedings it will arguably lead to reduced costs overall compared to awaiting a judicial hearing. Further research into the cost of mediation in CoP proceedings could explore relationships between the types of decision at the centre of mediated court proceedings and the percentage of case costs attributed to the mediation.

6.3. Time

Overall, mediation was perceived by respondents to at least resolve the case more quickly than a judicial hearing and a majority found the mediation to be less time consuming or about the same as a judicial hearing. The above research findings show that cases resolved via mediation appear to be resolved more quickly than those that go to judicial hearing. It is difficult, based on these findings alone, to draw firm conclusions as to the time required for mediation proceedings and how this compares with a judicial hearing, or as to the factors contributing to this. The primary source of statistical data concerning the CoP is the Family Court Statistics Quarterly published by the Ministry of Justice, with the most recent available edition at time of writing covering the final quarter of 2021.[70] There is, however, no indication of the duration of proceedings held within this dataset. This is in contrast to the data collected on the practice of other parts of the Family Courts: for example, "timeliness" is recorded in relation to divorce cases (mean time from petition of 30 weeks, up 2 weeks from the equivalent period in 2019), and private law cases (39 weeks to final order, an increase of 11 weeks on the previous year). No equivalent statistics are available from this source in respect of the CoP, making it very challenging to compare the timeliness of mediation with judicial hearings.

Given the apparent criticism already levelled at the court with regard to the duration of proceedings before it, it is to be expected that legal actors, including members of the judiciary, may be reluctant to engage with mediation if it risks lengthening the duration of proceedings further, and thereby further negatively impacting court statistics. We therefore have only been able to state the evidence gathered from the evaluation of the Scheme and would recommend that further data be collected closely analysing

[70] Ministry of Justice, Family Court Statistics Quarterly: October to December 2021 (2021), available at: www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020.

and comparing data on length of time cases take to resolve where mediation is used contrasted with comparable cases where mediation was not used.

6.4. Working Relationships

The data above supports the perception that mediation may improve working relationships in CoP cases. There are numerous policy arguments that centre on this benefit, such as that mediation can preserve and maintain relationships between parties beyond court proceedings themselves, offering scope for improved longitudinal outcomes in cases where social interaction and relationships between parties after the conclusion of proceedings will be of benefit to the person at the centre of proceedings before the court. Improved communication between parties in disputed proceedings through mediation is also likely to increase efficiency in the proceedings, thereby reducing the duration of the case overall. Furthermore, the prevention of future disputes through improved communication via mediation is likely to reduce the amount of litigation before the CoP in total. The fact that respondents indicated their mediations were successful and showed overwhelming willingness to consider CoP mediation in the future, is a major success of the Scheme.

6.5. Other Issues

6.5.1. Can and should capacity be mediated?

One issue that was raised during the research is whether mediation can be used in disputes about capacity itself or whether it is only appropriate that mediation be used once incapacity has been established. We believe this is an important issue that needs to be more effectively addressed in any future mediation scheme, and therefore address the matter here.

The assertion that mediation cannot be used to determine mental capacity is found in sources of policy and in academic literature.[71] It was also discussed by participants at a roundtable discussion on the role of mediation in the CoP,[72] and Hobbs and Alonzi[73] state that "mediation and Family Group Conferences cannot be used to determine incapacity" as "an assessment of an adult's capacity is a legal determination".[74] Papers by Lindsey, and Hobbs and Alonzi, discuss whether the determination of capacity is a matter so fundamental to the personal autonomy of an individual, it should not be settled by agreement. It seems that philosophical arguments concerning the primacy and prioritisation of autonomy are at the centre of the assertion that mental capacity itself is not to be resolved by mediation. What is less clear, however, is the legal position on which the assertion relies.

The question of whether mental capacity can be determined by way of mediation is not explicitly addressed in either the MCA or the Code of Practice. The MCA provisions regarding the definition of "people who lack capacity" and the definition of "inability to make decisions" make no reference to the way these issues are to be determined in individual cases. It seems the only place where there is scope for an interpretation that the determination of capacity is a matter exclusively for the court is found in ss 5 and 6 MCA. S 5 MCA provides a defence where an individual acts as part of care or treatment in the "reasonable belief" that the person on whom the act is done lacks the mental capacity to consent to the act and that it would be in their best interests for the act to be done. This provision primarily protects clinicians and other medical professionals from charges of assault and battery in case of the carrying out of treatment without consent in emergency situations. However, it is qualified by limitations set out in s 6 MCA. S 6 concludes by stating that life-sustaining treatment or treatment intended to prevent further deterioration of P's condition may be carried out "while a decision as respects any relevant issue is sought from the court". One possible interpretation of this provision is an inference that any determination of capacity (such as that referenced in s 5 MCA) is to be sought from the court. However, "any relevant issue" demonstrably covers a wider range of circumstances than simply the determination of capacity (e.g. decisions regarding the best interests of an

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[71] Social Care Institute for Excellence, (2012) Safeguarding Adults: Mediation and Family Group Conferences, available at: https://www.scie.org.uk/publications/mediation/workingwithadults/mentalcapacityact.asp.
[72] Lindsey n9.
[73] A Hobbs and A Alonzi, 'Mediation and Family Group Conferences in Adult Safeguarding' (2013) 15(2) *Journal of Adult Protection*.
[74] ibid, 73.

incapacitous person). It therefore does not seem possible to rely on this interpretation of s 6(7) MCA to support the legal position that the determination of capacity itself must exclusively be determined by the court.

It is also possible that the assertion that determinations of mental capacity may not be made via mediation draws on the Code of Practice. The Code states that where a disagreement regarding the assessment of capacity cannot be resolved, the person challenging the assessment may be able to apply to the CoP, which can rule as to whether the individual has capacity to make the decision dealt with in the assessment.[75] There are, however, reasons why this does not seem to be sufficient grounds to assert that the determination of capacity cannot be made by mediation. First, and perhaps most compellingly, application to the CoP is not the first stage listed in the Code of Practice for the resolution of a disagreement following the challenging of a capacity assessment. The first steps prescribed in the Code involve engaging with the original capacity assessor and asking them to justify their original assessment.[76] There is very little procedural detail regarding the form of such a challenge, but it is difficult to see why such a process may not involve mediation. Secondly, and perhaps relatedly, where the Code of Practice references the possibility of an application to the CoP in the event of an unresolved challenge to the assessment of capacity, it states that the challenger "may" be able to apply to the court. This is obviously distinct from the suggestion that a disagreement regarding capacity *must* be brought before the court. While a reading of some legal and policy provisions may produce an interpretation that the determination of capacity cannot be resolved by way of mediation, in our view none of these provisions (either singularly or when combined) supports such an interpretation.

One important point to note here is that whether or not capacity can be mediated may depend on the ultimate outcome of the mediation. That is, the issue of capacity may legitimately be explored in mediation, with the parties ultimately walking away convinced that P *does* have capacity and therefore mediation may consider the most effective ways of supporting P while respecting her capacitous autonomy. However, if the mediation results in at least one party maintaining the view that P *lacks* capacity, then it may at that point require court proceedings for determination. In this regard, therefore, we think that it is not appropriate to take the absolute position that "capacity cannot be mediated". Rather, the position ought to be that "capacity can be explored

[75] n5 63.
[76] ibid.

at mediation, subject to court approval where P is believed to lack capacity in a particular domain".

6.5.2. Do mediated agreements require court approval?

Another specific issue which arose during this research, and which ought to be addressed before any expansion of mediation, is whether or not mediated agreements require court approval. Where mediation in respect of an issue relating to a person deemed to lack capacity results in an agreement but proceedings have already been issued in the CoP, this raises a procedural question concerning the impact of the mediated agreement on court proceedings. While there are no specific procedural rules concerning the impact of successful mediation on proceedings, it may be expected that in circumstances where a mediated agreement is reached the appropriate course of action would be for an application to be made for proceedings to be withdrawn. While there is no explicit reference to mediation in the latest edition of the COPR, para. 13.2 deals with the withdrawal of proceedings, stating that – (1) Proceedings may only be withdrawn with the permission of the court; and (2) An application to withdraw proceedings must be made in accordance with Part 10 [of COPR 2017]. Where an application to the court within proceedings is concerned solely with seeking the withdrawal of an existing application, the applicant "must file a written request for permission, setting out succinctly the reasons for the request"[77] which must "be an application notice".[78]

An indication of the way in which the judiciary may be expected to deal with an application within proceedings may be expected to be found in CoP case law. However, a search of relevant case law for "application within proceedings" yields only three results, of which only one deals substantively with an application within proceedings. *Re G (adult)*[79] dealt with an application by a newspaper company to be joined as a party to proceedings on which they wanted to report. While this case differed from the matter at issue here, it offers some instructive insight into the role of

[77] Para 10.1(5)(a) COPR 2017.
[78] Para 101(5)(b) COPR 2017.
[79] *Re G (Adult)* [2014] EWCOP 1361.

the court in scrutinising applications within proceedings. Of particular note is reference to the point made by Baker J in *Cheshire West and Chester Council v P and M*[80] where he notes that the inquisitorial nature of the jurisdiction of the CoP means that it is the role of the court, rather than the parties, to determine the ambit of the proceedings. While the contrasting nature of the facts of these cases means that they cannot be applied directly to the present question, it seems accurate to suggest that the inquisitorial approach adopted by the CoP is likely to lead it to interrogate and scrutinise the contents of any mediated agreement offered as a basis for an application within proceedings to withdraw such proceedings. And while it seems there is no available authority on this procedure, such scrutiny is likely to amount to more than a "rubber stamp".

Having determined that the appropriate approach for dealing with a mediated agreement is to apply for such proceedings to be withdrawn, this raises questions concerning how such an application is to be made. For example, with regard to the place and role of the mediated agreement in such an application, the extent of judicial scrutiny of the agreement as part of the application process, and the extent to which discussions at mediation are confidential. As there is no explicit procedural guidance on these issues, we recommend that the senior judiciary amend relevant procedural rules to clarify and confirm the position with regard to how they desire mediated agreements to be dealt with in issued proceedings.

7. Recommendations

Based on the data analysed for the Scheme as set out above, we make the following recommendations:

7.1. Implementation Recommendations

1. The CoP ought to develop a mediation information scheme, based on the MIAM approach in the family courts or the MIAS approach in SEND, with a specific timeframe in which information about mediation should be provided, and a

[80] *Cheshire West and Chester Council v P and M* [2011] EWHC 1330.

requirement for parties to consider the use of mediation in specific types of cases. This would make the proposed framework distinctive and represent a departure from the provision only of a mediation scheme.

2. A court-authorised mediation scheme should be piloted with authorisation from the CoP. There are various models on which this could be based that we have analysed in this report.

3. If a mediation scheme is to be implemented by the CoP, we recommend a similar model to the Court of Appeal scheme through the appointment of commercial, charitable, or non-governmental providers with suitably qualified mediators as per the requirements of the practitioner-led scheme.

7.2. Policy Recommendations

4. Capacity can be explored at mediation, provided that any belief that P lacks capacity be brought before the CoP. We recommend framing this in the following terms: “Capacity can be explored at mediation, subject to court approval where, following mediation, P is believed to lack capacity in a particular domain”.

5. P’s participation should be a requirement of a court-authorised scheme, with a broad definition of participation to include direct and indirect forms. If P is not able to participate directly, for example through attending the mediation, then they should participate indirectly, for example, through meeting with the mediator in advance or providing a written or verbal recording of their wishes relating to the mediated issues.

6. Participants in CoP mediation should be under an obligation to consider whether any adaptations or adjustments would better secure P’s participation.

7. Disability awareness training should be a requirement for CoP mediators.

8. The senior judiciary of the CoP should consider amending procedural rules to clarify and confirm the position with regard to how they desire mediated agreements to be dealt with in issued proceedings.

7.3. Scheme Documentation Recommendations

9. Make any scheme documentation available in Microsoft Word format to improve ease of use for participants.

10. Prepare Easy Read and otherwise accessible versions of key documentation.

11. Remove the requirement that the mediator must ensure the best interests test is applied. Change this obligation so that it is on the parties, not the mediator.

12. Amend the statement regarding P's capacity to participate being a facet of litigation capacity. P ought to be able to take a simple decision regarding attending a mediation even where they lack capacity to make decisions about the more complex issue of conduct of litigation.

7.4. Research-Related Recommendations

13. Comparative analysis of mediated and non-mediated CoP cases should be carried out, which can then inform the evidence base on a range of metrics, including timeliness and cost of proceedings.

14. Qualitative and longitudinal analysis of the impact of mediation on working relationships of parties should be carried out.

15. Quantitative research should be carried out investigating the impact of P's participation on substantive outcome of mediated cases.

16. Further research analysing the use of mediation in welfare and medical treatment cases, which were not sufficiently explored within this Scheme, should be commissioned.

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Appendix

Survey Questions: Evaluation of Court of Protection Mediation Pilot Scheme

Q1 [Consent question]

Q2 What was your role in the case? (please note that throughout this survey, any references to 'P' refer to the person who is the subject of the proceedings, i.e. the person who lacks capacity to make the decision in question)

- ○ Mediator
- ○ Solicitor for P
- ○ Solicitor for other party
- ○ Barrister for P
- ○ Barrister for other party
- ○ Advocate for P
- ○ Public body representative (i.e. attending on behalf of the local authority or NHS Trust)
- ○ Family member
- ○ Carer
- ○ Other professional (please explain) _____

○ Other (please explain)
_____

Q3 Were you involved in the case as?

○ An individual

○ A representative of an organisation

○ Other (please explain)
_____

Q4 Have you been involved in a Court of Protection case before?

○ Yes

○ No

Q5 Have you been involved in a mediation before?

○ Yes

○ No

Q6 What was the subject matter of the case that was mediated? (select all that apply)

☐ Medical treatment

☐ Welfare

☐ Property

☐ Finances

☐ Deprivation of liberty

☐ Other, please say _____

Q7 How did you find out about the Court of Protection mediation pilot scheme?

○ Recommended by my advisor/lawyer

○ Recommended by the other side

○ Friends/family

- ○ Colleagues
- ○ Other (please explain)

_____

Q8 Why did you decide to try mediation?

- ○ Because my advisor recommended it
- ○ Because the judge recommended it
- ○ Because the other side suggested it
- ○ Because I thought it would save money
- ○ Because I thought it would save time or other resources
- ○ Because I wanted to avoid a court hearing
- ○ Because I was curious
- ○ Other (please explain)

_____

Q9 Did the case settle at the mediation (i.e. did the parties reach an agreement)?

- ○ Yes
- ○ No

Q10 Briefly describe what was agreed in the settlement

_____

Q11 Was the settlement reached in the case better or worse than you expected

- ○ Better
- ○ The same
- ○ Worse

Q12 How satisfied were you with the following aspects of the mediation?

	Extremely satisfied	Somewhat satisfied	Neither satisfied nor dissatisfied	Somewhat dissatisfied	Extremely dissatisfied

Your opportunity to participate	○	○	○	○	○
P's opportunity to participate	○	○	○	○	○
The length of time the mediation took compared to judicial hearing	○	○	○	○	○
The costs of the mediation compared to judicial hearing	○	○	○	○	○
The impact of the mediation on your working relationship with the other parties	○	○	○	○	○

Q13 Did P participate in the mediation?

○ Yes

○ No

Q14 How did P participate in the mediation?

☐ P attended in person

☐ P attended remotely

☐ P was represented by a lawyer

☐ P had an advocate

☐ P provided a statement to the mediation

☐ Other, please say _____

Q15 Do you think that P's participation had an impact on the outcome of the mediation?

○ Yes

○ No

Q16 Did P attend the mediation?

- ○ Yes
- ○ No

Q17 Were there any accommodations needed to facilitate P's attendance at the mediation?

- ○ Yes, if so what? _____
- ○ No, but there should have been (if so what?) _____
- ○ No, and P did not need any

Q18 Did you think P's attendance had any impact on the mediation itself (as opposed to the outcome) where he/she attended?

- ○ Yes
- ○ No

Q19 If P did not attend the mediation, as far as you are aware, what was the reason for P not attending? (you may select more than one answer)

- [ ] Cost
- [ ] Distance
- [ ] P unwell
- [ ] P did not want to attend
- [ ] P was not invited
- [ ] Not sure
- [ ] Other, please say _____

Q20 How much time did you spend on the mediation? Please include time spent preparing your mediation and time spent at the mediation session (whether successful or not).

- ○ 0-2 hours
- ○ 2-4 hours

- ○ 4-6 hours
- ○ 6-8 hours
- ○ 8-10 hours
- ○ 10-12 hours
- ○ More than 12 hours (if so, please estimate how long you spent _____

Q21 Do you think the mediation was more or less time consuming than a judicial hearing, why?

- ○ More time consuming (please explain) _____
- ○ Less time consuming (please explain) _____
- ○ About the same (please explain) _____

Q22 Did the mediation lead to the case being resolved sooner than it would have been had you gone to a judicial hearing?

- ○ Yes

- ○ Not sure
- ○ No

Q23 What were the costs incurred by your side during the course of this case? (please estimate the costs for ALL aspects of the case to date, including costs for the mediation and costs for any court hearings/applications, travel etc)

- ○ £0-£2,500
- ○ £2,500-£5,000
- ○ £5,000-£10,000
- ○ £10,000-£15,000
- ○ £15,000-£20,000
- ○ £20,000-£25,000
- ○ £25,000-£30,000
- ○ More than £30,000 (if more, please estimate your costs to date for the case _____

Q24 What proportion of the costs identified in the previous question were for the mediation part of the case only?

- ○ 0-10%
- ○ 11-20%
- ○ 21-30%
- ○ 31-40%
- ○ 41-50%
- ○ 51-60%
- ○ 61-70%
- ○ 71-80%
- ○ 81-90%
- ○ 91-100%

Q25 Was it cost effective to take the case to mediation, why?

- ○ Yes (please explain) _____
- ○ No (please explain) _____

Q26 Did the mediation improve your working relationship with the other parties?

- ○ A great deal
- ○ A lot
- ○ A moderate amount
- ○ A little
- ○ Not at all

Q27 Would you be prepared to use Court of Protection mediation again?

- ○ Yes
- ○ Maybe
- ○ No

Q28 Which issues do you think are most appropriate for mediation?

_____

Q29 Would you be prepared to pay for the mediation service?

○ Yes (please say how much)
_____

○ Maybe (please explain)
_____

○ No (please explain)
_____

Q30 Do you have any further comments regarding the Court of Protection mediation pilot scheme?

_____